IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 89
EMPC 117/2016

IN THE MATTER OF	an application for recall of judgment or rehearing
BETWEEN	NEW ZEALAND NURSES ORGANISATION Applicant
AND	WAIKATO DISTRICT HEALTH BOARD Respondent
AND	CENTRAL REGIONS TECHNICAL ADVISORY SERVICES LIMITED Intervener

Hearing:	24 June 2016 (Heard at Auckland)
Appearances:	R Harrison QC, counsel for applicant P David QC and A Russell, counsel for respondent B Scotland, counsel for interevener
Judgment:	12 July 2016

JUDGMENT OF CHIEF JUDGE G L COLGAN

Nature of application for recall/rehearing

[1] The New Zealand Nurses Organisation (the NZNO) applies to have the Court recall its judgment issued on 4 May 2016[1] or, alternatively, seeks a rehearing of its claims against the Waikato District Health Board (WDHB). WDHB opposes those applications, and is supported in its opposition by the intervener.

[1] *NZ Nurses Organisation & Panettiere v Waikato District Health Board* [2016] NZEmpC 50.

[2] The Court's substantive judgment was issued by his Honour Judge AD Ford on 4 May 2016, very shortly before the Judge retired from the Bench. The NZNO says that whilst the judgment addresses Marissa Panettiere's claim to a retirement gratuity (by dismissing that claim), NZNO as a separate party had put before the Court related disputed issues which the Judge did not decide. The NZNO says that it is entitled to have those issues determined and it is in the broader interests of justice to do so now.

[3] A recall of the Court's judgment for the purpose of correcting an error would usually involve the trial Judge considering the NZNO's claim and reissuing his/her judgment. If the NZNO is entitled to a rehearing, the Employment Relations Act's powers of rehearing would permit another Judge to consider and determine its claim if it is found that the original judgment did not do so, but ought to have done.

The Authority's determination appealed from (challenged)

[4] Ms Panettiere had worked for some years as a midwife with WDHB. She resigned from her employment with WDHB but subsequently continued to practise as a midwife, principally on her own account, but for short periods as an employee of organisations other than district health boards (DHBs). Ms Panettiere claimed what she said was her entitlement to a retiring gratuity under the collective agreement which had governed her employment with WDHB. It refused to consider her application for two reasons. It said that she had not retired so was not eligible for a retiring gratuity but, in any event, it said that she had insufficient continuity of service with it to meet the qualifying threshold under the collective agreement.

[5] Ms Panettiere was supported in her claim for a retiring gratuity by the NZNO which also wished the Authority to determine a controversial matter of interpretation, application or operation of the collective agreement in respect of what was meant by the phrase "retiring from the organisation". This is a qualifying factor for the payment of a gratuity. Ms Panettiere was the second applicant and the NZNO the first applicant in proceedings which were issued in the Authority. The NZNO's lawyers acted also for Ms Panettiere and the relevant central organisation of DHB employers sought, and was granted, leave to be heard in the proceeding as intervener

because of the significance to DHBs generally of the disputed question advanced by the NZNO.

[6] The Authority concluded that although Ms Panettiere met the threshold requirements of service, which WDHB contested, she had not "retired" in the sense of ceasing altogether work in her field and so was not eligible for consideration for a gratuity. In these circumstances, both parties challenged the Authority's conclusions that were adverse to them. These challenges came before the Employment Court (Judge Ford), although as separate challenges to the Authority's determination, with each party having elected to challenge under s 179 of the Employment Relations Act 2000 (the Act) other than by hearing de novo. The challenges were heard together.

[7] It is instructive to refer to the Authority's determination issued on 27 January 2015 which was the subject of challenge and cross-challenge by all parties.[2] The Authority's summarised conclusion at the outset, relating to the NZNO's dispute claim, was that:

> [Ms] Panettiere did not qualify for payment of a retirement gratuity at the end of her employment with Waikato District Health Board because she was continuing to work elsewhere as a professional midwife.

