Employment Court of New Zealand

Alkazaz v Enterprise IT Limited [2022] NZEmpC 15 (8 February 2022)

Last Updated: 11 February 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 15
EMPC 397/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for recall of judgment/rehearing
BETWEEN	AHMED ALKAZAZ Plaintiff
AND	ENTERPRISE IT LIMITED Defendant

Hearing:	On the papers
Appearances:	Plaintiff in person R Bryant, counsel for defendant
Judgment:	8 February 2022

INTERLOCUTORY JUDGMENT (NO 11) OF CHIEF JUDGE CHRISTINA INGLIS

(Application for recall of judgment/rehearing)

Introduction

[1] The plaintiff seeks an order recalling an earlier interlocutory judgment (interlocutory judgment no 9).[1] In that judgment I declined an application for a stay of a costs challenge pending the outcome of an appeal process and held that the defendant was entitled to costs on the application, the quantum of which would be determined if they could not otherwise be agreed. In the alternative the plaintiff seeks

1 *AlKazaz v Enterprise IT Ltd* (No 9) [2021] NZEmpC 62.

a rehearing of the interlocutory application, a recall or rehearing of the original substantive judgment,[2] or an order of reduced costs. The defendant opposes the orders sought.

[2] Generally speaking, once delivered a judgment must stand. There are exceptions. In limited circumstances the Court may order that a judgment be recalled or that the matter be reheard. Neither is an alternative to an appeal, and both require the existence of special circumstances. One of the key underlying reasons for the Court taking a cautious approach to such applications is the public interest in the finality of litigation.

[3] There is a degree of overlap in the sort of circumstances in which the Court may order a recall of a judgment or a rehearing. In terms of a recall, the circumstances tend to fall into three categories. First, where, following delivery of the

judgment, there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; second, where the representatives have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and third, where for some very special reason, justice requires that the judgment be recalled.[3]

[4] The Court may grant a rehearing under the Employment Relations Act 2000, sch 3 cl 5. Special or unusual circumstances are required to warrant a rehearing. Such circumstances may, for example, involve the discovery of fresh or new evidence that could not, with reasonable diligence, have been discovered prior to the hearing and which is of such a character as to have had an impact on the original decision;[4] or where a statutory provision or authoritative decision was inadvertently overlooked or misapprehended.[5]

[5] The appropriateness of either route (recall or rehearing) will depend on the particular circumstances.

2 *AlKazaz v Enterprise IT Ltd* [2020] NZEmpC 171.

3 *Horowhenua County v Nash* (No 2) [1968] NZLR 632 (HC) at 633.

4 See, for example, *Davis v Commissioner of Police* [2015] NZEmpC 38, [2015] ERNZ 27 at [13].

5. *Davis* above n 4; *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* [1995] NZCA 390; [1995] 2 ERNZ 85 (CA).

The circumstances in this case

[6] It is necessary to set out the background context in order to understand the grounds being advanced by Mr AlKazaz in support of his application, and to assess their strength.

[7] Mr AlKazaz was briefly employed by the defendant company, for around 90 days. His employment was terminated; he says unjustifiably. He pursued a grievance in the Employment Relations Authority. The Authority upheld his grievance.[6] While Mr AlKazaz was not satisfied with the Authority's determination, he did not seek to challenge it; rather he applied to reopen the investigation. The Authority declined to do so.[7] Mr AlKazaz then filed a challenge to the Authority's re-opening determination. The company applied for an order for security for costs on the challenge, which was granted (interlocutory judgment no 1).[8] Security in the amount ordered was duly paid by Mr AlKazaz and timetabling directions were made for the hearing.

[8] An application was then advanced by Mr AlKazaz for leave to participate at the hearing from a distance (Dubai) via audio visual link. That application was granted (interlocutory judgment no 2).[9] Witness summonses were sought by Mr AlKazaz, and issued, prior to the hearing. The company successfully applied to have the summonses set aside (interlocutory judgment no 3).[10]

[9] Mr AlKazaz then advanced an application for leave to file an amended statement of claim. The application was granted (interlocutory judgment no 5).[11] The judgment recorded that in the intervening period the Authority had delivered a determination awarding costs against Mr AlKazaz on his unsuccessful application to reopen the investigation; that he had filed a challenge against the Authority's costs determination; and that it was convenient to defer dealing with the challenge to the Authority's costs determination until after the Court had dealt with the challenge to the Authority's re-opening determination.

6 *AlKazaz v Enterprise IT Ltd* [2017] NZERA Auckland 400 (Member Craig).

7 *AlKazaz v Enterprise IT Ltd* [2019] NZERA Auckland 560 (Member Craig).

8 *AlKazaz v Enterprise IT Ltd* [2020] NZEmpC 42.

