NOTE: SUPPRESSION ORDERS MADE IN THE EMPLOYMENT COURT REMAIN IN FORCE, SEE [31] OF THE REASONS.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA552/2009
[2010] NZCA 547

BETWEEN	A WORKER Appellant
AND	A FARMER Respondent

Hearing: 26 October 2010

Court: O'Regan P, Chambers and Ellen France JJ

Counsel: G E Slevin for Appellant
R L Towner for Respondent

Judgment: 23 November 2010 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The matter is remitted to the Employment Court to determine whether or not the dismissal was justifiable under s 103A of the Employment Relations Act 2000.

C The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Ellen France J)

Introduction

[1] The employment relationship between the respondent, a farmer, and the appellant, a farm worker, came to an abrupt end after the farmer's young son alleged he had been indecently assaulted by the worker. The allegations were investigated by the police but no charges were ever laid.

[2] The worker raised a personal grievance alleging he had been unjustifiably dismissed. The Employment Relations Authority (the Authority) decided the matter in favour of the worker determining that, although the farmer was justified in initially sending the worker away from the farm, he was unjustified in failing to take any further steps.[1] The farmer was ordered to pay the worker sums by way of lost remuneration ($6,571.52 gross) and holiday pay ($917.30 gross) with interest. In addition, the Authority awarded the worker $12,000 for humiliation, loss of dignity and injury to feelings.

[3] The farmer appealed to the Employment Court. The Employment Court decided that the employment contract was frustrated once the farmer's son made his allegation of indecent assault. The employment relationship came to an end then and the worker was not dismissed. The Employment Court accordingly found that the personal grievance of unjustifiable dismissal was not sustained and the appeal was allowed.[2]

[4] Subsequently, this Court granted leave to the worker to appeal on the following question:[3]

> On the facts found by the Judge, was it open to him to find:
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> (1) the contract was frustrated; and therefore
>
> (2) there was no dismissal or other relevant action by the farmer; so that
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> (3) s 103A [of the Employment Relations Act 2000] has no application.

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1 *D v M* ERA Christchurch CA128/07 5043271, 1 November 2007.
2 *A Farmer v A Worker* EmpC Christchurch CC3/09 CRC 49/07, 20 March 2009.
3 *A Farmer v A Worker* [2009] NZCA 326.

Facts

[5] We take the facts largely from the appellant's written submissions. Those submissions reflect the Employment Court decision and are not disputed.

[6] At the relevant time, the farmer and his wife owned and ran a farm where they lived with their two pre-school children. The farmer operated the farm on a day-to-day basis while his wife worked part-time elsewhere.

[7] In May of the relevant year, the farmer and his wife employed an experienced farmhand. They gave him accommodation in a sleep-out about 20 metres from the family home in an area accessible to their children. There was no written contract between the worker and the farmer. The two had reached agreement on pay, accommodation and hours of work, but the terms of the contract were otherwise primarily statutory.

[8] The worker joined the family in their home for lunch most days and the relationship between the farmer and his family and the worker was a congenial one. On occasions, the farmer and the worker would have a drink together after work and they regularly engaged in sporting activities together.

[9] On an evening some five months later, the farmer's four year old son behaved unusually by repeatedly grabbing his father's testicles. The farmer told the boy off for doing this and asked him "Who does this to you?" to which the boy replied that the worker had done it. The farmer and his wife believed the boy.

[10] Later that night the farmer telephoned the police, his solicitor and a family friend. The friend came to the farm to offer support. At about 11.45 pm, the farmer and his friend went to the sleep-out where they woke the worker. The farmer told the worker the boy had accused him of sexual abuse and that he had to leave immediately. The worker denied the allegations and asked the farmer if he believed them. The farmer replied that it was the boy making the allegation and not him. The family friend then intervened to tell the worker firmly that he must pack his

belongings and leave. The farmer gave the worker a cheque for what was thought to be a week's wages and left with the friend. The worker left about half an hour later.

