Employment Court of New Zealand

Rimmer v Carter Holt Harvey Limited [2015] NZEmpC 215 (3 December 2015)

Last Updated: 15 December 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2015] NZEmpC 215

EMPC 328/2014

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER of an application for admissibility of evidence

BETWEEN NIGEL RIMMER Plaintiff

AND CARTER HOLT HARVEY LIMITED Defendant

Hearing: (on the papers filed on 27 November and 2 December 2015) Counsel: L Acland, counsel for the plaintiff

D Erickson, counsel for the defendant

Judgment: 3 December 2015

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The Court is required to resolve an issue as to whether expert evidence which the plaintiff proposes to call is admissible.

[2] This issue arises in the context of a challenge de novo to a determination of the Employment Relations Authority (the Authority).1

[3] Mr Nigel Rimmer was a Grader at a Coastal Grade Station operated by Carter

Holt Harvey (CHH). He was dismissed on 10 February 2014. He raised a personal grievance of unjustifiable dismissal by CHH on procedural and substantive grounds.

1 *Rimmer v Carter Holt Harvey Ltd* [2014] NZERA Christchurch 185.

The Authority held that Mr Rimmer was not unjustifiably dismissed so that his personal grievance was unsuccessful.

[4] In Mr Rimmer's statement of claim, the facts which are relevant for the

present application are summarised in this way:

Isolation Breach Incident

9. On Thursday 30 January 2014 the plaintiff worked his usual 10-hour shift at the grading station.

10. At one point during the shift boards of wood became skewed and blocked on the landing table at the grading station.

11. The plaintiff undertook the task of fixing that blockage.

12. The plaintiff turned off the machinery at the control consol and walked over to the isolation switches with the intention of isolating power away from the landing table area.

13. The plaintiff conducted the normal lockout procedure.

14. The plaintiff mistakenly locked out the wrong switch on the bank of isolation switches. Because of that the landing table area was not isolated from mains power.

15. The plaintiff did not test isolation of the landing table by attempting to restart it at the control consol.

16. The plaintiff walked up some steps and on to the landing table to fix the skewed boards.

17. The plaintiff saw a roller turn on the landing table about

600 millimetres away from where he was standing.

18. It is not known how the roll was activated.

19. The plaintiff was unharmed in any way.

20. The plaintiff walked off the landing table and reviewed the isolation switches. The plaintiff saw that he had mistakenly locked out the wrong isolation switch.

[5] The statement of claim goes on to plead that he reported the incident to his supervisor. Then CHH undertook an investigation and ultimately a disciplinary meeting. This resulted in a decision to dismiss him on the ground of serious misconduct. It is Mr Rimmer's case that he did not breach isolation policies and procedures at the site and should not have been dismissed.

[6] For its part, CHH pleads that relevant documents required Mr Rimmer to attempt to restart the Coastal Grade Station in order to ensure the isolation he had undertaken was effective. He had trained and been assessed as competent in undertaking the restart isolation procedure, and that while he may have inadvertently isolated the incorrect part of the plant, he deliberately used an isolation procedure other than the one he was required to follow. CHH accordingly contends that the dismissal was justified in the circumstances.

The admissibility objection

[7] Mr Rimmer wishes to call Mr M J Cosman as an expert witness who is a partner in a risk and safety consultancy business.

[8] Mr Cosman's intended brief of evidence was filed on 29 October 2015. On

27 November 2015, Mr Erickson, counsel for CHH, filed an application for directions regarding the admissibility of Mr Cosman's evidence, together with submissions in support. It is asserted that the entire contents of the brief of evidence were inadmissible because:

a) Mr Cosman intends to give evidence that Mr Rimmer's breach of CHH's isolation procedures was not deliberate or wilful. Such evidence would be beyond the scope of Mr Cosman's specialised knowledge and skill.

b) Mr Cosman offers his opinion on the justification for the dismissal, which is solely for the Court to determine under s 103A of the Employment Relations Act 2000 (the Act). As such, it would not substantially help the Court and is therefore not admissible under s 25 of the Evidence Act 2006 (the EA).

[9] On receipt of the application, I issued a minute establishing a timetable for Mr Rimmer's response. On 2 December 2015, Mr Acland, counsel for Mr Rimmer, filed an amended brief of evidence for Mr Cosman, together with submissions opposing the objection.

