IN THE COURT OF APPEAL OF NEW ZEALAND

CA389/2016
[2017] NZCA 247

BETWEEN	WAIKATO DISTRICT HEALTH BOARD Appellant
AND	NEW ZEALAND NURSES ORGANISATION Respondent

Hearing:	26 April 2017
Court:	Miller, Winkelmann and Clifford JJ
Counsel:	P David QC and A Russell for Appellant R Harrison QC and J Lawrie for Respondent
Judgment:	14 June 2017 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

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

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] On 12 July 2016 Chief Judge Colgan of the Employment Court granted an application by the respondent, the New Zealand Nurses Organisation, for a rehearing of part of an earlier decision of that Court involving an employment dispute between

Marissa Panettiere and the appellant, the Waikato District Health Board.[1] The Waikato DHB, with leave of this Court,[2] now appeals that decision.

[2] The question of law for our determination is:

> Did the Employment Court err in law in exercising its power under cl 5 of sch 3 to the Employment Relations Act 2000 to order a rehearing of the New Zealand Nurses Organisation's challenge which had been dismissed by a final judgment of the Court?

Facts

[3] Ms Panettiere is a midwife. On 16 November 2012 Ms Panettiere resigned from her employment with the Waikato DHB. Following her resignation Ms Panettiere claimed she was entitled to be paid a retiring gratuity. She did so by reference to provisions of the relevant collective agreement (the Nurses' Collective Agreement) which were of specific application to employees of the Waikato DHB. As relevant, those provisions read:

> **Waikato DHB**
>
> **RETIRING GRATUITIES**
>
> NOTE: This clause shall not apply to employees employed after 30 June 1992.
>
> 1. The employer may pay a retiring gratuity to staff retiring from the organisation who have had not less than 10 years' service with the employer, with the employer and one or more other District Health Board or it[s] predecessors and with one or more of the following services: the Public Service, the Post Office, New Zealand Railways or any university in New Zealand.
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> 2. For the purposes of establishing eligibility for a gratuity, total organisational service may be aggregated, whether this be part-time or whole-time, or a combination of both at different periods. Part-time service is not to be converted to its whole-time equivalent for the purpose of establishing eligibility.

[4] All involved acknowledged that those provisions "grandfathered" the entitlement to retiring gratuities to people who had been employed by the

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1 *New Zealand Nurses Organisation v Waikato District Health Board* [2016] NZEmpC 89 [Rehearing decision] and *New Zealand Nurses Organisation v Waikato District Health Board* [2016] NZEmpC 50 [Substantive decision].

2 *Waikato District Health Board v New Zealand Nurses Organisation* [2016] NZCA 488 [Leave decision].

Waikato DHB before or on 30 June 1992. Beyond that, agreement as to their meaning proved elusive.

[5] The Waikato DHB declined Ms Panettiere's claim. Based on the material available to us, it would appear that it initially based its decision on Ms Panettiere not having the qualifying 10 years' service. It did so by reference to the following, generally applicable definition of service which appeared in the Nurses' Collective Agreement at that time:

> Service means the current continuous service with the employer and its predecessors (Hospital and Health Services, Crown Health Enterprises, Regional Health Authorities, Health Funding Authority, Area Health Boards and Hospital Boards) except where otherwise defined in the applicable clause. As of the commencement of the previous MECA07 service will transfer between DHBs and service shall not be deemed to be broken by an absence of less than three months. However, where the employee remains actively engaged on nursing or midwifery related work or study whilst absent, the period of three months shall extend to twelve months. This period of absence does not count as service for the purpose of attaining a service related entitlement.

[6] On 12 December 2012 the Nurses Organisation wrote to the Waikato DHB on Ms Panettiere's behalf. It said that, given the ability to aggregate service provided by paragraph two of the retiring gratuities provisions, continuous service was not required. It asked the Waikato DHB to pay Ms Panettiere what she was owed.

[7] The Waikato DHB replied on 30 January 2013, declining the claim. It said Ms Panettiere had not retired at all. Rather she had resigned and taken up regular paid work in her own midwifery practice as a Lead Maternity Carer (LMC).[3] Thus she did not qualify for consideration for a discretionary retiring gratuity. Moreover, whilst the Waikato DHB acknowledged service could be aggregated to meet the 10-year requirement, it maintained such service was required to be continuous.

