IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2022] NZEmpC 60
EMPC 359/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to recall a judgment
BETWEEN	THE CHIEF OF NEW ZEALAND DEFENCE FORCE Plaintiff
AND	JULIETTE DARNLEY Defendant

Hearing:	22 March 2022 (Heard at Auckland via VMR)
Appearances:	JP Boyle, counsel for plaintiff P McKenzie-Bridle, counsel for defendant
Judgment:	30 March 2022

INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK
(Application to recall a judgment)

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[1] On 20 January 2022 the Court issued a substantive judgment in relation to a challenge to a determination of the Employment Relations Authority brought by the Chief of New Zealand Defence Force (NZDF).[1]

[2] The Authority had found that Ms Darnley had been constructively dismissed from employment by NZDF.[2] That determination was set aside in the Court's judgment, and Ms Darnley's success was limited to a finding that she had been

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1 *Chief of New Zealand Defence Force v Darnley* [2022] NZEmpC 4.
2 *Darnley v Chief of the New Zealand Defence Force* [2020] NZERA 440.

disadvantaged by the unjustified actions of NZDF. She was penalised for a breach of her good faith obligations.

[3] Ms Darnley now applies for a recall of that judgment.

[4] The grounds for the application are that the Court made an error at [93] of its judgment. It had found that Ms Darnley had raised her personal grievance on 29 May 2019 by way of a letter authored by her representative. This was found to capture grievances arising in the course of the preceding 90 days.[3] The Court then counted back those 90 days to 31 March 2019 (the incorrect date). This meant that a grievance, found to have arisen on 18 February 2019, was not captured by that period and was therefore out of time. The Court was not satisfied that there were any exceptional circumstances justifying leave to bring that grievance out of time.[4]

[5] Mr McKenzie-Bridle, counsel for Ms Darnley, points out that the correct date for this count-back would actually have been 28 February 2019.

[6] A hearing in respect of the recall application was held on 22 March 2022. It proceeded on the basis that the Court and both parties accepted that an error had occurred which appears to have been the result of the wrong month being input into the calculation. While the error itself is in the nature of a clerical slip, the questions were to what extent the error coloured the reasoning and outcome of the judgment, and how the error should appropriately be rectified.

[7] Mr McKenzie-Bridle submits that the error resulted in the Court considering a delay of 41 days before the grievance was raised, as opposed to the 10 days using the correct date. He says had the Court exercised its discretion with reference to the correct length of delay, it would have granted Ms Darnley leave to bring her grievance out of time.

[8] NZDF opposes the application. Mr Boyle, counsel for NZDF, characterised the error as a clerical error that could be corrected through the slip rule.[5] He submitted

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3 As per s 114 of the Employment Relations Act 2000.
4 See ss 114(4) and 115.
5 High Court Rules 2016, r 11.10.

that the error had no material bearing on the outcome and that there was no proper basis in justice requiring a recall.

Recall principles

[9] Generally speaking, a judgment once delivered must stand, for better or for worse. Recall is one of a small number of exceptions to this rule and is provided for by r 11.9 of the High Court Rules 2016. The threshold is a high one.[6] It is to be approached cautiously given the important public interest consideration of the finality of litigation.[7]

[10] It is well accepted that the Employment Court has the power to recall judgments.[8] This power is discretionary and must ultimately depend upon the interests and administration of justice and its exercise on a case-by-case basis.[9]

[11] Mr McKenzie-Bridle submitted, and I accept, that this Court must have special regard to the objects of the Act and its equity and good conscience jurisdiction in exercising this discretion. Those considerations inform and augment, but do not displace, the principles that have been established in the courts of general jurisdiction.

[12] The well-known principles of recall are set out in *Horowhenua County v Nash (No 2)*.[10] That judgment identifies three circumstances in which a judgment may be recalled being:

(a) where, since the hearing, there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority;

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6 *Nottingham v Real Estate Agents Authority* [2017] NZCA 145.
7 *AlKazaz v Enterprise IT Ltd (No 11)* [2022] NZEmpC 15 at [2].
8 *Waikato District Health Board v New Zealand Nurses Organisation* [2017] NZCA 247, [2017] ERNZ 378; referencing reg 6(2)(a)(ii) of the Employment Court Regulations 2000 which enables the Employment Court to have recourse to the High Court Rules 2016 where there is no applicable procedural rule.
9 *Gilbert v Attorney-General* [2006] ERNZ 1 (EmpC) at [21].
10 *Horowhenua County v Nash* (No 2) [1968] NZLR 632 (SC).

(b) where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; or

(c) where, for some other very special reason, justice requires that the judgment be recalled.

[13] This application was advanced under the third "very special reason" category.

Analysis

[14] Ms Darnley's position is that, had the Court not used the erroneous date, the less significant delay of 10 days would have led it to find that exceptional circumstances existed under s 114.

[15] Section 114(4) sets out two criteria that must be met for the Court to consider granting leave to bring a personal grievance out of time: first, the Court must be satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances; and, second, it must consider it just to do so. Section 115 then sets out a non-exhaustive list of scenarios in which exceptional circumstances arise including where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance.

[16] Exceptional circumstances have been defined as those which are "unusual, outside the common run, perhaps something more than special and less than extraordinary", that phrase being understood as meaning an exception to the rule.[11]

[17] During the 90-day period from 18 February 2019, Ms Darnley's mother sadly passed away. The Court found she was "very clearly stressed and upset by the events at the time and her own personal circumstances, such as the death of her mother".[12] However, the judgment makes no express or implied finding that those feelings, or the effect on her of the matters giving rise to the grievance, rose to the level of exceptional circumstances.

