IN THE EMPLOYMENT COURT
WELLINGTON

[2015] NZEmpC 84
WRC 26/14

IN THE MATTER OF	an application for rehearing
BETWEEN	ALAN ROBINSON Applicant
AND	PACIFIC SEALS NEW ZEALAND LTD Respondent

Hearing: 13 May 2015

Appearances: T Kennedy, counsel for applicant
J Tannahill, counsel for respondent

Judgment: 9 June 2015

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] The applicant has applied for a rehearing of the proceedings which were the subject of my substantive judgment given on 9 July 2014.[1] The applicant submits that a rehearing is necessary to redress a miscarriage of justice that the Court's earlier substantive judgment is said to have given rise to. The applicant submits that the Court misdirected itself on an important point of law in stating that it was not for the Court to have imposed an award that it would have imposed had it been determining the issue at first instance. Rather it is said that the Court was required to make its own assessment as to the quantum of compensation.

[2] The respondent stoutly opposes the application. The nub of the opposition is that there was no identifiable miscarriage of justice and, even if there was, the

1 *Robinson v Pacific Seals New Zealand Ltd* [2014] NZEmpC 99.

application is misconceived because an appeal is the appropriate vehicle for dealing with the applicant's complaints.

Background

[3] It is not necessary to traverse the background to these proceedings in any detail. The applicant was seriously injured when a car drove through a large glass window in his workplace in 2011. He was hospitalised for some months and, as at the date of the Court's substantive hearing, remained on accident compensation. Following the incident the applicant's employer (the respondent), which is a small scale engineering enterprise, topped up the applicant's accident compensation payments for nearly a year and took other steps to support him. Eleven months after the incident the respondent terminated the applicant's employment.

[4] The applicant pursued a personal grievance, alleging that his dismissal was unjustified and that he had been unjustifiably disadvantaged in his employment. The Employment Relations Authority (the Authority) upheld his grievance and awarded a global sum of $5,000 by way of compensation for humiliation, loss of dignity, and injury to feelings under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).[2] The applicant challenged the Authority's determination. He did not elect to challenge the determination de novo. Rather he elected to challenge particular aspects of it, on the basis of a number of errors allegedly made by the Authority. The challenge was dismissed for reasons set out in the Court's substantive judgment. In relation to the issue of quantum it was held that:[3]

> It is not for the Court on a non-de novo challenge to impose an award that it would have imposed had it been determining the issue at first instance. Having regard to all matters before me, I consider that the award of $5,000 was within the permissible range. I cannot detect any error underlying the quantum ordered by the Authority in the plaintiff's favour.

[5] The applicant contends that this approach was in error and gave rise to a substantial miscarriage of justice. That is said to be because the Court heard evidence from the applicant's mother which was relevant to the quantum of

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2 *Robinson v Pacific Seals (NZ) Ltd* [2013] NZERA Wellington 101.
3 *Robinson v Pacific Seals New Zealand Ltd*, above n 1, at [64].

compensation awarded and ought to have had regard to this evidence in determining the challenge. It is common ground that this evidence was not before the Authority.

Approach: rehearings

[6] The application is brought pursuant to cl 5(1) of sch 3 of the Act. It provides:

> **Rehearing**
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> The Court has in every proceeding, on the application of an original party to the proceeding, the power to order a rehearing to be had upon such terms as it thinks reasonable, and in the meantime to stay proceedings.
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> …

[7] Mr Tannahill, counsel for the respondent, submits that the application is misconceived because it should have been pursued by way of appeal, rather than rehearing. This submission is based on the contention, which is accepted on behalf of the applicant, that the alleged miscarriage of justice amounts to an error of law. Mrs Kennedy, counsel for the applicant, submits that the fact that there is an asserted error of law does not automatically exclude a right of rehearing. While that is correct, I consider that the circumstances in which the Court will grant a rehearing based on an error of law in this jurisdiction will be rare.

