IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 128
WRC 4/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MANA COACH SERVICES LIMITED Plaintiff
AND	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGER TRANSPORT EMPLOYEES UNION INC Defendant

Hearing: By memoranda of submissions filed on 15, 17 and 30 May and 15 June 2012 and hearing on 25 July 2012

Appearances: Hugh Fulton and Susan-Jane Davies, counsel for plaintiff
Tanya Kennedy and Paul McBride, counsel for defendant

Judgment: 2 August 2012

INTERLOCUTORY JUDGMENT NO 3 OF CHIEF JUDGE GL COLGAN

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[1] Before the Court hears and decides the issues remitted to it by the Court of Appeal in its judgment of 21 November 2011,[1] it is necessary to resolve the parties' dispute about what the Court of Appeal has remitted and how this is to be dealt with.

[2] During the timetabled receipt of submissions from counsel for the parties about the proper interpretation of the Court of Appeal's remission of issues to this Court, the plaintiff also filed an application for rehearing of the proceedings. This was, not unpredictably, opposed by the defendant and at a telephone directions conference with counsel on 6 July 2012, it was agreed that this application for

[1] *New Zealand Tramways and Public Transport Employees Union Incorporated v Mana Coach Services Limited* [2011] NZCA 571; [2012] 1 NZLR 753.

rehearing would be dealt with in this same judgment as that interpreting the Court of Appeal's remission. So there are two, albeit inter-related, issues now for judgment.

[3] Since the Court of Appeal's judgment was delivered about eight months ago, the parties have attempted to settle the outstanding issues but without success. There will be a further hearing in this Court on the remitted issues, but because of the commitments of counsel, regrettably this cannot be until late August 2012. The events with which this case is concerned go back to 2007 and the need for litigation finality, and a restoration or even establishment of good employment relations, is undeniable.

The question(s) remitted by the Court of Appeal

[4] The reasons of the three Judges in the Court of Appeal are not unanimous except in allowing Mana Coach Services Limited's (Mana's) appeal. Chambers J would not have remitted any matter to the Employment Court but the majority (Arnold and Harrison JJ) did so. The scope of the issues for remission and how they were to be dealt with, however, were not agreed as between Arnold and Harrison JJ. It was another majority (Chambers and Arnold JJ) which determined that issue. They delivered separate reasonings and their directions on remission are recorded separately in these.

[5] To understand what must now be decided, it is necessary to go back to the point on which the appeal was allowed. That was this Court's decision that "equity and good conscience" (s 189 of the Employment Relations Act 2000) could not deprive the employees of remuneration for work originally scheduled for a period of hours following cancelling of a notice of strike action. This Court had found that the employees' bad faith conduct towards the employer by their Union, in respect of the cancellation of the strike notice, justified the refusal of their claim to remuneration by reference to equity and good conscience under s 189.

[6] The "Judgment of the Court of Appeal", as opposed to the reasons therefor given by the three appellate Judges, provides at "C":

> The proceeding is remitted to the Employment Court for it to determine whether the bad faith which it has found was present can operate in some way other than through the equity and good conscience jurisdiction to disentitle the employees from payment for the hours at issue.

[7] Further analysis of the reasons of Chambers and Arnold JJ who formed the majority of the Court of Appeal on the matter of what is to be remitted to the Court, reveals the following. Arnold J dealt with this matter at [52] of the reasons for judgment as follows:

> Against this background, I consider that the matter should be remitted to the Employment Court so that it can consider whether the bad faith which it has found was present operates in some way other than through the equity and good conscience jurisdiction to disentitle the employees from payment for the hours at issue. It may be, for example, that there is scope within New Zealand employment law for the application of the doctrine discussed by the House of Lords in *Miles v Wakefield Metropolitan District Council*, particularly given the 2004 amendments to s 4 of the ERA. The question will be whether this is consistent with the collective agreement and employment contracts, as well as the New Zealand legislative scheme. In any event, these are matters for further consideration by the Employment Court.

[8] It is noticeable that, with reference in the foregoing passage to the 2004 amendments to s 4 of the Act, the learned Judge added a footnote as follows:

> See *Kelly v Tranz Rail Ltd* [1997] ERNZ 476 (EmpC) at 495 and 501; *Witehira v Presbyterian Support Services (Northern)* [1994] 1 ERNZ 578 (EmpC) at 600. But see also *Bickerstaff v Healthcare Hawkes Bay Ltd* [1996] 2 ERNZ 680 (EmpC) at 688–689; *Postal Workers Association v New Zealand Post Ltd* (2007) 8 NZELC 98,918 (ERA) at [36]–[46]; *Thompson v Norske Skog Tasman Ltd* [2011] NZERA Auckland 291 at [55]–[60].

[9] Turning to this aspect of the reasons of Chambers J, [83] records as follows:

> … By a majority (Arnold J and me), the rehearing is limited to a determination of whether the bad faith which the Employment Court has found was present can operate in some way other than through the equity and good conscience jurisdiction to disentitle the employees from payment for the hours at issue.