[8] Thus, it may be seen that the Authority did decide the issue that the NZNO brought to it as a dispute, albeit by reference to Ms Panettiere's case that was also before it. It concluded, in the foregoing summary, that a former employee who continued to work in the same professional capacity did not "retire" and was, thereby, not entitled to a "retirement gratuity". The NZNO had argued for an interpretation to the contrary: it subsequently sought, by a challenge to the Employment Court, to have that interpretation re-examined and re-determined.

[9] The Authority's determination then records:[3]

> The New Zealand Nurses Organisation (NZNO) and Marissa Panettiere pursued a dispute with Waikato District Health Board (WDHB) over the interpretation, application and operation of some clauses in the 2012-[15]

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[2] *New Zealand Nurses Organisation & Panettiere v Waikato District Health Board* [2015] NZERA Auckland 18.
[3] At [1].

> Nursing and Midwifery Multi-Employer Collective Agreement (the MECA) between District Health Boards and NZNO.

[10] The Authority recorded WDHB's denial that Ms Panettiere's employment history met the requirements of the definition of "service" in the MECA, as well as WDHB's contention that she "had resigned rather than retired from its employment so did not qualify for the gratuity in any event … because she continued to work as a professional midwife elsewhere."[4] This latter argument was supported in the Authority's conclusion, and the Authority's determination thereon, that the NZNO sought to have the Employment Court re-decide, and on which it now still seeks to obtain a judgment.

[11] In challenging the Authority's determination about the interpretation, application or operation of the MECA's retirement gratuity provisions, the NZNO relied on s 179 of the Act. This allows a party who was dissatisfied with a determination of the Authority to elect to have the matter heard by the Court. The NZNO was required to specify the determination or the part of the determination to which its election related. It did so in its statement of claim by specifying the part of the Authority's determination which found in WDHB's favour on the question of the interpretation of the MECA dealing with retirement gratuities. The NZNO did not identify its challenge as including that part of the Authority's determination finding in Ms Panettiere's favour on what might be called the gate keeping or service qualification issue, that is whether her service with WDHB qualified her to apply for a retiring gratuity. WDHB's cross-challenge related to the issue on which the Authority had found for Ms Panetierre, that her service qualified her for consideration for a gratuity.

The Court's judgment

[12] In his judgment of 4 May 2016, Judge Ford concluded that, as a matter of interpretation of the relevant qualification clause in the collective agreement, Ms Panettiere did not meet the length of service qualification for a gratuity. In doing so,

[4] At [3].

he upheld WDHB's cross-challenge to the Authority's determination that Ms Panettiere had attained the length of service qualification.[5]

[13] The Judge concluded:[6]

> … I dismiss the plaintiffs' [the NZNO's and Ms Panettiere's] challenge and uphold the defendant's cross-challenge based on the cut-off date issue. Having reached this conclusion, I do not find it necessary to go on to consider whether Ms Panettiere's voluntary resignation in 2012 amounted to a 'retirement' within the meaning of the retirement gratuity contained in Appendix 2(a) of the MECA.

[14] So, in my conclusion, the Court was faced with a challenge brought by the NZNO against that part of the Authority's determination dismissing the NZNO's own dispute, but with which the Court did not deal other than by dismissing it as a direct consequence of its dismissal of Ms Panettiere's claims.

[15] The applicant's essential argument in support of recall or rehearing is that the Court's decision to terminate the case, by finding Ms Panettiere's ineligibility to a retirement gratuity in any event, did not deal with the NZNO's independent challenge to the Authority's determination. This was the broader question of the meaning of the phrase "retiring from the organisation" in relation to gratuities under the relevant MECA. The NZNO says that its interest is in obtaining a ruling on the Authority's unfavourable (from its point of view) interpretation of "retirement" and "retiring". It says this is in the interests of its wider membership in particular, and other eligible employees who wish to know where they stand when contemplating resignation or retirement from not only WDHB but other DHBs who are employer parties to the MECA and subject to materially similar provisions.