[8] From that point onwards the two questions, of retirement and continuity of service, were expressed in a variety of forms in the parties' correspondence and in their statements of problem and reply when they took their dispute to the Employment Relations Authority (the Authority).

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[3] A Lead Maternity Carer is a person who co-ordinates maternity care for pregnant women.

The Authority's Determination

[9] The Authority released its determination on 27 January 2015, upholding the position taken by the Waikato DHB on the retirement issue:[4]

> In Ms Panettiere's case she remained registered to practice as a midwife and was doing so through her work as an LMC. Her evidence established that she worked shifts a[s] a midwife at private birthing units and expanded her practice as an LMC in the following months. She simply had not 'withdrawn' from her occupation and profession so could not reasonably be said to have 'retired' in any way meaningful for the interpretation and application of WDHB's retirement gratuity clause.

[10] Having acknowledged it was not strictly necessary to do so,[5] the Authority went on to consider whether, had Ms Panettiere in fact retired, her employment history would have met the service requirement.

[11] Ms Panettiere was first employed in the public service (IRD) in 1977. From 1980 to 1987 she had worked with local hospital boards (Thames and Waikato) and then the Ministry of Health. Between 1987 and 1996 Ms Panettiere worked at the Waikato Hospital. She took maternity leave from June 1990 to August 1991, and for a time had worked in Tauranga, both at the local hospital and as a GP's practice nurse. She stopped working for the Waikato DHB in November 1996 and started working as a midwife privately in Huntly. She resumed her employment with the Waikato DHB in September 1997, staying in that job until November 2012.[6]

[12] Given that history, the Waikato DHB had argued that on 30 June 1992, Ms Panettiere was not employed by it. As relevant, her employment with the Waikato DHB had not begun until September 1997, when she had returned to work from Huntly Birthcare, an entity which was not part of its service. Hence she was not in the "grandfathered" group. More broadly, and as the Authority put it:

> [53] The evidence and submissions provided for the Authority investigation led to questions about whether, properly interpreted, the WDHB retirement gratuity clause required an employee to:
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> (a) have been a current employee of WDHB on 30 June 1992; and

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4 *New Zealand Nurses Organisation v Waikato District Health Board* [2015] NZERA Auckland 18 [Authority determination] at [46].

5 At [47].

6 We have drawn these dates from the Authority determination, above n 4, at [51].

(b) have been continuously employed by WDHB from that date to the date of her or his retirement.

[13] The Authority found that the retirement gratuities provisions did not require service as at 30 June 1992: rather they excluded employees employed after that date.[7] Thus an employee — like Ms Panettiere — who was employed on 30 May 1992, but had left before 30 June 1992, could theoretically be part of the grandfathered class.[8]

[14] At issue then was whether the "continuous" requirement of the definition of service applied, or whether this was a situation where service was "otherwise" defined in those provisions.

[15] The Authority concluded that, based on an analysis of the text of the Nurses' Collective Agreement as it applied both to the Waikato and other DHBs, continuous service was not required from the cut-off date.[9] It then reasoned:

> [64] In application to Ms Panettiere's circumstances, the effect of this interpretation was that — provided she was in the employment of WDHB at some time on or before 30 June 1992 — she was within the closed category of people who could later be considered for a retirement gratuity. It was not relevant, for this purpose (and only that purpose), if she had left the employment of WDHB and later returned to it — or, put another way, she did not have current, continuous service with WDHB during all the intervening period. The three necessary factors were to:
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> (a) have been employed by WDHB on 30 June 1992 or some time sooner; and
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> (b) be employed by WDHB (and not some other entity) at the time of retiring; and
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> (c) in her total employment history, prior to retiring from her WDHB position, to have completed at least ten years' service with WDHB, other health boards or their predecessors, the Public Service, the Post Office, New Zealand Railways or a New Zealand university.
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> [65] If she had met those criteria, the relevant service and length of service would be calculated by aggregating her service with each of the identified employing entities, as contemplated by the reference in the second paragraph of the WDHB clause to "*total organisation service*".

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7 At [54].
8 At [54].
9 At [64].

[16] On that basis Ms Panettiere would have qualified for consideration for a retirement gratuity.

