



Employment Court of New Zealand

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Zhang v Telco Asset Management Limited [2019] NZEmpC 175 (28 November 2019)

Last Updated: 5 December 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[\[2019\] NZEmpC 175](#)

EMPC 58/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for recall
BETWEEN	YAN ZHANG Plaintiff
AND	TELCO ASSET MANAGEMENT LIMITED Defendant

Hearing: (On the papers)

Appearances: Y Zhang, in person
T Cleary, counsel for the
defendant

Judgment: 28 November 2019

JUDGMENT OF B A CORKILL

[1] The defendant has applied for recall of the Court's judgment of 20 November 2019.¹ In that judgment, the slip rule was applied to correct three inadvertent errors contained in the Court's substantive judgment of 23 October 2019.²

[2] One of these errors related to an issue as to contributory conduct under [s 124](#) of the [Employment Relations Act 2000](#) (the Act). In the substantive judgment, I found that the appropriate range for such conduct was between 15 and 25 per cent; and that the Employment Relations Authority had accordingly erred in determining that 50 per

¹ *Zhang v Telco Asset Management Ltd* [\[2019\] NZEmpC 168](#).

² *Zhang v Telco Asset Management Ltd* [\[2019\] NZEmpC 151](#).

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cent was the correct figure. My conclusion was expressed in that way, as I was dealing with a non-de novo challenge where an issue arose as to whether the Authority had adopted an erroneous approach.

[3] At para [149] I said the correct figure was 20 per cent; at para [173](c), I inadvertently said the correct figure was 25 per cent.

[4] Mr Zhang raised the issue with the Court. In response, Mr Cleary filed a memorandum stating that contributory conduct should be set at 25 per cent, not at 20 per cent. No further reasons for the submission were advanced, and no indication was given that counsel wished to advance further submissions.

[5] In the judgment which I then issued, I corrected para [149] to 20 per cent, as that reflected the Court's intentions.³

[6] Mr Cleary's application for recall stated that the Court issued its judgment under the slip rule without hearing from the defendant as to why the figure of 25 per cent was correct. He argued that the Court should have adopted the figure most favourable to the defendant, 25 per cent, and that this flows from the Court's finding in *Xtreme Dining Ltd v Dewar* when it stated:⁴

A non de novo hearing is in the nature of an appeal. The challenger or plaintiff is required to show that the Authority's determination was wrong.

[7] Mr Cleary went on to refer to the well-known principles of recall in *Horowhenua County v Nash (No 2)*⁵ and *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*.⁶ There is no doubt that the Employment Court possesses the power to recall judgments.⁷

[8] I am not satisfied that grounds for recall are made out. As already mentioned, I concluded that the Authority had erred, having regard to my assessment of the

³ *Zhang v Telco Asset Management Ltd*, above n 1, at [3] and [6].

⁴ *Xtreme Dining Ltd (T/a Think Steel) v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628 at [16].

⁵ *Horowhenua County v Nash (No 2)* [1968] 5 NZLR 632 (CA).

⁶ *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [2].

⁷ *Waikato District Health Board v New Zealand Nurses' Organisation* [2017] NZCA 247, [2017] ERNZ 378.

appropriate range. Exercising the discretion which the Court has in such circumstances, I adopted the mid-point of the range, 20 per cent. The corrected judgment reflects that conclusion.

[9] The same reasoning was adopted with regard to compensation under [s 123\(1\)\(c\)\(i\)](#) of the Act. The Authority had fixed an award of \$10,000. I concluded that the correct range was \$20,000 to \$25,000, and that the Authority had erred.⁸ In exercising my discretion, I considered the appropriate figure was the mid-point of the range, \$22,500, subject to contribution.⁹

[10] In short, in the circumstances of this particular case I considered the mid-point approach was fair to both parties in both instances.

[11] The point now raised by Mr Cleary is a substantive one relating to the exercise of the Court's discretion where it is found on a non-de novo challenge that the Authority has erred; it is submitted that a position which is most favourable to the defendant should be taken. Whilst it may be open to a court to adopt such an approach, that is not what I considered was fair and reasonable in this instance.

[12] Had Mr Cleary outlined the issues now contained in the application for recall, I would not have accepted his submission.

[13] To summarise, the ground raised does not concern an inadvertent error; it is in substance an appeal point. The recall procedure is not an appropriate mechanism for consideration of this point. I am not satisfied that special circumstances exist to justify the recall and alteration of the judgment of 20 November 2019.

[14] The application for recall is declined.

⁸ *Zhang v Telco Asset Management Ltd*, above n 2, at [133].

⁹ At [134].

[15] There is no issue as to costs.

B A Corkill Judge

Judgment signed at 4.30 pm on 28 November 2019