IN THE COURT OF APPEAL OF NEW ZEALAND

CA40/2009
[2011] NZCA 571

BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC TRANSPORT EMPLOYEES UNION INCORPORATED Appellant
AND	MANA COACH SERVICES LIMITED Respondent

Hearing: 2 June 2011

Court: Chambers, Arnold and Harrison JJ

Counsel: S R Mitchell for Appellant
H Fulton and M S King for Respondent

Judgment: 21 November 2011 at 2:30 PM

JUDGMENT OF THE COURT

A The appeal is allowed.

B The decision of the Employment Court, in so far as it held that the respondent did not have to pay wages to those drivers who had given notice of an intention to strike on 1 August 2007 but then did not in fact strike, is set aside.

C The proceeding is remitted to the Employment Court for it to determine whether the bad faith which it has found was present can operate in some way other than through the equity and good conscience jurisdiction to disentitle the employees from payment for the hours at issue.

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

REASONS

Harrison J [1]
Arnold J [42]
Chambers J [53]

HARRISON J

Table of Contents

Introduction [1]
Background [4]
Authority's determination [11]
Mana's case [14]
Employment Court Decision [17]
Analysis [20]
Disposition [33]

Introduction

[1] The New Zealand Tramways and Public Transport Union Inc (the Union) appeals with leave against a decision of the Employment Court on a question of law.[1] The question is whether the Court correctly held that the respondent, Mana Coach Services Ltd (Mana), was not obliged to pay wages to those drivers who had given notice of an intention to strike on 1 August 2007 but did not in fact strike.

[2] The Union gave notice of a strike by some of Mana's drivers. Just minutes before the strike was scheduled to commence, it gave notice of cancellation. By then the Union members had presented themselves at Mana's premises. But the company refused to deploy them for work because it had already implemented alternative arrangements. The Employment Relations Authority (the Authority) found that the Union members were nevertheless entitled to be paid.[2] In reversing that finding, the Employment Court held that the Union, in its capacity as the members'

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1 *Mana Coach Services Ltd v New Zealand Tramways and Public Transport Employees Union Inc* [2008] ERNZ 439 (EmpC). Leave to appeal was granted by this Court in *New Zealand Tramways and Public Transport Employees Union Inc v Mana Coach Services Ltd* [2008] NZCA 529 on 4 December 2008 on two questions of law but only one is pursued.

2 *The New Zealand Tramways and Public Passenger Transport Authorities Employees' IUOW (Wellington Branch) v Mana Coach Services Ltd* ERA Wellington 5096809, 20 December 2007.

representative, had acted in bad faith by deliberately delaying withdrawal of its cancellation notice for the purpose of maximising Mana's loss and disruption.

[3] A number of issues were before the Employment Court. In this Court the Union submits that Chief Judge Colgan erroneously invoked the Court's equity and good conscience jurisdiction in finding that the Union's bad faith conduct disentitled its members from their wages.

Background

[4] The facts are recited in considerable detail in the Authority and Employment Court decisions. However, I am able to abbreviate them for the purposes of this judgment.

[5] Chief Judge Colgan described Mana's activities in this way:

> [7] [Mana] owns and operates a bus service on the outskirts of Wellington. It has contracts with the greater Wellington Regional Council to provide scheduled bus passenger services and with the Ministry of Education to provide school bus services. In addition, [Mana] operates ad hoc charter and tourist services. The company has three depots, at Paraparaumu, Porirua and Newlands. Scheduled passenger transport, charter and school services operate from each of these depots. [Mana] employs about 160 staff, some of whom are members of the Tramways Union, others of whom are members of the Central Amalgamated Workers' Union, and others still of whom are not union members.
>
> [8] [Mana] employs full-time, part-time, and casual staff including, in particular, as bus drivers. Because of the nature of its operations, employees are rostered to work defined duties. The rosters are posted in depots and, because they can change even as late as the day before a duty, employees are urged to consult the rosters and confirm their next working hours and duties when leaving their depots after work. Although [Mana] attempts to inform employees orally of roster changes, this cannot always happen, so employees themselves bear a responsibility for being aware of their duties and times.

[6] The Union initiated bargaining for a new collective agreement in early 2007 (an unfortunate feature of the delays which have beset this litigation is that the subsequent collective agreement has itself now expired). The Union members went on strike twice in late July 2007. Just before 2.30 pm on 31 July the Union gave lawful notice of a further strike by drivers for a period of four hours from 2.30 pm on 1 August.

[7] Because Mana provides a "passenger road service", the Union's strike notice had to meet the requirements of s 93(2) of the Employment Relations Act 2000 (the ERA). In particular, it had to:

(a) give a period of notice of not less than 24 hours;

(b) specify the nature of the proposed strike;

(c) specify the particular services that would be affected; and

(d) give the date on which the strike would begin.

The Union's notice met these requirements.

[8] Under s 93(4) Mana was required to take all practicable steps, as soon as practicable after the receipt of the notice, to ensure that the public who were likely to be affected were notified of the strike. As the Chief Judge recited, Mana reacted in this way:

> [13] The notice of strike action was lawful but minimal so far as time was concerned. [Mana] took a number of steps to deal with the effect of the intended strike action. These included making driver roster and timetable changes to services, arranging for other persons to operate services scheduled to be performed by intending strikers, and changing some of the rostered duties of drivers intending to strike during periods immediately before and immediately after the period of intended strike. Service changes were advertised both publicly to bus users, and on posted depot rosters.

[9] At some stage on the morning of 1 August the Union decided to call off the strike shortly before its scheduled starting time. By then the Union members would have presented themselves for work, advising they were ready, willing and able to carry out their duties but knowing others had been rostered for their duties. In accordance with this strategy the Union members arrived at Mana's depots at about 1 pm on 1 August. But they did not then indicate a willingness to work or advise of the planned cancellation. The Union finally gave notice of cancellation of the strike by an email sent to Mana at 2.22 pm on 1 August, just eight minutes before the scheduled start.