[16] Judge Ford did dismiss the NZNO's challenge to the Authority's determination, but not on its merits. The Judge dismissed Ms Panettiere's own challenge, having decided WDHB's cross-challenge by upholding that. In this sense, therefore, the NZNO's challenge to the Authority's determination remains a live issue that the Judge decided not to determine (except by dismissing the dispute from further consideration) in his judgment of 4 May 2016.

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[5] At [64].
[6] *NZNO & Panettiere v WDHB*, above n 1, at [49].

The statutory rehearing power

[17] The Court's power to order a rehearing is set out in cl 5 of sch 3 to the Act. The power includes ordering a rehearing upon such terms as the Court thinks reasonable: see subcl (1). Sub-clause (6) provides that a rehearing need not take place before the Judge by whom the proceedings were originally heard. That will allow for the exigencies of this case of the retirement and expiry of the temporary warrant of the Judge before whom the proceedings were originally heard. The power to order a rehearing is discretionary and broad. There is, by contrast, no express power to recall a judgment.

[18] Counsel submitted that there is no longer any statutory procedure for rehearings under the High Court Rules, which are the default procedural provisions for the Employment Court via reg 6 of the Employment Court Regulations 2000. The closest analogy in the High Court is now r 11.15 referring to verdicts given by juries in civil trials. The presiding Judge may reserve leave for either party to apply to set aside the judgment or for another judgment. A brief consideration of the Rules tends to confirm the accuracy of that submission, although previously a power under r 494, that and an equivalent District Court provision have now been deleted.

[19] In cases such as this, the High Court is asked by parties to exercise its inherent power to "recall" a judgment, the first of the processes invoked by the NZNO in this case. There are many cases of applications for recall, even of judgments of the Supreme Court, although few, if any, of these are successful, principally because they amount only to a wish to re-litigate already-decided questions where there is no further appeal pathway.

[20] Although without analysis of its constitutional power to do so, the Employment Court has, from time to time, recalled judgments to correct errors or omissions in those judgments. Such instances include not only to apply what is known commonly as 'the slip rule', that is to correct typographical errors.[7] Recalls are also made where, for example, the Court has overlooked dealing with costs. I

[7] For a recent (and successful) example, to correct the word "relevant" to the word "irrelevant" in a judgment, a typographical error.

have no doubt that the Employment Court, as a court of record, possesses an inherent power to recall and correct judgments in this way too,[8] as is probably illustrated by general recourse to, and acceptance by and among, litigants and their lawyers.

[21] As compared to the inherent power to recall a judgment for error correction, the statutory power of the Employment Court to rehear a case will generally be applicable to more serious and significant errors or omissions than typographical slips or inadvertent omissions. The (albeit qualified) phrase "miscarriage of justice" appears frequently in the judgments of such cases, confirming this distinction.

The case law on rehearings

[22] A jurisprudence of the ways in which rehearing applications are dealt with has developed and the leading and most authoritative case in employment law is the judgment of the Court of Appeal in *Ports of Auckland Ltd v New Zealand Waterfront Workers Union.*[9] The statutory basis for a rehearing was then s 125(1) of the Employment Contracts Act 1991 which was materially identical to the current provision, albeit the latter now being contained in a schedule to the Act.

[23] In *Ports of Auckland* the likely reason for seeking a rehearing of an interpretation by a single Judge of four collective employment contracts, was because there was no statutory right of appeal to the Court of Appeal against that original judgment. The grounds in support of seeking a rehearing were that the judgment at first instance contained errors of law and fact. A full Court of three judges (but not including the original trial judge) allowed a rehearing.[10]

[24] The Court of Appeal essentially endorsed the full Court's approach to whether a rehearing should be granted, although expanded upon the latter's reasons in an explanatory way. It is, therefore, necessary to go back to the full Employment Court's reasoning to understand the explanation of it on appeal.

