Employment Court of New Zealand

Saipe v Bethell (aka Bethell-Paice) [2022] NZEmpC 63 (8 April 2022)

Last Updated: 13 April 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2022] NZEmpC 63
EMPC 188/2018 EMPC 399/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for proceedings removed
AND IN THE MATTER OF	an application for recall of judgment
AND IN THE MATTER OF	an application for stay
BETWEEN	BRIAN SAIPE Plaintiff
AND	TRUDE JEAN BETHELL (ALSO KNOWN AS TRUDE JEAN BETHELL-PAICE) Defendant

Hearing:	28 March 2022 (Heard at Auckland, via VMR)
Appearances:	M Donovan, counsel for plaintiff R Hooker, counsel for defendant
Judgment:	8 April 2022

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE J C HOLDEN

(Application for recall)

[1] This judgment resolves Mr Saipe's application for a recall of the Employment Court's judgment of 22 March 2021, declining a challenge brought by Mr Saipe against his former employer, Ms Bethell.1

1 *Saipe v Bethell* [2021] NZEmpC 33, [2021] ERNZ 74 *[EmpC judgment]*.

[2] Mr Saipe also has applied for a stay of the costs determination of the Employment Relations Authority (the Authority) and the costs judgment in the Court (the costs decisions).2 This was because Ms Bethell has instituted bankruptcy proceedings in the High Court with respect to the costs decisions. In the course of the hearing on 27 March 2022, Mr Hooker, for Ms Bethell, acknowledged the bankruptcy proceedings should be put on hold pending the outcome of the application for a recall.

[3] Mr Saipe sought leave to appeal the Court's substantive judgment in the Court of Appeal. His leave application was declined in a decision dated 20 October 2021 as it did not raise an issue of general or public importance.3

[4] Following receipt of that decision, Mr Saipe filed an application with the Court of Appeal seeking recall of its decision. The Court of Appeal's judgment as originally issued, had asserted that an argument based on the contract law concept of repudiation had not been raised in the Employment Court (the repudiation argument).

[5] Mr Saipe was able to show that the repudiation argument had in fact featured in the closing submissions of his representative. The Court of Appeal granted the recall to correct this factual mistake in a judgment dated 20 October 2021.4 It noted that while the argument had been raised, the Employment Court had made no findings of fact or stated any conclusions in respect of the repudiation argument. As such, the outcome of the Court of Appeal's leave judgment was not changed as the Court did not consider it appropriate to entertain a question of law in the abstract without a finding first having been made by the Employment Court. It said if Mr Saipe wished to pursue the repudiation argument, the avenue to do so was a request for a recall of the Employment Court's decision.5

[6] In the meantime, by judgment dated 9 September 2021, costs were ordered in favour of Ms Bethell.6 A certificate of judgment in respect of the costs judgment was sealed by the Registrar on 8 October 2021.

2 *Saipe v Bethell* [2018] NZERA 382 (Member Tetitaha); *Saipe v Bethell* [2021] NZEmpC 147 *[EmpC costs]*.

3 *Saipe v Bethell* [2021] NZCA 429 *[CA leave judgment]*.

4 *Saipe v Bethell* [2021] NZCA 546 *[CA recall judgment]*.

5 At [3].

6 *EmpC costs*, above n 2.

[7] An application to recall this Court's substantive judgment followed, filed on 16 November 2021. The grounds were that:

(a) the Court had not addressed the repudiation argument in its judgment;
(b) the Court of Appeal had held the appropriate course would be to seek recall of the Employment Court's judgment; and
(c) it is in the interests of justice for the application to be granted and for the Court to consider the merits of the repudiation argument.

[8] On 15 March 2022, Mr Saipe amended his application for a recall to include an application for an order that the Court's costs judgment be recalled for reconsideration following recall of the substantive judgment.

[9] Mr Saipe says he wishes the substantive judgment to be recalled and reissued with the repudiation argument addressed so that, if necessary, he can again seek leave to appeal the judgment to the Court of Appeal.

[10] Ms Bethell opposes the application for recall, asserting the sealing of the costs judgment means the substantive judgment has now been sealed and cannot be recalled. In the alternative, she argued that the repudiation argument did not raise a separate issue that needed to be determined or feature in any of the pleadings or other filings prior to closing submissions. In those circumstances, she says the application for a recall ought be declined.

Timing was the key preliminary issue

[11] The key preliminary issue in the substantive matter was whether Mr Saipe lodged his statement of problem with the Authority within three years of raising his grievance for unjustifiable dismissal.7 If he had not done so, he was barred from pursuing his personal grievance.