[10] The Chief Judge described the consequences as follows:

> [19] When company management realised that the Tramways Union had cancelled its strike notice, the employer decided to continue with the alternative arrangements for services that it had put in place and that had, in many instances, begun to operate. These alternative services required considerable management in the sense of answering telephone inquiries from bus users, ensuring that buses were available for school services from about 3 pm that day, and the like. Even if managerial personnel had not been too busy with maintaining alternative services, they would not have been able to have returned the company's operations to normal rostered driving for the balance of the period of the then cancelled strike. Others were out driving buses that intended strikers had been rostered to operate. Services were running to an alternative timetable that had been publicly notified and which, if changed again, would have created confusion among passengers. The company had committed expenditure to the alternative operations that it could not have recovered if these had to be cancelled or amended at the last moment.
>
> [20] The result was that Tramways Union members were not provided with their usual, or indeed any, work for the period of the notified strike and most of those who were not scheduled to resume work at 6.30 pm that day went home during the course of the afternoon.

Authority's determination

[11] Various issues between the Union and Mana were submitted to the Authority. Its determination, issued on 20 December 2007, found that Mana acted unlawfully by making roster changes after receiving the Union's strike notice on 31 July. All the affected workers were then rostered to work shifts covered by part or all of the strike notice; that is, between 2.30 pm and 6.30 pm on 1 August. Mana had responded by serving suspension notices on each affected employee. It acted on the apparent premise that giving notice constituted a strike. The suspension notices were prospective in effect, purporting to suspend each affected worker for the four hour period of the strike unless the recipient gave immediate notice of his willingness to work.

[12] Materially, the Authority found that:

> [25] ... Mana points out that all employees were paid in accordance with the rosters posted soon after notice of the 1 August 2007 strike was given. The question of arrears must be resolved by considering whether Mana could lawfully make those roster changes. The answer is clear enough for any employee engaged as a full-time employee in accordance with the applicable collective employment agreement. Those persons are entitled to payment of

at least 40 hours each week, with ordinary hours not exceeding 8 per day worked on 5 out of the 7 days in the week. Irrespective of any roster changes, they must be paid at least for that time since there was no default on their part to entitle Mana to make a rateable deduction. Clause 9.13 of the agreement requires the employer to display a roster in a conspicuous place. There is also [the] company handbook referred to in the employment agreement as binding. That says that rosters are posted 3-4 days in advance *opera[ting], as closely as possible, to the 6 month roster matrix*. There may be changes to that roster resulting from *charter work, annual leave, sick leave, bereavement leave etc and other driver absences from work .... Driver Supervisors will, where practicable, notify and highlight changes that occur at short notice.* Reading the collective agreement and the handbook together, I find there was no right for Mana to change the rosters of striking full-time employees from that posted 3 or 4 days before 1 August 2007. It follows that full-time employees must be paid for the rosters set prior to the notice of strike dated 31 July 2007 together with payments for time actually worked during that week.

(Authority's emphasis.)

[13] As this passage emphasises, the principal issue between the parties was whether Mana was lawfully entitled according to the collective employment agreement to change existing rosters on receipt of the strike notice on 31 July. In finding for the Union, the Authority also rejected other arguments advanced by Mana in these terms:

(a) the ERA does not expressly prevent a party from unilaterally withdrawing a notice at any time before the strike is to take effect;[3]

(b) equity and good conscience and good faith could not operate to deny the affected workers any fiscal reward arising from the act of giving then withdrawing a strike notice – that is because the strike was lawful: ss 80 and 85 of the ERA;[4] and

(c) the strike did not commence upon giving notice – if the position was otherwise, a party could never comply with its statutory obligation to give 24 hours notice of a strike.[5]

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[3] At [28].
[4] At [29].
[5] At [30].

Mana's case

[14] Mana challenged the Authority's findings. Its amended statement of claim was filed in the Employment Court on 30 June 2008. These terms are relevant:

> 15. On 31 July 2007 [the Union] served another notice of strike action to commence at 2.30 pm on 1 August and to continue until 6.30 pm that day, the strike being complete withdrawal of labour by participating Union members and thereby such members wholly discontinuing their employment and breaking their employment agreements.
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> 16. On receipt of the notice in para 15 [Mana] took similar and urgent action as described [to change its rosters to remove from the rosters those drivers giving notice of strike and who did not notify Mana that they would be available to work during the strike period] to maintain appropriate services during that strike period.
>
> 17. *As a result of the employees breaking their employment agreements by notifying their discontinuance of employment and withdrawing their service and [Mana] discharging its said obligations, those employees were not engaged to work during the notified period on 1 August 2007 and work was not available to them.*
>
> ...
>
> 21. *The purported cancellation of the strike notice was ineffective* and it did not revive or create any entitlement to wages for the drivers for the period for which strike notice had been given.
>
> (My emphasis.)

[15] Mana confirmed that it did not seek a full hearing of the entire dispute (a hearing de novo). It then identified the issues on which it sought a hearing. Those of particular relevance to this appeal are as follows:

> A The Authority did not or did not correctly consider and apply the law relating to [the Union's] purported cancellation of the strike notice in respect of the strike notified to commence on 1 August;
>
> B The Authority had no or insufficient regard to s 93 of the ERA in relation to the strike action notified to occur on 1 August and subsequently purportedly cancelled;
>
> C The Authority wrongly found or had no or insufficient regard to the circumstances by which drivers' rosters are changed;

D The Authority was wrong in fact and/or in law in its findings relating to the purported withdrawal of the strike on 1 August 2007, and extending to:

(i) The obligations and commitment of [Mana] to provide passenger road services.

(ii) Disentitlement of employees to wages when not rostered for work.

(iii) Disentitlement of employees to wages when not working on account of notified breaches of their employment agreement.

(iv) Employee liability for actions taken contrary to their obligations of good faith, fidelity and loyalty.

E The Authority had no or insufficient regard to [Mana's] obligations to the public as a provider of passenger road transport services. These include avoiding the confusion and uncertainty that would have resulted if [Mana] had attempted to revert to the pre-strike notice schedules, without any effective ability to advise the public of such further changes.

[16] Mana sought an order that:

> The drivers for whom strike notice was given for strike action on 1 August 2007 have no entitlement to wages in respect of the period for which the strike was notified, namely the period from 2.30 pm to 6.30 pm on 1 August 2007.