The Employment Court Decision

[17] The Nurses Organisation and Ms Panettiere, as first and second plaintiffs (in February 2015), and the Waikato DHB, as a plaintiff on its own (in June 2015), filed separate statements of claim in the Employment Court under s 179 of the Employment Relations Act 2000 (the Act) challenging the Authority's determination. The proceedings commenced by the Nurses Organisation and Ms Panettiere were EMPC 43/2015. Those of the Waikato DHB were EMPC 155/2015.

[18] Intervener status was subsequently granted to Central Regions Technical Advisory Services Limited (CRTAS). CRTAS provides advisory services to employers, and intervened in support of the positon taken by the Waikato DHB.

[19] As the pleadings stood when the matter was heard in the Employment Court:

(a) The Nurses Organisation and Ms Panettiere sought a declaration that Ms Panettiere had "retired from" the Waikato DHB within the meaning of the retiring gratuity provision and that accordingly, on the basis of the Authority's finding as to qualifying service, Ms Panettiere was entitled to a retiring gratuity.

(b) The Waikato DHB, supported by CRTAS, challenged the Authority's, admittedly obiter, finding that Ms Panettiere's employment qualified her for retirement gratuity. By reference to her history of employment, it sought a declaration:

> that an employee whom commenced after 30 June 1992 irrespective of previous employment with the [Waikato DHB] is not eligible for a retirement gratuity pursuant to the relevant collective employment agreement.

[20] Judge Ford concluded that the Authority's approach, of considering the question of retirement before that of service, put the cart before the horse.[10] It was more logical, he reasoned, first to determine the issue raised by the Waikato DHB in its cross-challenge. As put by Mr David QC, counsel for the Waikato DHB, that was whether Ms Panettiere was:[11]

> [W]ithin the closed class of employees who could apply for a retiring gratuity" given that her contract of employment was entered into after the cut-off date of 30 June 1992.

[21] On that issue the Judge found:[12]

> It seems to me that on an objective analysis of the natural and ordinary meaning of the introductory Note to Appendix 2(a) of the [Nurses' Collective Agreement], a reasonable reader having the background knowledge of the parties would interpret the wording to mean that anyone employed after 30 June 1992 was excluded from a retirement gratuity entitlement, irrespective of whether or not they had been employed some time sooner.

[22] The Judge concluded:[13]

> For the above reasons, I dismiss the [Nurses Organisation and Ms Panettiere's] challenge and uphold the [Waikato DHB's] cross-challenge based on the cut-off date issue. Having reached this conclusion, I do not find it necessary to go on to consider whether Ms Panettiere's voluntary resignation in 2012 amounted to a 'retirement' within the meaning of the retirement gratuity contained in Appendix 2(a) of the MECA.

The application for recall or rehearing

[23] The Nurses Organisation applied for a recall of Judge Ford's decision or, in the alternative, a rehearing. It did so on the basis Judge Ford had not determined its independent challenge to the Authority's determination on retirement. The hearing had been conducted, and extensive evidence and legal argument adduced, in relation to that issue. It was an issue of general importance to its members. A recall or a rehearing to provide a determination of that issue was in the interests of justice.

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10 Substantive decision, above n 1, at [30].
11 At [30].
12 At [44].
13 At [49].

[24] The Waikato DHB opposed the application for a recall or rehearing. It said that none of the required grounds for a recall existed. The retirement issue which the Nurses Organisation sought to have determined in the recall could not have any material effect on the outcome of the case. The recall application was wrong in principle. Moreover, the trial Judge was no longer sitting. The Waikato DHB opposed a rehearing on similar grounds. A rehearing would be granted where there was a substantial risk of a miscarriage of justice. No such risk existed here, again because the issue in question was not material to the outcome of the case.

The Chief Judge's decision

[25] Chief Judge Colgan declined a recall. He noted there was no express power to recall a judgment.[14] The Employment Court had, he acknowledged, from time to time recalled judgments to correct errors or omissions.[15] Other instances of recall were where the Court had overlooked dealing with costs.[16] That power of recall had not generally been applied to substantive issues. Further, a recall usually involved the trial judge considering a claim and reissuing his or her judgment. The Employment Court's power to rehear could permit another judge to undertake that exercise.[17] The Chief Judge then considered the scope of that power.