9 *AlKazaz v Enterprise IT Ltd* (No 2) [2020] NZEmpC 78.

10 *AlKazaz v Enterprise IT Ltd* (No 3) [2020] NZEmpC 138.

11 *AlKazaz v Enterprise IT Ltd* (No 5) [2020] NZEmpC 151.

[10] A substantive judgment on the re-opening challenge followed, on 22 October 2020. Mr AlKazaz's challenge was dismissed.[12]

[11] Mr AlKazaz filed an application seeking an order staying execution of the Authority's costs order pending the outcome of the costs challenge in the Court. The application for a stay was granted on the condition that the sum ordered to be paid by the Authority be paid into Court (interlocutory judgment no 6).[13] This sum was duly paid by Mr AlKazaz.

[12] Mr AlKazaz then sought leave to appeal to the Court of Appeal against the Court's judgment of 22 October 2020. Leave was declined by the Court of Appeal on 15 February 2021.[14]

[13] Mr AlKazaz indicated that he wished to seek leave to appeal to the Supreme Court against the Court of Appeal's judgment and filed an application for a stay of the costs challenge in this Court, pending the outcome of the appellate process. An application for an adjournment was advanced prior to the hearing and was dealt with at the outset. An adjournment was granted; the parties were given an opportunity to file further material in relation to matters in the Court of Appeal; and orders were made that the stay application would be dealt with on the papers once filed (interlocutory judgment no 7).15

[14] An application was then filed seeking orders that Mr Bryant be struck out as counsel for the company. The company filed a cross-application striking out the strike out application and for further security for costs. The application for an order striking out counsel was dismissed; the application for an order for further security for costs was granted (interlocutory judgment no 8).16

[15] The costs ordered against Mr AlKazaz by way of security were paid and the application for a stay of the costs challenge was dealt with. The application for stay

12 *AlKazaz*, above n 2.

13 *AlKazaz v Enterprise IT Ltd* (No 6) [2020] NZEmpC 186.

14 *AlKazaz v Enterprise IT Ltd* [2021] NZCA 13.

15 *AlKazaz v Enterprise IT Ltd* (No 7) [2021] NZEmpC 15.

16 *AlKazaz v Enterprise IT Ltd* (No 8) [2021] NZEmpC 43.

was dismissed (interlocutory judgment no 9),17 and orders were made directing that a telephone conference be set down to timetable all outstanding matters through to hearing. The Court found that the company was entitled to costs on the unsuccessful application for a stay but that if the quantum could not be agreed memoranda could be filed.

[16] Mr AlKazaz then filed an application for stay in the Supreme Court which appeared to extend to the costs challenge in the Employment Court. It was agreed that the costs challenge should be deferred pending resolution of the application in the Supreme Court and timetabling directions were made following discussion with the parties, as recorded in a minute dated 17 June 2021. The Supreme Court dismissed the application on 16 August 2021.18

[17] A further application for a stay of the costs challenge, and (in the alternative) an application for variation of the 17 June 2021 timetabling orders, followed. These orders were sought on the basis that Mr AlKazaz had applied for recall of the Supreme Court's judgment dismissing a stay pending determination of his application for leave to appeal, and on the basis that he had a five day fixture pending in the Employment Court on an unrelated matter which he needed to focus on. The application to vary the timetabling orders was granted by way of interlocutory judgment dated 29 June 2021 (interlocutory judgment no 10); the Court found it unnecessary to decide the application for a stay in the circumstances.19

[18] On 8 October 2021 the defendant filed a memorandum seeking costs in relation to interlocutory judgment no 9. Mr AlKazaz then sought the recall of interlocutory judgment no 9. It is evident, from material now filed by Mr AlKazaz, that the orders he seeks are somewhat broader. I turn to set out my understanding of the relief that is sought on the current application and the reasons why Mr AlKazaz submits that recall/a rehearing is appropriate.

17 *AlKazaz*, above n 1.

18 *AlKazaz v Enterprise IT Ltd* [2021] NZSC 101.

19 *AlKazaz v Enterprise IT Ltd* (No 10) [2021] NZEmpC 94.

[19] Interlocutory judgment no 9 dismissed Mr AlKazaz's application for a stay of the costs challenge and found that the company was entitled to costs on the application. The quantum of those costs would be fixed by the Court following the filing of memoranda if the parties could not agree. According to Mr AlKazaz, this judgment was overtaken by interlocutory judgment no 10, which extended the timeframes for progressing the costs challenge. This, it is said, amounted to an implicit stay, which provided time for the application in the Supreme Court to be dealt with. The point, I infer, is that interlocutory judgment no 10 effectively made the orders that Mr AlKazaz unsuccessfully sought in the earlier application for a stay. It was those orders that gave rise to an as yet unquantified costs liability, so the liability should be re-evaluated.