Employment Court Decision

[17] When upholding Mana's appeal, the Chief Judge made these relevant findings:

(a) The Union was acting as representative or agent for and on behalf of its member drivers at all relevant times.[6] The Union members had authorised the Secretary to give notice of and call such strikes as he considered appropriate without further recourse to them. As a result, the Union's knowledge and conduct was attributable to those members even if they did not have direct or actual knowledge of its intended action.[7]

6 At [27].
7 At [53].

(b) The Union's conduct in deciding sometime early in the morning on 1 August to cancel the strike but deliberately withholding notice until 2.22 pm constituted bad faith because it misled or deceived Mana or at least was likely to have done so.[8]

(c) At the time of receipt of the Union's notice of cancellation of intended strike, Mana was unable to revert to its normal timetabled operations. But Mana could have done so if the Union had given notice of cancellation when it actually decided to cancel. In that event the affected drivers could have legitimately expected to work according to the roster if they presented themselves for scheduled duties that afternoon and Mana could not have declined to engage them for work that day.[9]

(d) However, given the late notice, Mana acted reasonably in continuing with its emergency arrangement and not offering work to the affected drivers at 2.30 pm.[10] By that time a number of its buses were already on the road driven by a range of other people and school bus services were due shortly to depart with alternative drivers.[11] Mana would have been in breach of its contractual obligations to the substitute drivers if it had replaced them with the Union members.[12]

(e) In agreement with the Authority, the affected workers were never on strike on 1 August. The Union's act of giving notice did not oblige its members to go on strike. *The Union was lawfully entitled to withdraw or abandon the notice at any time before it took effect*.[13]

(My emphasis.)

8 At [38] and [39].
9 At [41].
10 At [42].
11 At [46].
12 At [47].
13 At [48].

[18] The question which the Chief Judge identified for determination was as follows:

> [49] But it is another question whether the Tramways Union members are entitled to be paid for the time during which they said they would be on strike but were not so. More particularly, was their bad faith (or lack of good faith) and/or that of their union in misleading or deceiving [Mana] in the way I have concluded that the Tramways Union did, something that would justify the company's refusal to pay the employees for that time?

[19] The ratio for the Chief Judge's decision was as follows:

> [55] The case raises, for the first time to my knowledge, the issue of whether a union's dealings in bad faith with an employer can disentitle its members to wages otherwise payable for the work associated with the bad faith dealing. This, in turn, brings into question what is known colloquially as the Authority's and the Court's equity and good conscience jurisdiction.
>
> ...
>
> [57] Absent considerations of bad faith behaviour by the Tramways Union and its members towards [Mana], those union members who presented themselves for work on 1 August 2007 might have had a legitimate expectation to have been paid for the periods for which they were prepared to work, even if not assigned to do so. Indeed, this was the Employment Relations Authority's conclusion. That would have been a contractual entitlement at common law. If, however, the Tramways Union and/or its members have acted in bad faith towards [Mana] as I have concluded, is the Court at liberty to refuse to award wages to the employees for this reason?
>
> ...
>
> [63] It is unnecessary to determine the current position of collective agreements in isolation because this case turns on the added component of good or bad faith conduct by affected parties.
>
> [64] I do not think it can be said now that a party that acts in bad faith by misleading or deceiving the other should nevertheless be entitled to claim, including on behalf of others, entitlements that would have existed absent the bad faith. When one considers the words *"equity"* and *"good conscience"*, bad faith behaviour is the antithesis of the ideals and requirements of good faith conduct in employment relations.
>
> [65] I have concluded that both judgments of the Court of Appeal [*Bell (Inspector of Awards & Agreements) v Broadley Downs Ltd* [1987] NZILR 959 and *CMI Screws and Fasteners Ltd v NZ Amalgamated Engineering etc IUOW* [1990] 2 NZILR 433] are distinguishable and that the breach of statutory good faith obligations may now sound in remuneration deprivation under the equity and good conscience jurisdictions of both the Employment Relations Authority and the Employment Court in appropriate cases. I have also decided that this is one such case where the misleading conduct of the Tramways Union, acting on behalf of its members, towards the employer means that related remuneration should not have to be paid by the company.

In these circumstances, affected union members should not benefit in the sense of being paid for work not performed, as a result of their union's bad faith conduct towards [Mana].

Analysis

[20] Mr Mitchell for the Union accepts the Chief Judge's finding that the Union acted in bad faith at all relevant times. Section 4 of the ERA defines the obligation to act in good faith as follows:

> **4 Parties to employment relationship to deal with each other in good faith**
>
> (1) The parties to an employment relationship specified in subsection (2)—
>
> (a) must deal with each other in good faith; and
>
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
>
> (i) to mislead or deceive each other; or
>
> (ii) that is likely to mislead or deceive each other.
>
> [(1A) The duty of good faith in subsection (1)—
>
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
>
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; ...
>
> ...
>
> (2) The employment relationships are those between–
>
> (a) an employer and an employee employed by the employer:
>
> (b) a union and an employer:
>
> (c) a union and a member of the union:
>
> ...

[21] However, Mr Mitchell submits that the Chief Judge erred in law when invoking the Court's statutory jurisdiction to act in equity and good conscience. That power is found in s 189 of the ERA, which materially provides that:

> (1) ... for the purpose of supporting successful employment relationships and promoting good faith behaviour [the Court has] jurisdiction to determine [all matters before it], and to make such decisions or orders, *not inconsistent with this or any other Act* or any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.
>
> ...
>
> (Our emphasis.)

[22] Relevantly, also, s 4 of the Wages Protection Act 1983 (the WPA) provides:

> **4 No deductions from wages except in accordance with Act**
>
> Subject to sections 5(1) and 6(2) of this Act, an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[23] Mr Mitchell's essential proposition is that a worker's entitlement to wages is absolute. It is guaranteed by s 4 of the WPA and that provision prevails over the Employment Court's statutory power to act in equity and good conscience. It is reinforced by an employee's right to recover arrears of wages from an employer by commencing an action in the Authority under s 131 of the ERA. The equity and good conscience jurisdiction has never been intended to defeat a contractual obligation to pay and a statutory right to recover wages, because the employer has other remedies available when the Union acts in bad faith.[14] Mr Mitchell cites authority from this Court in support: see *Bell (Inspector of Awards & Agreements) v Broadley Downs Ltd*[15] and *CMI Screws and Fasteners Ltd v NZ Amalgamated Engineering etc IUOW*.[16]

[24] I largely accept Mr Mitchell's equity and good conscience submission. The difficulties with the Chief Judge's finding on the question under appeal can be stated shortly. Counsel agree that the Employment Court was asked to determine whether the Union members were entitled to wages for the four hour shift commencing at 2.30 pm on 1 August. That was a self-contained or discrete inquiry, to be determined

[14] See for example ERA, ss 4A and 137(1)(ii).
[15] *Bell (Inspector of Awards & Agreements) v Broadley Downs Ltd* [1987] NZILR 959.
[16] *CMI Screws and Fasteners Ltd v NZ Amalgamated Engineering etc IUOW* [1992] NZILR 433.

according to statutory and common law principles. There was no scope to invoke the power to act in equity and good conscience.

