

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**[2011] NZCA  
[2011] NZCA 30**

BETWEEN                      MAORI TELEVISION SERVICE  
   Applicant  
  
AND                                DAVID MERCER  
   Respondent

Hearing:      15 February 2011  
  
Court:              Glazebrook, Arnold and Harrison JJ  
  
Counsel:        B R Edwards for Applicant  
                         Respondent in person  
  
Judgment:      22 February 2011 at 10 am

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**JUDGMENT OF THE COURT**

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- A      The application for leave to appeal is declined.**
- B      The applicant is to pay the respondent usual disbursements.**
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**REASONS OF THE COURT**

(Given by Glazebrook J)

**Introduction**

[1]      Mr David Mercer was a camera operator with Maori Television. He was dismissed. The Employment Court (Judge Travis) held that the dismissal was not justified. Three months of lost wages were awarded to Mr Mercer, together with \$10,000 for humiliation, loss of dignity and injury to feelings. The award was

reduced by 25 per cent to take into account the fact that Mr Mercer's declining performance had contributed to his dismissal.

### **Nature and grounds of application**

[2] Maori Television seeks leave<sup>1</sup> to appeal against the finding in the Employment Court on the following issues:

- (a) Did the Employment Court err in law by awarding three month's lost remuneration pursuant to s 128(2) of the Employment Relations Act 2000 (the Act) after finding that Mr Mercer had failed to mitigate his losses and the chain of causation between the grievance and his losses had therefore been broken?
- (b) Did the Employment Court err in law by awarding three month's lost remuneration pursuant to s 128(2) of the Act after finding that there was "inadequate" evidence as to actual losses, the amounts subsequently earned and Mr Mercer's efforts to obtain other employment?
- (c) When the Judge awarded three month's lost remuneration, did he err in law by failing to deduct the four weeks' pay in lieu of notice paid to Mr Mercer on termination of employment?

### **Our assessment**

[3] Leave can only be granted on questions of law, where those questions are of public importance. The real complaint in the first two proposed questions concerns findings of fact. Despite there being some confusion in the wording of the judgment, we do not accept that the Judge found that Mr Mercer had failed to mitigate his loss. Rather the Judge made findings of fact as to Mr Mercer's losses and the extent to which Mr Mercer had failed to mitigate those losses, based on the evidence

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<sup>1</sup> Required by s 214 of the Employment Relations Act 2000.

(admittedly rather sketchy) that was before him. In any case it is difficult to see how these two issues are matters of public importance since the judgment is specific to the facts with no precedential value.

[4] As to the third issue, if the Judge overlooked the payment for notice period in setting the compensation figure, this could involve a question of law but there is no precedential value in Judge Travis' decision, which is confined to the particular facts. Alternatively, the Judge, although he did not refer to it specifically, may have taken into account the notice period in setting the three months figure (a finding of fact). Either way an appeal is not available.

### **Result and costs**

[5] The application for leave to appeal is declined.

[6] The applicant is to pay Mr Mercer usual disbursements.

Solicitors:  
Kirkland Enright, Auckland for Applicant