7 Employment Relations Act 2000, s 114(6).

[12] Mr Saipe raised several arguments, one of which was the repudiation argument. In summary, that argument was that an email to Mr Saipe from Ms Bethell dated 24 August 2013 that dismissed him was an unlawful repudiation of Mr Saipe's employment agreement (as no notice was given) and the repudiation was of no effect until accepted by Mr Saipe, which appeared to have occurred on 2 September 2013.8 This meant that Mr Saipe's reply email of 26 August 2013 could not have raised a grievance for unjustifiable dismissal as it predated the termination of Mr Saipe's employment. Mr Saipe said the grievance was raised by a later letter, which was sent less than three years before Mr Saipe filed his statement of problem in the Authority.

[13] The Court found Mr Saipe was summarily dismissed through the email dated 24 August 2013; he raised a personal grievance for unjustifiable dismissal in his email of 26 August 2013; and so he was out of time when he lodged his statement of problem with the Authority on 29 August 2016.9 The Court did not refer to the repudiation argument.

Recall principles

[14] Rule 11.9 of the High Court Rules 2016 allows for High Court judgments to be recalled at any time before they are

sealed. The Employment Court too can recall its judgments.10

[15] Generally speaking, and subject to rights of appeal, a judgment once delivered must stand for better or worse, subject to appeal. A decision to recall a judgment will only be made in exceptional circumstances.11 This reflects the importance of finality

8. Mr Saipe refers to *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26 at footnote 25.

9 *EmpC judgment*, above n 1, at [35], [39]-[41].

10. See for example *Waikato District Health Board v New Zealand Nurses Organisation* [2017] NZCA 247; and *Gilbert v Attorney-General* [2006] NZEmpC 13; [2006] ERNZ 1.

11 *S (SC 39/2017) v R* [2022] NZSC 7 at [3].

in litigation to the administration of justice.12 There are three established categories of cases in which a judgment not yet sealed may be recalled:13

(a) where, since the hearing, there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority;

(b) where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and

(c) where for some other very special reason justice requires that the judgment be recalled.

[16] It is the third category that is relevant here. It is a narrow category.14 Cases appropriate for recall on this basis are rare.

[17] Beyond that, the Court's decision is discretionary, with that discretion exercised on a case-by-case basis, ultimately depending on the interests and administration of justice.

[18] It has been recognised that the failure to consider an issue may constitute a very special reason requiring a recall.15 However, this must be tempered by the recognition in other cases that there is no basis for recall in cases where the Court has considered an issue but has decided either not to deal with it, or to deal with it on a narrower basis than argued. Further, the Court is not obliged in its reasons for judgment to discuss every aspect of argument.16

[19] Here, and as acknowledged by Mr Donovan, counsel for Mr Saipe, the issue of when Mr Saipe's dismissal took effect was dealt with. His repudiation argument in favour of a later date was not referred to.

12 *AlKazaz v Enterprise IT Ltd (No 11)* [2022] NZEmpC 15 at [2].

13 *Horowhenua County v Nash (No 2)* [1968] NZLR 632.

14 *Zhang v Yu* [2020] NZCA 592 at [9].

15. *Brake v Boote* [1991] NZHC 1484; (1991) 4 PRNZ 86 (HC); *Waikato District Health Board v New Zealand Nurses Organisation* [2017] NZCA 247, [2017] ERNZ 378 at [55].
16. *Lusty v Thorburn* [2021] NZHC 2045 at [6]; citing *R v Nakhla (No 2)* [1974] 1 NZLR 453 (CA) at 456.

Mr Saipe ought to have obtained a sealed judgment

[20] Previous decisions of this Court include comment that there was no procedure equivalent to that in the High Court for the drawing up of a formal record or the sealing of a judgment in the Employment Court.17

[21] However, those decisions predate the changes to the Employment Court Practice Directions that have, for some time, required a party proposing to seek leave to appeal to the Court of Appeal against a judgment of the Employment Court to obtain a sealed judgment. The Practice Directions include a process to be followed whereby an applicant is to file a draft form of sealed judgment with the Registrar of the Employment Court who, when satisfied with the form of the draft, will seal it and return it to the applicant to be filed with the application for leave, if this is required by the Court of Appeal.18

[22] In dealing with applications for recall, the Court looks to r 11.9 pursuant to the Employment Court Regulations 2000.19 That rule only permits a Judge to recall a judgment up until a formal record of it is drawn up and sealed.20 It is clear that, if Mr Saipe had obtained a sealed judgment, the Court would not have been permitted to recall it.