[25] With respect, I am satisfied that Chief Judge Colgan conflated two separate statutory concepts.[17] One was the obligation imposed upon the Union to act in good faith in its dealings with Mana. The other was the Court's power to act in equity and good conscience. The Chief Judge erred, I think, by relying on the equity and good conscience jurisdiction as the ground for disentitling the Union members to payment following his threshold finding of bad faith.[18] As Mr Mitchell submits, in exercising that jurisdiction the Employment Court is bound to act consistently with applicable legislation and employment agreements. It was thus impermissible for the Chief Judge to invoke it as the legal foundation for depriving the Union members of their entitlement to payment according to s 4 of the WPA and reinforced by s 131 of the ERA.

[26] I add that the Chief Judge's grounds for distinguishing this Court's decisions in *Bell* and *CMI* are unconvincing. He emphasised that they were delivered on predecessor legislation which did not include the good faith obligations found in s 4 of the ERA. However, with respect, that is not the point. *Bell* and *CMI* affirm that the statutory power to act in equity and good conscience cannot be used to deny a worker's contractual right to payment of wages. Nor, I add, can it be used to deny statutory rights.[19] Mr Mitchell is correct that the current statutory provision is not materially different. The underlying principle remains the same.

[27] *Bell* concerned s 48(4) of the Industrial Relations Act 1973. Like s 189 of the ERA, the Court's power under it to act in equity in good conscience could only be invoked where it was "not inconsistent with this or any other Act ...". While s 189 adds that the power is to be exercised for the purpose, amongst other things, of promoting good faith behaviour, that does not affect the essential limitations on its use. And in *Bell*,[20] Cooke P discussed the scope of the equity and good conscience

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17 See at [55] and [65] of the judgment.
18 See at [65].
19 *Bell* at 961 adopting *Grover (Inspector of Awards and Agreements) v Southland Engineering Holdings Ltd* [1982] ACJ 25 (CA).
20 At 963.

jurisdiction. He gave examples of its use such as where an award does not "... in its words or spirit clearly cover a particular set of facts ..." or where there are deficiencies or a lack of precision in the evidence. It exists to plug a gap or resolve an ambiguity. Seen in that light, the power is not dissimilar to the inherent jurisdiction of the High Court.

[28] The Chief Judge implied that *CMI* might have been decided differently under the ERA because of the specific obligation imposed by s 4 to act in good faith. I disagree. The Court in *CMI* expressly affirmed the principle in *Bell* that equity and good conscience could not be used to deny a worker's monetary rights.[21]

[29] In written submissions Mr Fulton sought to uphold the Chief Judge's reliance on the equity and good conscience jurisdiction. However, in recognition of the difficulties to which I have referred, Mr Fulton seeks to support the decision on other grounds. In his words, "... certain conclusions follow from [the Employment Court's] findings and the absence of other findings". He says that the critical issue for the Employment Court's determination was whether the workers had established a contractual or statutory entitlement to payment for the relevant four hour period.

[30] Mr Fulton says that in order to meet this threshold the Union members would have to prove that:

(a) they had a contractual right to work between 2.30 pm and 6.30 pm on 1 August;

(b) their work was available to be done by them;

(c) they were ready and willing to do the work; and

(d) they communicated that willingness to Mana.

Mr Fulton says the essential issue was factual, not legal.

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[21] At 436.

[31] However, the Chief Judge did not make findings on these issues. Mr Mitchell and Mr Fulton each seek to draw support from the decision for findings favouring their respective opposing positions. In some passages, the Chief Judge implies that the Union members had established an entitlement to payment, in apparent agreement with the Authority.[22] In other passages, (see above at [19]), the Chief Judge is equivocal – observing that: "to the extent that the evidence established that [the workers] were ready, willing and able to work, they *might* have an argument at common law of an entitlement to be paid";[23] and later that absent bad faith the workers "*might* have had a legitimate expectation ..." of payment[24] (my emphasis). But his finding that Mana acted reasonably in refusing work to the drivers at 2.30 pm on 1 August[25] suggests disagreement with the Authority's impugned finding on the lawfulness of Mana's roster changes. This Court does not have the power to resolve these conflicts or to make or substitute our findings of fact and unlike Chambers J I do not accept that we can speculate about what may have happened at the appeal hearing or to reconstruct what we believe the Chief Judge was meaning when he did not make particular findings or in passages which appear equivocal or contradictory. We must proceed according to the terms of the judgment as written.

[32] That leads to the question of whether the Employment Court's decision might nevertheless be sustainable on other grounds. The only possibility is the existence of the finding of bad faith on its own. My difficulty is that the Chief Judge erroneously linked it with the Court's power to act in equity and good conscience. The two concepts were inextricably mixed in his reasoning, and I am not satisfied on the findings made (or not made) in the Employment Court that the decision can be independently sustained on the Chief Judge's finding of bad faith without a careful analysis of the relationship between relevant contractual and statutory provisions.

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22 See [64] of the judgment.
23 See at [52].
24 See at [57].
25 See at [42], [46] and [47].

Disposition

[33] I am satisfied that Mana's claim must be remitted to the Employment Court for rehearing. However, while Arnold J and I agree on that course, we differ on the scope and nature of a rehearing. Chambers J agrees with Arnold J on that subject. By setting out what I consider would be the appropriate approach to a rehearing, which I consider necessary to ensure that the issues arising in this litigation are determined in a careful and structured manner, I am identifying my reasons for differing from Arnold and Chambers JJ.

