NOTE: ORDER MADE IN THE EMPLOYMENT COURT SUPPRESSING THE NAME OF THE APPELLANT'S LAWYER IN THE EMPLOYMENT COURT CONTINUES IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA780/2009
[2010] NZCA 218

BETWEEN	JONATHON PARKER First Applicant
AND	ALAN PAUL CRESSEY Second Applicant
AND	SILVER FERN FARMS LIMITED First Respondent
AND	THE EMPLOYMENT COURT AT WELLINGTON Second Respondent

CA800/2009

AND BETWEEN	JONATHON PARKER Applicant
AND	SILVER FERN FARMS LIMITED Respondent

Hearing: 20 April 2010

Court: William Young P, O'Regan and Arnold JJ

Counsel: B A Corkill QC for Applicants
T P Cleary for First Respondent
P J Gunn for Second Respondent

Judgment: 28 May 2010 at 3.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal in CA800/2009 is declined.

B The application for CA780/2009 to be heard in conjunction with CA800/2009 is dismissed.

C The applicant being legally aided, we make no order for costs.

REASONS OF THE COURT

(Given by Arnold J)

[1] There are two applications before the Court:

(a) An application for leave to appeal (CA800/2009) against a decision of the Employment Court in which Chief Judge Colgan refused Mr Parker's application for an extension of time within which to file a challenge to a determination of the Employment Relations Authority;[1] and

(b) An application for Mr Parker's judicial review claim (CA780/2009) to be heard in conjunction with CA800/2009. This is, of course, contingent on the first application succeeding.

[2] The second respondent abides the decision of the Court.

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1 *Parker v Silver Fern Farms Ltd* [2009] ERNZ 301 (EMC).

Background

[3] Mr Parker was employed as a slaughter board butcher at meat works owned by Silver Fern Farms Ltd (Silver Fern). He was covered by a collective agreement which incorporated a drug and alcohol policy. On 31 October 2007 Silver Fern searched a number of its employees' vehicles, including that of Mr Parker, apparently with the consent of the employees. Cannabis was found in Mr Parker's vehicle as well as in some of the other vehicles.

[4] Mr Parker was asked to remain on site, not to begin his duties and to meet with management. Despite this request, and advice from his union delegate that he should stay, Mr Parker said he was stressed and immediately left the works. By contrast, the other employees identified in the search remained on site and cooperated with management. They admitted possessing cannabis. All the employees were given warnings.

[5] Mr Parker did not return to work for five weeks, having obtained medical certificates that he was unfit for work. When he did return to work, Silver Fern required him to undergo a drug test in accordance with the drug and alcohol policy. He refused, and was dismissed.

[6] Mr Parker then raised a personal grievance, seeking various monetary remedies including lost wages and compensation for humiliation. In a decision dated 7 November 2008 the Employment Relations Authority (the Authority) found that Mr Parker's dismissal was justified.

[7] Mr Parker had 28 days within which to challenge the decision,[2] which expired on 5 December 2008. No challenge was filed within this period, and it was not until 10 September 2009 that Mr Parker's application for an extension of time within which to challenge the decision was ultimately filed. Mr Parker's explanation was delay in the granting of legal aid.

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[2] Employment Relations Act 2000, s 179(2).

[8] Mr Parker said that after he received the Authority's decision he engaged a lawyer and signed an application for legal aid. Apparently the lawyer prepared a basic statement of claim. On 5 December 2008, the day on which time expired, Mr Parker contacted the lay advocate who had acted for him at the hearing before the Authority and provided her with the filing fee for the challenge. She contacted the lawyer, who advised her that the challenge should not be filed until the Legal Services Agency (the Agency) had determined Mr Parker's application for legal aid.

[9] The Agency declined Mr Parker's application for aid on 6 January 2009. The lawyer indicated that he could not undertake further work on the file without proper funding. The lay advocate then attempted to find another lawyer for Mr Parker, which she did in April 2009. That second lawyer prepared a full statement of claim for the proposed challenge to the Authority's decision, and submitted this to the Agency in support of a renewed application for aid. On 5 June 2009 the Agency again declined to grant aid.

[10] Mr Parker then sought a review of the Agency's decision by the Legal Aid Review Panel (the Panel), apparently without his lawyer's knowledge. Having obtained further material from Mr Parker, the Panel issued a decision on 2 September 2009 reversing the Agency's decision and granting aid. The lawyer was advised of this on 7 September 2009 and the following day advised Silver Fern that Mr Parker intended to challenge the Authority's decision. On 11 September 2009 the necessary documents were filed in the Employment Court, including the application for an extension of time within which to challenge the decision.

Employment Court's judgment

[11] Chief Judge Colgan said that he had jurisdiction to extend time under s 219 of the Employment Relations Act 2000 (the Act). He said that the ultimate test was "the interests of justice for both parties".[3] He noted that Mr Parker was dismissed not for possession of cannabis but for refusing to take a drug test as a condition of

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[3] At [14].

returning to work.[4] Having summarised the factual background relevant to delay, the Judge noted that the reasons for the delay were scant as neither of the lawyers involved had filed an affidavit to explain what had happened.[5]

[12] The Judge went on to find that:

(a) There was no significant prejudice to Silver Fern arising from the delay.[6]

(b) Mr Parker's challenge had merit because there was a substantial argument that Silver Fern's requirement that he undertake a drug test as a condition of returning to work was not authorised by its drug and alcohol policy.[7]

[13] Despite this, the Judge refused the application. He said:[8]

> This is a finely balanced case. Despite the long delays and inadequate and non-existent explanations for them, Mr Parker has a substantial arguable case of unjustified dismissal. It would, nevertheless, be unjust for the respondent to have to defend a challenge after such a delay. Mr Parker's claimed remedies are for money. Any prospective success enjoyed by Mr Parker, had his challenge been prosecuted promptly, would almost certainly have had to have been tempered by application of s 124 of the Act. It is clear that there was significant disentitling contributory conduct by the plaintiff on the day when his vehicle was searched which would have to reduce significantly any monetary remedies to which he might be entitled. Had reinstatement been sought and a viable remedy, it is likely that I would have granted leave, although on strict terms and on conditions as to costs. In my assessment, however, the applicant can be compensated adequately if those responsible for these gross, largely unexplained and inexcusable delays, were negligent.

