

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2023] NZEmpC 47
EMPC 440/2021
EMPC 432/2022**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER of an application for leave to apply for
rehearing

AND IN THE MATTER of an application for rehearing

BETWEEN FARRAND ORCHARDS LIMITED
Plaintiff

AND MICHAEL TANE
Defendant

Hearing: On the papers

Appearances: N Taefi, counsel for the plaintiff
M Pollak, counsel for the defendant

Judgment: 29 March 2023

JUDGMENT OF JUDGE B A CORKILL
(Application for leave to apply for rehearing and application for rehearing)

Introduction

[1] In my judgment of 27 July 2022, I concluded that the Employment Relations Authority had not erred in concluding that there was no valid 90-day trial period on which Farrand Orchards Ltd (FOL) could rely to terminate Mr Michael Tane's employment.¹

¹ *Farrand Orchards Ltd v Tane* [2022] NZEmpC 131, [2022] ERNZ 527.

[2] The challenge had been brought on a non-de novo basis. It related to a series of findings the Authority had made as to whether it was agreed between the parties that Mr Tane would be subject to a 90-day trial period before he commenced working for FOL on 1 April 2019.

[3] The case involved a number of credibility issues, most of which were resolved in Mr Tane's favour.

[4] There are now two material applications before the Court.

[5] The first is whether leave should be granted to FOL to enable it to bring an application for rehearing out of time.

[6] My judgment was issued on 27 July 2022. The time for filing an application for rehearing under sch 3 cl 5 of the Employment Relations Act 2000 (the Act) is 28 days unless the Court is satisfied the application could not reasonably have been made sooner. FOL says that on 25 August 2022 it became aware of fresh evidence to the effect that Mr Tane knew, prior to starting work, that he was indeed subject to a 90-day trial period in respect of his employment with it. FOL says there is fresh evidence supporting this contention, hence the application for a rehearing.

[7] FOL also asserts the rehearing application could not have been advanced sooner and that there is no prejudice to Mr Tane since the delay was only nine working days beyond the usual 28-day limit for filing the application for a rehearing.

[8] The second application which the parties have agreed I should determine at the same time, is the application for rehearing itself, a possibility which is allowed for under the Court's Practice Directions.²

[9] Since the merits of the application for rehearing may be relevant to the issue as to whether an extension of time should be granted, I will deal with that topic first, after summarising the relevant findings made in the substantive judgment.

² "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz>.

Key findings

[10] In the substantive judgment I made the following findings as to the state of Mr Tane's knowledge about the possible application of a 90-day trial period up to the date when he started work:

- (a) At an initial meeting between Mr Kerry Farrand and Mr Tane on 8 March 2019, the Authority had not erred by stating there was no accord as to a 90-day trial provision on that occasion.³
- (b) A draft individual employment agreement (IEA) was submitted to Mr Tane by email on 17 March 2019. The document was confusing because it contained reference to both a probationary period of 90 days, and a trial period of 90 days. Each was of different effect.⁴
- (c) The covering email of that date suggested all terms of the attached IEA were negotiable. The email did not highlight a 90-day trial condition.⁵
- (d) The Authority had distinguished the earlier determination of *Berea v Best Health Foods Ltd*⁶ on the basis there was insufficient evidence that the parties had agreed a trial period before Mr Tane commenced work.⁷ Contrary to the position in *Berea*, there was an absence of corroboration of agreement; there was a statement in the covering email that the terms of the employment agreement were negotiable; and the email did not highlight the 90-day trial period condition. I found that on a review of the evidence, which was before the Authority and the Court, none of these findings were shown to be incorrect. In *Berea*, the parties had reached a consensus about a 90-day trial period in an exchange of emails before the employee commenced work, although the IEA was signed

³ *Farrand Orchards Ltd*, above n 1, at [45]–[52].

⁴ At [56] and [64].

⁵ At [58].

⁶ *Berea v Best Health Foods Ltd* [2020] NZERA 474 at [27]–[33].