[34] On my approach, the starting point for a rehearing of Mana's appeal would be to identify the true nature of its case. The relevant extracts from its amended statement of claim (set out extensively at [14] and [15] above) confirm Mr Fulton's advice. 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. Determination of this threshold question would be necessary because on Mana's pleaded case the Union's "purported notice of cancellation was ineffective": that is, events occurring after the rosters were altered were irrelevant.

[35] A staged approach to the appeal would assist the parties. The first or threshold stage would be to determine, in accordance with its pleaded claim, whether Mana acted lawfully in changing the rosters. If so, what happened subsequently – such as, whether the Union acted in bad faith or the drivers were ready, willing and able to work at 2.30 pm – would not matter. That is because they had already been lawfully rostered off. An affirmative answer would be the end of the inquiry. As I understand it, that is the essence of Mana's case.

[36] The second stage, contingent upon the first, would be to consider the legal consequences if Mana acted unlawfully. On one view it may not matter whether the Union acted in bad faith in delaying notice of cancellation of the strike; if it was found that Mana's unlawfulness had already had a decisive effect all that needs to be proved is that the workers were ready, willing and able to work at 2.30 pm on

1 August. Factual findings might be required to resolve which event occurred first in time – Mana's decision to change the roster or the Union's act of bad faith. On another view, it might be appropriate to inquire whether Mana would in fact have changed its revised rosters (the Chief Judge found that it would have been able to do so) if the Union had given timely notice of cancellation.

[37] The third stage, again contingent on the answers to the earlier stages, would be necessary if the Union's bad faith did have a legally causative effect. Mana's statement of claim expressly pleaded bad faith, albeit tangentially (see Issue D(iv) at [15] above). The issue was raised before and addressed by the Authority (see at [13](b) above).

[38] In this respect the Chief Judge has made a threshold finding of fact. He has held that the employees had authorised the Union secretary to give notice and call such strikes as he considered appropriate without further recourse to the members.[26] As a result, he found, the Union's bad faith is attributable to the workers.[27] However, an issue might arise about whether the union's bad faith conduct in delaying notice of cancellation of the strike was within the scope of the members' authority. The relevant provisions of the ERA would require careful consideration.[28]

[39] Subject to this finding, the Court would have to determine whether the employees are disentitled to payment of wages as a consequence. Two competing arguments might arise. One would be whether the Union's bad faith, if attributable to the employees, constituted a breach of an implied obligation of good faith under the collective employment agreement. Apart from common law authorities, the provisions of the ERA would likely be material, particularly given the 2004 amendment to s 4 of the ERA. The doctrine discussed in *Miles v Wakefield Metropolitan District Council*[29] cited by Mr Fulton might also fall for consideration.

[40] Against that would be the proposition that s 4 of the WPA and s 131 of the ERA impose an absolute obligation to pay wages. Other sections of the ERA provide

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[26] At [27].
[27] At [52].
[28] See ss 4, 18, 40 and 83.
[29] *Miles v Wakefield Metropolitan District Council* [1987] AC 539 (HL).

a discrete means of redress to an employer against a Union guilty of bad faith conduct. There is also the important issue of reconciling the Chief Judge's findings that, first, the Union was lawfully entitled to cancel its strike notice at any time before it took effect (that is, before 2.30 pm on 1 August 2007) (see at [17](e) above) and, second, that the Union acted in bad faith and unlawfully in delaying giving notice of cancellation. The correct remedial response might require analysis. Whether there was a separate avenue of liability for damages available to an employer, for quantifiable loss attributable to a breach of duty of good faith, might require exploration, together with the compliance order regime.

[41] These observations reflect my concern about the unsatisfactory state of the findings made in the Employment Court and their effect on the ultimate result of Mana's claim.

ARNOLD J

[42] I agree with Harrison J that the Employment Court was not entitled to utilise the Court's equity and good conscience jurisdiction in the way that it did. I also agree with Harrison J that the matter should be remitted to the Employment Court. I write separately to indicate what I consider to be the critical issue when the matter is considered further by the Employment Court and why I disagree with the view of Chambers J that breach of the duty of good faith was not raised for consideration in the Employment Court.

[43] As I understand it, Chief Judge Colgan found that the appellant (the Union) acted in bad faith in deliberately not notifying the respondent (Mana) of its decision to call off the strike until a few minutes before the strike was due to commence, at a time when the Union knew that Mana had not only organised but had also begun to implement changes to its schedules to accommodate the advised strike action and had notified the public of those changes (as required by s 93(4) of the ERA). Again as I understand it, the Chief Judge considered that the relevant employees had acted in bad faith as well.[30]

[30] See [53] and [57] of his judgment.

[44] I consider that the Chief Judge was entitled to make those findings of bad faith. Mana's challenge to the determination of the Authority was made under s 179 of the ERA. Its pleading had to meet the requirements of that section. In its amended statement of claim, Mana identified the parts of the Authority's determination that it wished to challenge including:

> B. The findings of fact and the application of law relating to the liability of [Mana] to pay wages during the notified strike period on 1 August 2007 when there was no work available for the relevant employees.

[45] Under the heading "Particulars of claim" Mana pleaded the giving of the strike notice, the steps it took in response in terms of re-organising its schedules and notifying the public, and the Union's last minute notification that the strike would not proceed before alleging:

> 19. The said employees:
>
> (a) Knew, or ought to have known [Mana's] passenger services to the public would be operated according to publicly notified changes on account of strike action.
>
> (b) Had notified by themselves or through the [Union] they will not work during that period.
>
> (c) Knew or ought to have known that the passenger services as changed will operate without their engagement.
>
> (d) Knew amended rosters will disclose they are not engaged during such period.
>
> (e) Knew or ought to have known that if present at the workplace during the strike period they will not perform their work as drivers.
>
> (f) Should conclude that any expected benefit or gain from a purported withdrawal of the strike is disingenuous.

The amended statement of claim then alleged that:

> 21. The purported cancellation of the strike notice was ineffective and it did not revive or create any entitlement to wages for the bus drivers for the period for which the strike notice had been given.

[46] Later, the amended statement of claim said that Mana did not seek a full hearing of the entire matter but simply a hearing in relation to certain specified issues, which included the following:

> D. The Authority was wrong in fact and/or in law in its findings relating to the purported withdrawal of the strike on 1 August 2007, and extending to:
>
> ...
>
> (iv) Employee liability for actions taken contrary to their obligations of good faith, fidelity and loyalty.

