

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2011] NZEmpC 115
CRC 7/11**

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

BETWEEN BRIAN MULDOON
Plaintiff

AND NELSON MARLBOROUGH DISTRICT
HEALTH BOARD
Defendant

Hearing: By memoranda of submissions filed on 24 August and 5 and 15
September 2011

Counsel: Anjela Sharma, counsel for plaintiff
Paul McBride, counsel for defendant

Judgment: 16 September 2011

SUPPLEMENTARY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The plaintiff seeks recall of the Court's judgment to deal with his claim for interest which was not addressed in the substantive judgment. Although counsel for the plaintiff has couched the request as an inquiry about why interest was not awarded, the real thrust of Ms Sharma's submission is that interest should have been awarded and, accordingly, I will treat the request as one to recall and correct the judgment. The defendant opposes recall of the judgment in these circumstances and the parties have made submissions by memorandum.

[2] There is a fundamental jurisdictional issue raised by the defendant that should be dealt with first. The defendant says, employing archaic Latin, that the Court is "functus officio". That means that there is no live proceeding before the Court in which it is empowered to make orders. In short, its role is spent.

[3] That is, however, clearly not so. First, the proceeding has not concluded because costs have yet to be dealt with. Even more fundamentally, however, even if there were no live applications before the Court, it, as in the case of other courts, is empowered to recall its judgments to correct slips or omissions. Failure to deal with an issue raised in the proceeding or, more particularly as in this case, to grant a form of relief claimed, is a classic example of the appropriate exercise of such a power. If the Court has overlooked doing something it ought to have addressed, then it is only just that there should be a procedure to enable that to be considered and, if appropriate, done.

[4] I am satisfied that in this case the plaintiff did claim interest on remuneration lost, even if this was not highlighted expressly in evidence. The calculation of interest is not generally something that is dealt with in evidence. The rules governing an award of interest on monetary compensation for remuneration loss are circumscribed and generally applied, if warranted, without leading evidence although a calculation of the amount of interest by counsel is usually helpful, as has now been provided in this case. It is enough that the claim for interest was made in the statement of claim and reiterated, albeit briefly, in final submissions and that the defendant was therefore on notice of that remedy.

[5] Because the defendant, through counsel, has made strenuous submissions in opposition to interest now being awarded including by reference to decided cases, I should address those.

[6] The first case relied on by Mr McBride is *Ashburton Veterinary Club Inc v McGowan*.¹ He submitted that the Court held that in the absence of any reservation of leave on a particular issue (in that case costs), the Employment Tribunal was without the power to make such an award subsequently. This judgment is, however, distinguishable. First, it dealt with the practice and procedure of the Employment Tribunal and not of this Court which has, by reference to reg 6 of the Employment Court Regulations 2000, the powers of the High Court where there is no relevant express provision for the Employment Court. In the *McGowan* case, not only had no

¹ [1993] 2 ERNZ 581, 592.

application for costs been made, but a claim to them had been disavowed expressly by counsel during the hearing. That is not the position here.

[7] The Employment Court in *McGowan* followed two judgments of the High Court, *Petone Borough Council v Treadwell*² and *Fyfe v Devonport Borough Council*.³ In those cases, both involving the Planning Tribunal, the parties had not ever sought costs until after the Tribunal's decisions had been delivered and neither subsequent applicant for costs had asked during the hearing that these should be reserved. That, too, is a very different situation to the present.

[8] Mr McBride also relied on the judgment of this Court in *Trotter v Telecom Corporation of New Zealand Ltd*⁴ as follows: "It is highly desirable that once the Court's judgment is issued, there should be finality and that unless any question is reserved by the judgment for further debate, what the Court has said should be an end of the matter." The judgment in *Trotter* relied on and applied the judgment in *McGowan* set out above. In *Trotter*, the Court was asked to make an order for payment of dividends on shares and to vest shares in one of the parties. At p491 Chief Judge Goddard wrote:

... I am *functus officio* in relation to remedies other than costs. This convenient Latin phrase refers to a rule that once a Court has delivered judgment, it cannot add to, amend, or detract from the judgment that has been delivered. There are recognised exceptions to the rule to enable the correction of an accidental slip or other error resulting in the judgment not correctly stating what the Court actually decided and intended. There is also a facility or power for the Court to add to or clarify the reasons for its decision as opposed to the decision itself. Obviously, departures from this general rule - which is one of the common law - could be authorised by statute and a possible example appears, as it happens, in s 108 Employment Contracts Act 1991 which seems to enable the Court to vary or alter any order for costs that it has made in such manner as it thinks reasonable.

