IN THE COURT OF APPEAL OF NEW ZEALAND

CA713/2015
[2016] NZCA 191

BETWEEN	RITCHIES TRANSPORT HOLDINGS LIMITED Applicant
AND	KEERITHI ROHAN MUTHA MERENNAGE Respondent

Hearing: 18 April 2016

Court: Harrison, Wild and Kós JJ

Counsel: P G Skelton QC and G L Mayes for Applicant
H White for Respondent

Judgment: 10 May 2016 at 11.30 am

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 for leave to appeal on a band A basis plus usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] Ritchies Transport Holdings Limited (Ritchies) applies under s 214 of the Employment Relations Act 2000 for leave to appeal to this Court from a judgment of

the Employment Court delivered by Judge Inglis at Auckland on 13 November 2015.[1]

[2] The questions on which leave to appeal is sought will be more readily understood if we first set out the factual background and summarise the relevant parts of the judgment of the Employment Court.

Factual background

[3] The respondent, Mr Merennage (M), was a bus driver employed by Ritchies. He had, on his driver's licence, the P (for Passenger Service Vehicle) endorsement required for bus driving.

[4] The following table chronicles the main relevant events:

Date	**Event**
January 2011 and following	Passenger B complains to Ritchies that M had indecently assaulted her. M was charged and the New Zealand Transport Authority (NZTA) then suspended the P endorsement on M's licence. Ritchies did not suspend M, instead placing him on a combination of sick leave, annual leave and anticipated leave. After the police offered no evidence, the charge was dismissed. The NZTA then reinstated the P endorsement on M's licence.
17 November 2011	Passenger T complains to Ritchies that M had "a while ago" done something toward her of a sexual nature.[2] M, who was out driving a bus, was asked to return to Ritchies' depot. A meeting took place. Ritchies informed M he was suspended from duty pending an investigation. (Although M thought he had been suspended without pay, the suspension was actually on pay pending completion of the investigation.)
16 December 2011	M was formally charged in relation to passenger T's complaint. The NZTA then suspended M's P licence endorsement again. Ritchies advised M's lawyer it was proposing to suspend M without pay in the new circumstances and sought the lawyer's response. M's lawyer failed to respond.
21 December 2011	M was suspended without pay with retrospective effect from 16 December 2011. This suspension without pay continued for about one and a half years until 10 June 2013.
February 2013	M, who had a wife and young son, is declared bankrupt.
May 2013	M's trial on the charge relating to passenger T takes place. The jury finds M not guilty and he is acquitted.
10 June 2013	Ritchies place M back on suspension on pay (the quantum of which

1 *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198.
2 At [12].

	was disputed) pending completion of Ritchies' disciplinary process, which M was told would now resume. Ritchies advise M that it is not appropriate that he return to work in the meantime.
29 August 2013	Ritchies wrote to M advising him that it considered summary dismissal was the only appropriate disciplinary action. Ritchies invited any submission by M by 5 September 2013.
16 October 2013	Ritchies confirmed its earlier, preliminary decision to dismiss M with immediate effect.
"Shortly afterwards"	M files a personal grievance against Ritchies, in particular alleging unjustified dismissal.

The Employment Court judgment

[5] In the introduction to her judgment, Judge Inglis said this:

> [4] Various issues were raised by Ritchies in support of its challenge. While I deal with each of those issues, resolution of the challenge primarily boils down to a finding that the decision to dismiss was unjustified because of a failure to approach the investigation and decision-making with an open mind, to assess the relevant information in a fair and balanced way, and to make reasonable inquiries. That was essentially the conclusion reached by Member Robinson in the Authority[3] and it is the same conclusion I have reached on the company's de novo challenge.

[6] As foreshadowed in that paragraph, most of the Employment Court's judgment deals with the primary issue: was Ritchies justified in dismissing M? That issue is not relevant to this application.