[47] In its statement of defence the Union said that individual employees had told Mana shortly before the strike was due to start at 2.30pm that they no longer intended to take strike action. It went on to deny the allegations in paragraph 19 of the statement of claim and to say:

> 19.1 [Mana's] employees were entitled to decide not to take previously contemplated industrial action and to undertake their normal duties;
>
> 19.2 The [Union's] members each made the decision to undertake their normal duties; but
>
> 19.3 The [Union's] members were prevented from undertaking their normal duties (comprising the previously rostered duties to have been performed in the absence of strike notification) by [Mana's] decision not to permit that.

[48] In its determination the Authority found:[31]

> A third strike was called for 1 August 2007 from 2.30 pm until 6.30 pm. The Tramways Union gave notice dated 31 July 2007 by sending a letter by fax and email. Mana then gave each Union member a notice dated 1 August 2007 similar to the previous suspension notices. Soon after deciding to give notice of the third strike, the Tramways Union made a decision to cancel that strike. However, the cancellation decision was not communicated to Mana until about 2.20pm on 1 August 2007, just before the scheduled commencement of the strike. Mr Griffiths suggested in evidence that he was not able to advise of the cancellation any sooner because of other commitments. However, it is clear that a tactical decision was made to give notice of the cancellation at the last minute. That was intended to cause disruption to Mana.

Following this, the scheduling and other changes that Mana had made to deal with the foreshadowed strike were set out.

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[31] At [15].

[49] Then, when addressing the arguments raised by the parties, the Authority said:[32]

> There is a further submission that employees should be denied any *fiscal reward* arising from the tactic of giving then withdrawing strike notice because of equity and good conscience and good faith. The point about good faith [is] answered by whether a strike (or lockout) is lawful: see sections 80(a) and 85 of the Employment Relations Act 2000. The strikes in question were all lawful. Both points are also resolved by *Bell v Broadly Downs Ltd* [1987] NZILR 959 which held that contractual (in this case) or statutory rights cannot be defeated by reference to equity and good conscience.

[50] The consequence of all this is that, in my view, the question of bad faith was squarely on the table and there was a proper basis for the Employment Court to address it. In this connection, I note that Chief Judge Colgan questioned the Union representative who gave evidence before him as to the explanation for the delay in advising Mana of the cancellation of the strike. He asked whether there were any late developments in the negotiations which might have justified it and was advised that there were not. He addressed the significance of this in his judgment.[33]

[51] Moreover, there was no challenge before us to the Chief Judge's finding that the Union had acted in bad faith, although the submission was made that the Chief Judge had not made an explicit finding of bad faith on the part of the employees. Rather, the Union's challenge focussed on the availability of the equity and good conscience jurisdiction to deny the employees wages in these circumstances.

[52] Against this background, I consider that the matter should be remitted to the Employment Court so that it can consider whether the bad faith which it has found was present operates in some way other than through the equity and good conscience jurisdiction to disentitle the employees from payment for the hours at issue. 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*,[34] particularly given the 2004 amendments to s 4 of the ERA.[35] The question will be whether this is consistent with the relevant

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[32] At [29].
[33] At [30]–[32].
[34] *Miles v Wakefield Metropolitan District Council* [1987] AC 539.
[35] See *Kelly v Tranz Rail Ltd* [1997] ERNZ 476 (EmpC) at 495 and 501; *Witehira v Presbyterian Support Services (Northern)* [1994] 1 ERNZ 578 (EmpC) at 600. But see also *Bickerstaff v*

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.

CHAMBERS J

Introduction

[53] I begin this opinion with my legal analysis based on (a) facts found by the Employment Court and (b) what was properly in issue in that Court. Both qualifications are important. This Court has no fact-finding powers on appeals from the Employment Court.[36] If this Court, on its legal analysis, considers relevant facts have not been found, this Court has no alternative but to remit the matter to the Employment Court for the necessary fact-finding to be undertaken. The second qualification is also important. I have limited my analysis to what was open on the pleadings in the Employment Court. The matter should not be determined on the basis of what might have been argued in the Employment Court had the parties framed their cases differently.

[54] I will then turn to consider the issue on which the Employment Court found against the Union. This was, to use Chief Judge Colgan's own heading, the issue of "Equity and good conscience/Good faith dealings".

[55] Finally, I shall set out why I think Harrison and Arnold JJ are wrong to be remitting this case to the Employment Court. It is my clear view that, on the findings of fact made by the Employment Court, the Union should succeed and the relevant drivers should be paid their wages.

Healthcare Hawkes Bay Ltd [1996] 2 ERNZ 680 (EmpC) at 688–689; *Postal Workers Association v New Zealand Post Ltd* (2007) 8 NZELC 98,918 (ERA) at [36]–[46]; *Thompson v Norske Skog Tasman Ltd* [2011] NZERA Auckland 291 at [55]–[60].

36 Employment Relations Act 2000, s 214.

My analysis based on the case pleaded in the Employment Court

[56] I gratefully adopt Harrison J's summary of the relevant facts.[37]

[57] So far as I can see, Mana was running two separate arguments in the Employment Court:

(a) On receipt of the strike notice, Mana lawfully amended the roster so that those drivers who intended to strike on 1 August 2007 were rostered off and therefore not entitled to wages. I shall call this "the rostering-off argument".

(b) Because the notice of cancellation of the strike came so late in the piece, it was invalid. Accordingly, the drivers are to be treated as if they were on strike and had been suspended. As a consequence, they were not entitled to any wages. I shall call this "the on-strike argument".

[58] The pleadings did not state the propositions with perhaps quite that clarity and the propositions do appear at some points to have become conflated. But the Chief Judge hacked his way through the thicket and I think it is clear he rejected both these arguments.

[59] I deal first with the rostering-off argument. This argument had been advanced before the Employment Relations Authority as well. It found that the relevant drivers were lawfully rostered on and that the late attempt by management to make roster changes was contrary to the collective agreement and the company handbook.[38] In the Employment Court, Mana pursued this argument, at least in its pleadings. It pleaded the Union's action in giving the strike notice had led to its "members wholly discontinuing their employment and breaking their employment agreements". As a consequence of that alleged breach, Mana had (lawfully) rostered them off. As a consequence, "work was not available to [the drivers rostered off]"

[37] At [4]–[10] above.
[38] The Authority's decision at [25]–[26].

and those drivers were not entitled to wages. The Chief Judge did not explicitly refer to this argument in his judgment. The explanation for that may be either the argument was not pursued or, following discussion between bench and bar, it was dropped. A judge as experienced as the Chief Judge would not have failed to mention an argument if it had been seriously pursued.