⁷ *Tane v Farrand Orchards Ltd* [2021] NZERA 503 at [30].

after work commenced.⁸ Accordingly, I found *Berea* had been correctly distinguished.⁹

- (e) It had been contended that Mr Tane had moved into a FOL's orchard accommodation on 30 March 2019 and that this meant there had been an acceptance of a 90-day trial provision. I found the Authority had not erred in concluding this was not the case. I concluded there was no evidence to contradict Mr Tane's evidence that he did not notice the 90-day trial period provision in the pro forma agreement sent on 17 March 2019. Nor was there evidence of the trial provision being drawn to Mr Tane's attention. Further, the parties did not discuss the terms of the agreement over the weekend of 30 to 31 March 2019, when Mr Tane moved his effects from Auckland to Kerikeri, establishing himself in accommodation provided by FOL.¹⁰
- (f) FOL had not provided a signed offer of employment to Mr Tane before 1 April 2019.¹¹
- (g) I held the Authority had not erred in concluding that a 90-day trial period had not been agreed between the parties prior to Mr Tane commencing work on 1 April 2019.¹²

[11] I also dealt with an estoppel point, finding that it had not been adequately pleaded for FOL. I also said that even if it had been, the Authority correctly concluded that Mr Tane had not made a binding promise on 1 April 2019 that he would sign the incomplete offer which had been provided to him on 17 March 2019, before he started work.¹³

⁸ *Berea*, above n 6, at [28].

⁹ *Farrand Orchards Ltd*, above n 1, at [62]–[63].

¹⁰ At [79]–[80].

¹¹ At [81].

¹² At [97].

¹³ At [104]–[115].

The application for rehearing

[12] The rehearing application centres on an affidavit provided by Mr Craig Sawers, a retired clinical psychologist, in which he provides his recollection of a party he and his wife held at their home on 31 March 2019, in part to welcome Mr Farrand and his wife as neighbours. They arrived at the party with a man who he had not seen before.

[13] Mr Sawers recalls meeting that person, who he understands was Mr Tane. He had a conversation with him about his recent arrival in Kerikeri from Auckland. Mr Sawers says he recalls being told by Mr Tane that he was on a “3-month trial period” or a “3-month temp trial”. He says he cannot recall the exact words used. The words might have been to the effect of a “review” or a “trial”. He said this reference to the period stuck in his mind.

[14] A range of other affidavits have been filed by FOL to support the proposition that this event took place on the evening of 31 March 2019.

[15] Mr Tane filed an affidavit in response. After describing his transfer of effects from Auckland to Kerikeri over the weekend in question, he said he did not recall having seen or spoken to Mr Farrand on 31 March 2019, let alone attending a party on that date. He said on the previous day they had exchanged texts and a phone call to confirm his arrival, but there was no further text or phone communication until 2 April 2019.

[16] Turning to the prior litigation, he said Mr Farrand had never previously mentioned taking him to a party on 31 March 2019, either in evidence given to the Authority during its investigation meeting, or in evidence he gave to the Court. Rather, Mr Farrand’s evidence had been that he had spoken to Mr Tane on 30 March 2019, and that he did not speak to him again until he started work on Monday, 1 April 2019. He thought he may have attended a party with Mr Farrand subsequently.

[17] In a response affidavit, Mr Farrand confirmed a recollection of taking Mr Tane to a “dinner party” which he had attended at Mr Sawers’ home on a date which he could not recall.

[18] Mr Farrand made no comment about Mr Tane’s assertion as to the evidence he had given previously to the Authority and Court.

[19] In Mr Tane’s notice of opposition to the application for rehearing, it is asserted that a rehearing should not be granted because it was an attempt to relitigate the case in its entirety by a “backdoor method”. Moreover, if the Court had heard Mr Sawers’ evidence at the hearing, it would not have come to a different conclusion.

[20] The key issue was whether Mr Tane had signed the employment agreement prior to commencing work on 1 April 2019. The asserted conversation between Mr Sawers and Mr Tane could not change the fact that this did not happen. The new evidence could not, even if accepted, conclusively refute the conclusion reached in the judgment that the parties had not reached a prior accord that the offer of employment made to Mr Tane was conditional on the successful completion of a 90-day trial period.

[21] Finally, it was alleged in Mr Tane’s notice of opposition that the new information could, with reasonable diligence, have been discovered prior to the hearing.

