

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA247/2012
[2012] NZCA 285**

BETWEEN NEW ZEALAND CARDS LIMITED
 Applicant

AND COLIN RAMSAY
 Respondent

Hearing: 12 June 2012

Court: Glazebrook, Randerson and Wild JJ

Counsel: R Beresford representing the Applicant
 R Thompson representing the Respondent

Judgment: 28 June 2012 at 4 p.m.

JUDGMENT OF THE COURT

- A The application for leave to appeal is granted on the question identified in [14] of this judgment.**
- B The application for an extension of time is granted on the conditions stated in [23](b) of this judgment.**
- C The application for stay of execution is adjourned for further consideration on the conditions stated in [23](d) of this judgment.**
- D Further orders are made as stated in [23](c), (e), (f) and (g) of this judgment.**
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REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] The applicant company, represented by its principal Mr Beresford, applies for an extension of time to seek leave to appeal against a judgment of the Employment Court in which the applicant was found liable to the respondent for \$12,880 plus costs on the grounds that the respondent was unjustifiably dismissed from the applicant's employment.¹

[2] It seems that the applicant filed within time a document seeking leave to appeal but the document was defective. An extension of time was necessary under r 29A of the Court of Appeal (Civil) Rules 2005 because the appeal was not filed within the period of 20 working days after the Employment Court's decision. That period expired on 24 April 2012.

[3] On 3 May 2012, the Court received an application for an extension of time to seek leave to appeal and a second application seeking a stay of execution of the judgment of the Employment Court.

[4] By a Minute issued on 7 May 2012, Arnold J advised the applicant that the appeal was not in proper form in terms of s 214 of the Employment Relations Act 2000. A question of law must be identified and the question must be one which, by reason of its general or public importance, or for any other reason, ought to be submitted to this Court for decision. Arnold J said that the documents filed on the applicant's behalf failed to identify any appropriate question of law. He directed that the applicant file and serve an application for leave to appeal which identified a specific question of law.

[5] The Minute further advised the applicant that the applications for an extension of time and a stay of execution would not be considered until the direction was complied with. Arnold J concluded the Minute by recommending that the applicant obtain legal advice.

¹ *New Zealand Cards Ltd v Ramsay* [2012] NZEmpC 51 (27 March 2012).

[6] Despite the directions given by Arnold J, the applicant did not identify any questions of law. Instead, he provided extensive and discursive comments criticising the judgment of the Employment Court on largely factual grounds. Arnold J then directed that the applications for extensions of time and stay of execution be set down in a miscellaneous motions list as soon as convenient. The applications were placed in the list for 12 June 2012 at rather short notice to the parties.

[7] Despite the short notice, Mr Beresford for the applicant and Mr Thompson, an employment advocate representing the respondent, appeared by videolink from Christchurch. It transpired that the respondent had not been served with either of the applications. He discovered they had been made only after being contacted by Registry staff during the week before the hearing. Mr Beresford accepted that he deliberately refrained from serving the respondent with the applications because he did not trust him. Although his explanation was a little confused, we understand from Mr Beresford that he was concerned that if the respondent was aware the applications had been filed, he might have taken steps to enforce the judgment in the Employment Court and thereby thwarted the intended appeal.

[8] Mr Thompson's submission was that the application for an extension of time should be dismissed on the following grounds:

- (a) The application had not been properly brought since it had still not been served.²
- (b) The applicant had not complied with the directions of Arnold J given on 7 May 2012 and, in consequence, the application should be treated as abandoned.³
- (c) The applicant had not identified any question of law warranting consideration by this Court.
- (d) The applicant had deliberately engaged in a course of action designed to impair the respondent's rights to respond to the application.
- (e) The intended appeal had no reasonable prospect of success.

² Court of Appeal (Civil) Rules 2005, r 16(1)(b).

³ Court of Appeal (Civil) Rules, r 30(3).

[9] During the hearing, we asked Mr Beresford whether he was able to identify any question of law for the purposes of the intended appeal. With some assistance from us, the only question identified which might amount to a question of law was whether the facts as found by the Employment Court Judge could amount to a constructive dismissal.

[10] Mr Beresford also said he wished to argue that the decision of the Employment Court Judge was irrational in the sense that he could not have come to the conclusions he did on the basis of the evidence. He also complained about the lengthy delay in delivering the judgment, a matter of obvious concern but not necessarily giving rise to any question of law.⁴

[11] Given the short notice for the hearing and Mr Beresford's advice that he anticipated a hearing in the July Miscellaneous Motions list, we agreed to allow Mr Beresford to consult a lawyer and make any further submissions identifying any questions of law by Friday 15 June 2012.

[12] Despite the further time allowed, the additional submissions made by Mr Beresford did not assist in identifying any further questions of law and did not show any obvious signs that Mr Beresford had received any detailed legal assistance. The respondent filed a brief reply submission which has also been considered.

Discussion

Leave to appeal

[13] There is no general right of appeal to this Court from decisions of the Employment Court. Appeals are limited to questions of law and any such question must be one that, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for decision.⁵

[14] Much of the material presented to us by Mr Beresford disputed the factual conclusions reached by the Judge. In general, issues of disputed fact do not

⁴ *Cobham v Frett* [2001] 1 WLR 1775 (PC); *Boodhoo v Attorney-General of Trinidad & Tobago* [2004] UKPC 17, [2004] 1 WLR 1689.