[26] The Judge referred to the express power to order a rehearing found in cl 5 of sch 3 to the Act:

> **5 Rehearing**
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> (1) The court has in every proceeding, on the application of an original party to the proceeding, the power to order a rehearing to be had upon such terms as it thinks reasonable, and in the meantime to stay proceedings.
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> (2) Despite subclause (1), a rehearing may not be granted on an application made more than 28 days after the decision or order, unless the court is satisfied that the application could not reasonably have been made sooner.
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> (3) The application—

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14 Rehearing decision, above n 1, at [17].
15 At [20].
16 At [20].
17 At [17].

(a) must be served on the opposite party not less than 7 clear days before the day fixed for the hearing; and

(b) must state the grounds on which the application is made.

(4) Those grounds must be verified by affidavit.

(5) The application does not operate as a stay of proceedings unless the court so orders.

(6) The rehearing need not take place before the Judge by whom the proceedings were originally heard.

[27] That power, the Chief Judge noted, was discretionary and broad.[18] The basis of the proper exercise of that power had been discussed by this Court, on appeal from the full Employment Court, in *Ports of Auckland Ltd v New Zealand Waterfront Workers Union*.[19] The issue was whether the Employment Court had in the following passage misstated the relevant test for recall on the grounds of a miscarriage of justice:[20]

> We observe, as the Court did in the *Cavalier Carpets* case, that there are no restrictions on the grant of a rehearing except as to time. It is undesirable that the Court should supply restrictions that appear nowhere in the statute. However, every judicial discretion must be exercised according to clear principle.
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> What considerations should move the Court to order to be reheard a case that has already been concluded? Obviously if a positive finding can be made that a miscarriage of justice has taken place that would be enough. The likelihood of a miscarriage of justice should also be enough, especially in a case such as this where contrary to the Court's usual practice the question of rehearing or no is separated from the rehearing. The particular species of miscarriage of justice will include those listed in *Cavalier Carpets* but is not confined to them. A mere possibility or suspicion is however not enough to warrant disturbing a considered judgment reached after a full and well exercised opportunity to the parties to be heard.
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> Our view is that in general the Court must look toward the possibility of a miscarriage of justice, but should not look for proof of that possibility to a high standard. For balance, it must give equal weight to the importance of certainty in litigation and the right normally enjoyed by a successful litigant, particularly in dispute resolution cases like this one, to enjoy the fruits of a judgment in its favour.

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18 At [17].

19 *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* (1995) 2 ERNZ 85 (CA).

20 *New Zealand Waterfront Workers Union v Ports of Auckland Ltd* [1994] 1 ERNZ 604 at 607.

[28] The submission by reference to those comments was that the "possibility of a miscarriage of justice" was not enough. What was required was a substantial risk of such a miscarriage. The Chief Judge summarised the Court of Appeal's reasons for rejecting that appeal as follows:[21]

> [26] The Court of Appeal rejected a submission that the proper test was whether there was a "substantial risk" of miscarriage of justice. Taken together, the foregoing paragraphs from the judgment of the full Court were held to be correct. Interpreting the full Court's phrase "look toward the possibility" in the final paragraph quoted above, the Court of Appeal considered this to mean that the Employment Court should have regard to the degree of possibility, where it is something less than a probability but more than a mere possibility. The Court of Appeal confirmed that Parliament had chosen to confer on the Employment Court a discretion "in wide terms" to allow rehearings.
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> (Footnotes omitted.)

[29] Applying those principles the Chief Judge reasoned that, whilst the specific gratuity provision Ms Panettiere relied on was only relevant to the Waikato DHB and its employees, the meaning of the phrase "retirement from an organisation" was of far broader significance.[22] It was also relevant to the employees of 19 other DHBs and perhaps even "other similar entities that were formerly local or central government agencies".[23] The intervention of CRTAS showed that. That issue was one of some general importance. The role of the Employment Court was to promote and encourage successful employment relationships.

[30] Chief Judge Colgan was therefore satisfied that the Court's dismissal of the Nurses Organisation's application, without considering or deciding the "retirement" issue, had brought about a "real possibility of a miscarriage":[24]

> That possible miscarriage is the failure of the Court to decide a party's pleaded case on which evidence and submissions were heard fully, but which was dismissed without consideration of its merits. The interests of justice do require the Court in this case to hear and decide this dispute on its merits.