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[8] See, for instance, *Mutual Shipping Co v Bayshore Shipping Co* [1985] 1 All ER 520 (CA) at 528.
[9] *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* [1995] 2 ERNZ 85 (CA).
[10] *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* [1994] 1 ERNZ 604 (EmpC).

[25] The full Court held:[11]

> … there are no restrictions on the grant of a rehearing except as to time. It is undesirable that the Court should supply restrictions that appear nowhere in the statute. However, every judicial discretion must be exercised according to clear principle.
>
> What considerations should move the Court to order to be reheard a case that has already been concluded? Obviously if a positive finding can be made that a miscarriage of justice has taken place that would be enough. The likelihood of a miscarriage of justice should also be enough, especially in a case such as this where contrary to the Court's usual practice the question of rehearing or no is separated from the rehearing. The particular species of miscarriage of justice will include those listed in *Cavalier Carpets* but is not confined to them. A mere possibility or suspicion is however not enough to warrant disturbing a considered judgment reached after a full and well exercised opportunity to the parties to be heard.
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> Our view is that in general the Court must look toward the possibility of a miscarriage of justice, but should not look for proof of that possibility to a high standard. For balance, it must give equal weight to the importance of certainty in litigation and the right normally enjoyed by a successful litigant, particularly in dispute resolution cases like this one, to enjoy the fruits of a judgment in its favour.

[26] The Court of Appeal rejected a submission that the proper test was whether there was a "substantial risk" of miscarriage of justice.[12] Taken together, the foregoing paragraphs from the judgment of the full Court were held to be correct. Interpreting the full Court's phrase "look toward the possibility" in the final paragraph quoted above, the Court of Appeal considered this to mean that the Employment Court should have regard to the degree of possibility, where it is something less than a probability but more than a mere possibility. The Court of Appeal confirmed that Parliament had chosen to confer on the Employment Court a discretion "in wide terms" to allow rehearings.[13]

[27] The Court of Appeal considered that the full Employment Court was entitled, in determining to grant a rehearing, to take the view that it was inappropriate for the Judge at first instance to consider one situation in which a legal obligation might apply, without considering another situation. The Court of Appeal continued:[14]

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[11] At 607.
[12] *Ports of Auckland Ltd*, above n 9, at 88.
[13] At 88.
[14] At 89-90.

> One would expect both to be treated in a consistent manner, unless there was some valid reason to do otherwise. It was unsatisfactory to assume the correctness of an existing practice on which no ruling was sought, and then to use it as the basis for deciding what was to apply in the other situation. The full Court was therefore justified in concluding that a rehearing was appropriate, so that both situations could be considered together. …

[28] For completeness, and because it was referred to and approved by the Court of Appeal in *Ports of Auckland*, I will also consider briefly the judgment of the Labour Court in *Cavalier Carpets NZ Ltd v NZ (except Taranaki etc) Woollen Mills etc IUOW.*[15]

[29] Pertinently for the purposes of this case, the grounds on which a rehearing was sought in *Cavalier Carpets* included that the Court had not determined a material issue in the proceedings. That was an application to amend the statement of claim to include a claim for compensation which was said to have prevented Cavalier from addressing that claim or seeking an adjournment. The Court determined that "the overriding consideration" on an application for rehearing under what was then s 302 of the Labour Relations Act 1987, was "to avoid a miscarriage of justice" which "[sat] comfortably" with the Court's equity and good conscience jurisdiction.[16] The Court decided that a rehearing would be granted, but only in part; one of the two issues, had it been addressed, would not have changed the outcome of the case. The Court determined, however, that its failure to deal with the application to amend the statement of claim to include a claim for compensation was a miscarriage of justice in that it deprived the employer of an opportunity of adducing relevant evidence and may have unfairly taken it by surprise. In that regard, the Court's admitted failure to decide an issue, resulting in a miscarriage of justice, is analogous to this case currently before me.

[30] I must and will follow in this case, the judgment and reasoning of the Court of Appeal in *Ports of Auckland*.

