IN THE COURT OF APPEAL OF NEW ZEALAND

CA233/2015
[2015] NZCA 433

BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGER TRANSPORT EMPLOYEES UNION INCORPORATED Applicant
AND	MANA COACH SERVICES LIMITED Respondent

Hearing:	7 September 2015
Court:	Harrison, French and Cooper JJ
Counsel:	P Cranney for Applicant H Fulton for Respondent
Judgment:	11 September 2015 at 10 am

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs on a standard application for leave to appeal as on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] The New Zealand Tramways and Public Passenger Transport Employees Union Inc (the Union) applies for leave to appeal to this Court on a question of law

against a decision of the Employment Court.[1] The Court determined that members of the Union covered by a strike notice were not entitled to recover wages which they would have earned for a four hour period if they had not, through the Union, acted in bad faith when withdrawing the notice.

[2] The Union's claim has already been the subject of a decision of this Court,[2] allowing the Union's appeal against a previous decision of the Employment Court and remitting the claim to that Court for a rehearing.

[3] The question of law identified by the Union for determination on this application for leave is whether the Employment Court erred when rehearing the claim in concluding that the Union's breach of s 4 of the Employment Relations Act 2000 (ERA) disentitled its members to payment of wages.

Background

[4] This litigation commenced in 2007 following a failed bargaining process between the Union and Mana for a new collective agreement. What happened next was summarised in this Court's earlier decision as follows:[3]

> The Union gave notice of a strike by some of Mana's drivers. Just minutes before the strike was scheduled to commence, it gave notice of cancellation. By then the Union members had presented themselves at Mana's premises. But the company refused to deploy them for work because it had already implemented alternative arrangements. The Employment Relations Authority (the Authority) found that the Union members were nevertheless entitled to be paid. In reversing that finding, the Employment Court held that the Union, in its capacity as the members' representative, had acted in bad faith by deliberately delaying withdrawal of its cancellation notice for the purpose of maximising Mana's loss and disruption.

[5] This Court was unanimous in its earlier decision that the Employment Court had erred by invoking its equity and good conscience jurisdiction to find that the Union's bad faith conduct disentitled its members to wages. However, it was unable

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1 *Mana Coach Services Ltd v New Zealand Tramways and Public Transport Employees Union* [2015] NZEmpC 44.

2 *New Zealand Tramways and Public Transport Employees Union Incorporated v Mana Coach Services Ltd* [2011] NZCA 571.

3 At [2] (footnote omitted).

to agree about disposition. The majority (Chambers and Arnold JJ) allowed the appeal on terms set out by Chambers J as follows:

> [82] We unanimously set aside the decision of the Employment Court in so far as it held that Mana did not have to pay wages to those drivers who had given notice of an intention to strike on 1 August 2007 but then did not in fact strike. We should point out that the decision under appeal also dealt with other matters which were not the subject of appeal. The Employment Court's decision on those matters of course stands.
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> [83] By a majority (Harrison and Arnold JJ), the proceeding is remitted to the Employment Court. By a majority (Arnold J and me), the rehearing is limited to a determination of whether the bad faith which the Employment Court has found was present can operate in some way other than through the equity and good conscience jurisdiction to disentitle the employees from payment for the hours at issue.

[6] The Chief Employment Court Judge reheard the proceeding on 30 and 31 August 2012 but did not deliver judgment until 2 April 2015. The Chief Judge identified the essential question as whether the Union's breach of s 4 of ERA (the good faith obligation) can be invoked as a shield to defend proceedings for arrears of wages.[4] In his judgment the rationale for incorporating good faith obligations into the personal grievance jurisdiction and for rewarding monetary compensation to an employer who was the victim of bad faith was that:

> [160] Section 4 requires employees and employers to deal with each other in good faith. If an employee is subjected to a disadvantage in employment, or is dismissed from it, the employer must demonstrate justification for that disadvantage or dismissal: s 103A of the Act. The test is (now) what a fair and reasonable employer could have done in all the circumstances and whether what a fair and reasonable employer did was how it could have been done. This includes adherence to those mandatory good faith requirements. Put simply, a fair and reasonable employer will be expected to act in good faith towards an employee. If the employee has been disadvantaged in his or her employment or dismissed from it by actions which amount to bad faith under s 4 by the employer, such disadvantage or dismissal will not be justifiable and monetary remedies may flow indirectly from that bad faith conduct.