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21 Rehearing decision, above n 1.
22 At [32].
23 At [32].
24 At [43].

[31] The Chief Judge proceeded to order "a rehearing of that part of the proceedings, being a dispute about the interpretation, application or operation of the retirement gratuity provisions of the collective agreement".[25]

This appeal

[32] For the Waikato DHB, Mr David argued that the Employment Court had formulated the test for the grant of a rehearing incorrectly. The submission was that the test should be whether there was a real or substantial risk of a miscarriage of justice, not the "real possibility" approach taken. The Court had also erred when it had identified the Nurses Organisation as having an independent claim of its own, distinct from that of Ms Panettiere. The claims were one and the same. The factual issues regarding the length of service involved a threshold matter.

[33] Therefore, having found that Ms Panettiere's service did not qualify her for consideration of a retirement gratuity, no miscarriage could possibly arise from the Judge not determining the retirement issue. The determination of that issue could have no effect on the claim brought by Ms Panettiere, with the support of the Nurses Organisation. In those circumstances, that issue became a theoretical one. The decision in *Julian v Air New Zealand Ltd* held that the Employment Court should not decide issues of contract interpretation by reference to a hypothetical problem.[26] Judge Ford's decision was an orthodox approach to the determination of a dispute.

[34] For the Nurses Organisation, Mr Harrison QC supported Chief Judge Colgan's analysis of the proceedings that were before Judge Ford. Section 179 of the Act established that there were two distinct questions for Judge Ford to decide: that raised by the Nurses Organisation and that raised by the Waikato DHB. As the Chief Judge has reasoned, the retirement issue had been approached by all parties on the basis that it had a significance beyond that of Ms Panettiere's individual case. Rather, the "retirement" question raised issues of principle that were relevant to the nurses employed by all of the employers covered by the Nurses Collective Agreement.

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25 At [44].

26 *Julian v Air New Zealand Ltd* [1994] 2 ECNZ 612 at 628.

[35] The significance of that issue was reflected in the Nurses Organisation's argument that the interpretation of the retirement gratuity provision advanced by the Waikato DHB was based on an employee paradigm which no longer existed. In the circumstances the Judge was well within his discretionary jurisdiction when he determined that Judge Ford's failure to consider the merits of the Nurses Organisation's retirement challenge had given rise to the real possibility of a miscarriage of justice.

Analysis and outcome

[36] We first consider the Waikato DHB's challenge to Chief Judge Colgan's decision to grant a rehearing. We dismiss that challenge. We then comment on the Chief Judge's approach to the possibility of recall. We note that the Employment Court does, in fact, have a power of recall. Furthermore, an accepted ground for the grant of a recall is where a judge has failed to determine an issue properly before the Court. A power of recall is not exercisable only by the judge who made the decision, but in appropriate cases (including where a judge has retired) by one of his or her colleagues. We therefore conclude that Chief Judge Colgan could also have granted recall. That conclusion supports our decision that the Judge did not act incorrectly in granting a rehearing.

A rehearing?

[37] The Waikato DHB's criticism of the Employment Court's approach to the threshold miscarriage issue, in our view and echoing the words of this Court in *Ports of Auckland Ltd*, involves "subtle refinements based on semantic differences [which] are not helpful".[27] We accept the Chief Judge may have slightly overstated the position when he said that this Court in *Ports of Auckland Ltd* had rejected a submission that the proper test was whether there was a "substantial risk" of miscarriage of justice. What the Court said in response to the challenge to the Employment Court's reasoning set out at [27] was:[28]

> Mr Towner challenged the reference to "possibility" in the last of these paragraphs, and submitted that the proper test was whether there was a

[27] *Ports of Auckland Ltd*, above n 19, at 88.
[28] At 88.