[7] What is relevant is Judge Inglis' consideration of whether Ritchies was entitled to suspend M without pay during the 81 weeks from 16 December 2011 to 10 June 2013. The Judge held it was not because:

(a) there was no provision in the collective agreement to suspend;

(b) there was provision in Ritchies' House Rules[4] for suspension, but only following a process prescribed in those Rules and on pay. The relevant House Rule provided:

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3 *Merennage v Ritchies Transport Holdings Ltd* [2014] NZERA Auckland 406.

4 The preamble to these House Rules states: "RITCHIE TRANSPORT HOLDINGS LTD has established a set of house rules to give an indication to all employees of the standard of behaviour expected and the disciplinary action, which will follow if that standard is not met or transgressed."

> The employer shall consider any explanation given by the employee and may suspend the employee on pay pending investigation of the alleged events.

(c) the Judge rejected Ritchies' argument that the House Rules did not apply at and from the meeting on 17 November 2011 at which Ritchies informed M he was suspended; and

(d) consistently with the House Rules, Ritchies advised M at the 17 November 2011 meeting that he would be suspended on pay pending the outcome of Ritchies' investigation. That investigative process did not conclude until October 2013. M was not paid for the entirety of that period.

[8] Based on her finding that M ought to have been paid throughout his suspension, the Judge then considered by how much Ritchies needed to reimburse M. Since M had on average worked more than 40 hours a week during the 53½ weeks preceding his suspension, the Judge considered reimbursement should be on the basis of M's average weekly earnings. The Judge ordered Ritchies to pay M:[5]

- The sum of $72,856.26 gross, plus holiday pay, by way of unpaid wages for the period 16 December 2011 to 10 June 2013;
- Minus the sum of $20,860.84 [being the amount M had earned from other employment during the period he was suspended, unpaid].

The questions on which leave is sought

[9] There are three. We will deal with them in turn, setting out the question, summarising counsel's arguments and then giving our decision.

Question 1: Did the Employment Court err in law in concluding that Ritchies was required to continue to pay M's wages in circumstances where he was not ready, willing and able to perform his contractual duties as a bus driver, following the suspension of his "P" driver licence endorsement by the NZTA?

[10] Mr Skelton QC argued that the Employment Court's sole focus upon the terms of Ritchies' internal suspension policy (its House Rules) had led it into error.

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5 *Ritchies Transport Holdings Ltd v Merennage*, above n 1, at [135].

He submitted it is well established that parties to an employment agreement are subject to a correlative relationship, in which the ability to work and the right to pay are inherent mutual obligations. He described this as the "wage/work bargain". As authority he relied on the House of Lords decision in *Miles v Wakefield Metropolitan District Council*, in particular this statement by Lord Oliver:[6]

> Thus, applying the contractual analogy, the plaintiff's position was no different from that of an employee voluntarily absenting himself from work. The question to be asked, therefore, is not so much "has the employer a *right* to withhold from an employee who voluntarily absents himself from work wages for the period in which he is absent?" but "is the employee entitled to sue for and recover from his employer wages in respect of a period during which he has made it perfectly clear that he is not ready and willing to perform his own contractual obligations?"

[11] *Miles* is a case where the appellant employee refused to work in breach of his employment agreement. Here, M did not refuse to work. He was suspended by Ritchies before the NZTA cancelled the P endorsement on his driver's licence. Certainly, after cancellation of the P endorsement on his driver's licence, M was unable to drive a passenger bus for Ritchies. But he was already unable to work because Ritchies had suspended him. Unlike the employee in *Miles*, M never refused to perform his obligations under his employment agreement with Ritchies.

[12] The passage we have cited from Lord Oliver's judgment makes it clear that the question for their Lordships depended on the terms of Mr Miles' employment agreement with the respondent Council. At least two of the other judgments delivered in *Miles* similarly make that clear. Lord Bridge stated:[7]

> If an employee refuses to perform the full duties which can be required of him under his contract of service, the employer is entitled to refuse to accept any partial performance.