There is also the provision for an application for a rehearing which could result in a different judgment between the parties if a rehearing is granted and takes place but that is a different matter.

² (1986) 11 NZTPA 366.

³ (1990) 15 NZTPA 26.

⁴ [1993] 2 ERNZ 935 at 941.

[9] The final judgment relied on by Mr McBride in support of his “functus officio” submissions is *Fleming v Jacquelynne Brown, Chief Executive - Department of Child, Youth and Family Services*.⁵ That, too, is distinguishable in the sense that the slip or omission rule was not relied on in a subsequent claim for interest after delivery of a substantive judgment in which only questions of costs were reserved for further decision. As Judge Travis noted in *Fleming*:

[11] It was not in issue between the parties that the Court has jurisdiction to recall a decision if there has been any slip or omission which needed addressing. For example, in one case cited by Mr Pollak, *NZ Educational Institute v The Board of Trustees of Auckland Normal Intermediate School*, unreported, AC 33/97, 5 May 1997, Judge Colgan recalled his earlier judgment in the interests of justice to correct an aspect relating to taxation on an award, applying, by analogy, Rule 12 of the High Court Rules. This rule provides that if a judgment or order contains a clerical mistake or error arising from an accidental slip or omission, or if any judgment or order is drawn up as to not express what was actually decided and intended, the judgment or order may be corrected by the Court, either on its own motion or on an interlocutory application for that purpose.

[10] As already noted, reg 6 of the Regulations enables the Court to have recourse to the High Court Rules where there is no applicable procedural rule in this Court. Rule 11.9 of the High Court Rules (“Recalling judgment”) provides: “A Judge may recall a judgment given orally or in writing at any time before a formal record of it is drawn up and sealed.”

[11] There is, of course, no procedure for the drawing up of a formal record or the sealing of a judgment in the Employment Court. The Court’s written reasons for judgment, signed by a Judge, are the formal record of the disposition of a case. The absence of the equivalent to the High Court procedures has been held not to preclude access to what is commonly known as the slip rule: see *Gilbert v Attorney-General*.⁶

[12] Rule 11.10 (“Correction of accidental slip or omission”) is also relevant. It provides:

- (1) A judgment or order may be corrected by the court or the Registrar who made it, if it—

⁵ AC16B/02, 24 October 2002.

⁶ [2006] ERNZ 90 (CA).

- (a) contains a clerical mistake or an error arising from an accidental slip or omission, whether or not made by an officer of the court; or
 - (b) is drawn up so that it does not express what was decided and intended.
- (2) The correction may be made by the court or the Registrar, as the case may be,—
- (a) on its or his or her own initiative; or
 - (b) on an interlocutory application.

[13] The rule provides that this power may be exercised by the Court on its own initiative or on an interlocutory application.

[14] Here, the failure to deal with interest is an error arising from an accidental omission, albeit that the claim to interest contained in the statement of claim was drawn to the Court's attention during the course of the hearing or otherwise before the judgment was issued, even if faintly.

[15] As a fall back to its argument that the Court is not empowered to make an award of interest in these circumstances (against which I have found), the Board, whilst conceding that any award of interest is within the discretion of the Court, says (correctly) that interest as a remedy was barely mentioned at the hearing. I accept that is so although, as Mr McBride concedes, para 7.6 of the plaintiff's final submissions do refer to that as a claim. So too, of course, did the plaintiff's statement of claim. In these circumstances I am satisfied that interest was claimed but that this was overlooked in the judgment.

[16] Mr McBride's better submission criticises the way in which the plaintiff's calculation of interest appears to have been formulated. It is in the form of a bare spreadsheet document based on chronological changes to the 90 day bill rate but assuming that the principal sum of \$19,584.35 was applicable in whole from immediately after Mr Muldoon's dismissal. That is, however, not so because the sum is an accumulation of weekly debts so payable which would, in turn, require interest calculations of equivalent frequency. In these circumstances, it seems inevitable that the interest payable by the defendant will be less than the sum of \$590.84 claimed by the plaintiff.

[17] So, while the plaintiff is entitled to interest on remuneration compensation, the amount of this has not yet been established satisfactorily and I invite the plaintiff to recalculate this and attempt to obtain the defendant's agreement on the amount. If that cannot be settled between the parties, leave is reserved for the plaintiff to apply to the Court to fix the amount of interest.

GL Colgan
Chief Judge

Judgment signed at 9 am on Friday 16 September 2011