[10] It is apparent from the amended brief of evidence that many statements of opinion as to the propriety of steps taken either by Mr Rimmer or CHH have been deleted or removed. As I shall explain shortly, the amended brief nonetheless contains detailed information with regard to various aspects of isolation processes, and as to the factors which are said to be relevant to the isolation breach.

[11] Mr Erickson submits that his concerns have not been satisfactorily alleviated by the amended brief of evidence, and maintains the submission that the entire brief of evidence is inadmissible. Counsel has highlighted nine paragraphs of the brief of evidence which it is said are either beyond the scope of admissible expert evidence, or which contain opinion as to what a fair and reasonable employer could have done in all the circumstances.

[12] It is necessary to resolve the objection promptly, as the trial is due to commence on 7 December 2015. Given the time

constraints and also the fact that the issues have been narrowed significantly by the filing of the amended brief of evidence, my reasons may be briefly expressed.

Legal principles

[13] In *Maritime Union of New Zealand v TLNZ Limited,*2 Chief Judge Colgan outlined relevant principles concerning expert evidence in this Court, and the associated questions of evidence admissibility.3 In summary:

a. The primary determiner of evidence admissibility in this Court is s 189(2) of the Act which provides:

(2) The court may accept, admit, and call for such evidence and information in an equity and good conscience it thinks fit, whether strictly legal evidence or not.

b. The EA has no express application to the Employment Court, but its principles are nevertheless an important source of reference for

2 *Maritime Union of New Zealand v TLNZ Ltd* [2007] ERNZ 593 (EmpC).

3 At [12]-[27].

admissibility issues.4 Consequently those provisions of the EA relating to the giving of opinion evidence by experts may be considered, and may well provide guidance. For the purposes of the present objection, I set out s 25 which provides materially:

(1) An opinion by an expert is that part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion and understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

(2) An opinion by an expert is not inadmissible simply because it is about−

(a) an ultimate issue to be determined in a proceeding; or

(b) a matter of common knowledge.

[14] In *Pora v R*,5 Lord Kerr, delivering the opinion of the Privy Council, said:

[26] It was submitted that s 25(2)(a) had abolished the common law rule that forbad evidence being given as to the ultimate issue. The Board does not accept that proposition. The rule may have been modified by the 2006 Act but it still has a part to play in the decision as to whether particular species of expert evidence is admissible. As Andrews J observed in *R v Philips*:

[W]hile s 25(2) of the Evidence Act does not make evidence as to the "ultimate issue" (that is, one that is to be determined by the jury) inadmissible on those grounds alone, it does not make such evidence admissible. Admissibility must still be determined.6

[15] Lord Kerr went on to state:7

... [I]n general, an expert should only be called on to express an opinion on "the ultimate issue" where that is necessary in order that his evidence provide substantial help to the trier of fact.

Mr Cosman's amended brief of evidence

[16] After describing his qualifications and experience, Mr Cosman states that he has been asked to give evidence on:

4 At [14].

5 *Pora v R* [2015] UKPC 9, (2015) 27 CRNZ 47.

6 Footnotes omitted.

7 At [27].

(i) The seriousness of the isolation breach incident.

(ii) Human factors in error-inducing conditions that contribute to occupational health and safety.

(iii) Shortcomings in CHH's health and safety investigation.

iv) Health and safety best practice, namely:

• multiple causes of workplace health and safety incidents; and

• just culture.

[17] After describing the documents he has reviewed and his understanding of the facts, Mr Cosman discusses aspects of each of the foregoing topics.

[18] In each instance, reference is made to relevant statutory provisions, guidance from WorkSafe New Zealand, the literature on human factors and errors, and studies relating to the causes of accidents. In the course of discussing those topics, reference is made from time to time to the facts giving rise to Mr Rimmer's personal grievance.

[19] I observe at the outset that there were multiple statements in the original brief that would not have substantially helped the Court in its resolution of Mr Rimmer's challenge, since they went further than merely addressing technical or expert issues on which I would have been assisted by dispassionate professional opinion evidence; they traversed the ultimate issue of justification for the dismissal. Most of those statements have been removed.

[20] Mr Erickson has now highlighted a number of paragraphs in Mr Cosman's brief of evidence which still require consideration. In dealing with these I apply the foregoing legal principles, focusing particularly on the issue of whether the Court will be substantially helped by the evidence which it is proposed Mr Cosman will give.

[21] The first relates to para 13 which I have already summarised above.8 That paragraph is simply a statement of the intended topics which will be covered. It will be evident from my later reasoning that I consider each of the topics on which it is proposed evidence is admissible, with one exception. I consider the content at para 13 of Mr Cosman's evidence is admissible.