[8] As Judge Couch pointed out in *Yong t/a Yong and Co Chartered Accountants v Chin* there are four processes by which the substance and effect of a judgment can be changed after it was given – appeal, judicial review, recall and rehearing.[4] Judge Couch also observed that:

> [23] The fourth process available to deal with perceived injustice in a judgment is an order for rehearing. This is a step which no Court will take lightly as it involves setting aside a judgment which would otherwise be binding and compelling the parties to engage again in the trial process which they were entitled to regard as over.
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> [24] It will be apparent from this analysis that the scheme of the Employment Relations Act 2000 is to provide two specific processes to address dissatisfaction with a judgment: appeal and judicial review. In addition the Act provides a general power to order a rehearing and the Court has an inherent power of recall.

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4 *Yong t/a Yong and Co Chartered Accountants v Chin* [2008] ERNZ 1 (EmpC) at [15].

> [25] As a matter of principle, where a specific process is available, a party should not seek to invoke the exercise of a general power to achieve the same result. The general power should be reserved for those cases in which no other process is available. Thus, where a party is dissatisfied with a judgment of the Employment Court on grounds which may be the subject of an appeal under s 214 … or an application for judicial review under s 213, the Court should be very reluctant indeed to entertain an application for rehearing on those grounds.
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> …
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> [27] This conclusion is also consistent with the history of cases in which an order for rehearing has been made. By far the most common ground is that new evidence has been discovered which is material and which could not have been given at trial. In such cases, no right of appeal or review is available. It has only been in exceptional circumstances that any Court has entertained an application for rehearing on grounds that the judgment contained an error of law.

[9] Mrs Kennedy referred to an order for rehearing made by the full Court in *New Zealand Waterfront Workers Union v Ports of Auckland*, in circumstances involving an error of law.[5] However, as Judge Couch pointed out in *Yong*,[6] the approach adopted in that case can be seen as exceptional in the sense that the Court was very much influenced by the fact that no other process was available to address what was perceived to be a possible miscarriage of justice; and the Court's judgment had effectively been at first instance, given that the matter had been remitted to the Court for hearing.

[10] There has been a discernible upswing in applications for rehearing filed in this Court over recent years. I make the general observation that there is the potential for parties to seek to circumvent the limited rights of appeal available in this jurisdiction and to attempt to have multiple bites at the cherry in terms of seeking to secure a more favourable litigation outcome. That is not, in my view, consistent with the scheme of the Act, the overall interests of justice and the desirability of finality. I agree with the analysis in *Yong* that the Court should be reluctant to order a rehearing in circumstances where an error of law is alleged and the dissatisfied party has an appeal option available to them.

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5 *New Zealand Waterfront Workers Union v Ports of Auckland Ltd* [1994] 1 ERNZ 604 (EmpC) at 606-607.

6 *Yong*, above n 4, at [28].

[11] In the present case, the appropriate avenue for the applicant is to seek leave to appeal the Court's substantive judgment.[7] I do not accept that the fact that the Court of Appeal may refer the matter back to this Court to determine the quantum of compensation, if satisfied that an error of law has been made in the way contended for, swings the balance in favour of ordering a rehearing.

[12] This is sufficient to dispose of the application. However, for completeness I record that I would have declined the application in any event as I am not satisfied that a miscarriage of justice occurred. My reasons follow.

Approach: challenges to determinations of the Employment Relations Authority

[13] As the Act makes clear, any person who is dissatisfied with a determination of the Authority may elect to have the matter heard by the Court: s 179(1). The election must state whether or not the party making the election is seeking a full hearing of the entire matter (referred to in the Act as a hearing de novo).[8]

[14] If the party electing to have the matter heard by the Court is not seeking a hearing de novo, the Act requires that party to specify:[9]

- the determination or part of the determination to which the election relates (s 179(3)(a));
- any error of law or fact alleged by that party;
- any question of law or fact to be resolved;
- the grounds on which the election is made, to be sufficiently particularised so as to give full advice to both the Court and the other party of the issues involved; and
- the relief sought.

[15] I pause to note that in the present case the applicant's statement of claim made it clear that he was not seeking a hearing de novo, and identified limited parts of the Authority's determination to which his election related. Six alleged errors of law and/or fact were specified and three questions of law and/or fact were stated for

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7 Employment Relations Act 2000, s 214.
8 Employment Relations Act 2000, s 179(3)(a).
9 Sections 179(3)-(4).

resolution by the Court on the challenge. Relief, including an increase in the level of compensation, was sought. I return to the pleadings below.