[13] And Lord Templeman expressed his agreement with Lord Bridge in these terms:[8]

> … the legal consequences of industrial action will depend on the rights and obligations of the worker …

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6 *Miles v Wakefield Metropolitan District Council* [1987] AC 539 (HL) at 568.
7 At 551.
8 At 561.

[14] This Court made the same point in *NZ Tramways and Public Transport Employees Union Inc v Mana Coach Services Ltd*.[9] Harrison J stated:[10]

> Mana's case was consistent throughout. It was that the terms of the collective employment agreement and the relevant statutory provisions entitled it to change rosters for affected drivers upon receipt of the Union's strike notice. It asserted that the Authority was wrong in dismissing this argument.

[15] Further, in *NZ Tramways v Mana* both Harrison and Arnold JJ referred to *Miles*, observing that the principle it enunciated might apply if the employees of Mana were in breach of their employment contracts. Arnold J observed:[11]

> 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 relevant 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.

[16] To summarise, the principle enunciated in *Miles* has no application to M's case. *Miles* is the basis for the asserted error by the Employment Court. Further, there was no provision in the employment agreement between Ritchies and M (the collective agreement) for Ritchies to suspend M. There was provision in Ritchies' House Rules, but that provision was for suspension on pay during Ritchies' disciplinary investigation of M. For those reasons we are satisfied that, patently, there is not the error of law posed in Question 1. Further, Question 1 does not meet the criteria laid down in s 214(3) of the Employment Relations Act: it is not a question of general or public importance.

Question 2: Did the Employment Court err in law in failing to make any findings on the third ground of serious misconduct relied upon to justify Ritchies' dismissal of M?

[17] This second question is misconceived. Judge Inglis explained the primary reason why she found Ritchies had unjustifiably dismissed M in the passage we have set out in [5] above. The Judge elaborated in this paragraph:[12]

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9 *NZ Tramways and Public Transport Employees Union Inc v Mana Coach Services Ltd* [2011] NZCA 571, [2012] 1 NZLR 753.

10 At [34].

11 At [52] (footnotes omitted).

> [78] An employer must satisfy the Court on the balance of probabilities that, as a result of a complete and fairly conducted inquiry, it was justified in believing that serious misconduct had occurred. That decision must be made out not only on the evidence known to the employer at the time but that which would have been available after proper inquiry by it. An employer must base the decision to dismiss on a reasonably founded belief, honestly held, that serious misconduct has occurred. While there is no doubt that Mr Harvey genuinely believed that Mr Merennage had committed serious misconduct and that dismissal was the only appropriate outcome, his belief was not reasonably founded because of deficiencies in the investigative and decision-making processes.

[18] No further analysis or reasoning in relation to Ritchies' third ground of serious misconduct was needed or appropriate given the Judge found Ritchies' disciplinary investigation was fundamentally flawed.

[19] Even if Question 2 was not beside the point, we would not have considered that it meets the s 214(3) criteria.

Question 3: Did the Employment Court err in law in refusing to permit cross-examination of M on his alleged serious misconduct of sexual assault?

[20] In the Employment Court, counsel for Ritchies, Ms Mayes, began to cross-examine M about what he had done to passenger T. The following exchange between counsel and the Judge then took place:

> **Q.** But the reason you knew it was [T] was because you had done all of those things that she said you did in her complaint didn't you?
>
> **A.** I never ever in my life this type of formal complaint. I never ever in my life this type of bad behaviour, this type of bad things. I never in my life, never heard.
>
> **Q.** You took her down to the back of the bus and you did everything she alleged in her statement.
>
> **THE COURT**: Can I just pause you here. What's the relevance of this line of questioning to the issues I need to decide?
>
> **MS MAYES**: Your Honour I felt I need to put to him —
>
> **THE COURT**: Why?
>
> **MS MAYES**: — the allegations that —

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[12] *Ritchies Transport Holdings Ltd v Merennage,* above n 1.