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[15] *Cavalier Carpets NZ Ltd v NZ (except Taranaki etc) Woollen Mills etc IUOW* [1989] 2 NZILR 378 (LC).
[16] At 381.

The significance of the MECA dispute

[31] It is appropriate to deal with the importance or otherwise of the issue that the NZNO seeks to have decided on its merits, because both WDHB and the intervener in opposing the application for rehearing, now seek to minimise significantly its importance. They say, in effect, that Ms Panettiere's claim has been dismissed and that the NZNO should await another similar claim if it wishes to raise a fresh dispute in the Authority which might then be able to be removed to the Court for hearing. WDHB and the intervener say that the issue for decision is a narrow one in the sense that the particular wording of the retirement gratuity clause is confined to WDHB and its employees covered by the particular MECA.

[32] The precise retirement gratuity provision relied on by Ms Panettiere (in the Authority) and the NZNO (in the Authority and on this application for rehearing) is unique to staff employed under the collective agreement with the WDHB. However, very similar and arguably materially identical provisions apply to staff employed by the 19 other DHBs across New Zealand covered by the collective agreement and, it appears, other staff under other collective agreements employed by DHBs. This issue may extend, perhaps, even to other similar entities that were formerly local or central government agencies.

[33] The widespread and important nature of the question in dispute (What does the phrase "retirement from the organisation" mean?) is illustrated, as much as anything, by the successful application of Central Regions Technical Advisory Services Ltd (CRTASL) to join the proceedings before Judge Ford, and the evidence tendered by it in support. CRTASL's application for leave to intervene stated that it is a limited liability company whose sole purpose is to provide shared workforce and employment relations services to 20 DHBs including the WDHB. It is owned by several DHBs and is their designated representative pursuant to s 236(2) of the Act in relation to bargaining for multi-employer collective agreements. It said, through counsel, that other DHBs are bound by similar clauses in their collective agreements and collective agreements with other unions, and face potential financial consequences depending on the Court's disposition of the proceeding.

[34] CRTASL's Manager for Strategic Workforce Services, Michael Prior, deposed before Judge Ford that the other five DHBs which own the company, and the other 14 DHBs nationally, wished to be heard because the clauses and matters at issue were "highly relevant" to a number of them, and decision of the issues will have a material impact on the funding of retiring gratuities to their employees. Mr Prior deposed to the fact that in addition to the parties covered by the collective agreement in this case, other DHBs had almost 100 current collective agreements to which they were parties, with 18 different unions, 21 of which collective agreements are multi-employer collective agreements, and 75 either single-employer collective agreements or multi-union collective agreements. Similar clauses are included in many of these.

[35] Judge Ford granted the intervener that status by consent, or at least without opposition, because of a general recognition of the importance of the question at issue and the desirability of having a settled and authoritative interpretation of retirement gratuity clauses. The costs of providing on-going retirement gratuities are not insignificant and it is likely there are increasing numbers of employees who wish to continue to work in their fields after working for DHBs.

[36] I have to say that in these circumstances, it was at least counter-intuitive for counsel for CRTASL to join with WDHB in opposing staunchly the application for rehearing before me. The result of this stance, if successful, would be that CRTASL would continue to be unsure about the interpretation of these very many clauses and, therefore, in the advice that it might give DHBs. As well as being an inexplicable about-face in terms of its own interests and those of its constituent members, it was not appropriate for CRTASL as an intervener to have taken such a position in opposing the NZNO's applications, and especially such an uncompromising one.

[37] The role of the Employment Court is broader than just to decide single cases between litigants, although it does so of course. Its role, including in those individual cases, is to promote and encourage successful employment relationships including the avoidance of potential litigation between parties to ongoing relationships. This is a future-looking jurisprudence and one which attempts to assist not only immediate parties to a case, but others in materially similar circumstances. This is one aspect of the Court's long-established and broad "equity and good

conscience" jurisdiction and to meet the objectives of s 3 of the Act. That wider view of the Court's role influences the decision in this case.