[16] It is well established that where a hearing de novo is not sought, the hearing in the Court will be in the nature of an appeal.[10]

[17] It is notable that the Act does not place the same restrictions on the evidence that may be adduced on a challenge as applied under the previous legislation.[11] While s 179(4) of the current Act makes clear that the plaintiff on a non-de novo challenge defines the issues for decision, s 183 establishes that this does not extend to decisions about the mode of trial, including the evidence to be considered by the Court. On such challenges the Court is required to direct the nature and extent of the hearing.[12] This has implications for the evidence that the Court may hear on a challenge. On occasion the Court has shown a willingness to effectively direct a de novo hearing on a non-de novo challenge, having particular regard to the pleadings. This was the approach adopted in *Goodman Fielder New Zealand Ltd v Ali*,[13] where the Court found that aspects of the Authority's determination which each party wished to challenge were so numerous and interrelated that the Court had to hear the whole case to justly determine those challenges. In *Carter Holt Harvey v Yukich* the Court of Appeal found that despite a non-de novo challenge the Court was entitled to hold a "full rehearing on the points in issue before it."[14] Mrs Kennedy submitted that in circumstances where the Court had effectively directed a full rehearing on a non-de novo challenge, the Court was obliged to reach its own view on the matters at issue. She referred to two Supreme Court judgments. In *Austin Nichols & Co Inc v Stichting Lodestar* it was said that:[15]

> On a general appeal, the appeal Court has the responsibility of arriving at its own assessment of the merits of the case;

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10 *Jerram v Franklin Veterinary Services (1977) Ltd* [2001] ERNZ 157 (EmpC) at [8].

11 See s 95 Employment Contracts Act 1990.

12 Employment Relations Act 2000, s 182(3)(b).

13 *Goodman Fielder New Zealand Ltd v Ali* [2003] 2 ERNZ 65 (EmpC) at [15].

14 *Carter Holt Harvey v Yukich* CA42/04, 28 April 2004 at [37]. See too *Sefo v Sealord Shellfish Ltd* [2007] ERNZ 680 at [32], where it was held that on a non-de novo challenge the Court may direct that the matter be heard by way of a full rehearing of the entire case before the Authority.

15 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

And in *K v B*[16] the Court observed that:

> If the appellate court admits further evidence, that evidence will necessarily require de novo assessment … those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree.

[18] While I accept that where evidence is given on a non-de novo challenge the Court may be required to consider it in determining the matters before it, a more nuanced approach is required. That is because where new evidence is presented to the Court that has not been before the Authority, the Court will have to decide on a case-by-case basis how far to take the new evidence into account in dealing with the particular challenge to the Authority's determination. In my view the pleadings will be pivotal to this exercise.

[19] As Judge Travis observed in *Counties Manukau District Health Board v Trembath*:[17]

> A non-de novo challenge is not described as an appeal in the Act and is not subject to any express limitations which existed in relation to an appeal from a decision of the Employment Tribunal under the Employment Contracts Act 1991. However, *the election by the plaintiff effectively requires a decision as to whether there was an error of law or fact going to the jurisdiction of the Authority or its exercise of the jurisdiction that it had. As was said in Jerram's case, a non-de novo hearing is in the nature of an appeal and the challenger/plaintiff is required to show that the Authority's determination was wrong. There is an absence of any guidance in the Act as to how to deal with new evidence not previously put before the Authority.* That evidence would be admissible in relation to the stay application, which was, as I have observed, presented as an alternative by the plaintiff at this hearing. *It is questionable how far I can take this new evidence into account in dealing with the challenge to the determination*, especially as the evidence reveals a conflict between the plaintiff and Ms Trembath as to the nature of the role identified by the Authority in its interim order. In the event it was not necessary to resolve this issue.
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> [Emphasis added]

[20] Mrs Kennedy submitted that s 183 reinforced the point that the Court must reach its own decision on a challenge. Section 183(1) provides that where a party to a matter has elected under s 179 to have that matter heard by the Court, the Court

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16 *K v B* [2010] NZSC 112, [2011] 2 NZLR 1 at [31-[32].
17 *Counties Manukau District Health Board v Trembath* [2001] ERNZ 847 (EmpC) at [9].

must make its own decision on that matter and any relevant issues.[18] Again, I consider that the correct approach is more nuanced than Mrs Kennedy suggests.

