Employment Court of New Zealand

Davis v Commissioner of Police [2015] NZEmpC 38 (30 March 2015)

Last Updated: 15 April 2015

IN THE EMPLOYMENT COURT AUCKLAND

[2015] NZEmpC 38

EMPC 238/2014

IN THE MATTER OF	an application for a rehearing
BETWEEN	STEPHEN DAVIS Applicant
AND	THE COMMISSIONER OF POLICE Respondent

Hearing:	19 March 2015 (heard at Christchurch)
Appearances:	S Davis, in person E Child and R Groot, counsel for the respondent
Judgment:	30 March 2015

JUDGMENT OF JUDGE A D FORD

Background

[1] Mr Davis has applied for a rehearing of a long-running proceeding which was heard before Judge Perkins in June and July 2014. Mr Davis is a Police Constable currently stationed in Christchurch. The case involved two sets of proceedings where he sought remedies resulting from alleged disadvantage grievances. The first claims allegedly arose when Mr Davis was employed at Mangonui in the Northland Region and the others allegedly arose after he had been transferred to Christchurch. Both sets of proceedings were heard together by Judge Perkins, but for the convenience of witnesses the Northland matters were heard in Whangarei in June 2014 and the Christchurch claims were heard in Christchurch in July 2014.

[2] In his judgment dated 19 August 2014, Judge Perkins found against

Mr Davis, concluding that he had failed to establish that he had suffered the disadvantage grievances claimed and that the employment relationship problems

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were largely of his own making.1 In a subsequent judgment dated 23 October 2014, Judge Perkins made a costs award against Mr Davis amounting to $115,000 plus disbursements.2

[3] At the hearing before Judge Perkins, Mr Davis was represented by two partners from a specialist employment law firm in Christchurch. His senior counsel, Mr Goldstein, is highly experienced in the field of employment law and is a former member of the Employment Tribunal. Mr Davis appeared in person before me in relation to the rehearing application. He explained that the reason he applied for a rehearing instead of bringing review proceedings or seeking leave to appeal to the Court of Appeal, was because he had received legal advice to the effect that the judgment of Judge Perkins was "un-appealable".

[4] It was clear that Mr Davis had expended considerable time and effort in preparation for the hearing of his application. His

supporting affidavit dated

19 December 2014 was detailed and ran to 250 paragraphs. His written submissions, which he spoke to orally, were also comprehensive and thorough. I suspect, and indeed would hope, that after listening to the impressive submissions presented by counsel for the Commissioner, Mr Child, that Mr Davis would now have a better appreciation of some of the legal difficulties he faces in relation to his application for a rehearing. Nonetheless, I do recognise and compliment him on his diligence.

[5] I will not traverse the facts giving rise to the alleged grievances in any detail. They are fully canvassed in Judge Perkins' judgment. Mr Child appears to have succinctly encapsulated Judge Perkins' conclusions in these terms:3

In essence, the plaintiff had raised complaints with his superiors [during

2009], and was unable to accept the fact that managers had, repeatedly and at senior levels, rejected them. In Northland, his falling out with colleagues

and managers was so widespread that he needed to be moved [to

Christchurch]

... In Christchurch, from October 2011 the plaintiff began to make complaints about his new supervisor. Again, he refused to accept the conclusions managers formed about them.

1 *Davis v Commissioner of Police* [2014] NZEmpC 152 at [84].

2 *Davis v Commissioner of Police* [2014] NZEmpC 195 at [17].

3 Submission of respondent opposing application for a rehearing (22 March 2015) EMPC

238/2014 at [10], [14].

[6] Mr Davis is 44 years of age and is of Samoan/European descent. He grew up in South Auckland and when he was 14 he moved with his family to Christchurch. Before joining the police he had a variety of jobs including periods of working for the Christchurch City Council and Income Support (now the Ministry of Social Development). He joined the Police Force in 2002, moving back to Auckland. He is married with three children, although he told the Court that he and his wife have separated over matters relating to this litigation and some three weeks ago he was served with divorce papers. His wife has custody of the three children but Mr Davis has visitation rights.

The application

[7] The grounds upon which Mr Davis has made application for a rehearing are: (a) The Court was biased in its decision against the applicant.

(b) That the Court failed to consider relevant evidence and statements.

(c) That disparities in the respondent's evidence were ignored by the Court in making their (sic) decision.

(d) That some of the facts relied on by the Employment Court in its decision are incorrect and/or misinterpreted.