A rehearing of a part of proceedings?

[38] I consider that the statutory discretion to impose terms on a rehearing includes the power to order a rehearing of one or more causes of action but not necessarily of the whole of the proceeding: so too does the case law, see *Cavalier Carpets*.[17] This will enable the Court to order a rehearing of the NZNO's dispute (which I consider the Judge did not determine as the Act contemplates) but to omit from the order for rehearing Ms Panettiere's claim which the Judge did decide on its merits. Subject to any appeal (the time for bringing which has now expired in any event), Ms Panettiere and WDHB are fixed with the Judge's dismissal of Ms Panettiere's claim for the threshold reasons that he gave.

Potential issues for rehearing

[39] A rehearing of the Union's dispute can most justly be approached on the basis of assuming that an employee, such as Ms Panettiere, meets the service requirements of the collective agreement as these have been interpreted by Judge Ford's judgment in this case. The questions on a rehearing might be:

- Is such an employee entitled to the payment of a gratuity or, alternatively, to the expectation that a DHB employer will give proper consideration to making such a payment?

- If the latter, what is the DHB, as employer, entitled or not entitled to take into account in determining whether to pay a gratuity?

[17] At 383.

Other factors affecting a rehearing

[40] It is clear that the Judge heard evidence and submissions on the question of the interpretation of the word "retirement" although, in the circumstances already set out, he did not decide with reasons but, rather, simply dismissed the dispute. The evidence was recorded and a transcript has been made of it. It is likely, also, that submissions made to the Judge were also recorded and a transcript of these can be made. There may be courses of action, other than a rehearing on the papers, upon which the parties may wish to consider and on which they may make submissions to the Court.

[41] I note from the original judgment that there was an objection to the evidence of Susan St John proposed to be called for the plaintiffs. The Judge determined to hear this evidence but reserved to himself the right to determine subsequently the admissibility of this evidence. Although it was not ultimately needed in view of the way the Judge decided the case, he indicated clearly in his judgment that he would have found the evidence of Ms St John to have been admissible and valuable in deciding the NZNO's dispute.[18] The question may arise, now, whether the Judge rehearing the NZNO's dispute claims should follow that indication of Judge Ford and consider Ms St John's evidence; or, alternatively, whether its admissibility will be objected to again by WDHB requiring a preliminary decision again on that issue.

[42] So, although necessarily to be conducted by another Judge, a rehearing of that part of the proceeding which was the NZNO's application to determine a dispute about the interpretation, application or operation of the collective agreement, will not need to be a complicated exercise. The parties' cases have already been presented to the Court and accurate records of those are readily available.

Decision

[43] I am satisfied that the Court's dismissal of the NZNO's application, by challenge to the Court, to resolve that dispute, because Ms Panettiere had failed to establish the length of service threshold in her case, has brought about a real

[18] *NZNO & Panettiere v WDHB*, above n 1, at [50].

possibility of a miscarriage of justice. That possible miscarriage is the failure of the Court to decide a party's pleaded case on which evidence and submissions were heard fully, but which was dismissed without consideration of its merits. The interests of justice do require the Court in this case to hear and decide this dispute on its merits.

[44] There will be a rehearing of that part of the proceedings, being a dispute about the interpretation, application or operation of the retirement gratuity provisions of the collective agreement.

[45] I have already suggested at [39] how the disputed issue might be framed but this may be determined finally after submissions of the parties. So, too, will be the scope and nature of the rehearing after hearing submissions from counsel for the parties and the intervener. For those purposes, the Registrar should arrange a directions conference by telephone within 21 days of the date of this judgment.

[46] Although the NZNO having been successful in this opposed application, it might be expected that costs would follow that event, the responsibility for the situation giving rise to the rehearing is not WDHB's and, in these circumstances, the most just course is to let costs lie where they have fallen to date.

GL Colgan
Chief Judge

Judgment signed at 3.10 pm on Tuesday 12 July 2016