[21] In *Jerram v Franklin Veterinary Services (1977) Ltd*[19] the plaintiff unsuccessfully contended that s 183 meant that in both de novo and non-de novo challenges the Court should have no regard to the Authority's determination, which in turn meant that a challenger should not have to establish that the determination being challenged was wrong. The argument did not find favour with the Court, which held that:

> [14] … Although I accept Mr Jerram has an onus of establishing that the Authority's determination was wrong, it is inappropriate to attempt to set the standard, whether on the balance of probabilities or otherwise. If, upon consideration of the Authority's determination and the facts and law, the Court concludes that the Authority was wrong, that is sufficient to set aside its determination or relevant parts of it. It will then be for the Court to make such orders as it considers ought to have been made at first instance and are just at the time of deciding the challenge.
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> [15] Mr Parmenter next relied on the requirement in s 183 that the Court "must make its own decision" to say that in a non-de novo challenge, as in a de novo hearing, the Court should have no regard to the Authority's determination and, in particular, the challenger should not be required to establish that the determination was wrong. *Although I accept that the requirements of s 183 apply equally to de novo hearings and non de novo challenges, the court can still make its own decisions as much in cases where it starts with a completely clean slate (the de novo hearing) as in cases where the challenger should be required to satisfy the Court that the Authority's determination was wrong.* So it follows that, although in a de novo hearing the party that originally brought the problem to the Authority must re-establish that cause of action when challenged to do so in Court, *in the case of a non-de novo hearing the Court will have regard to the Authority's determination and its reasoning and will have to be persuaded by the challenger that these were wrong.*

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[18] The authors of *Mazengarb Employment Law* cite *Jerram* with approval and endorse the point about the difference between non-de novo and de novo challenges and the impact or otherwise of the Authority's determination: "[a] significant difference between a de novo and a non-de novo challenge is that in the latter type of hearing the Court ought to have regard to the Employment Relations Authority determination. This is despite the requirement in s 183 that the Court must make its own decision." Mazengarb's Employment Law, (online looseleaf ed, LexisNexis) at [ERA 179.6]. See too *Lexis Nexis Personal Grievances* which makes a similar point, namely that in a non-de novo hearing the Court ought to have regard to the Authority's determination despite the requirement in s 183 that the Court must make its own decision. Personal Grievances (NZ) (online looseleaf ed, LexisNexis) at [2.46].

[19] *Jerram v Franklin Veterinary Services (1977) Ltd*, above n 9.

> [16] *I find that the non-de novo hearing in this case is in the nature of an appeal from a determination of the Authority so that the challenger/plaintiff is required to show that the Authority's determination was wrong. This approach is consistent with ss 180 and 183 summarised above.* It is to be contrasted with the different process contemplated by the legislation in a de novo hearing challenge. In that case there is no requirement upon a challenger to establish that the Authority's determination was wrong. Parliament intended the two modes of challenge to be different. This approach is consistent with that of the Court in the only other decided challenge to date, *Baguley v Coutts Cars Ltd* unreported, 3 April 2001, AC 25/01. *It is also consistent with the way in which the plaintiff/challenger has framed his papers in this Court, especially the statement of claim. This makes allegations of wrong decisions by the Authority.* It is difficult to imagine how the statement of claim could fulfil its function in any other way because Mr Jerram had no complaints about what was happening to him in employment that he brought to the Authority for resolution.
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> [Emphasis added]

[22] Mrs Kennedy submitted that *Jerram* was wrongly decided. I do not accept this submission. I respectfully agree with the Chief Judge's analysis. It is consistent with the requirement on a party who does not elect a hearing de novo to specify those parts of a determination that are being challenged and to particularise the errors of law and fact that are alleged to have been made. In determining such a challenge the Court must be satisfied that the Authority erred in one or more of the ways alleged. The plaintiff carries that burden. In undertaking its task the Court is required to consider the Authority's determination together with any evidence, to the extent that it is relevant to the assessment process. If the Court is not satisfied that the Authority has erred in the way contended for by the plaintiff the challenge must fail. If it were otherwise the distinction drawn in the legislation between a de novo challenge and those that are not pursued on that basis would be otiose.