Submissions as to application for rehearing

[22] Ms Taefi, for FOL, referred to relevant authorities on the question of whether a rehearing should be granted. She said what the Court must determine is whether there is a real or substantial possibility, or substantial risk, of a miscarriage of justice.¹⁴

[23] She submitted that the emergence of new evidence is a well-established ground for granting a rehearing. Generally, three criteria would apply:¹⁵

- (a) The evidence could not have been discovered prior to the hearing with reasonable diligence.

¹⁴ *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* [1995] 2 ERNZ 85 (CA) at 88.

¹⁵ *Squire v Waitaki New Zealand Refrigerating Ltd* [1985] ACJ 839 (Arbitration Court) at [842]; and *Lewis v Greene* [2005] ERNZ 142 (EmpC).

- (b) The evidence will have an important influence on the result of the case, although it need not be decisive.
- (c) The evidence must be such as is presumably to be believed, or in other words, must be apparently credible although it need not be incontrovertible.

[24] Ms Taefi developed submissions with regard to each of these three limbs. She argued that it was not reasonable to have expected Mr Farrand to speak to everyone who knew Mr Tane or spoke to him in the hope they may have knowledge of a conversation of relevance in the case, prior to the substantive hearing. That would set the “reasonable diligence” bar too high.

[25] Next, Ms Taefi submitted that the new evidence would have an important influence on the result of the case and could be decisive. Whereas the Court had found there was insufficient evidence the parties had agreed a trial period which would form part of their terms of employment, were Mr Sawers’ evidence to be accepted it would mean there was in fact an understanding that a trial period would form part of the terms of employment. The Court would likely find that the point of formation of the employment agreement between FOL and Mr Tane was prior to the commencement of actual employment. It would then be open to the Court to follow the reasoning adopted by the Authority in *Berea*.

[26] It was then argued that Mr Sawers’ evidence was apparently credible. He was a third party to the proceeding. He was clear as to the content of his discussion with Mr Tane. Other deponents confirmed his account in one key aspect, namely, the date on which it is alleged to have occurred. It would contradict a key finding of the Court’s substantive decision were this evidence not to be before the Court. There was a substantial possibility of a miscarriage of justice.

[27] In the submissions advanced for Mr Tane, his counsel, Ms Pollak, placed reliance on the following passage from *Davis v Commissioner of Police*:¹⁶

¹⁶ *Davis v Commissioner of Police* [2015] NZEmpC 38, [2015] ERNZ 27 (footnotes omitted).

[11] On the face of it, [the rehearing] provision grants the Court a broad unqualified discretion in relation to rehearing applications but, as with any such general discretion, it must be exercised judicially according to principle.

[12] The authorities show that some special circumstance must be found to exist to warrant the ordering of a rehearing. It would be an impossible burden on this Court if a rehearing under cl 5 could be obtained merely by request and there is a strong countervailing public interest consideration in having finality to litigation.

[13] Traditionally, rehearings have been ordered when the integrity of a judgment has been placed in issue by some special and unusual circumstance. Examples include the discovery of fresh or new evidence, that could not with reasonable diligence have been discovered prior to the hearing, which is of such a character as to appear to be conclusive: *Hardie v Round* ... The threshold test to be applied is whether the applicant can establish a real or substantial risk of a miscarriage of justice if the judgment is allowed to stand.

[14] The rehearing jurisdiction is not to be exercised for the purpose of rearguing arguments already considered by the Court or providing a backdoor method by which unsuccessful litigants can seek to reargue their case.

[28] She submitted it was arguable the new evidence could with reasonable diligence have been discovered prior to the hearing.

[29] Developing this submission, Ms Pollak submitted Mr Farrand was a well-known member of the community who had plainly spoken to family and friends about FOL's dispute with Mr Tane. This was evidenced from information provided by Mr Farrand himself, and from the fact that several acquaintances had been contacted and called to give evidence to the Court. Moreover, Mr Farrand and Mr Sawers were clearly friendly neighbours who would be likely to discuss the dispute given it was common knowledge in the community.

[30] She said it was necessary to consider other evidence given by Mr Farrand. During the Authority's investigation meeting, and again during the Court hearing, Mr Farrand had confirmed that he had no contact with Mr Tane at all during the weekend of 30 and 31 March 2019 other than when they exchanged texts as to his arrival in Kerikeri, and in a telephone conversation with Mr Tane who confirmed he had moved into the orchard accommodation.

