

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2013] NZEmpC 167
ARC 75/12**

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

AND IN THE MATTER of an application to recall and reissue a
judgment

BETWEEN ROBERT LEWIS
Plaintiff

AND JPMORGAN CHASE BANK N.A.
Defendant

Hearing: By written submissions filed on 14 and 21 August and 2 and 4
September 2013

Appearances: Michael O'Brien, counsel for plaintiff
Rob Towner, counsel for defendant

Judgment: 5 September 2013

INTERLOCUTORY JUDGMENT NO 2 OF CHIEF JUDGE G L COLGAN

[1] The defendant has applied for an order for recall of the Court's interlocutory judgment of 8 August 2013¹ and its reissue with the deletion and modification of some paragraphs. Those sought to be deleted are [4], [5] and [109], and the rewriting of [109] seeks to reverse the orders made for disclosure of documents by the defendant in that paragraph.

[2] Although the parties' comprehensive submissions in support of, and in opposition to, recall and reissue address the legal principles applicable to such applications in other courts, and this Court has been, and will be, guided by those principles, ultimately the decision whether to recall and reissue a judgment is one to be made in the interests of justice between the parties. I accept the defendant's

¹ [2013] NZEmpC 148.

general submission that the limited rights of appeal from judgments of this Court will affect, in appropriate cases, whether to recall and reissue a judgment. But rather than applying what the defendant submits should be a more “liberal” approach to the recalling of judgments, I would prefer to categorise that approach as a careful one to ensure that justice is done between the parties. I accept, also, the principle that an application for recall and reissue should not be allowed to be, or to have the effect of, an appeal de facto.

[3] Also relevant for the decision of this application for recall and reissue is the fact that the proceeding in this Court is still at a preliminary stage. The merits of what is now a significantly different case to that which was before the Employment Relations Authority, have not yet been explored or decided. Therefore, it is important for the Court to adhere to an even-handed and principled approach to the litigation. I accept, also, following the judgment of *Gilbert v Attorney-General*² in this Court and, more recently, the judgment of the Court of Appeal in *Erwood v Maxted*³ that recall and reissue of a judgment should be a rare exercise. However, unlike the concerns expressed by the Court of Appeal in the *Erwood* judgment, there has not been a proliferation of such applications in this Court and I do not consider that to allow recall in this case would risk opening proverbial floodgates.

[4] I accept and apply also the principle that the recall and reissue of a judgment should not have the effect of modifying significantly its outcome. I am satisfied, however, that the changes that I am prepared to make will not have that consequence.

[5] I do not accept the plaintiff’s submission that because the hearing on 30 July 2013, which resulted in the judgment of 8 August 2013 which is sought to be recalled, was in open court and the issues in [4]-[5] of the impugned judgment were discussed in that forum, they should not be deleted from the judgment. Nor do I accept the plaintiff’s submission that the defendant’s application for recall and reissue is a belated and backdoor application for an order prohibiting publication of certain allegations.

² [2006] ERNZ 1.

³ [2010] NZCA 93.

[6] I accept that the current contents of [4]-[5] of the judgment set out what was pleaded in the plaintiff's second amended statement of claim but which pleading was directed to be deleted in a further amended statement of claim that the plaintiff was directed to file. The events related in [4]-[5] of the judgment are not appropriate to a statement of the plaintiff's claim although, as I noted elsewhere in the judgment, evidence of those allegations may nevertheless be relevant at trial as background context to other issues that are properly justiciable.

[7] In these circumstances I will delete [4]-[5] but in order to make sense of the judgment they will be replaced by paragraphs with the same numbers as follows:

[4] Mr Lewis was formerly the Chief Executive Officer (CEO) of the New Zealand branch of the Bank. During 2009 there was a deterioration in that relationship involving the actions of another senior bank officer.

[5] Other events at the Bank at about the same time resulted in Mr Lewis raising a personal grievance alleging that he had been disadvantaged unjustifiably in his employment.

[8] Paragraph [109] of the interlocutory judgment will be amended to omit specific references to allegations that were formerly narrated at [4]-[5] of the judgment. It will, however, not change the directions for disclosure of documents that I made. That is because, as just reiterated, the events referred to in such documents may be relevant: see reg 38 of the Employment Court Regulations 2000. In these circumstances [109] of the interlocutory judgment to be reissued will read as follows:

[109] As to para 1(c) of the notice, I accept that documents relating to the named employee of the defendant, who the plaintiff alleges did the things affecting the plaintiff that led to the plaintiff's disadvantage personal grievance in 2009, are or may be relevant to the issues for trial and must be disclosed. So, too, are the documents referred to in para 1(d) of the notice which are or may be relevant for the same reason. These are documents evidencing the involvement of any of the other employees of, or contractors to, the defendant in actioning these matters.

[9] The judgment will be reissued with the foregoing changes and with a fresh date of issue but, in all other respects, unchanged.

[10] There will be no orders for costs on this application for recall.

GL Colgan
Chief Judge

Judgment signed at 3.15 pm on Thursday 5 September 2013