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11 *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7, [2008] ERNZ 109 at [30]-[31].

12 *Darnley*, above n 1, at [95].

[18] On the contrary, the Court noted that those factors did not preclude her from engaging in job-seeking activities from as early as 27 March 2019 and attending various job interviews (within the 90-day period). It was also noted that she was an experienced Human Resources practitioner and would have been well aware of the 90-day time period for raising a grievance. In view of those considerations, the Court found that the delay was not occasioned by exceptional circumstances and that it was not appropriate to grant leave to raise a grievance out of time in respect of the 18 February 2019 letter.[13]

[19] In carrying out the s 114(4) exercise, a causative relationship between the exceptional circumstances and the delay is required by (4)(a). If that is established, the Court must then go on to consider under (4)(b) whether it is just to grant leave.

[20] Here, the Court undertook an assessment of the facts which led it to the conclusion that the delay was not occasioned by any exceptional circumstances, having reference to Ms Darnley's experience and her actions during that time period. The error as to the date does not impugn that conclusion or open the door for Ms Darnley to relitigate contested evidence around her state of mind.[14]

[21] The incorrect date had no material bearing on the reasoning and outcome of the judgment. It is a clerical error.

Continuing cause of action

[22] Mr McKenzie-Bridle advanced in submissions that the Court should use the opportunity provided by the recall application to consider a new argument that Ms Darnley wished to advance. The argument in question was based on the case law around continuing causes of action.[15]

[23] It was submitted that it was in the interests of justice to do so, and that the Court's equity and good conscience jurisdiction and the objects of the Act supported

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13 At [96].
14 *Zhang v Yu* [2019] NZHC 29 at [24].
15 *Minister of Education v Bailey* [1992] 1 ERNZ 948 (CA); *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79, (2012) [2012] ERNZ 257.

giving consideration to this argument. *Gilbert* was pointed to as an example of the Employment Court taking a broader approach to other courts in its exercise of its recall powers.[16] There, former Chief Judge Colgan, having acknowledged that certain methodologies he had required for calculation in his judgment were incorrect, granted leave for further actuarial evidence and submissions to be filed.[17]

[24] It was unclear as to whether this ground was advanced as a "very special reason" or under the second category set out in *Horowhenua County* dealing with failure to bring the Court's attention to a legislative provision or authoritative decision of plain relevance. In the case of the latter, the case law makes clear that to be plainly relevant there must be potential for the overlooked authority to make a difference to the outcome of the decision.[18] An example would be where there was a statutory bar of some kind which was not brought to the Court's notice.[19]

[25] However, as noted in *Nottingham v Real Estate Agents Authority*, recall does not extend to a party recasting arguments previously given and re-presenting them in a new form. Nor does it extend to putting forward further arguments that could have been raised at the earlier hearing but were not.[20]

[26] Mr McKenzie-Bridle suggested that cases like *Nottingham,* decided in the High Court or appellate courts were of little help in the Employment Court context. I have accepted that this Court's unique circumstances may impact on its exercise of its recall discretion.[21] Cleary though, considerations of the Court's jurisdiction under s 189 must include the important principle of the finality of litigation. There are strong public interest considerations in ensuring that parties are not encouraged to proceed through the processes of the Authority and the Court and then be allowed to belatedly raise points which are "collateral attacks" on the prior processes and determination.[22]

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16 *Gilbert*, above n 8.
17 At [33].
18 See for example *Auckland Council v Mawhinney* [2014] NZHC 906.
19 *Taylor v Roper* [2021] NZCA 691.
20 *Nottingham,* above n 6
21 See above at [11].
22 *R v Palmer* CA334/03, 18 October 2004 at [29].

[27] This claim had already been through the Authority's investigation process before it came to the Court in the form of a de novo challenge. The Court's hearing was adjourned following the completion of the evidence and approximately three to four weeks followed in which the parties were able to formulate their written and oral submissions. Months later, after those submissions had been made, both parties provided further written submissions by way of memoranda.

[28] The point is that Ms Darnley has had ample opportunity to put her arguments before the Court. These arguments made cannot now be reframed in light of her dissatisfaction. No equity and good conscience considerations change that.

[29] In respect of *Gilbert*, that case dealt with a unique set of circumstances in which the calculation methodologies were incorrect. The Chief Judge was obviously minded to ensure that whatever methodologies they were to be replaced with would be fit for purpose, requiring further evidence and submissions. It was not a situation in which reframed arguments were allowed or factual findings relitigated.

[30] In any case, I am unconvinced that the continuing cause of action cases are plainly relevant. I consider that the interests of justice weigh firmly against recalling the judgment on those grounds.

Conclusion

[31] The application for recall is declined.

[32] Having concluded that the erroneous date is a clerical error and has no material impact on the reasons for the Court's decision, I am satisfied that the appropriate approach is to correct it pursuant to the slip rule at r 11.10 of the High Court Rules 2016.

[33] I order that the judgment be amended and reissued with the reference to "31 March 2019" at [93] being corrected to "28 February 2019".

[34] The costs directions made in the substantive decision were suspended pending the outcome of this application. I consider it appropriate that those costs are dealt with simultaneously with those on this application.

[35] Once again, counsel are encouraged to discuss costs in the first instance. If these cannot be resolved by agreement, any relevant application should be filed and served within 21 days, with a response given within a further 21 days.

Kathryn Beck
Judge

Judgment signed at 3 pm on 30 March 2022