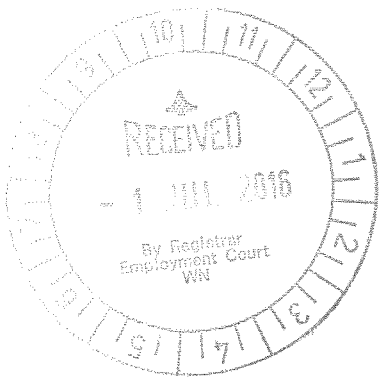

IN THE COURT OF APPEAL OF NEW ZEALAND

CA166/2016
[2016] NZCA 300

BETWEEN		HOCKEY MANAWATU INCORPORATED Applicant
AND		WARREN NEWETT BANKS Respondent

Court: Randerson, French and Kós JJ

Counsel: A N Isac and A L M Osman for Applicant
B A Buckett and J P A Boyle for Respondent

Judgment: (On the papers) 1 July 2016 at 10 am

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs to the respondent for a standard application for leave with usual disbursements.

REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] The applicant seeks leave to appeal under s 214 of the Employment Relations Act 2000 (the ERA) on questions of law. The application arises from a judgment of the Employment Court in which the applicant was found to have unjustifiably

dismissed the respondent from its employment.[1] In its amended application for leave to appeal the questions of law identified are:

(a) Did the Employment Court wrongly admit privileged legal advice contrary to ss 53 and 54 of the Evidence Act 2006?

(b) Was the Employment Court wrong to permit the respondent to introduce the privileged advice by witness summons when this process denied the applicant the ability to call relevant evidence in response?

(c) Does the doctrine of waiver apply to employment agreements and, if so, was the Employment Court wrong not to consider whether the process requirements of cl 13.4 [of the employment agreement] had been waived?

(d) Was the Employment Court's finding of unjustified dismissal a conclusion to which, on the evidence, it could not reasonably have come?

[2] The parties have agreed that the application may be dealt with on the papers.

Relevant background

[3] To provide context for the questions raised we set out briefly the material facts. For six years prior to the termination of his employment on 28 September 2014, the respondent was the operations manager of the applicant under an individual employment agreement which contained the following clause:

> **13.4 Termination on Medical Grounds**
>
> In the event the Employee has been absent from work for 4 weeks which should represent an extended break from employment because of illness, the Employer shall be entitled to require the Employee to undergo a medical examination by a registered medical practitioner nominated by the Employer, at the Employer's cost. In assessing the Employee's fitness for work, the Employer shall take into account any report provided as result of

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1 *Banks v Hockey Manawatu Incorporated* [2016] NZEmpC 23.

> that examination, and any other medical report provided by the Employee within a reasonable time-frame. If, in the reasonable opinion of the Employer, the Employee is incapable of the proper performance of their duties by reason of illness, the Employer may terminate this agreement by the provision of at least **4 weeks** notice.
>
> (original emphasis)

[4] The respondent's employment was terminated under this clause against a background set out in detail in the Employment Court's decision following a hearing occupying some 12 days. During the hearing, an issue arose concerning the admissibility of legal advice sent by the applicant's solicitor to an employment consultant on 11 April 2014. The disputed material contained advice given by the solicitor to a member of the applicant's Board relating to the respondent's employment issues. In the Employment Court, Judge Ford accepted that normally, such advice would be privileged but ruled that privilege had been waived. The respondent's advisers issued a summons to the employment consultant who produced her file in response and gave evidence at the hearing. The Judge relied in part on this material in reaching his decision.

[5] The respondent was dismissed under cl 13.4 in relation to health issues. The dispute in the Employment Court focused on the process the applicant adopted in dealing with medical certificates provided by the respondent.

The key findings in the Employment Court

[6] Judge Ford found that the respondent had been unjustifiably dismissed on multiple grounds both as to process and substantively. In summary, he found:

(a) The applicant had breached its obligation of good faith towards the respondent.