(e) That the employer's failure to meet its obligations were not given appropriate weight by the Court.

(f) The Court failed to take into account various factors and overlooked significant details.

(g) The Court failed to consider the Protected Disclosures Act 2000.

[8] Two other grounds were raised in the supporting affidavit dated

19 December 2014. The first was what Mr Davis described as a "crippling cost decision" in which approximately $135,000 (including disbursements) was awarded against him. The second ground was that new evidence had "come to light". It was explained to Mr Davis that the costs judgment was a separate judgment from the

substantive judgment dealing with his personal grievance claims and could not be relied on as a ground for a rehearing. Mr Child accepted, however, that new evidence could constitute grounds for a rehearing and, although counsel did not accept that there was new evidence in the present case, he did not object to the application being amended to include that particular ground.

[9] Normally an application for rehearing will be referred to and dealt with by the Judge who presided at the hearing but in this case, as soon as Judge Perkins noted the grounds relied upon, he advised the Registrar that it would not be appropriate for him to deal with the application and he gave directions for the file to be referred to another Judge.

The legal position

[10] The grounds upon which this Court may order a rehearing are set out in cl 5 of Sch 3 to the Employment Relations Act 2000 (the Act) which provides:

5 Rehearing

(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.

[11] On the face of it, this 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.4

[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

4 See *Autodesk Inc v Dyason (No. 2)* (1993) HCA 6; (1993) 173 CLR 300 cited in *Idea Services*

Ltd v Baker [2013] NZEmpC 24 at [37].

diligence have been discovered prior to the hearing, which is of such a character as to appear to be conclusive: *Hardie v Round.*5 A similar situation, albeit less common, may arise where a significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended: *Ports of Auckland Ltd v New Zealand Waterfront Workers Union*6 and *Yong t/a Yong and Co Chartered Accountants v Chin.*7 Other special and unusual circumstances will no doubt arise and each will fall to be considered on a case-by-case basis. 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.8

[14] The rehearing jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court or providing a backdoor method by which unsuccessful litigants can seek to re-argue their case.9

Discussion

Bias

[15] Mr Davis cited no authority in support of the proposition that allegations of bias can warrant the making of an order for rehearing. I must say that I have concerns about whether it is appropriate for an application alleging bias to be determined by the Judge against whom the allegations are directed or, for that matter, by one of the Judge's colleagues in the same forum. The notion does not sit comfortably alongside the fundamental principle that the Court should be independent and impartial. It seems to me both preferable and desirable that any challenge to a judgment based on allegations of bias should be referred to the Court of Appeal. Neither party has taken that point, however, and presumably the applicant is comfortable to have his bias allegations considered by myself.

[16] The thrust of the principal bias allegation made by Mr Davis was that the presiding Judge repeatedly showed impatience towards him while he was giving

5 *Hardie v Round* [2002] NZEmpC 23; [2002] 2 ERNZ 1 at [13].

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

7 *Yong t/a Yong and Co Chartered Accountants v Chin* [2008] ERNZ 1 at [27].

8 *Ports of Auckland Ltd v New Zealand Waterfront Workers Union,* above n 7, at [88]-[89].

9 *Autodesk Inc v Dyason*, above n 4, at 302-303 per Mason CG, cited in *Idea Services Ltd v*

Barker above n 4, at [37].

evidence and did not treat him with the "fairness, care and professionalism that all participants should be given." Mr Davis alleged that the Judge challenged his answers "in an interrogative way which was not how he treated other Court witnesses" and he interrupted him "at least 21 times while he was giving his evidence which no other witness was subjected to."

[17] The legal test for bias is now well established. The Supreme Court in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*10 confirmed that in *Muir v Commissioner of Inland Revenue,*11 the Court of Appeal had brought New Zealand law into line with the test for apparent bias applied in the United Kingdom and in Australia. The governing principle is that a judge is disqualified if a

fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

[18] In *Muir* the Court of Appeal made the point12 that the factual inquiry as to whether a judge was or may be seen to be biased should be rigorous in the sense that complainants should not "lightly throw the 'bias' ball in the air " and it should not lightly be accepted that a judge has put aside his or her professional oath or professional training. Mr Child cited another relevant passage from *Muir*, which he appropriately submitted was particularly apposite to the present case:13

It is common sense that people generally hate to lose, and their perception of a judge's perceived tendency to rule against him or her is

inevitably suspect. As Kenneth Davis has said, 'Almost any intelligent person will initially assert that he wants objectivity, but by that he means biases that coincide with his own biases' (Administrative Law Treatise (2 ed Vol 3 1978) at 378). Every judicial ruling on an arguable point necessarily disfavours someone - judges upset at least half of the people all of the time - and every ruling issued during a proceeding may thus give rise to an appearance of partiality in a broad sense to whoever is disfavoured by the ruling. But it is elementary that the judge's fundamental task is to judge. Indeed the very essence of the judicial process is that the evidence *will* instil a judicial 'bias' in favour of one party and against the other - that is how a court commonly expresses itself as having been persuaded.