[23] Mr Saipe did not obtain a sealed judgment. He ought to have done so prior to filing his application for leave with the Court of Appeal. It would not be in the interests of justice for Mr Saipe to benefit from his non-compliance. For that reason alone, the application for a recall fails.

An application for recall ought to have been filed promptly

[24] In any event, the length of time that has passed since a judgment was delivered would certainly be a relevant factor in considering whether recall is in the interests of

17 *Muldoon v Nelson Marlborough District Health Board* [2011] NZEmpC 115; *Gilbert*, above n 10.

18 "Employment Court Practice Directions" <www.employmentcourt.govt.nz> at No 15.

19 Employment Court Regulations 2000, reg 6(2)(a)(ii).

20 *Rabson v Gallagher* [2012] NZCA 237, (2012) 29 FRNZ 23; *Saxmere Co Ltd v Wool Disestablishment Co Ltd* [2009] NZSC 122, [2010] 1 NZLR 76 at [2]; Farquhar v Property Restoration Ltd CA186/89, 27 May 1991 at 5.

justice. The longer that period, especially if unsatisfactorily explained, the more reluctant the Court would be to recall the judgment. The cases where recall is appropriate, even where there is a long delay before applying, will be rare. 21

[25] In this case, approximately eight months elapsed between the date of this Court's judgment and the filing of the recall application. If Mr Saipe thought there were reasons to apply for a recall of the judgment, an application ought to have been filed promptly and before filing in the Court of Appeal. This delay too is a very significant factor weighing against the granting of Mr Saipe's application, particularly in circumstances where a considerable period has already elapsed since Mr Saipe's dismissal in 2013.

[26] The Court of Appeal did not, as characterised in the grounds for the application, indicate that the appropriate way forward now was for Mr Saipe to return to the Employment Court and seek a recall. The language used by the Court of Appeal was in the past tense, noting that "[i]f Mr Saipe wished to pursue the repudiation proposition, the avenue to do so was a request for a recall of the Employment Court's decision."22 The Court's comments were directed at the decision to pursue that argument on appeal rather than by way of recall. The words used reflect a level of finality in this choice.

[27] Having reached the view that the delay weighs against a recall, I have considered whether there were very special reasons or equity and good conscience considerations that would have weighed in favour of granting the application, despite the delay.

[28] While I acknowledge that Mr Saipe is aggrieved that his repudiation argument was not referred to in the judgment, the failure to refer to an argument is not a very special reason.23 Nor do I consider equity and good conscience considerations arise to support Mr Saipe's application. As acknowledged by Mr Donovan, it is ultimately for a judge to identify the issues that need to be determined, and the arguments that ought

21 *Gilbert*, above n 10, at [29].

22 *CA leave judgment*, above n 3, at [19].

23 *Unison Networks Ltd v Commerce Commission* [2007] NZCA 49 at [34]; *Nakhla*, above n 16.

to be addressed. For this reason, although the submissions on the application for a recall were more focussed on the timing and finality points, and therefore I do not reach a concluded view, my inclination is that the failure to address the repudiation argument would not have merited a recall, even if an application had been brought promptly.

[29] Certainly, such a failure would not have overcome the difficulties of the delay when considering the interests of justice and the desirability of finality in litigation. This is particularly so in this jurisdiction, where the Employment Relations Act 2000 reinforces that matters ought be dealt with promptly.24 Another factor against recall is that raised by Mr Hooker that the repudiation argument only arose as an alternative argument in closing submissions, with the main argument throughout being that reasonable notice needed to be included when determining the date of dismissal.25

[30] Therefore, even without the sealing issue, the application for a recall would have been declined in any event.

[31] Given my conclusions, it is not necessary for me to consider Ms Bethell's argument that the sealing of the costs judgment means the substantive judgment has now been sealed. Nor do I deal with what the appropriate procedural steps would have been with respect to the costs judgment had the substantive judgment been recalled and reissued with a different result.

Outcome

[32] The application for recall is declined.

[33] Given the outcome of the application for recall, no order is made with respect to the application for a stay of the costs decisions.

[34] Ms Bethell may apply for costs by memorandum filed and served within 15 working days of the date of this judgment. Mr Saipe may respond by filing and

24 *AlKazaz v Enterprise IT Ltd* [2020] NZEmpC 171 at [5].

25 *Saipe v Bethell* [2019] NZEmpC 103 *[EmpC strike out judgment]* at [13].

serving a memorandum in response within 10 working days from receipt of Ms Bethell's memorandum and any memorandum in reply must be filed and served by Ms Bethell within a further five working days. The application for costs would then be dealt with on the papers.

J C Holden Judge

Judgment signed at 11.30 am on 8 April 2022