[11] The police conducted two evidential interviews with the boy who did not repeat any of the allegations reported by the farmer or say anything else to suggest inappropriate behaviour by the worker.

[12] When the farmer learnt this, some 11 days after the allegations were made, he telephoned the worker and told the worker that he was "off the hook".

[13] A few days later the farmer's wife reported to the police further allegations which were susceptible to forensic investigation. The worker was interviewed. He agreed to provide a DNA sample but subsequent analysis did not support what the boy was said to have alleged. At that point the police concluded their enquiries.

[14] The farmer and his wife had no further contact with the worker. Very shortly after the worker was sent away from the farm it became widely known in the area that he had been accused of indecent assault on the boy. He was subjected to verbal abuse, assaulted and his car damaged.

The decision of the Employment Court

[15] The case was presented in the Employment Court as a personal grievance of unjustifiable dismissal. The focus of the farmer had been on justifying his response. However, some time after the conclusion of the hearing, Judge Couch issued a minute raising the possibility of frustration.[4] Supplementary submissions on this topic were invited. Both parties filed further submissions. Judgment was then delivered on the basis that the contract was frustrated. That was because the boy's allegations had produced consequences for the farmer making continued employment of the worker radically different from the original undertaking.

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4 Minute of 10 February 2009.

[16] We note that there was no challenge to the Authority's order about holiday pay so that order was unaffected by the Court's decision. The other aspects of the Authority's decision were set aside.

A frustrated contract?

[17] The argument before us proceeded on the basis that the doctrine of frustration could apply to employment contracts.[5] That reflects the position taken by this Court in *Karelrybflot AO v Udovenko* where Blanchard J explained that:[6]

> ... it is not difficult to conceive of situations in which a supervening event might produce consequences for an employer which would render the situation, and the performance of an employment contract, particularly one for a fixed term, radically different from what had been undertaken when the contract was entered into. ... it seems to us that, in view of the nature of a contract of employment, the doctrine will not easily be able to be invoked by an employer because of the drastic effect which it would have on the rights of vulnerable employees – the present respondents being an example (16 *Halsbury's Laws of England* (4th ed), para 283). We bear in mind also the observation of Bingham LJ (as he then was) in *J Lauritzen AS v Wijsmuller BV* [1990] 1 Lloyd's Rep 1 (The "*Super Servant Two*") at p 8 that:
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> > "2. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended. ..."

[18] Accordingly, the issue on appeal is whether the Judge was correct to find that the doctrine applied. As we shall explain, we consider that the Judge has erred in this respect.

[19] We need to first record that the Judge accepted the evidence of the farmer and his wife that the immediate effect of the allegations made it intolerable for the farmer and his wife to have the worker on the farm and that, regardless of the outcome of the police investigation, they could never trust the worker or have him back on the farm again.

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5 That means it is not necessary for us to consider the impact of the enactment of s 103A on the doctrine, a matter referred to by this Court in granting leave to appeal in the present case.

6 *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 (CA) at [37].

[20] This factual finding, of course, is not in issue before us. But the error as we see it is that, having made that finding, the Judge has reasoned from it that what occurred made performance of the contract something radically different from what had originally been undertaken.

[21] There is a missing step in this analysis, namely, to ask what performance of the employment contract entailed. Because it is only if the employment contract did not make sufficient provision for what occurred that the doctrine of frustration will apply.[7] In this context, Mr Slevin for the worker says that the statutory requirements, including dealing in good faith[8] and providing the employee with an opportunity to comment on information relevant to a proposed termination of employment,[9] are imported into the contract. Mr Slevin described these as "basic procedural requirements to ensure fairness in decision making".

[22] The Judge did not consider the effect of the statutory requirements on the ability of the contract to respond to the situation. Rather, he said that it must have been beyond contemplation at the time the worker was employed that such allegations would be made because otherwise the worker would not have been employed.