10. *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72 at [3], [2010] 1 NZLR 35 (SC).

11 *Muir v Commissioner of Inland Revenue* NZCA 334[2007] NZCA 334; , [2007] 3 NZLR 495 (CA).

12 At [62] and [96] respectively.

13 At [99].

[19] To similar effect are the following observations made in the majority decision of the High Court of Australia in *Johnson v Johnson*14 a decision approved in both *Muir* and *Saxmere*:

Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.

[20] In my view, the conduct complained of in the present case falls well short of the test for establishing bias. I respectfully agree with the following analysis submitted by Mr Child:15

The judge's management of the hearing did not amount to bias. His interventions were reasonable and moderate, when viewed in the context of the entire hearing. They were for the relevant and proper purpose of keeping the proceedings clear and focused, or exploring the issues raised. The occasional comment on an answer during evidence did not exceed what can be expected by way of judicial participation during the course of hearing.

In the context of an 11-day hearing, where Mr Davis himself gave oral evidence for more than two days (and spanning more than 300 pages in the transcript) it is not surprising that from time to time the Judge interpolated an observation, or sought to keep matters focused, or had to direct the witness to answer a question more directly. The interventions were trivial.

Other specific complaints

[21] There were three particular matters Mr Davis raised before me which had clearly upset him in the course of the hearing of the two sets of proceedings. First, he was unhappy about having his brief of evidence accepted as read. Secondly, he was upset to be told by the Judge during the Whangarei hearing not to approach or pass notes to his lawyer. The third matter was that he had requested a delay for the commencement of the Christchurch hearing because of his poor health but his

application had been turned down. I deal briefly with each matter in turn.

14 *Johnson v Johnson* [2000] HCA 48, (2000) 201 CLR 488.

15 Submissions of respondent opposing application for a rehearing (12 March 2015) EMPC

238/2014 at [55]-[56].

[22] Mr Child said that the hearing took place over a total of 11 days in the two different locations and it would have taken significantly longer but for an agreement between the Judge and the parties to take the witnesses' written briefs of evidence "as read". Counsel said that there were three separate written briefs of evidence for Mr Davis, one of which alone ran to 38,000 words.

[23] In the circumstances, it is easy to understand why the Court would want to explore with counsel the option of taking the evidence as read. No criticism can be directed at the Judge in this regard because both parties consented.

[24] Without casting any reflection on Mr Goldstein, because the Court has not heard from him on the matter, I make the general observation that it is important for counsel to take clear instructions on an issue of this nature. Mr Davis explained that he was unsure how to handle the situation because to him it did not necessarily mean that the Judge "had taken on board the content of [the] briefs". The implication was that this was the reason for some of the long-winded and discursive answers he had given in cross-examination which he had been criticised for. Allowing Mr Davis to read his briefs of evidence would also have provided him the opportunity to better understand the workings of a Court he said that he was completely unfamiliar with. Having listened to him present this particular submission, I accept that Mr Davis was genuinely aggrieved over the decision made to take the briefs of evidence as read.

[25] The second specific matter Mr Davis complained about regarding the direction from the Judge preventing him from passing notes to his lawyer was not recorded in the transcript available at the hearing before me. I indicated to the parties that I would endeavour to obtain a transcript of the exchange in question. The Registrar has subsequently been able to track the relevant passage in the recording

system and has arranged for a transcription to be made available. The exchange occurred in the course of the Whangarei hearing during the cross-examination of Mr Parry Neho, one of Mr Davis' witnesses:

MR GOLDSTEIN: Barry Knightsbridge?

THE WITNESS: Ah?

MR GOLDSTEIN: You don't know?

THE WITNESS: No sorry.