[31] Mr Farrand's case had been that there was no face-to-face contact, as he had not wanted to disturb Mr Tane when he was settling in.¹⁷ This position contradicted the evidence Mr Farrand was now giving to the effect that he had taken Mr Tane to a party after he arrived in Kerikeri on 31 March 2019.

[32] The new evidence, if accepted, would not have an important influence on the issue that was before the Court, because Mr Tane did not receive a completed IEA until after he started work. Moreover, the language of the trial period clause did not meet the necessary statutory criteria. The draft document which had been forwarded to Mr Tane on 17 March 2019 was unclear because as well as not containing all relevant terms and conditions of employment, it referred both to a 90-day probationary clause and to a 90-day trial clause, a confusion which was never resolved.

Analysis of rehearing issues

[33] I adopt the approach to the rehearing issue in accordance with the authorities to which I have been referred.

Could evidence have been discovered prior to the hearing with reasonable diligence?

[34] It is plain from the history of the matter that this litigation has been comprehensively argued. In the case of FOL's position, that fact is evident from the broad range of persons from the local community who were called by the company to support its position on various aspects of the challenge.

[35] A key part of FOL's case in support of the proposition that there was a binding accord before Mr Tane began work, concerned what happened over the preceding weekend. The Court received detailed evidence of these events. One of the several issues specifically addressed this aspect of the chronology.

[36] It heard nothing about Mr Tane being taken to a party by Mr Farrand and his wife on the night before he was due to commence work.

¹⁷ *Farrand Orchards Ltd v Tane*, above n 1, at [15] and [75].

[37] If that event was as important as is now asserted, I am satisfied FOL could with reasonable diligence have explored what occurred on that occasion, rather than denying that there was any contact with Mr Tane other than the disclosed texts and phone call.

[38] It is clear that Mr Farrand on behalf of FOL canvased a range of acquaintances in his community for relevant evidence. It is surprising that he did not canvas Mr Sawers, his neighbour, with whom he was friendly.

[39] In short, I am satisfied that FOL could with reasonable diligence have sought further evidence.

Would the evidence have an important influence on the result of the case, although it need not be decisive?

[40] The proposed evidence is unlikely to assist the Court. The alleged reference to a 90-day provision in an informal conversation with Mr Tane, if indeed it occurred, would not take the matter further.

[41] In my judgment, I referred to the confusing references to two different types of 90-day clauses, as evidenced in the draft (but incomplete) IEA that was provided to Mr Tane on 17 March 2019.

[42] The statement attributed to Mr Sawers, if it was subsequently shown to have occurred, was ambiguous because it might have been a reference to a 90-day probationary clause or to a 90-day trial clause.

[43] Given this confusion, there could hardly be an accord about a 90-day trial provision. Moreover, on the evidence before the Court, no finalised agreement had been submitted to Mr Tane prior to 1 April 2019.

[44] Given the totality of credibility issues which the Court has already considered and given the further credibility issues which would arise as just discussed,¹⁸ the fresh evidence does not persuade me that it could have an important outcome on the case.

¹⁸ See at [30]–[31] above.

Is the evidence apparently credible?

[45] Mr Sawers' evidence is on the face of it credible, but as I have explained, it is not determinative. It relates to one aspect only of a complex chronology. As noted, I do not consider that the evidence has the potential to lead to a different outcome.

Discretion

[46] At the end of the day, when considering an application for rehearing, the Court must exercise a judicial discretion as to whether the interests of justice require the unusual step of allowing a rehearing, as explained by Judge Ford in *Davis*.¹⁹

[47] I am not satisfied that the circumstances are such that the Court should conclude that FOL has established that there is a real or substantial risk of a miscarriage of justice if the judgment is allowed to stand.

Result

[48] In light of that conclusion, it is unnecessary to discuss the application for leave to bring the application for rehearing out of time. Had I been required to do so, I would have concluded that the delay of nine days was not such as to disqualify the applicant from pressing its application for a rehearing.

[49] I reserve costs. Any application for costs is to be brought within 14 days and responded to within 14 days thereafter. That application will be dealt with on the papers alongside the application for costs which has already been filed in connection with the substantive judgment.

B A Corkill

Judge

Judgment signed at 1.10 pm on 29 March 2023

¹⁹ *Davis v Commissioner of Police*, above n 16, at [11]–[13].