

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2011] NZEmpC 58
CRC 28/09**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority
AND IN THE MATTER OF a request to have a judgment recalled

BETWEEN GREGORY MARK GOODFELLOW
Plaintiff

AND BUILDING CONNEXION LIMITED
TRADING AS ITM BUILDING CENTRE
Defendant

Hearing: on the papers - memoranda received 10 February 2011 and 29 April
2011

Judgment: 3 June 2011

JUDGMENT OF JUDGE A A COUCH

[1] This judgment concerns a request by counsel for the plaintiff that I recall my costs judgment¹ in order to add an award of costs relating to the proceedings before the Employment Relations Authority.

[2] The substantive matter before the Court was the plaintiff's personal grievance that he had been unjustifiably dismissed. The Authority determined that he had not been dismissed.² He challenged that determination and there was a hearing de novo on 28 and 29 June 2010. At the conclusion of that hearing, I gave an oral decision, the last two paragraphs of which were:³

¹ [2010] NZEmpC 153.

² CA 170/09, 9 October 2009.

³ [2010] NZEmpC 82.

[51] In summary then my conclusions are:

- (a) Mr Goodfellow was dismissed.
- (b) That dismissal was unjustifiable.
- (c) The company is ordered to pay Mr Goodfellow \$8,000 by way of compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.
- (d) The company is also ordered to pay Mr Goodfellow \$19,070 as reimbursement of lost remuneration.
- (e) The determination of the Authority is set aside and this decision stands in its place.

[52] Costs are reserved. The parties are urged to agree costs if possible. If they are unable to do so, Mr Zindel is to file and serve a memorandum within 21 days after today. Mr Wilson is then to have a further 14 days in which to respond.

[3] Counsel duly filed memoranda. On behalf of the plaintiff, Mr Zindel filed two memoranda dated 22 July 2010 and 26 July 2010. Mr Wilson then filed a memorandum in response dated 5 August 2010. I gave my costs decision on 22 November 2010.

[4] In his memoranda, Mr Zindel only sought an award of costs in relation to the conduct of the proceeding before the Court. He made no mention of the proceeding before the Authority and did not seek any order in relation to that proceeding. He now says that this was an error and asks that my costs decision be recalled and amended to include an award of costs in relation to the Authority proceeding. In support of that request, Mr Zindel has filed a memorandum to which are attached several documents. Mr Wilson has filed a memorandum in response opposing a recall and any further order.

[5] The events which followed my substantive judgment are summarised in counsel's memoranda. Costs were not fixed by the Authority. I surmise this was because the Authority's substantive determination was challenged. After filing his memoranda in the Court, Mr Zindel sent a memorandum to the Authority, seeking an award of costs in relation to its proceedings. There followed an exchange of emails between counsel and the Senior Support Officer of the Authority in Christchurch, Mr Gallen, about whether the Authority had jurisdiction to make an order for costs after its substantive determination had been set aside. Mr Gallen advised Mr Zindel to

make any request for costs related to the Authority proceeding to the Court. On 30 July 2010, Mr Zindel replied by email to Mr Gallen and Mr Wilson in which he said:

I'm content if the Court makes the costs determination for the Authority case but it should have the briefs and submissions filed there to assess the work done. Or, if counsel agree that it was at least an "above-average case" in terms of work done for a one day investigation.

[6] Mr Wilson did not make the concession sought. It appears Mr Zindel then took no further steps either before or after Mr Wilson filed his memorandum of 5 August 2010. It was only on 14 February 2011 that Mr Zindel filed his memorandum asking the Court for the first time to consider the issue of costs relating to the Authority proceeding. That was more than six months after he had decided that the issue should be dealt with in the Court and more than two months after my costs judgment.

[7] In his memorandum, Mr Zindel says:

7. It is respectfully requested that the costs judgment of 22 November 2010 effectively be recalled to the extent that the decision failed to address costs in the Employment Relations Authority or, alternatively, that the Court issue an addendum judgment to deal with costs in the Authority.

[8] No evidence is provided in support of this request. In particular, there is no evidence to explain why no further steps were taken on behalf of the plaintiff after 30 July 2010 and before I gave my decision on costs. Rather, Mr Zindel simply relies on the fact that my judgment did not deal with costs in the proceeding before the Authority.

