IN THE COURT OF APPEAL OF NEW ZEALAND

CA141/2013
[2013] NZCA 398

BETWEEN	VULCAN STEEL LIMITED Applicant
AND	KIREAN WONNOCOTT Respondent

Hearing:	12 August 2013
Court:	White, French and Asher JJ
Counsel:	C T Patterson and A M Halloran for Applicant M B Breech and J R Sparrow for Respondent
Judgment:	27 August 2013 at 12.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent's costs for a standard application on a band A basis plus usual disbursements.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Vulcan Steel Ltd seeks leave to appeal against a decision of the Chief Judge of the Employment Court. Chief Judge Colgan found that Vulcan Steel had impliedly consented to Mr Wonnocott raising a personal grievance out of time.[1]

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[1] Vulcan Steel Ltd v Wonnocott [2013] NZEmpC 15.

[2] The issue for us to determine is whether the proposed appeal raises a question of law which, by reason of its general or public importance or for any other reason, ought to be determined by this Court.

Background

[3] Mr Wonnocott was employed by Vulcan Steel.

[4] On 21 March 2012, Mr Wonnocott raised a personal grievance regarding a written warning that Vulcan Steel had given him on 21 December 2011. The Employment Relations Authority found that the grievance was raised outside the 90 day limitation period imposed by s 114(1) of the Employment Relations Act 2000, but that Vulcan Steel had nevertheless impliedly consented to the grievance being raised out of time.[2] On appeal to the Employment Court, Chief Judge Colgan upheld both those findings.

[5] In his judgment, Chief Judge Colgan identified the leading authority on implied consent under s 114(1) as being the decision of this Court in *Commissioner of Police v Hawkins*.[3] The Judge stated that whether there has been implied consent will be a matter of fact and degree and that the question to be determined is whether the employer "so conducted himself that he can reasonably be taken to have consented to an extension of time".[4] In finding that Vulcan Steel had impliedly consented, the Judge relied on conduct and correspondence from between 21 March 2012 (being the date the personal grievance was raised) and 31 July 2012, when Vulcan Steel first took the limitation point.

[6] Vulcan Steel contends that the Judge erred in finding it had impliedly consented to the grievance being raised out of time and wishes to appeal to this Court. In order to do that it must first obtain leave, requiring it to demonstrate that the proposed appeal involves a question of law which, by reason of its general or

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2 *Wonnocott v Vulcan Steel Ltd* [2012] NZERA Auckland 409.
3 *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 NZLR 381.
4 At [22], quoting *Commissioner of Police v Hawkins*, above n 3, at [24].

public importance or for any other reason, is one that ought to be submitted to this Court for decision.[5]

Grounds of proposed appeal

[7] Vulcan Steel seeks leave to appeal on two grounds.

[8] First, while it accepts that the Judge articulated the correct legal test for determining implied consent, it argues that he nevertheless took irrelevant factors into account when applying that test. The alleged irrelevant factors are said to be:

- Vulcan Steel's failure to raise any objection to the grievance being out of time;
- Vulcan Steel making reference to the grievance in correspondence;
- Vulcan Steel's refusal to engage in mediation for reasons other than the limitation issue;
- the fact the grievance was only two days out of time;
- Vulcan Steel's use of professional advisers; and
- Vulcan Steel's engagement in the resolution process in relation to other grievances raised by Mr Wonnocott.

[9] Vulcan Steel submits that there has been a significant number of cases regarding consent under s 114 and that confirmation of whether the factors the Judge took into account in this case were relevant or not will provide much needed certainty.

[10] The second proposed ground of appeal is that the Judge made material errors of fact which would make it unjust to allow the Employment Court decision to stand without a reasonable reconsideration.

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

Discussion

[11] We accept that the Judge made some errors of fact. For example, he described the personal grievance in issue as Mr Wonnocott's first personal grievance when in fact it was his second; he wrongly stated that Mr Wonnocott raised two personal grievances in a letter on 21 March 2011 when he raised only one; he wrongly attributed to Vulcan Steel certain statements that were in fact made on behalf of Mr Wonnocott; and he described Vulcan Steel as "engaging" with or responding comprehensively to the merits of the personal grievance when that was not the case.

[12] However, as noted in *Coutts Cars Ltd v Baguley*, it would be an extreme step to set aside a judgment for error of law because of factual findings.[6] It would only be justified if this Court were satisfied that no person acting judicially and properly instructed as to the relevant law could have come to the determination that Chief Judge Colgan reached in this case.

[13] We are satisfied that none of the factual errors are capable of reaching that threshold. There was evidence to support the inference of implied consent, most notably in correspondence written by Vulcan Steel's legal representatives. In one letter for example, Vulcan Steel's barrister denied that Vulcan Steel had breached its obligation to try and resolve the grievance and was critical of Mr Wonnocott's representatives for failing to communicate how they wished to resolve it and for failing to provide specifics. The letter stated:

> Vulcan Steel cannot take steps to resolve any unspecified claim(s). *To that extent*, Vulcan Steel does not accept that your letters of 12 December 2011 and 21 March 2012 validly raised any personal grievance on behalf of Mr Wonnocott.
>
> (Emphasis added.)

[14] As to the relevance of some of the factors taken into account by Chief Judge Colgan, we are not satisfied that this raises a question of law of sufficient public importance to warrant granting leave. The test to be applied in

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6 *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 (CA) at [31]. Also see *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 2 NZLR 721.

determining implied consent is one of fact and degree. Each case will have its own factual matrix and while the factors relied upon by Chief Judge Colgan might be relevant in one case, they may not be relevant in another. Further, while a particular factor might not be relevant when considered in isolation, it might become relevant when considered alongside or in combination with other facts. For this Court to adjudicate on the relevance of any particular factor would be of limited precedent value.

[15] In short, in circumstances where the Judge directed himself correctly and came to a factual finding which was available to him on the evidence, we consider leave to appeal should not be granted.

Outcome

[16] The application for leave to appeal is dismissed.

[17] The applicant must pay the respondent costs for a standard application on a band A basis plus usual disbursements.

Solicitors:
Murdoch Price Ltd, Auckland for the Applicant
Holland Beckett, Tauranga for the Respondent