IN THE COURT OF APPEAL OF NEW ZEALAND

CA382/2015
[2015] NZCA 585

BETWEEN	PORIRUA WHANAU CENTRE TRUST Applicant
AND	IRITANA HOROWAI NGAWHARAU Respondent

Hearing: 9 November 2015

Court: Wild, Miller and Cooper JJ

Counsel: A J Knowsley for Applicant
B Paradza for Respondent

Judgment: 1 December 2015 at 3.00 pm

JUDGMENT OF THE COURT

The application for leave to appeal is declined.

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] This is an application for leave to appeal a judgment of the Employment Court in which it was held that the employee, Mr Ngawharau, did not abandon his employment with the applicant but rather was unjustifiably dismissed.[1]

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[1] *Ngawharau v The Porirua Whanau Centre Trust* [2015] NZEmpC 89 [Employment Court decision].

The proposed questions of law

[2] Under s 214 of the Employment Relations Act 2000 (the Act) this Court may grant leave to appeal on a significant question of law. It is incumbent on counsel for an applicant to pose specific questions of law. That was not done in this case, but we have extracted the following from counsel's written and oral submissions:

(1) Whether the Employment Court created a new category of "vulnerable worker" (beyond those workers identified in Schedule 1A of the Act), and imposed more stringent good faith obligations on employers.

(2) Whether the Employment Court misapplied the established meaning of "dismissal" in New Zealand law.

(3) Whether the employer's conduct was capable in law of amounting to a dismissal.

(4) Whether the Employment Court erred in law by not reducing the compensation payable to recognise the employer's offer of an opportunity to return to work.

Discussion

Question one

[3] In the Employment Court Judge Ford described the employee as "a vulnerable worker in every sense of that term".[2] By that he meant the employee had a long criminal record and history of substance abuse and had never held a job. The Judge accepted that it was commendable to hire such a person, but held that the employer may have to go to extra effort to comply with its good faith obligations under s 4 of the Act. Of particular relevance here was the requirement that the parties take an active and constructive approach to maintaining a productive employment relationship.

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2 Employment Court decision, above n 1, at [1].

[4] The applicant contends that the Judge effectively created a separate category of vulnerable employee, apart from workers affected by pt 6A of the Act, and says that the Judge imposed heightened obligations in relation to such a worker.

[5] We do not accept that the Employment Court did create such a separate category. All the Judge did was to identify what the good faith obligation required in the circumstances of the case.

[6] We conclude that the proposed question is not seriously arguable.

Question two

[7] The applicant says that the Employment Court departed from the well-established meaning of "dismissal" in New Zealand law by applying Australian authorities rather than this Court's judgment in *E N Ramsbottom Ltd v Chambers*, in which it was held that dismissal means "the termination of employment at the initiative of the employer".[3] Counsel characterised the New Zealand test as objective and the Australian one as subjective.

[8] We do not think that it can seriously be argued that the Employment Court applied an unorthodox test. It followed *Ramsbottom*. It is not correct to say, as the applicant does, that the particular circumstances of the employee cannot form part of the factual matrix against which the termination took place.

Question three

[9] Counsel submitted that language used by the employer at a meeting on 6 June 2013, at which the employee was held to have been dismissed, is incapable in law of amounting to a dismissal. The employer said something along the lines of "I hate to be the bearer of bad news but we are going to have to let you go if you are not going to be working for us." The applicant's case was that the employer was asking whether the employee had abandoned his employment, and rather than answer the question the employee stormed out.

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[3] *E N Ramsbottom Ltd v Chambers* [2000] 2 ERNZ 97 at [20], citing *Wellington, Taranaki and Marlborough Clerical Etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 at 103.

[10] However, these words cannot be considered in isolation. The Judge accepted that at the time of this conversation the employee was working at another organisation because he had been seconded there by the employer. He had not simply failed to turn up to work. The Judge also found that the employee was "ambushed"; the employer called the meeting to address concerns about his performance but he had no idea why he was there. The Judge found that it was made clear that he was being dismissed.

[11] Given these findings, the proposed question of law is academic.

Question four

[12] The applicant says that some days after the meeting of 6 June it invited the employee to return to work and that offer should have put an end to the claim for compensation. The employee did not respond to the offer. However, the Judge found that the employer's behaviour after the meeting was self-serving. The offer was made after the applicant learned that the employee had taken legal advice. In light of these findings, which clearly indicate that the offer was not bona fide, the point is not seriously arguable.

Other matters

[13] Counsel's written submissions also contended that the Employment Court misapplied the law to the facts in various ways. As we have found that there is no seriously arguable question of law to be argued, we need not address these submissions. To the extent that the submissions contended that the findings were not open to the Employment Court, we do not find the point seriously arguable.

[14] We conclude by acknowledging that the applicant feels keenly that it has been hard done by. Its decision to hire Mr Ngawharau was commendable. A contrary view of the facts had been taken by the Employment Relations Authority, which accepted that he had abandoned his employment.[4] However, the applicant's essential complaint is with the Employment Court's factual findings. Given those

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[4] *Ngawharau v The Porirua Whanau Centre Trust* [2014] NZERA Wellington 34.

findings, we are not persuaded that any of the proposed questions of law meets the threshold for leave.

Decision

[15] The application for leave to appeal is declined.

[16] Mr Paradza appeared as a lay advocate,[5] so he is not entitled to costs. The applicant must pay usual disbursements.

Solicitors:
Rainey Collins, Wellington for Appellant
Kapi Mana Employment Law Ltd, Wellington for Respondent

[5] As to which, see *New Zealand Cards Ltd v Ramsay* [2012] NZCA 285 at [22].