[10] There is a substantial identity between the descriptions of the issue to be remitted in [52] (Arnold J) and [83] (Chambers J) which has found its way into the judgment of the Court under "C" above.

[11] Arguing for a narrow interpretation of the remission, counsel for the defendant submits that it is implicit that the judgment of this Court was that there

would otherwise have been an entitlement to wages and that the Court of Appeal so interpreted this Court's judgment.

[12] The plaintiff's position is that other questions for decision flow necessarily from the Court of Appeal's remitted question or questions and more particularly if the plaintiff is unsuccessful in persuading the Court to refuse the defendant any relief on grounds other than the exercise of equity and good conscience. These other questions are said to include:

- whether, on the evidence, the Union and its members prove that they were entitled to payment of wages in an unspecified amount when they did not strike on 1 August 2007;

- if the Union and its members have proved or are able to prove an entitlement to wages, whether their admitted bad faith is to be considered in connection with their entitlement, or disentitlement, to payments (other than through equity and good conscience); together with

- as a subset of the above, whether bad faith is a default under a relevant employment agreement or collective agreement entitling the plaintiff to deduct whatever wages may have been earned, pursuant to the Wages Protection Act 1983 (ss 15 and 16).

[13] The plaintiff says this Court did not hold that the relevant individual drivers had earned, or were entitled to payment of, wages for the period of about four hours in the afternoon of 1 August 2007. It says there was no finding by this Court of an entitlement to wages for such employees.

[14] I find in favour of the defendant's narrow scope argument and against the plaintiff's broad scope position for the following reasons.

[15] The first and paramount reason is my interpretation of the relevant directions of the majority (Chambers and Arnold JJ), and of the reasoning of the unanimity of the Court of Appeal in allowing the Union's appeal against this Court's judgment.

[16] Next, it is important to acknowledge that the proceeding in this Court was a challenge to the determination of the Employment Relations Authority[2] other than by hearing de novo. In other words, only some but not all of the issues before the Authority and its decision on them, were in issue in this Court.

[17] Next, I agree with counsel for the defendant that the interpretation of the remission argued for by the plaintiff is, in effect, although not so worded, the kind of three stage approach to the remission proposed by Harrison J but emphatically rejected by the majority on the remission question (Chambers and Arnold JJ) in the Court of Appeal.

[18] Although, unconstrained by the judgment and reasoning of the majority, I would have adopted the approach to the limited questions proposed by Harrison J at [33]-[37] of the judgment of the Court of Appeal, I am bound to follow the directions of the majority on remission (Chambers and Arnold JJ).

[19] If, therefore, the plaintiff's bad faith operates in some way other than through equity and good conscience to disentitle the employees from payment for the hours at issue, their claims to remuneration will remain dismissed. If, on the other hand, the bad faith does not so disentitle the employees, it will follow that they are entitled to be paid as if they had worked the hours in question and as the Employment Relations Authority found.

The application for rehearing

[20] The following are the statutory criteria by which the Court may allow a rehearing. For reasons that are not clear, but appear to be repetitious rather than

[2] *New Zealand Tramways and Public Passenger Transport Authorities Employees IUOW (Wellington) Branch v Mana Coach Services Ltd* 20 December 2007 WA 176/07

inconsistent, both cl 5(2) of Schedule 3 to the Act and reg 61(4) of the Employment Court Regulations 2000 (the Regulations) provide respectively:

> (2) … 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.

And

> (4) Under clause 5(2) of Schedule 3 of the Act, 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.

[21] It is not in dispute that the 28 day period ran from the date of the Court's judgment on 28 September 2008. The application for rehearing was made on 30 May 2012.

[22] After this Court's judgment was issued in September 2008, leave to appeal was granted by the Court of Appeal on 4 December 2008. Among the grounds of appeal were s 97 (strike breaking) issues. By then, it was known that s 97 was to be considered by the Court of Appeal (and subsequently by the Supreme Court) in another case. It was agreed between counsel that the appeal would be 'parked' until the appellate Courts' interpretation of that section was known. That was the reason for the delay from December 2008 until the hearing in the Court of Appeal on 2 June 2011 although, by that time, the s 97 issues had been abandoned in this case.

[23] Even if the date after which the Court might reasonably have expected the plaintiff to have applied for a rehearing is the date of the Court of Appeal's judgment (21 November 2011), there is a period of more than five months for which the plaintiff has failed to establish in evidence its reasons for not applying for a rehearing until it did.

[24] Even if the Court accepts, as it does, that the parties attempted to negotiate a resolution of this dispute after the judgment of the Court of Appeal was issued, that does not explain sufficiently or even at all why the application for rehearing was not made more promptly. I would not have accepted (if it had been argued) that the filing of such an application would have exacerbated the position or put at risk the

prospective success of those negotiations, especially if the defendant had been put on notice that this was a step taken to preserve the plaintiff's rights to apply for leave. This is often done and the non-prejudicial implications are well understood.