[23] Mrs Kennedy referred to a subsequent observation of the Chief Judge in *Cliff v Air New Zealand Ltd* as reflecting a move away from the approach previously adopted in *Jerram*. In *Cliff* it was said that: [20]

> [7] The election that challengers must make under s 179(3) refers not so much to the nature of the presentation of the case in Court but, rather, to the extent to which the decision under appeal is challenged. An election by the challenger "seeking a full hearing of the entire matter (... a hearing de novo)" indicates that all matters that were before the Authority will be at issue on the challenge. What has become known colloquially as a "non-de novo

[20] *Cliff v Air New Zealand Ltd* [2005] ERNZ 1 (EmpC).

> challenge" (because of the absence of reference to this in s 179) is a narrower form of appeal in the sense that it identifies some but not all of the determination that is under appeal. That is exemplified by s 179(4) which requires a party not seeking a hearing de novo to specify what it says are errors of law or fact in the Authority's determination and other particulars as to the issues to enable the Court to conduct a restricted and more focused hearing of the appeal. But the election does not dictate the way in which the appeal will be heard. So, as here, there may be evidence or further evidence about the matters in issue in the non-de novo challenge and in such a case it is particularly appropriate, and indeed necessary, for the Court to make its own decision on the point or points as required by s 183.
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> [8] So I do not accept that the Court is constrained in its consideration of the parties' cases as the defendant submitted.

[24] The point remains, however, that the Court must be satisfied that the Authority has erred in the manner alleged by the challenging party. The challenger, who is required to identify "any error of law or fact alleged by that party" under the Act,[21] bears an onus of persuading the Court of the existence of an error of fact and/or law by the Authority in the determination challenged.

[25] In summary, on a non-de novo challenge the plaintiff is required to set out each of the alleged errors made by the Authority and has the onus of demonstrating that the Authority was wrong. The Court, in directing the nature and scope of the hearing, decides the evidence that may be relevant to a determination of those issues, namely the issues identified by the plaintiff in the statement of claim.

[26] In the present case Judge Couch, who had carriage of the pre-trial issues, issued the following directions in a minute to the parties on 6 December 2013:

> [4] The plaintiff challenges only some aspects of the determination. In the statement of claim, it is alleged that the Authority erred in six respects. … As a de novo hearing was not sought, the Court is required by s 182(3) [of the Act] to give directions as to the nature and scope of the hearing.
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> [5] After considerable discussion with counsel and subsequent consideration of the pleadings, it is clear that the essence of the plaintiff's claim is that the award of compensation made under s 123(1)(c) [of the Act] [ought to be increased. I give the following directions for the hearing:
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> > Scope – the issue to be decided is the quantum of remedies to be awarded to the plaintiff under s 123(1)(c)(i) [of the Act] for humiliation, loss of dignity and injury to his feelings as a result of

[21] Employment Relations Act 2000, s 179(4)(a).

> the unjustified disadvantage and unjustified dismissal found by the Authority to have occurred.
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> Nature – the issue will be at large and decided on the basis of any agreed facts and the evidence adduced before the Court.
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> [6] I have defined the scope of the hearing taking into account that the plaintiff wishes to argue that the alleged breach by the defendant of its obligations under the Health and Safety in Employment Act 1992 should be taken into account to increase his remedies under s 123(1)(c)(i). In deciding the issue, the Court will also need to consider the effect on the plaintiff's claims of s 317 of the Accident Compensation Act 2001.
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> …
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> [10] Following discussion with counsel, I give the following directions:
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> a) There will be a hearing de novo.
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> …

[27] Mrs Kennedy submitted that two points could be drawn from the terms of the minute. First, that the hearing was to proceed on a de novo basis, having regard to Judge Couch's reference to a hearing de novo at [10] and second that the issue as to the quantum of compensation would be determined afresh on the basis of the evidence put before the Court.