[9] Equally, Mr Zindel does not deal in his memorandum with the nature and extent of the Court's jurisdiction to recall judgments or to issue the sort of "addendum judgment" he seeks in the alternative.

[10] Mr Wilson helpfully canvasses these issues in his memorandum. As he correctly notes, the principles applicable to the exercise of the Court's discretion to recall a judgment were fully discussed by the Chief Judge in *Gilbert v Attorney-General in Respect of the Chief Executive of the Department of Corrections (No 1)*.⁴

⁴ [2006] ERNZ 1.

The Chief Judge adopted the summary of the circumstances in which a judgment may be recalled given by Wild CJ in *Horowhenua County v Nash (No 2)*⁵ which has frequently been adopted and may be summarised as follows:

- (a) Since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and higher authority.
- (b) Where counsel have failed to draw the Court's attention to a legislative provision or relevant authoritative decision.
- (c) Where, for some other "very special reason",⁶ justice requires that the judgment be recalled.

[11] This case clearly does not fall within either of the first two circumstances. I must therefore consider whether there is a "very special reason" to recall the judgment in this case. I am guided in doing so by some of the principles summarised by the Chief Judge in the *Gilbert* decision:⁷

- (a) Recall will usually be appropriate where there has been a slip or inadvertent error in reducing the judgment to writing so that the text does not accurately mirror the judicial intent.
- (b) Recall may be appropriate where the Court has failed to deal with a matter which was properly before it.
- (c) The Court should be very reluctant to recall a judgment to deal with issues which were not before the Court but which the parties, with due diligence, could have placed before the Court.
- (d) Recall will not be appropriate if its purpose or effect is to modify or significantly change the outcome of the judgment as opposed to the reasons for it.

⁵ [1968] NZLR 632.

⁶ At 633.

⁷ See [21] and [26]-[29].

- (e) The extent of any delay by the party seeking recall and whether that delay is explained will be relevant.

[12] Applying these principles to this case as it currently stands, I am bound to decline the plaintiff's request to recall my costs judgment. The issue of costs relating to the Authority proceeding was not before the Court. The plaintiff had ample opportunity to properly raise that issue but did not do so. The plaintiff's reason for seeking recall of the judgment is to seek an additional award of costs of \$6,000. If ordered in addition to the award of \$7,200 already made, that would significantly change the outcome. The plaintiff's delay of more than two months after my costs judgment was delivered was significant and is entirely unexplained.

[13] The principal reason the plaintiff is in his current position is that, although Mr Zindel correctly accepted that the Court had jurisdiction to fix costs in relation to the Authority proceeding and that he ought to take that course rather than seeking a costs determination from the Authority, no such application was ever made to the Court. Why this occurred is not explained but it may not be the end of the matter. While it was correct that the Court had jurisdiction to fix costs relating to the proceeding in the Authority following a successful challenge,⁸ that did not necessarily mean that the Authority no longer had jurisdiction to do so. Having failed to take the opportunity to have the Court decide costs in the Authority, it remains open to the plaintiff to seek a costs determination from the Authority. If he now chooses to do that, however, the plaintiff should expect that the defendant may say that any award made should be reduced because it has been unnecessarily put to the expense of involvement in two costs processes.

[14] The fact that the plaintiff still has available to him the option of seeking a costs award from the Authority is another very strong factor militating against recall of my costs judgment.

[15] In these circumstances, I comment only briefly on Mr Zindel's alternative proposition that I should issue an "addendum judgment" to deal with costs in the proceeding before the Authority. Where, as in this case, the Court has finally

⁸ See *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 at [13].

disposed of all issues before it without reservation, I doubt whether it has jurisdiction to hear and decide a further issue which could have been raised earlier. If it does, that jurisdiction would need to be exercised according to very similar principles to those applicable to recalling a judgment.

[16] The plaintiff's application is dismissed. The defendant is properly entitled to contribution to the costs it has incurred in having Mr Wilson prepare the memorandum he has filed on its behalf. Rather than prolong the matter by seeking further submissions, I fix those costs now. The plaintiff is to pay the defendant \$600 by way of costs.

A A Couch
Judge

Signed at 10.00 am on 3 June 2011