[60] One thing is certain. The Chief Judge did not find in Mana's favour on the basis that it had lawfully rostered the drivers off in terms of the collective agreement. Had that been the case, there would have been no need to discuss bad faith or equity and good conscience. Nor would the Chief Judge have made references of this kind:[39]

> I have concluded ... that the breach of statutory good faith obligations may now sound in remuneration deprivation under the equity and good conscience jurisdictions of both the Employment Relations Authority and the Employment Court in appropriate cases. I have also decided that this is one such case where the misleading conduct of the Tramways Union, acting on behalf of its members, towards the employer means that related remuneration should not have to be paid by the company. In these circumstances, affected union members should not benefit in the sense of being paid for work not performed, as a result of their union's bad faith conduct towards [Mana].

[61] The Chief Judge would not have used the language of "breach" and the remedy of "remuneration deprivation under the equity and good conscience jurisdiction" if he had thought Mana was lawfully entitled to roster off drivers who had threatened to participate in a lawful strike.

[62] In any event, the rostering-off argument was obviously wrong in law. The Union was entitled to give a lawful notice of an intention to conduct a lawful strike. What an employer can do in response to such a lawful notice is constrained. Section 97(2) of the ERA permits the engagement of strike-breakers only in the limited circumstances sanctioned by s 97(3) and (4). Section 97(5) is also important: even where strike-breaking is permitted, the strike-breaker may perform a striker's work only during the strike. The moment the strike ends, the strike-breaker must stop working. He or she must return to his or her normal employment. Strikers may be suspended, but only where a strike has begun and the suspension ends the

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39 At [65].

moment the strike ends: see s 87. Generally speaking, neither employee nor union is liable civilly for the economic consequences of a lawful strike: s 85. Obviously parties cannot contract out of these statutory protections. An employer cannot subvert s 97 by simply rostering off workers planning to strike and engaging substitutes.

[63] I turn now to the on-strike argument. The Chief Judge rejected this argument in robust language: he found "with certainty that no strike took place on 1 August 2007".[40] That was because the notice of strike action was withdrawn. His Honour found that the Union was entitled to withdraw the strike notice "at any time before the notified strike action took effect and there would be no strike in these circumstances. That is what happened."[41] This argument was not before us. The certified question of law posed for this Court was predicated on the finding of mixed fact and law that no strike had occurred. Notwithstanding this, there were times in the course of Mr Fulton's submissions when he attempted to raise again, if rather obliquely, the possibility that a strike had in fact occurred.

[64] In my view, the Chief Judge was entirely correct to reject Mana's rostering-off argument and its on-strike argument. Having so concluded, he should have found in favour of the Union and awarded the drivers their wages. They were not on strike.

[65] The Chief Judge, however, went on to "deprive" them of their wages on a different basis altogether. Utilising what he saw as his equity and good conscience jurisdiction, he resolved to deprive them of their wages because of the Union's "bad faith". In my view, the judgment is clear that the Chief Judge would have come, "absent considerations of bad faith behaviour",[42] to the same conclusion I have come. I turn now to consider His Honour's reliance on "equity and good conscience/good faith dealings".

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[40] At [48].
[41] At [48].
[42] At [57].

Was the Employment Court entitled to "deprive" the relevant drivers of their wages pursuant to the Court's "equity and good conscience" jurisdiction?

[66] In my respectful view, the Chief Judge made only one error. He wrongly considered this Court's decisions in *Bell (Inspector of Awards & Agreements) v Broadley Downs Ltd*[43] and *CMI Screws and Fasteners Ltd v NZ Amalgamated Engineering etc IUOW*[44] could be distinguished on the basis that they were determined under earlier legislation which did not contain the obligations of good faith now to be found in the ERA. The Chief Judge considered that the inclusion of good faith obligations now meant he could take into account a breach of them when exercising the Court's equity and good conscience jurisdiction and could thereby deprive the employees of their entitlement to wages. The Judge accepted his approach was novel.[45]

[67] Like Harrison and Arnold JJ, I conclude the Chief Judge was in error in this regard. The two earlier decisions of this Court were not distinguishable. They clearly established that employees' "monetary rights [cannot] be denied by reliance on the equity and good conscience clause".[46] This Court's decision in *Bell* was primarily based on s 158 of the Industrial Relations Act 1973. There were equivalent provisions in the Labour Relations Act 1987 (s 198) and the Employment Contracts Act 1991 (s 48). The modern equivalent is s 131. These provisions are reinforced by s 4 of the Wages Protection Act 1983, to which Harrison J has referred.

[68] The inclusion of s 4 in the ERA has not in any way affected that jurisprudence or the metes and bounds of the Employment Court's equity and good conscience jurisdiction. If a party to an employment relationship asserts the other party has breached a duty of good faith, then it must plead its case accordingly. Various remedies may be available, but exercise of the Court's equity and good conscience jurisdiction will not be one of them.

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43 *Bell (Inspector of Awards & Agreements) v Broadley Downs Ltd* [1987] NZILR 959 (CA).

44 *CMI Screws and Fasteners Ltd v NZ Amalgamated Engineering etc IUOW* [1990] 2 NZILR 433 (CA).

45 At [55].

46 *Bell* at 962; followed in *CMI* at 436.

[69] In my respectful view, the Chief Judge was in error in finding a breach of good faith, because no such breach had ever been alleged by Mana. Nor had Mana ever sought to have the Court exercise its equity and good conscience jurisdiction. Mana's case was simply that there was no liability for the wages, either under the rostering-off argument or alternatively under the on-strike argument. Those arguments having been rejected by the Chief Judge, he should have found in favour of the Union.