[25] Additionally, the proceeding was back before this Court during that period in any event. By letter dated 29 March 2012, counsel for the plaintiff advised the Court that the parties had not been able to resolve their dispute themselves and that the Court's determination would be required to do so. A telephone directions conference was requested by counsel. This was arranged for 18 May 2012 and on 15 May 2012 the plaintiff's counsel filed a memorandum with the Court addressing the matters that were to be discussed. On 17 May 2012, the day before the directions conference, counsel for the defendant raised in a memorandum to the Court its concern that the plaintiff was seeking to broaden the issues remitted by the Court of Appeal. At the telephone directions conference on 18 May 2012, the Court set a timetable for the filing and exchange of written submissions and, for reasons of unavailability of counsel, allocated a hearing of these before the Court on Thursday 30 August 2012.

[26] It was not until 30 May 2012 that the application for rehearing was filed by the plaintiff. This was accompanied by a brief affidavit by the plaintiff's human resources manager. This set out his understanding of the issues remitted to the Court and identified another issue that the deponent said had not been decided in the Court's judgment[3] of 26 September 2008. The manager, Marau Russell, says in his affidavit: "For the plaintiff's operational purposes it would have been and remains very helpful to know the answer." Mr Russell continues:

> The employees' wage claims were defeated by bad faith impacting on equity and good conscience.
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> …
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> The point of principle is otherwise resolved. The plaintiff believes it is a necessary step in the determination of the case to return to and have findings of fact together with analysis relating to the wages' claim itself and the [effect] of bad faith on what is proved in relation to those findings and analyses, to determine what the plaintiff's liabilities are (if any) to make payment of wages. The evidence for these purposes is on record and should be sufficient for a complete determination of the issues.

[3] [2008] ERNZ 439

[27] Once an applicant establishes the statutory test of explaining reasonably the delay in applying for a rehearing after 28 days following the judgment, the courts have established a number of discretionary criteria to guide them on that question. But the first hurdle is the statutory requirement for explanation of the delay and why the application could not reasonably have been made sooner. If this is not addressed satisfactorily, the discretionary considerations do not come into play.

[28] Although in the nature of an application to recall a judgment for error, this has nevertheless been brought as one for a rehearing and the statutory provisions dealing with such applications must be complied with. Although there was some discussion towards the close of counsel's submissions whether this is indeed an application for rehearing or whether the plaintiff wishes it to be treated as an application for recall, I did not understand Mr Fulton to disagree with my summary of the plaintiff's position as being that it is an application for a rehearing that will be in the nature of an application to recall a judgment.

[29] Before the Court can grant a rehearing where, as here, more than 28 days have elapsed between the judgment and the application being made, the Court must be satisfied that the application could not reasonably have been made sooner: cl 5(2) of Schedule 3 to the Act and reg 61(4) of the Regulations. Even if, generously but justly in all the circumstances, the period for that assessment is taken as beginning with the delivery of the Court of Appeal's judgment on 21 November 2011, the subsequent period of more than five months is at best insufficiently accounted for. Mr Russell's brief affidavit does not address at all why the application for rehearing could not have been brought before 30 May 2012. Even if I accept, as I do, Mr Fulton's advice from the Bar that there were discussions between counsel about the meaning of the Court of Appeal's remission directions after its judgment was issued on 21 November 2011, it is not possible, without more, to accept that these precluded the earlier filing of the application for a rehearing. There is no explanation why the application could not have been brought sooner, out of an abundance of caution, to preserve the plaintiff's position while such discussions were under way.

[30] The statute places an onus on an applicant seeking to have a rehearing brought out of time to satisfy the Court that it could not have done so sooner than it

did. That jurisdictional test has not been met by the plaintiff and its application must, therefore, fail.

Summary of judgment

[31] The Court's task on remission to it by the Court of Appeal is to determine the single question set out at "C" of the judgment of the Court of Appeal, "whether the bad faith which [the Employment Court] has found was present can operate in some way other than through the equity and good conscience jurisdiction to disentitle the employees from payment for the hours at issue."

[32] The plaintiff's application for rehearing is dismissed.

[33] The defendant is entitled to an order for costs on the two matters determined by this judgment, the application for rehearing and the interpretation and statement of the issue or issues remitted by the Court of Appeal. Because there will need to be a further judgment following the next hearing set down on 30 and 31 August 2012, those costs will be determined in the context of costs in respect of that further hearing.

[34] The plaintiff should file and serve a synopsis of its submissions on the remitted issues no later than 10 working days before the start of that hearing, with the defendant doing likewise no later than three working days before that hearing.

GL Colgan
Chief Judge

Judgment signed at 2 pm on Thursday 2 August 2012