[23] It is however possible to envisage a range of situations where some form of serious wrongdoing is alleged which will leave one or both of the parties in distress and/or create a rift between the parties. Indeed, Mr Towner properly accepted that the employment contract in issue could deal with other allegations of wrongdoing such as stealing money. He says though that, because of the personalised nature of the allegations and their effect on the parties' relationship where their working and living arrangements brought them into such close contact, this was a unique situation. Mr Towner referred to the factors emphasised by Judge Couch, namely, the relationship of parent and child between the farmer and the maker of the allegations; the particular nature of the allegations; the fact those involved all lived in close proximity in the workplace; and the isolated nature of the workplace.[10]

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7 *Turner v Goldsmith* [1891] 1 QB 544 at 550 per Lindley LJ.
8 Section 4(1) and 4(1A)(b) of the Employment Relations Act 2000.
9 Section 4(1A)(c).
10 At [53].

[24] While these matters point to the seriousness of the allegations, it does not inexorably follow that what occurred was beyond the scope of the contract. Undoubtedly, the farmer and his wife were left in a difficult situation. But it was not such that the farmer could not afford the worker the benefit of the statutory processes for dismissal.

[25] Mr Towner pointed to the practical problem of the parties remaining in close quarters. He also questioned the ability of the farmer to suspend the worker in the interim. The authorities counsel relied on illustrate the difficulties the suspension issue has led to where the contract is silent on the point.[11] It is however possible the worker may have agreed to suspension on pay, for example. But whether or not that was an option is unknown because matters simply came to an end and the process necessary to meet the statutory provisions was not put in train. It was therefore premature to conclude that further performance of the contract was not possible. The parties could have undertaken the process which the statutory provisions made part of the contract.

[26] Finally, we need to deal with Mr Towner's submission that, given the Judge's finding that the parties' relationship had changed forever, following the statutory process would have been pointless. The problem with that submission is that we simply do not know whether or not the parties' relationship was irrevocably damaged because the process was not followed. It must be at least conceivable that some resolution may have been able to be reached.

[27] For these reasons, we consider that it was not correct to conclude that the contract was frustrated. It followed that the Judge should have considered whether the dismissal was justifiable on an objective basis in terms of s 103A of the Employment Relations Act. The parties agreed that, if this was our conclusion, the

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[11] *Richardson v Board of Governors of Wesley College* [1999] 2 ERNZ 199 (EmpC); *Canterbury Rubber Workers Industrial Union of Workers v Dunlop New Zealand Ltd* Arbitration Court AC82/83, 21 July 1983; *Gray v Nelson Methodist Presbyterian Hospital Chaplaincy Committee* [1995] 1 ERNZ 672 (EmpC); *Hanley v Pease & Partners Ltd* [1915] 1 KB 698; *Singh v Sherildee Holdings Ltd t/a New World Opotiki* EmpC Auckland AC53/05 ARC 111/04, 22 September 2005; *Graham v Airways Corp of New Zealand Ltd* [2005] ERNZ 587 (EmpC); *B & D Doors Ltd v Hamilton* (2008) 8 NZELC 99,258 (EmpC).

matter would have to be remitted to the Employment Court so the necessary factual findings can be made.

Disposition

[28] We accordingly allow the appeal and remit the matter to the Employment Court. We hope, however, that the matter can now be resolved. It is unfortunate that the proceedings have dragged on at, no doubt, considerable cost to both parties.

[29] In any event, we assume that no further evidence will be required by the Employment Court. The necessary evidence was before the Court although the Court ultimately did not decide the question of whether the dismissal was justifiable.

[30] The appellant is legally aided. Having succeeded on the appeal, he is entitled to costs for a standard appeal on a band A basis and usual disbursements. We order accordingly.

Suppression

[31] In the Employment Court an order was made permanently suppressing the names of the parties and other witnesses and of all information which might lead to their identification, including the location in which the events occurred. That order remains in force.

Solicitors:
Wynn Williams & Co, Christchurch for Appellant
Bell Gully, Wellington for Respondent