[28] As the applicant's written closing submissions for the substantive challenge made clear, the applicant had elected to pursue a non-de novo challenge, contending that the Authority had made six specified errors in its determination, each of which were identified and dealt with. This reflected the statement of claim, alleging that the Authority had erred in a number of respects in awarding compensation of $5,000. Whether the Authority had erred in the way contended for by the applicant was to be determined having regard, following Judge Couch's minute, to any agreed facts and evidence put before the Court.

[29] Six alleged errors of law and/or fact were specified in the statement of claim and three questions of law and/or fact were stated for resolution by the Court on the challenge. With particular regard to the allegations relating to the quantum of compensation under s 123(1)(c)(i) (which is the focus of the applicant's current complaint) it was pleaded that the following parts of the Authority's determination were the subject of the challenge:

Paragraph [80] in taking a global approach to compensation for the finding that the plaintiff was unjustifiably dismissed and unjustifiably disadvantaged in his employment and failing to appropriately compensate in the award of $5,000 for the personal grievance claims upheld;

Paragraph [81] and [82] in failing to take into account all of the evidence about the effect on the plaintiff, and of the increased humiliation, loss of dignity, and injury to feelings as a result of the dismissal and unjustified disadvantage where the plaintiff was not at fault, there was evidence of "fault" on the part of the employer, and where the plaintiff was unwell (increasing his concern over finding alternative employment) and the distress on his family, the effects on his health and his anxiety as a result of being dismissed and unjustifiably disadvantaged.

Paragraph [86] in terms of the level of award of compensation under section 123(1)(c)(i) being $5,000 where the evidence and circumstances support a much greater award of compensation.

[30] The six alleged errors of law and/or fact said to have been made by the Authority were particularised in the statement of claim as follows:

- *First Alleged Error*: The [Authority] erred in fact and law in failing to find that the defendant had failed its obligation of health and safety to the plaintiff throughout the employment…

- *Second Alleged Error*: The [Authority] erred in fact and law in failing to compensate the plaintiff for the failure in terms of health and safety and the effect this had on the plaintiff's hurt and humiliation before and after he was dismissed. Failing also to take into account the Employer fault caused or contributed to the dismissal.

- *Third Alleged Error*: The [Authority] erred in fact and law in finding part of the plaintiff's claim arising from the breach of health and safety was barred by the Accident Compensation Act 2001.

- *Fourth Alleged Error*: The [Authority] erred in fact in taking a "global approach to an assessment of compensation for humiliation, loss of dignity, and injury to feelings associated with [the applicant's] personal grievance claims" and only awarding $5,000 compensation for "distress associated with [the applicant's] unjustified dismissal".

- *Fifth Alleged Error*: The [Authority] erred in fact in failing to increase the award of hurt and humiliation compensation to reflect the increased hurt and humiliation of being dismissed where the likelihood of finding alternative employment was decreased by the workplace accident.

- *Sixth Alleged Error*: The [Authority] erred in law in applying a test that the plaintiff had to prove that safety rails or bollards would have prevented the accident that did occur, rather than whether or not this would have been a reasonably practicable step.

[31] Taking each alleged error in turn: Firstly, there was no established breach of the respondent's health and safety obligations. Accordingly, the allegation that the Authority had failed to compensate the applicant adequately for the alleged failures, and the effect this had on his hurt and humiliation, could not be sustained. The third allegation, that the Authority erred in fact and law in finding part of the plaintiff's claim arising from the breach of health and safety was barred by the Accident Compensation Act 2001, was not made out. Nor was the fourth allegation, that the Authority had only awarded compensation for hurt and humiliation for the dismissal, and had taken a global approach to the assessment of compensation under s123(1)(c)(i). Rather it was found that the Authority had factored in the unjustified disadvantage and had made no error of law (as alleged) in adopting a global approach. The Court did not accept that the Authority erred in failing to increase the award to reflect the increased hurt and humiliation of being dismissed where the likelihood of finding alternative employment was decreased by the workplace accident. The final allegation was one of error of law relating to whether the defendant had to prove that it had taken reasonable steps to avoid the accident. That was not accepted by the Court.