[20] In relation to the substantive matter (the challenge to the Authority's determination declining to reopen its investigation), Mr AlKazaz says that he was advised by the Authority that the way to address his concerns was to follow this procedural route, and he did not appreciate that he could apply for leave to extend time to challenge the determination.

[21] Mr AlKazaz submits that a combination of factors constitutes "very special reason" warranting a recall/rehearing. These factors include an alleged accidental slip in the substantive judgment in relation to an issue about perjury, his limited English capability, and his lack of knowledge about legal procedure.

[22] Further, Mr AlKazaz refers to personal issues which he was confronting in the lead-up to the substantive hearing, which impacted on his ability to present his case; as did his limited understanding of the law and practice. He says that while the substantive judgment focussed on prejudice to the company, focus was not given to the difficulties he was confronting. These difficulties included the fact that an application had been advanced in the Supreme Court and a challenge to the stay application was on foot.

[23] In his written submissions, Mr AlKazaz makes it clear that he seeks an order for recall or rehearing of the substantive judgment (dismissing the challenge to the Authority's determination declining to reopen its investigation), together with interlocutory judgment no 9 (declining to stay the challenge to costs ordered by the

Authority); or recalling interlocutory judgment no 9; and/or waiving any costs order in respect of interlocutory judgment no 9; or to "tune down" any costs order in respect of interlocutory judgment no 9.

Analysis

[24] Interlocutory judgment no 10 contained a number of timetabling directions, which had the effect of extending the timeframes involved in the lead-up to the costs challenge. While it is true that interlocutory judgment no 10 was delivered after interlocutory judgment no 9, it cannot properly be characterised as a new judicial authority of relevance in the sense referred to in *Horowhenua County v Nash*,[20] and nor can it be characterised as a judgment of higher authority. And it is well established that the power to recall does not extend to asking the Court to reverse interlocutory decisions on the grounds that they were wrongly decided (which appears to be the point Mr AlKazaz is concerned about).

[25] There is evidence before the Court that supports Mr AlKazaz's assertion that he was told to apply to re-open the Authority's determination rather than apply for an extension of time to file a challenge. However, as the authorities make clear, the fact that a person misapprehends the legal position or overlooks a procedural route which may have been available does not amount to special circumstances justifying the grant of recall/a rehearing. More fundamentally, the point was raised, and rejected, in the context of the original challenge. It ought not to be re-litigated.

[26] Nor has Mr AlKazaz pointed to any authority or legislative provision which was of plain relevance and which was not drawn to the Court's attention, in respect of either the substantive challenge to the Authority's reopening determination or the application for a stay of the Authority's subsequent costs determination, which gave rise to interlocutory judgment no 9.

[27] Mr AlKazaz has raised some arguments that were not raised during the course of the respective hearings. I understand him to say that this was because of the

20 *Nash*, above n 3.

difficulties he was confronting at the time. Mr AlKazaz is not legally trained and does not have a comprehensive understanding of the applicable law, practice and procedure. He has chosen to represent himself, as he is entitled to do, although the potential benefits of legal representation and/or support have been identified at various telephone conferences, and his attention has been drawn to a range of guidance on the Court's website. While I accept that Mr AlKazaz has not found the litigation process easy (including because of personal issues he has faced), and may have overlooked arguments and evidence he now wishes to raise, that does not of itself justify either a recall or a rehearing. If it were so, the underlying principle of finality in litigation would be seriously undermined.

[28] There may be circumstances where a litigant's personal circumstances, including health issues, are such that a recall or rehearing is warranted. The threshold is, however, high and has not been met in this case. And, as counsel for the company points out, the claims of prejudice have come at a comparatively late stage, and after the company sought costs against Mr AlKazaz in respect of interlocutory judgment no 9.

[29] It follows from the foregoing that I am not satisfied that the grounds for ordering a recall/rehearing of either interlocutory judgment no 9 or the substantive challenge judgment have been made out.

[30] For completeness I deal with the alternative argument, namely that costs consequent on interlocutory judgment no 9 should be waived or "tuned down". Costs following interlocutory judgment no 9 have not yet been decided; the parties will have an opportunity to file memoranda. The submissions Mr AlKazaz has raised will be taken into consideration when deciding an appropriate award of costs, and the company will have an opportunity to be heard further too. But the point for present purposes is that determining an appropriate quantum of costs on interlocutory judgment no 9 is not relevant to the immediate matter before the Court, namely deciding the application for a recall/rehearing.

Conclusion

[31] The plaintiff's application is declined. Costs are reserved.

Christina Inglis Chief Judge

Judgment signed at 1.30 pm on 8 February 2022