⁵ Employment Relations Act 2000, s 214(1) and (3).

constitute questions of law for the purposes of an appeal under s 214. At this juncture, there is only one question of law which we consider might appropriately be the subject of the grant of leave, namely:

“Could the facts as found by the Employment Court Judge amount to a constructive dismissal on the basis of the duty of good faith under s 4(1A) of the Employment Relations Act 2000.”

[15] Despite Mr Thompson’s submissions to the contrary, we are prepared to grant leave to appeal on that question of law on the ground that it is one which is of general importance beyond the facts of the present case and ought to be the subject of this Court’s attention.

[16] If the applicant obtains legal advice it may be that further questions of law may be identified. We will reserve leave to apply for leave to amend the existing ground or add new ones.

Extension of time to appeal

[17] Mr Beresford initially sought to appeal within time but his appeal was defective and was not served for reasons which reflect no credit on Mr Beresford. Nevertheless, the delay has been relatively short and we are prepared to extend the time to seek leave to appeal on strict conditions.

[18] As to Mr Thompson’s submission that the appeal is deemed to be abandoned by virtue of r 30(3) of the Court of Appeal (Civil) Rules, Arnold J did not specify any time for compliance with his direction of 7 May 2012 to file and serve an application for leave to appeal identifying a specific question of law. Rather, he stated that the applications for an extension of time and a stay of execution would not be considered until that was done. As a result of the hearing before us, a question of law has now been identified and, in the absence of any specific period for compliance with Arnold J’s direction, we are satisfied that r 30(3) does not apply and the appeal is not deemed to be abandoned.

Stay of execution

[19] Mr Beresford also seeks a stay of execution of the judgment of the Employment Court. Little attention was focused on this aspect of the appeal. The respondent will obviously suffer detriment if the amount of the judgment is not paid promptly or the applicant does not provide satisfactory security for it. Mr Beresford did not place any evidence before us to show the applicant could pay the judgment.

[20] The criteria for the grant of a stay of execution are well known.⁶ They need to be formally addressed so that a considered decision can be made. We adjourn this application for further submissions and will make a decision on the papers.

Representation

[21] It is a matter of concern to us that the applicant company is not legally represented. A company is not generally permitted representation by a non-lawyer but the Court has a discretion to do so in appropriate cases. It is a discretion to be exercised sparingly.⁷ We are not willing to permit Mr Beresford, or any other lay person, to present the appeal on behalf of the company in this case. If the applicant is represented by a lawyer, then we would be prepared, in due course, to consider an application to amend or add to the ground of appeal identified in this decision.

[22] There is also an issue about representation of the respondent Mr Ramsay. The right of a lay advocate to represent a party in the Employment Relations Authority or in the Employment Court under s 236 of the Employment Relations Act does not extend to representation in this Court. However, this Court has a limited discretion to permit that to occur.⁸ If Mr Ramsay wishes to apply for permission to have Mr Thompson (or another lay advocate) to represent him, he may apply to the Court. Otherwise, Mr Ramsay may be represented by a lawyer or appear on his own behalf. This last option would not be wise in a case of this kind.

⁶ *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87; *Keung v GBR Investment Ltd* [2010] NZCA 396 at [11]; and *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9].

⁷ *Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA) at 310–311; *Commissioner of Inland Revenue v Chesterfield Preschools Ltd* [2009] NZCA 334, (2009) 20 PRNZ 207.

⁸ *Honda New Zealand Ltd v New Zealand Boilermakers' Union* [1991] 1 NZLR 392 (CA) at 397; *Petersons Global Sales Ltd v Peterson* [2010] NZCA 56 at [23]–[24].

Result

[23] We make the following orders:

- (a) Leave to appeal is granted under s 214 of the Employment Relations Act 2000 on the question of law identified at [14] above.
- (b) The application for an extension of time to appeal is granted on the following conditions:
 - (i) An appeal in form 2 of schedule 1 of the Court of Appeal (Civil) Rules is to be filed and served within 14 days of the date of this judgment specifying the question of law identified in [14] above.
 - (ii) The applicant is to file and serve its case on appeal as required by r 40 of the Court of Appeal (Civil) Rules within 30 days of the date of this judgment.
- (c) The issue of security for Mr Ramsay's costs is deferred until Mr Ramsay's representation is determined. Leave is reserved to Mr Ramsay to apply for appropriate orders.
- (d) The application for a stay of execution is adjourned for further consideration on the following conditions:
 - (i) The applicant is to file and serve an affidavit as to its ability to pay the judgment or to provide security for it within 14 days of the date of this judgment, along with any submissions supporting the application for stay.
 - (ii) The respondent is to file and serve within 14 days after receipt of the applicant's affidavit and submissions, an affidavit as to his ability to repay the amount of the judgment in the event of the appeal succeeding, along with any submissions opposing the stay.
- (e) If the applicant is legally represented, leave is given to apply to amend or add to the question of law identified in [14] of this judgment.

- (f) No fixture for the hearing of the appeal is to be granted and the appeal will not be heard unless the Registrar of this Court is satisfied that the applicant is legally represented. To avoid doubt, we expect the applicant's legal representative to be engaged in all aspects of the appeal including the preparation of submissions and the presentation of the appeal in Court.
- (g) The costs of the applications which are the subject of this decision are reserved.