IN THE EMPLOYMENT COURT
AUCKLAND

AC 8/09
ARC 47/07

IN THE MATTER OF	an application for recall of judgment
BETWEEN	SIMON ROBERT VON TUNZELMAN Applicant
AND	MALCOLM BRIAN TAYLOR WORLDWIDE PUBLISHERS LIMITED (IN LIQUIDATION) Respondent

Hearing: (consideration of papers)

Judgment: 11 March 2009

JUDGMENT OF C M SHAW

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[1] Mr von Tunzelman seeks a recall of the judgment given by this Court on 15 October 2008. That judgment found that Mr von Tunzelman was not an employee of the plaintiff Malcolm Taylor and therefore Mr Taylor was not liable for the payment of $40,000 commission to him.

The application

[2] The grounds in support of the recall application are contained in a 10 page statement by Mr von Tunzelman which concluded:

> …
>
> *I feel that I have proven without a doubt that Judge Shaw's Judgment does not portray accurately the evidence which came to light in the Hearing. As a result of this I would like to apply for the Judgment to be recalled.*
>
> …

[3] The first issue raised in the application is delay. The hearing took place on 11 and 12 August of 2008 and the judgment was released on 15 October 2008. Mr von Tunzelman is concerned that given what he termed the significant amount of time that had passed between the hearing and the judgment there was a large risk of details discussed during the hearing being lost in time or events becoming unclear as time passed.

[4] Mr von Tunzelman then set out his reasons why the Court's conclusions were incorrect. In summary these are:

- a lack of understanding of the evidence
- incorrect findings of fact
- failing to refer to some evidence
- incorrect findings of credibility
- failing to permit Mr von Tunzelman to ask certain questions of Mrs Taylor.

[5] Following a detailed analysis of the evidence Mr von Tunzelman alleged that the Court did not have a strong recollection or understanding of the evidence and attributed this, in part, to the delay in issuing the judgment.

[6] In relation to the delay point I note that the Court had the advantage of a complete transcript of the evidence, copies of which were distributed to the parties.

Discussion

[7] The principles governing a recall of a judgment are set out in *Horowhenua County v Nash (No. 2)*[1] at page 633. Wild C J said:

> *Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled – first, 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; secondly, where counsel had failed to direct the Courts' attention to a legislative provision or*

[1] [1968] NZLR 6 32(SC)

> *authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.*

[8] Mr von Tunzelman does not raise any matters which come within the first or second categories. He therefore has to satisfy the Court that there is some other very special reason for the judgment to be recalled.

[9] In *Unison Networks Ltd v The Commerce Commission*[2] the Court of Appeal identified examples where a very special reason justified a recall including where judges had inadvertently failed to determine an issue that had been before the Court.[3]

[10] Examples where a recall was not granted included a situation where a judge had decided not to deal with an issue[4].

[11] In *Unison*, the Court of Appeal concluded[5] that the basis for recall under the special reasons category is intended to be narrow. It observed[6] that the Court's reasons for a decision and the issues it chooses to address in a judgment are within the discretion of the Court. The cases in which justice will require a recall are likely to be rare.

[12] In *R v Nakhla (No. 2)*[7] Wild J stated at p 456:

> *As to the complaints… that the Court did not deal with certain submissions and attributed to counsel a submission he did not make it maybe observed that a belief on the part of counsel, especially after a hard-fought case, that his argument had not been fully understood or adequately discussed is by no means uncommon. Nor, of course, can the reactions of counsel or the disappointment of his client in themselves afford ground for a rehearing. The Court is not obliged in giving its reasons for judgment to discuss every aspect of argument.*
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> …

[13] In the present case the one issue before the Court was the identity of Mr von Tunzelman's employer and this issue was decided. Apart from the question of delay

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[2] 2007 NZCA 49
[3] *Brake v Boote* (1991 4 PRNZ 86 (HC), *Works Civil Construction Ltd v Does Not Compute Corporation Ltd* HC Wellington 46/92 19 November 1992
[4] *Hobson v Harding* CA50/95 30 June 1997
[5] Paragraph 23
[6] Paragraph 34
[7] 1974 1NZLR 453 (CA)

all the matters raised by Mr von Tunzelman relate to his disagreement with the Court's findings of fact and conclusions arising from the application of those facts. These are not matters which can be rectified by having the judgment recalled.

[14] Although Mr von Tunzelman is undoubtedly disappointed by the outcome of his case, as the Court of Appeal has found, that does not afford a ground for a rehearing. He has not established any special reason for the judgment to be recalled. The application for recall of judgment is dismissed.

C M SHAW

JUDGE

Judgment signed at 2.30pm on 11 March 2009