THE COURT: Why? This isn't criminal court. It's not an opportunity to re-litigate it.

MS MAYES: Okay Your Honour I felt I needed to do that.

THE COURT: No no, I want to know why you're putting that line of questioning and whether there's good reason for it?

MS MAYES: The reason I felt I needed to do that was in order to make a submission about that but –

THE COURT: About what?

MS MAYES: About the fact that he did – the company did conclude that he engaged in serious misconduct so –

THE COURT: Well we know that the company concluded that don't we?

MS MAYES: Yes. I suppose we do.

THE COURT: Right. Thank you.

[21] Then, in her judgment, Judge Inglis said this:[13]

> [3] This judgment cannot and does not decide whether Mr Merennage sexually assaulted Ms T. It is focused on the actions of Mr Merennage's employer, based on the information reasonably available to it at the time; whether it followed an appropriate process and whether it was justified in dismissing him according to applicable employment laws.

[22] Mr Skelton submitted the Judge had confused s 103A with s 124 of the Employment Relations Act. While he accepted the Judge may have been correct in stopping counsel's line of questions for the purposes of s 103A (that is, Ritchies attempting to justify its dismissal of M by getting him to admit that he had sexually assaulted a passenger), Mr Skelton submitted the Judge had overlooked s 124 of the Act. Section 124 provides:

> **124 Remedy reduced if contributing behaviour by employee**
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> Where the Authority or the Court determines that an employee has a personal grievance, the Authority or the Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—
>
> (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and

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[13] *Ritchies Transport Holdings Ltd v Merennage*, above n 1.

(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[23] We consider Question 3 is also misconceived. The exchanges between counsel, the witness (M) and the Court set out in [20] above demonstrate that counsel for Ritchies had no factual foundation for further questioning M once he had denied misconduct in relation to passenger T, as he immediately did. Ritchies did not intend calling affirmative evidence to establish the truth of the complaint: that could only have come from T whose evidence in M's trial had not been accepted by the jury. Ritchies could not use the propositions in its counsel's questions to prove contributing conduct, for example the assertion in her question "you took her down the back of the bus and you did everything she alleged in her statement".

[24] Secondly, we do not accept the Judge overlooked s 124. When the Judge inquired of counsel as to the reason for her line of questioning, counsel did not mention s 124 or contributory conduct. She explained to the Judge that the point of her questions was to demonstrate that Ritchies "did conclude that [M] engaged in serious misconduct". That points to justification.

[25] Thirdly, as with the second question, we consider this third question is essentially irrelevant in a situation where the Judge had found Ritchies' disciplinary procedure altogether flawed. Just how flawed it was is demonstrated by this paragraph in the Employment Court's judgment:

> [33] It is apparent that the ground had shifted by this stage of the process [July 2013, when Ritchies had resumed its disciplinary investigation following M's acquittal at trial] and that the ball had been placed firmly in [M's] Court to convince Mr Harvey [Ritchies' Human Resources and Training Manager] that he was innocent. In evidence Mr Harvey said that:
>
> > So yes I looked very hard at that transcript [the transcript of the evidence at M's trial]. I looked very hard at that transcript to find absolutely incontrovertible evidence that [M] did not do what he was accused of doing. I couldn't find it.

[26] Ritchies dismissed M because it concluded he had done what passenger T had complained he had done, and we think also because Ritchies concluded M had done what passenger B had earlier complained he had done. And that, notwithstanding that the charge against M in relation to passenger B's complaint was dismissed when

the police offered no evidence, and the jury's verdict of not guilty in respect of the charge based on passenger T's complaint. In that situation, the asserted failure by the Judge to consider contributing behaviour is irrelevant.

Result

[27] We decline leave to appeal on any of the three questions.

[28] The applicant must pay the respondent's costs for a standard application for leave to appeal on a band A basis plus usual disbursements.

Solicitors:
Kerry F Amodeo, Auckland for Applicant
Clearwater & Associates, Auckland for Respondent