Where I differ from Harrison and Arnold JJ

[70] We all agree the Chief Judge erred. Harrison and Arnold JJ both agree that the proceeding should be remitted to the Employment Court, but they do not agree on the scope of the rehearing. It is, of course, imperative that the Employment Court knows what it is to do on the rehearing. Even though I do not think there should be a rehearing at all, I must choose between the approaches advocated by Harrison and Arnold JJ. In that way, a majority decision is arrived at. I have decided to fall in line with Arnold J's view, as he envisages a much more limited rehearing than Harrison J does. Indeed, as I understand it, the rehearing envisaged by Arnold J will not require the calling of any further evidence. It simply involves a legal analysis of whether there is a legal mechanism other than the equity and good conscience jurisdiction by which the Court could disentitle the drivers from payment of their wages because of the Union's bad faith.

[71] Harrison J envisages a three stage rehearing. Arnold J's approach picks up only the third stage of Harrison J's suggested rehearing. I agree with Arnold J that, if there is to be a rehearing, it is to be restricted to the proposition Arnold J sets out at [52] above, namely whether there is some way other than through the equity and good conscience jurisdiction by which the bad faith which the Court found to be present can disentitle the employees from payment for the hours at issue. I do not agree with Harrison J's first stage, which would effectively allow reopening of the rostering-off argument. Nor do I agree with his second stage, which envisages the need for more factual findings. Contrary to Harrison J's view, I consider the Chief Judge made all the necessary factual findings. His only error was a legal one.

[72] Although I am, for the reasons given, agreeing with Arnold J as to the scope of the rehearing, I want to explain why I think he is wrong to be requiring it. There are two main differences between us:

(a) Arnold J considers Mana had sufficiently pleaded a breach of the duty of good faith, whereas I do not;

(b) even if Arnold J is right on that first point, I think we should be deciding the legal question which arises, not sending it back to the Employment Court.

[73] As to (a), I do not agree that the pleadings made it clear Mana was running a cause of action based on breach of s 4 of the ERA. All there was was the obscure reference to "obligations of good faith" in paragraph 29(D)(iv) of the statement of claim. The assertion of bad faith in that sub-subparagraph was made in the context of an argument that the Authority was wrong in rejecting Mana's argument that the Union was not entitled to withdraw its strike notice (the on-strike argument). That was an assertion without merit, as the Authority, the Employment Court, and now we have all found. It was not raised in a context that the Union strategy in threatening strike action was in the circumstances in breach of a duty of good faith.

[74] In any event, an allegation of breach of the duty of good faith, were it to be pursued, would have had to be properly pleaded, with full particulars as to how and when the duty had allegedly been breached.[47] If it was alleged that the Union had breached the duty, then Mana would have had to plead the facts relied on as amounting to a breach of duty by the Union and the facts relied on for sheeting home the Union's breach to the relevant drivers so as to become their breach. If it was to be alleged that the drivers themselves had breached their duty, then full particulars of the drivers concerned and how and when they had breached their individual duties to Mana would have had to be pleaded. Neither the Union nor the drivers were put on proper notice as to the allegations. We can safely assume the Chief Judge would have insisted upon such pleading if he had understood Mana was running an argument based on s 4.

[47] See the Employment Court Regulations 2000, reg 11.

[75] Thirdly, it is by no means clear what remedies are available for a breach of the duty of good faith. Obviously, penalties are available but only in limited circumstances: see s 4A. A breach might also lead to a compliance order under s 137. But can damages be claimed? The authorities are divided on this point. There is slight authority for the proposition damages *might* be claimable in *Baguley v Coutts Cars Ltd*[48] and *Masina v Commissioner, Te Kura Kaupapa Maori O Piripino Te Kura Whakahou o Otara*[49]. I say "slight authority" because in neither case did the Employment Court actually decide damages were claimable; in each, the matter was disposed of on the basis that, even if damages can be recovered for a breach of s 4, such recovery was not appropriate on the facts of those cases. To the contrary is *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd*, in which the Employment Court held damages were not available as a remedy.[50] It is inconceivable that the Chief Judge would not have wanted submissions on this topic had he considered breach of s 4 was a discrete cause of action as opposed to something he could take into account when exercising *his* equity and good conscience jurisdiction.

[76] There is no suggestion either in the pleadings or in the judgment that deprivation of wages might be a remedy on the basis that has tentatively found favour with Arnold J.[51]

[77] I may add that these restrictions on remedies for breach of s 4 underline the error of the Chief Judge's approach. His judgment effectively undermines the restrictions by allowing a remedy which would never have been obtainable had Mana chosen to plead a breach of the duty of good faith.

[78] Even if, contrary to my view, breach of duty of good faith was properly on the table in the Employment Court, I think this Court should be determining the legal

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48 *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409 (EmpC) at [64].

49 *Masina v Commissioner, Te Kura Kaupapa Maori O Piripino Te Kura Whakahou o Otara* [2010] NZEmpC 141 at [36] and [66].

50 *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597 (EmpC) at [293]. The Court accepted, correctly in my view, that monetary remedies might be indirectly available if the breach of good faith led to "successful personal grievances for unjustified disadvantage in employment and/or unjustified dismissal by employees individually".

51 At [52] above.

question of whether the bad faith the Court found may operate so as to disentitle the employees from payment of their wages. I can see no reason why the parties are being put to further expense. It will be obvious from what I have said what I think the answer to the question we are remitting should be.

Conclusion

[79] I would have found for the Union. I would have answered the question posed in the notice of appeal "No": the Employment Court was not right in holding that Mana did not have to pay wages to the relevant drivers. I would have reinstated the Authority's decision on this point.

[80] But, for the reasons given, in order to cobble together a majority view as to the scope of the rehearing in the Employment Court, I will go with Arnold J's definition of its scope.

[81] Accordingly, we unanimously allow the appeal.

[82] We unanimously set aside the decision of the Employment Court in so far as it held that Mana did not have to pay wages to those drivers who had given notice of an intention to strike on 1 August 2007 but then did not in fact strike. We should point out that the decision under appeal also dealt with other matters which were not the subject of appeal. The Employment Court's decision on those matters of course stands.

[83] By a majority (Harrison and Arnold JJ), the proceeding is remitted to the Employment Court. By a majority (Arnold J and me), the rehearing is limited to a determination of whether the bad faith which the Employment Court has found was present can operate in some way other than through the equity and good conscience jurisdiction to disentitle the employees from payment for the hours at issue.

[84] We unanimously hold that Mana must pay the Union costs as for a standard appeal on a band A basis and usual disbursements.

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