[22] There is an objection to paras 45 and 46 of Mr Cosman's brief of evidence on the ground that opinions are expressed as to whether the failure of a lockout control when fixing skewed boards at a landing table constitutes an extreme risk of harm based on CHH's assessment of that risk. These paragraphs follow a discussion of relevant guidelines, and the way in which that guidance has been understood by CHH in conducting its hazard assessments. The contents of paras 45 and 46 are the conclusion of a reasoning process undertaken in the previous paragraphs. This topic of hazard assessment is potentially relevant. The point which Mr Cosman seeks to make in the passage under review has the potential to substantially help the Court. Paragraphs 45 and 46 are admissible.

[23] Next, objection is taken to paras 50 and 51 of Mr Cosman's brief of evidence, which summarise possible "fatigue factors", and "relevant human factors and error- inducing conditions", which occurred in the circumstances under review. These paragraphs arise in the context of an intended discussion as to the importance of understanding human factors when considering occupational health and safety.

[24] At para 50 Mr Cosman expresses his understanding that the isolation breach occurred in the early hours of the morning, towards the end of a 10-hour shift of a fourth consecutive nightshift. That of course will be an issue which will turn on the evidence of witnesses of fact. Having made that statement, Mr Cosman then identifies the manner in which such conditions can arise. No opinion is expressed as to whether those factors actually apply. That will be for the Court to determine. This evidence is of potential substantial help to the Court; and is admissible.

[25] In para 51 of Mr Cosman's brief of evidence, five "human factors and error-

inducing conditions" are described, with an opinion being expressed with regard to

each such factor. This passage does express opinions which are ultimately for the Court. That said, those factors are described in a substantially helpful way, which will facilitate a focus on a relevant issue; furthermore, I would expect Mr Cosman's views to be well capable of logical scrutiny. Paragraph 51 is accordingly admissible.

[26] At paras 66 to 69 of Mr Cosman's brief of evidence he proposes to give evidence on issues pertaining to a concept of "Just Culture" which he says emerged in the 1990s as a response to earlier attempts to encourage open and honest reporting of potential human and system failures. In these paragraphs Mr Cosman refers to what he describes as the industry standard for large employers in respect of these principles. Mr Cosman also refers to factors which would be relevant to this concept of "Just Culture" in the present case as well as the identification of these factors by Mr Rimmer during the disciplinary process. Finally he refers to a conclusion as to the appropriateness of dismissal in light of those factors. The discussion as to these factors will, potentially, be of substantial help to the Court in analysing relevant factors pertaining to the incident. However, para 69 of Mr Cosman's brief of evidence contains an opinion as to whether dismissal of Mr Rimmer was consistent with best industry practice. That opinion is not helpful in terms of s 25 of the EA. Paras 66 to 68 are admissible, but para 69 is inadmissible.

[27] Although Mr Erickson's submissions focused on the above particular paragraphs, he made an overarching submission that the contents of Mr Cosman's brief should be declared inadmissible in its entirety. Underpinning my consideration of that objection is the fact that this case concerns workplace health and safety. On

that topic, Judge Travis said in *Fuiava v Air New Zealand Limited*:9

... This Court and its predecessors have frequently noted the need to exercise caution in reaching a decision contrary to that of the employer where safety issues are involved. The decision of the Employment Court in the first instance in the *Samu* litigation is such an example. Issues of safety may therefore be critical, as they are in this case, in considering whether the actions taken by the employer are those that would have been taken by a fair and reasonable employer in all the circumstances.

[28] Given the technical nature of the health and safety issues which will need to be considered in this case, I am of the view that the threshold for admissibility as described in s 25(1) of the EA has been met in respect of all other paragraphs of the brief.

[29] I reiterate that this does not mean that the Court has reached a view as to whether it should accept any aspect of Mr Cosman's evidence. All I have determined is that the intended evidence is admissible. That evidence is open to being tested and evaluated, whether by searching and informed cross-examination, the leading of evidence from other witnesses and/or by submission. Ultimately it will be for the Court to determine whether the propositions raised by Mr Cosman are reliable and should be accepted.

Conclusion

[30] Mr Cosman may give evidence according to his amended brief of evidence, except for para 69.

[31] Costs are reserved.

B A Corkill

Judge

Judgment signed at 11.45 am on 3 December 2015