> substantial risk of a miscarriage of justice. The three paragraphs quoted from the judgment must be read together, however, and we do not think it can be said that the Court has erred. It has stated that an actual miscarriage of justice must be enough, and the likelihood of a miscarriage should also be enough. A mere possibility is rejected as being insufficient. In the next sentence it says the Court must "look toward the possibility". In its context we read this as meaning that the Court should have regard to the degree of possibility, where it is something less than a probability but more than a mere possibility. The Court then refers to the standard of proof required, and to the need to balance the risk of injustice against the importance of certainty. Mr Towner was concerned that the last paragraph cited might suggest that any possibility might be enough, but this is clearly not what is meant if one looks at the context. A possibility that is more than a "mere" possibility could be aptly described as a substantial possibility, which is the same as the "substantial risk" test proposed by Mr Towner. Subtle refinements based on semantic differences are not helpful. Parliament has chosen to confer the discretion in wide terms, and we find no error in the approach adopted by the full Court.

[38] The further argument was that the Employment Court had in fact adopted the test of "mere possibility" when it said that it was appropriate to grant a rehearing because there was "a possibility of miscarriage" if the challenged determination stood. To that, the Court responded:[29]

> The reference in this passage to the possibility of a miscarriage of justice must, we think, be read in the context of the earlier statement that a "mere possibility" would not be sufficient. It means a real or substantial risk. …

[39] What follows is two-fold. First, there was no error in Chief Judge Colgan's summary of the relevant passage when he granted the rehearing.[30] Second, there was no meaningful distinction in this context between the phrase a "substantial risk" of a miscarriage of justice, a "possibility that was more than a mere possibility" or the "real risk" formulation used by Chief Judge Colgan in his decision.

[40] The Waikato DHB's second proposition was that there was no possibility of miscarriage, whatever the requirements of that test, because a separate resolution of the retirement issue could not affect the outcome of Ms Panettiere's dispute with it. Chief Judge Colgan had been wrong to categorise the Nurses Organisation's dispute with the Waikato DHB as being separate and independent from that of Ms Panettiere.

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29 At 89.

30 See above at [28].

[41] We do not accept that proposition, essentially agreeing with Chief Judge Colgan's reasons as to why he granted a rehearing.

[42] The object of the Act provides the context within which the Employment Court exercises its jurisdiction:

> **3 Object of this Act**
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> The object of this Act is—
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> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—
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> (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
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> (ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and
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> (iii) by promoting collective bargaining; and
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> (iv) by protecting the integrity of individual choice; and
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> (v) by promoting mediation as the primary problem-solving mechanism other than for enforcing employment standards; and
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> (vi) by reducing the need for judicial intervention; and
>
> (ab) to promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors, the Authority, and the court; and
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> (b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

[43] As can be seen the role of the Employment Court is forward-looking and, in a remedial sense, anticipatory. That is, the Employment Court is to act to minimise future employment conflict.

[44] Section 187 gives the Employment Court a broad exclusive jurisdiction. The overall object of the Act is reflected in ss 188 and 189. Section 188 provides the

Employment Court's role in relation to this jurisdiction is to hear and determine matters within its jurisdiction and to exercise its powers. Section 189 provides that the Employment Court has jurisdiction to make decisions or orders as in equity and good conscience it thinks fit.

[45] Section 179 of the Act provides for challenges to determinations of the Authority in a very particular manner:

> **179 Challenges to determinations of Authority**
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> (1) A party to a matter before the Authority who is dissatisfied with a written determination of the Authority under section 174A(2), 174B(2), 174C(3), or 174D(2) (or any part of that determination) may elect to have the matter heard by the court.
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> (2) An election under subsection (1) must be made in the prescribed manner and within 28 days after the date of the determination.
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> (3) The election must—
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> (a) specify the determination, or the part of the determination, to which the election relates; and
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> (b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as a **hearing de novo).**

[46] In our view those provisions support the conclusion that multiple challenges under s 179 of the Act are themselves procedurally independent of each other, in a way that appeals and cross-appeals in the general civil jurisdiction are not.

[47] The issue then becomes the interdependence of the broad interest the Nurses Organisation had in the interpretation of the term retirement (as raised by Ms Panettiere's personal circumstances) and Ms Panettiere's specific claim of entitlement to a retiring gratuity. The Waikato DHB was critical of Chief Judge Colgan's description of the Nurses Organisation's challenge as being "its own dispute", as opposed to "Ms Panettiere's own challenge". But the substance of what the Chief Judge was saying was, that in the circumstances of this case, the s 179 challenge by the Nurses Organisation as first plaintiff and Ms Panettiere as second plaintiff on the question of retirement raised both a general and a particular

issue. The first, general issue was the meaning of the word "retirement". The second, particular issue was whether Ms Panettiere herself had retired.