[14] He concluded his judgment with the following observation:[9]

> Finally, although it is not for this Court to determine issues of ethical professional responsibility between lawyers and clients, I am concerned about one of the submissions made to me by [counsel]. That was that, in the absence of an assurance of payment, Mr Parker's lawyers were under no

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4 At [15].
5 At [22].
6 At [25].
7 At [26].
8 At [30].
9 At [34].

> obligation to protect his position in litigation, even to the extent of notifying the company of his intention to challenge, and/or filing the pro forma statement of claim that had been drawn up, or making a pro forma application for leave to extend the time for challenging. That was especially so when the client had, and had tendered, the court filing fee. Without deprecating the importance of fees for services, it is one of the hallmarks of a profession that its members are driven not by remuneration considerations but by an ethic of service to client. A lawyer having accepted a retainer to act for a legally aided client and aware of the time limits should in my view act to protect the client's rights of appeal even if this means that payment of the modest cost of doing so is delayed.

Judicial review proceedings

[15] In addition to the proposed appeal, Mr Parker has applied to this Court for judicial review of Chief Judge Colgan's decision pursuant to s 213(2) of the Act. The basis for the review application is essentially the same as the basis for the proposed appeal.

Basis of application for leave to appeal

[16] Under s 214(1) of the Act, an appeal is available, by leave, on a question of law. The question must be one which ought to be submitted to the Court "by reason of its general or public importance, or for any other reason".[10] In *Bryson v Three Foot Six Ltd* the Supreme Court held that the section limits appeals to "significant" questions of law.[11]

[17] Mr Corkill QC (who has not previously appeared and is not one of the lawyers referred to above) identified three grounds that would be pursued on appeal if leave is granted:

> (a) A significant error of fact has been made by the Court (no adequate explanation for delay, and wrongful attribution to solicitors) such that no reasonable decision maker should have reached a conclusion – this amounting to a point of law, because the conclusion could not reasonably have been entertained.
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> (b) Alternatively, the Court proceeded on the basis of an incorrect appreciation of principle, as to the duties owed by a

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10 Employment Relations Act, s 214(3).

11 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [19] [*Bryson*].

solicitor/advocate to a client applying for legal aid, amounting to a point of law.

(c) A breach of the principles of natural justice occurred, in that the Court did not make it clear it was contemplating there was a potential negligence claim involving Counsel as being a determinative point – a point not raised by Counsel for the Respondent, and not flagged by the Judge either. Such a breach of the principles of natural justice constitutes an error of law.

These issues were, Mr Corkill said, of sufficient importance to be submitted to this Court for decision.

Discussion

[18] In deciding whether to grant the application for an extension, Chief Judge Colgan was exercising a discretion. Accordingly, leave will be available only where there is an error of principle, an irrelevant consideration has been taken into account or a relevant consideration overlooked, or the decision is one which no reasonable decision-maker could have reached.[12] This, together with the requirement that the case raise a question of law of a type appropriate for consideration by this Court, creates a high hurdle. We do not consider that it has been surmounted in the present case.

[19] In relation to the first of the proposed questions, we accept that an error of law may arise where a fact-finder makes factual findings that have no basis in the evidence.[13] But we do not consider that any such error arose in the present case. The delay was lengthy, around nine months. The public interest in finality was engaged, albeit that this was not determinative. The explanation for the delay was that legal aid was not finally granted until September 2009. The Judge considered the circumstances of that, as he was obliged to do. He did not accept that the explanation was adequate. Without going into the merits of that conclusion, we do not consider that it raises a question of law, there being some basis in the facts for it.

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12 *May v May* (1982) 1 NZFLR 165 at 170..

13 *Bryson* at [26].

[20] Moreover, we consider that in this context Chief Judge Colgan was entitled to take account of the fact that, if Mr Parker's challenge had succeeded, the amount awarded would have been reduced to reflect his disentitling conduct in leaving his employer's premises despite being asked to stay and despite the union official's advice that he should stay.

[21] As to the second and third grounds identified by Mr Corkill, we make three points:

(a) While the second ground may raise a point of more general significance, it is difficult to see that the third ground does.

(b) In any event, these issues are raised in the judicial review proceedings, so that Mr Parker will have the opportunity to air his concerns even if the appeal does not proceed.

(c) While we will not express a concluded view given the scope of the judicial review proceedings, we record that there is an issue as to whether there is a factual basis for the proposed questions. It will be necessary in the judicial review proceedings to resolve the obvious argument for the respondent that the Judge did not reach any conclusion as to whether or not the lawyers were negligent. It will no doubt be argued that he merely flagged the possibility and suggested that Mr Parker may be entitled to recover something from them, which is a common enough suggestion in situations where timeframes have expired as a result of apparent inactivity on the part of legal advisers. We see no proper basis for allowing these matters to be aired in an appeal setting as well.

Decision

[22] We decline the application for leave to appeal. As a consequence, we formally dismiss Mr Parker's application for his judicial review claim (CA780/2009)

to be heard in conjunction with CA800/2009. As Mr Parker is legally aided, we make no order as to costs.

Solicitors:
Crown Law Office, Wellington for Second Respondent