[7] The Chief Judge concluded:

> [171] The collective agreement does not prohibit or otherwise affect the employer's ability to make rateable deductions or to refuse to pay for work not performed in these circumstances. That is because that situation came about by reason of the default of the employees. That default was purporting to make themselves available for work in the knowledge that this could not

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[4] At [156].

> be provided and that the cause of that inability was the employees' own bad faith conduct. The other collective agreement requirement that the deduction be made "for time lost" is also met. That is because the phrase means for working time lost through the default of the employees. They defaulted on their obligations to act in good faith in their dealings with their employer.
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> [172] For the foregoing reasons, I have determined that the drivers who were members of the defendant Union covered by the strike notice are not entitled to recover wages that they would have earned for the period of four hours (or part thereof) from 2.30 pm to 6.30 pm on 1 August 2007 had they, through their union, not acted in bad faith. Mana was entitled in law to deduct from drivers' wages which would otherwise have been payable, amounts representing what they would have earned between 2.30pm and 6.30pm in 1 August 2007. The entitlement in law to deduct was a consequence of their bad faith (vicariously by the Union) in misleading or deceiving Mana, until it was too late for it to provide them with work, into believing that strike action would take place between those hours.

Decision

[8] For the Union, Mr Cranney developed an argument in support of its application for leave to this effect. Employees are entitled to strike subject to certain limitations, such as those applying to employees in a passenger road service where they must give at least 24 hours notice through their Union. Once notice is given, the employees are not obliged to commence or complete the strike. If a notice is given and not withdrawn, the employee is nevertheless entitled to have work provided to him or her regardless of the notice.

[9] In Mr Cranney's submission there is no obligation on the employees through the Union to inform an employer of a change to a notified intention to strike. A genuine notice, once given, need not be acted upon. Nor is there an obligation to withdraw a notice, even if the intention changes. The employees are entitled to work regardless of whether a notice to strike has been given, or given and withdrawn, or given and not withdrawn or acted upon or not acted upon or otherwise. A notice to strike is no more than a notice of a current intention.

[10] Mr Cranney's essential proposition is that, as the Union was under no obligation to give notice of withdrawal of the strike, its conduct in delaying notification of withdrawal cannot be characterised as bad faith. It is in reality a challenge to the Employment Court's initial finding of bad faith.

[11] Mr Cranney's submission confronts a major obstacle. The Union's counsel in the first appeal before this Court (not Mr Cranney) accepted the Chief Judge's finding that the Union had acted in bad faith at all relevant times.[5] The proceeding was remitted to the Employment Court for rehearing on that premise. The only question was whether the Union's bad faith operated in some way other than through the equity and good conscience jurisdiction to disentitle the employees from payment for the hours at issue. It is now too late to challenge that finding.

[12] In any event, as Mr Fulton emphasises, the Employment Court did not hold that the employees' entitlement to wages was removed by the Union's bad faith breach of s 4 of the ERA. Instead the Chief Judge found as a matter of fact that the employees did not earn wages when they did not work; that the absence of available work was not Mana's fault; and that it was unavailable because the Union gave notice of the strike but in bad faith failed to advise the company of its decision to withdraw the notice until the last moment. Mana was deliberately placed in a position where it was forced to adhere to its existing work rosters prepared on the basis that the employees did not intend to work over the subject hours.

[13] The issue was ultimately determined against the employees on a factual finding of causation. The employees' breach of the terms of the relevant collective employment agreement disqualified them from a right to payment. The whole issue about strikes or the relationship of strikes to s 4 and wage entitlement became irrelevant.

[14] Accordingly, we are satisfied there is no arguable question of law arising for determination on the Union's application for leave. However, even if there was an arguable question, we are not satisfied that there is a general or public interest in reserving it for determination by this Court, for two reasons.[6] First, the argument which gave rise to this litigation is now rendered moot by the passage of amending legislation requiring a Union when giving notice of a strike to specify when and how the strike will end and also of notice of withdrawal of the strike notice.[7] Second,

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5 At [20].
6 Employment Relations Act 2000, s 214(3).
7 Section 95AA, as inserted by the Employment Relations Amendment Act 2014, s 61.

given that the amounts in dispute are relatively small, there is an overriding interest in finality in a dispute which has occupied litigation spanning nearly eight years.

Result

[15] The application for leave to appeal is dismissed.

[16] The applicant must pay the respondent costs on a standard application for leave to appeal as on a band A basis together with usual disbursements.

Solicitors:
Oakley Moran, Wellington for Applicant
Harkness Henry, Hamilton for Respondent