(b) The applicant had failed to provide the respondent with a reasonable opportunity to respond to concerns the applicant's other employees had raised concerning the respondent's conduct.

(c) Rather than referring these allegations to the respondent for his response and considering that in a genuine and meaningful way, the

applicant had proceeded to hold a special confidential meeting at which it considered options for dismissing the respondent.

(d) The emphasis in the options considered by the applicant was upon reaching an outcome that would end the respondent's employment and the option of retaining the respondent on his existing terms and conditions was effectively dismissed out of hand.

(e) The applicant invited the respondent to go to mediation but was not told what was to be discussed. Rather, the respondent was left to speculate or guess.

(f) The respondent had no knowledge whatsoever of the concerns that had been raised about him by the other employees.

(g) The procedure adopted by the applicant in the ultimate decision to terminate the respondent's employment appeared to be casual and offhand.

(h) The process failures by the applicant were significant and unrelenting and were not the actions expected from a fair and reasonable employer in all the circumstances.

[7] In relation to the medical issues, we set out the Judge's findings in full:

> [79] In terms of its substantive decision, again the [applicant's] Board members did not get it right. They proceeded to terminate [the respondent's] employment for medical incapacity under cl 13.4 of his employment agreement but they did not interpret the provision correctly. Termination for medical incapacity is something different from ordinary sick leave. Under cl 13.4, if the Board intended to terminate [the respondent's] employment on medical grounds, there was a set procedure which it needed to follow.
>
> [80] The plain meaning of cl 13.4 required HM to arrange for [the respondent] to undergo a medical examination by a registered medical practitioner nominated by HM and then to provide [the respondent] with the opportunity to obtain his own medical report. In assessing the employee's fitness for work, HM was then required to take into account the information provided in those reports. Putting to one side for the moment the issue raised by counsel for the defendant as to whether, under the Human Rights Act 1993, the employer was entitled to require the employee to be medically

examined by its own medical practitioner, the point is that on this occasion HM did not attempt to follow the procedure prescribed.

[81] Had HM complied with the requirements of cl 13.4, [the respondent's] legal advisor would have been put on clear notice as to the significance of the medical advice sought and [the respondent's general practitioner] could have been instructed accordingly. At no stage, however, did the Board seek a medical report directed to the issues raised under cl 13.4. Instead, it proceeded to make a decision to terminate [the respondent's] employment under cl 13.4 simply on the strength of the medical certificates provided by [the respondent's general practitioner] for sick leave purposes.

[82] The consequences of taking action under cl 13.4 were far more serious than a sick leave assessment. The clause needed to be strictly complied with. Once again, the Board failed [the respondent]. I am satisfied that its actions in this regard were not what a fair and reasonable employer could have done in terms of the s 103A test of justification.

Discussion

[8] We are not persuaded that the issues identified by the applicant are questions of law which, by reason of general or public importance or for any other reason, ought to be submitted to this Court for decision.[2]

[9] As to the first issue, we accept that the admissibility of evidence may give rise to a question of law. But in the present case, admissibility turned on whether privilege had been waived. This is a question of fact. As well, the evidence admitted was relevant to only one of many flaws the Employment Court found in the applicant's processes.

[10] The manner in which this evidence came before the court by witness summons does not raise a question of law. This disposes of the second issue.

[11] The third issue relating to cl 13.4 essentially raises a question of construction of an employment agreement for which this Court has no jurisdiction.[3] That is plain from the passages in the Employment Court's judgment we have cited at [7] above.

[12] Finally, the fourth issue is essentially factual in nature.

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2 Employment Relations Act 2000, s 214(3).
3 Employment Relations Act 2000, s 214(1).

Result

[13] The application for leave to appeal is dismissed. The applicant must pay costs to the respondent for a standard application for leave with usual disbursements.

Solicitors:
Jacobs Florentine, Palmerston North for Applicant
Buckett Law, Wellington for Respondent