IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA752/2020
[2021] NZCA 165

BETWEEN	CONCRETE STRUCTURES (NZ) LIMITED Appellant
AND	SAM WARD Respondent

Court: Miller and Brown JJ

Counsel: K A Badcock for Appellant
R Bryant for Respondent

Judgment: (On the papers) 4 May 2021 at 11.00 am

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent's cost for a standard application for leave on a band A basis.

REASONS OF THE COURT

(Given by Miller J)

[1] Concrete Structures (NZ) Ltd seeks leave to bring an appeal on a question of law from a judgment of the Employment Court dated 4 December 2020.

[2] The proposed appeal arises out of what the Employment Relations Authority, and the Employment Court on appeal, found to be the respondent's unjustified dismissal at a meeting on 7 November 2016.

[3] The proposed grounds of appeal are the Employment Court Judge was wrong to find:

(a) that a dismissal could occur even if the employee and employer did not subjectively believe dismissal had occurred at the meeting;

(b) that a reasonable person in the position of the respondent would have considered their employment was being terminated at the time;

(c) relying on s 122 of the Employment Relations Act, that the respondent's personal grievance was of a type other than what he had alleged;

(d) that the respondent's conduct did not contribute to a misunderstanding that he had been terminated;

(e) that the applicant could not correct, within what was a reasonable time, the respondent's misunderstanding that he had been terminated.

[4] So far as the first ground is concerned, the applicant appears to accept that the test of unjustified dismissal is an objective one, as the Employment Court held. The argument is that an employee cannot be dismissed unless they subjectively understood at the time that that is what was happening. This is a point of law, but it is not one of general or public importance. As the respondent submits, an employee will not necessarily be in a position to understand at the time that they have been dismissed. The proposed appeal ultimately rests on an argument that the Employment Court was wrong in fact.

[5] The third ground rests on process. It is said that the respondent did not plead disadvantage and as a result the applicant did not conduct its defence on the basis of constructive dismissal or disadvantage. The Judge did indicate during closing

addresses that she was minded to consider unjustified disadvantage under s 122, which allowed her to find the personal grievance was of a type not alleged by the applicant, but no opportunity was given to address the issue of constructive dismissal. We observe, however, that both sides agree the Judge did raise the issue, though they argue about exactly what was said, and the applicant's closing submissions did identify the issue as whether the respondent was dismissed actually, constructively or otherwise. It is not suggested that counsel asked the Judge for an opportunity to adduce further evidence in that event. And while it is now said that the applicant might or would have adduced further evidence, we have not been told what that evidence would say and so are in no position to evaluate the alleged disadvantage.

[6] The other grounds of appeal reduce to allegations of fact. It is said that the Judge's findings were so wrong as to amount to errors of law, as they were inconsistent with and contradictory of the evidence. The affidavit of the applicant's managing director develops this argument in some detail. In reply submissions, counsel for the applicant contends that the injustice that it will suffer if the decision below is permitted to stand is sufficient to justify leave under s 214(3) "for any other reason".

[7] We acknowledge that the applicant feels strongly that the respondent was never dismissed, but we do not think it arguable that the Judge's findings were so wrong as to amount to an error of law or that a grave injustice has been done.

[8] On the contrary, there was an evidential foundation in the record for her conclusions that the respondent was dismissed: he had been told the company had no work at his level within daily commuting distance (which he required because his mental health had begun to suffer); it had been suggested that he might take leave from the company and subsequently return to work should an opportunity arise; he was told that he would need to return his utility vehicle, tools and phone; he requested but was not given an opportunity to talk to his representative during the meeting; after the meeting he was driven home and his work tools were removed from his work vehicle and noted on a checklist; after the meeting the applicant's lawyer advised that the respondent had said at the meeting that his last day would be 11 November and that he was being paid in lieu of notice; he was in fact promptly paid his final pay, calculated in accordance with the notice provisions of his employment agreement.

[9] We accept that the applicant later maintained that the respondent had never been dismissed but rather had confirmed he was taking leave, and it offered him the alternative of sabbatical leave or work at the applicant's Rotorua factory, but those facts need not detract from the Judge's conclusions that he had already been dismissed and it was too late for the applicant to change course.

[10] We record that the applicant also contends that the Judge was biased. The applicant's managing director expressed the view the Judge made interventions appearing to indicate she had taken sides with the respondent and extensively cross-examined the applicant's witnesses. But this ground of appeal was not addressed at all in submissions and so we say no more about it.

[11] In conclusion, to the extent that the proposed appeal raises questions of law we do not accept that they are questions of general or public importance requiring the attention of this Court. The proposed appeal fundamentally turns on the applicant's view that the respondent was not in fact constructively dismissed at the meeting of 7 November 2016. That is a question of fact that has been resolved against the applicant by both tribunals below.

[12] The application for leave to appeal is dismissed. The applicant must pay the respondent's cost for a standard application for leave on a band A basis.

Solicitors:
Aspiring Law Ltd, Wanaka for Respondent