JUDGE PERKINS: Mr Goldstein I've put up with it right throughout the trial but when I agreed to Mr Davis sitting behind you – it is extremely disruptive and we're trying to concentrate on what is going on here and every 5 minutes your client is coming around with notes. Now the way to deal with this is that Mr Davis writes down on a big bit of paper what his concerns are and when we have an adjournment or the end of a witness or some break then he can give it to you.

MR GOLDSTEIN: Yes Your Honour I understand.

JUDGE PERKINS: Mr Davis you are to stay in your seat from now on okay?

MR DAVIS: Yes Sir.

JUDGE PERKINS: It is terribly disrupting when counsel is trying to concentrate on cross-examination we've got that nonsense going on.

MR GOLDSTEIN: Thank you Sir.

[26] The direction was quite innocuous in my view and the reason for it was explained by the Judge. It is significant that Mr Davis' counsel took no exception but, on the contrary, said he understood the ruling.

[27] Likewise, in relation to the third specific matter Mr Davis raised regarding his unsuccessful application to obtain an adjournment of the commencement of the Christchurch hearing. Mr Davis was not representing himself at that stage but he had senior and experienced counsel acting for him. Mr Child explained that the request for the adjournment came some two months prior to the proposed hearing date. I have no doubt that if Mr Goldstein considered that the applicant's case could have been prejudiced in any way because of the failure to obtain an adjournment then he would have taken the matter further. I see no substance in this complaint.

Evidentiary matters

[28] The next five grounds relied upon by Mr Davis in support of his rehearing application are all matters relating to the facts of the substantive proceeding. In his supporting affidavit Mr Davis has spent many pages going through Judge Perkins' judgment paragraph by paragraph highlighting evidentiary matters which he alleges were dealt with inadequately, insufficiently or straight out wrongly. As Mr Child expressed it, Mr Davis: "cherry-picks numerous minor evidential details that he

thinks were overlooked or misunderstood, or that he thinks are of more significance than the Judge did."

[29] As the Court of Appeal stated in *Moodie v Employment Court:*16

The limited nature of both the appeal provisions and those relating to review do not permit a second look at factual findings of the Employment Court. That is an aspect of the unique nature of the Employment Court process. It is not acceptable for the applicant to seek to circumvent this restriction on any form of second look at factual matters by converting a dispute about factual findings into an allegation of bias and bad faith.

[30] That is similar to the situation in the present case. Mr Davis is effectively seeking to circumvent the restriction on appeals from this Court on factual matters under the guise of a rehearing application based on allegations of bias and evidential matters. That, he is not permitted to do.

Protected Disclosures Act

[31] The next ground relied upon by Mr Davis is that the Court failed to consider the Protected Disclosures Act 2000. I heard from Mr Davis on this issue. I will not repeat his submissions. I see nothing in them that could form a proper basis for a rehearing application. There was no mention of the Protected Disclosures Act 2000 in Judge Perkins' judgment but Mr Davis sought to rely on it as an evidentiary matter which he alleged his employer should have informed him about at one stage when he was stationed in Christchurch. To that extent it was a continuation of the factual issues I have dealt with above and dismissed. If, on the contrary, the submission involved a point of law then I am confident that Mr Goldstein would have given it due consideration.

New evidence

[32] The final ground relied upon in support of the rehearing application is the alleged existence of new evidence. As noted above, in certain circumstances such a ground can warrant the ordering of a rehearing. Under this head, Mr Davis made some submissions which I have already dealt with. The thrust of his remaining

submission was that, if permitted, he would summon further witnesses who "were

16 *Moodie v Employment Court* [2012] NZCA 508 at [38].

too afraid to come forward because of job repercussions" but no names have been provided and there are no supporting affidavits from the people involved confirming what their evidence would be. As Mr Child correctly submitted, Mr Davis has not attempted to properly explain or particularize the alleged new evidence and his mention of it is vague, non-specific and hearsay.

[33] As the authorities referred to in para [13] of this judgment emphasise, if reliance is placed upon new or fresh evidence then the Court must be able to determine its credibility and needs to be satisfied that it could not, with reasonable diligence, have been discovered before the hearing. I am not satisfied on either of those matters and I, therefore, reject the ground and the supporting submissions.

Conclusion

[34] Mr Davis fails in his claim for a rehearing. The respondent is entitled to costs but I am aware that there is a significant costs order already outstanding which has not been complied with. If costs on the present application are sought then Mr Child is to file submissions within 28 days and Mr Davis will then have a like period of time in which to file submissions in response.

A D Ford

Judge

Judgment signed at 11.55 am on 30 March 2015