[32] The plaintiff alleges that there was a miscarriage of justice because the Court did not consider the quantum of compensation afresh, on the basis of all of the evidence before the Court. Although it is not necessary to resolve the issue in the context of the present application, it is difficult to see how the Authority could be said to have made an error of fact in determining compensation on the basis of evidence it never had before it.

[33] Judge Couch made it clear that the issue to be determined related to quantum of compensation. That is hardly surprising as it is the point that each of the six alleged errors particularised in the statement of claim was directed at, namely increasing the compensation that had been awarded on various pleaded grounds. He directed that the issue would be at large and decided on the basis of the evidence before the Court on the challenge. However, to succeed on the challenge the applicant was obliged to establish one or more of the alleged errors that he contended had impacted on the remedies granted. Evidence from the plaintiff's mother about the impact of the dismissal on her son may have been relevant if the

Court had been satisfied that the Authority had made one or more of the errors alleged, and had set aside the Authority's determination, but not before reaching that stage.

[34] I do not accept that Judge Couch's direction as to the nature and scope of the hearing had the effect of broadening the challenge to a consideration of all evidence afresh in order to determine what level of compensation under s 123(1)(c)(i) would be appropriate. As Judge Perkins observed in *Saipe v Waitakere Enterprise Trust Board,*[22] it is the plaintiff's prerogative to decide the findings and determinations of the Authority which he wishes to challenge, but it is for the Court to determine the extent of the evidence the Court may hear in respect of those issues. This will be defined by the plaintiff's pleadings.

[35] I agree with the observation in *Slight v Boise New Zealand Ltd*[23] that the election as to the hearing type requires important tactical decisions to be made by both parties which may affect the outcome, and the aphorism "procedure is power" applies to such decisions. The issue in that case was the extent to which parties can dictate the manner in which the non-de novo challenge is conducted. The Court held that while the plaintiff on a non-de novo challenge is entitled to select the issues it requires the Court to determine, it was not entitled to insist on the mode of trial by limiting the documentation that the Court can consider. The point was emphasised in *Sefo v Sealord Shellfish Ltd* where the Court decided that evidence relating to the three points in issue could not be isolated from the rest of the case, and so a full rehearing of the entire matter was directed.[24] Importantly, while the Court adopted this approach it made it plain that it would only decide the issues raised in the challenge. In subsequently declining leave to appeal, the Court of Appeal made it clear that the Judge had been aware that the issues before her were limited and it rejected a submission that the parties had effectively been forced into a de novo challenge.[25]

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22 *Saipe v Waitakere Enterprise Trust Board* (EmpC) Auckland, AC40/06, 25 July 2006 at [18].
23 *Slight v Boise New Zealand Ltd* (2005) 7 NZELC 97,792 at [1].
24 *Sefo v Sealord Shellfish Ltd* [2007] ERNZ 680 (EmpC) at [31].
25 *Sealord Shellfish Ltd v Sefo* [2008] ERNZ 54 (CA) at [16].

[36] I note that the evidence which the applicant contends ought to have been taken into account, but which was not, was from the applicant's mother. Her evidence was directed at corroborating the applicant's evidence as to the hurt and humiliation suffered. The applicant's evidence on this point had been accepted in the Authority.

[37] It seems to me that the issue of whether or not there was a miscarriage of justice in the present case is answered by the applicant's pleadings. The applicant did not establish that the Authority had erred in any of the ways contended for by him in the statement of claim. The evidence that the applicant says ought to have been considered by the Court was not relevant to a determination of the alleged errors, as pleaded. There was no scope for the Court to substitute its own view in terms of quantum of compensation in the particular circumstances.

[38] The application is dismissed. The parties are encouraged to agree costs. If that does not prove possible the respondent may file any submissions and material in support within 35 days of the date of this judgment, with the applicant filing and serving any submissions and material in response within a further 15 days; anything strictly in reply within a further five days.

Christina Inglis
Judge

Judgment signed at 11.45 am on 9 June 2015