[48] Judge Ford did not address that general question of interpretation at all. To that extent he dismissed the Nurses Organisation's claim as first plaintiff without having considered it.

[49] As the Chief Judge correctly reasoned, the retirement interpretation issue raised issues of broad application. Not only did it affect all employers party to the Nurses' Collective Agreement and their relevant employees, but it also involved the Employment Court in considering the question of retirement, and what it means in today's economy and in today's employment relationships, in the context of the Nurses Organisation's assertion that a "new paradigm" was required to properly analyse that issue. Evidence before Judge Ford reflected that. As to that evidence, and its admissibility, Judge Ford commented:[31]

> It addressed the economics of aging and other issues relating to the concept of retirement. I would not have excluded her evidence. The Authority's finding centred on whether Ms Panettiere had retired upon the cessation of her employment with the [Waikato DHB]. As it turns out, I found it unnecessary to go down that path but, had I needed to do so, it is likely, that in any consideration of the relevant contextual matrix, I would have found Ms St John's evidence helpful.

[50] This issue was not therefore a hypothetical one in the sense meant in *Julian*. Rather it had actually arisen between an individual employee and her employer and, having general significance, had been taken up by the Nurses Organisation not only in her interest, but that of relevant employees more generally.

[51] Our conclusion is, therefore, that Chief Judge Colgan's decision to grant the Nurses Organisation a rehearing does not reflect any error of law or principle. Our answer to the question of law put to us is "No".

[52] We therefore dismiss the Waikato DHB's appeal against that decision.

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[31] Substantive decision, above n 1, at [50].

A Recall?

[53] The appeal was argued before us on the issue of a rehearing. Chief Judge Colgan proceeded on the basis that the Employment Court did not have an express power of recall, and that recall was a procedure that, by implication, involved the original judge. In that context, we make the following observations.

[54] First, it would appear that the Employment Court does have a power to recall judgments. While there is no provision in the Act providing a power of recall, reg 6(2)(a)(ii) of the Employment Court Regulations 2000 enables the Employment Court to have recourse to the High Court Rules where there is no applicable procedural rule in the Employment Court. The High Court Rules include a power to recall "a judgment given orally or in writing at any time before a formal record of it is drawn up and sealed".[32] The Employment Court has from time to time utilised this power.[33]

[55] Second, the failure to decide an issue is a recognised ground for recall. The leading case is *Brake v Boote*.[34] For applications of this sort, it is necessary to distinguish between the situation where a judge does not advert to a matter at all, and one where the judge adverts to the matter but makes an erroneous determination.[35] While the former situation lends itself to recall, the latter does not. We consider that Judge Ford's judgment falls into the former category. Judge Ford explicitly stated that he did "not find it necessary to go on to consider whether Ms Panettiere's voluntary resignation in 2012 amounted to a 'retirement'".[36]

[56] Third, it is not necessary for the original judge to be involved. As noted in *McGechan on Procedure*, the retirement of the trial judge is not necessarily an

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32 High Court Rules 2016, r 11.9.
33 *Gilbert v Attorney-General* [2006] ERNZ 1 at [21]; and *Muldoon v Nelson Marlborough District Health Board* [2011] NZEmpC 115 at [10].
34 *Brake v Boote* (1991) 4 PRNZ 86 (HC).
35 *Clark v Central Lakes Homes Ltd* [2016] NZHC 2164 at [10].
36 Substantive decision, above n 1, at [49].

impediment to another judge recalling the judgment.[37] This principle has been adopted in a number of cases.[38]

[57] In our opinion, and given these three observations, we consider that it was open to Chief Judge Colgan to order a recall. That conclusion supports our decision that the Judge did not act incorrectly in granting a rehearing.

Result

[58] The appeal is dismissed.

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

Solicitors:
Chen Palmer, Auckland for Appellant

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37 Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR11.9.01(7)].

38 *Lewis Holdings Ltd v Steel & Tube Holdings Ltd* [2016] NZHC 42 at [20]; and *Healy Holmberg Trading Partnership v Grant* HC Auckland CIV-2009-404-2279, 12 October 2010 at [58].