# Sam's Fukuyama Food Services Ltd v Zhang

[2011] NZCA 608

Court of Appeal, (CA325/11) 5 December 2011
O'Regan P, Harrison, Stevens JJ

*Appeal against an Employment Court decision — Civil procedure — Appeals — Determination — Remedies — Compensation — Termination — Unjustified dismissal — Respondent truck driver was dismissed for failure to wear safety boots when loading his truck — Employment Court held respondent entitled to compensation for lost wages from expiry of notice period until he found alternative work — Employment Court granted award of 47.4 weeks of wages — Appellant contended that the Employment Court Judge had failed to exercise a discretionary power in s 128(3) of the Employment Relations Act 2000 when awarding compensation for remuneration lost — Employment Court Judge failed to consider limitations to compensation in s 128(2) of the Employment Relations Act 2000 when considering award under s 128(3) of the Act — Employment Court award exceeded respondent's wages for his actual 10-month term of employment — Employment Relations Act 2000, s 128.*

The appellant, Sam's Fukuyama Food Services Ltd, was a chicken processing and distribution company. The respondent, Mr Zhang, commenced working for the appellant as a truck driver on 8 December 2008. After a series of disagreements between the parties, the respondent was dismissed for failing to wear safety boots when loading his truck.

The Employment Relations Authority found that the respondent was unjustifiably dismissed, but the extent of his contributory conduct disentitled him to remedies.

The Employment Court overturned the Employment Relations Authority's finding of contributory conduct, and held that there was no reduction of remedy warranted. The Employment Court granted the respondent reinstatement and compensation for humiliation, as well as compensation for lost wages from the expiry of the notice period in October 2009 until he obtained another driving position in September 2010 (47.4 weeks in total).

The appellant sought, and was granted, leave to appeal on the question of whether the Judge in the Employment Court had failed to exercise the discretionary power in s 128(3) of the Employment Relations Act 2000 when awarding compensation for remuneration lost by the employee and, if so, what is the appropriate sum payable to the employee in the exercise of such discretion?

**Held**, (1) the Employment Court Judge had not properly exercised his discretion under s 128(3) of the Act. The Judge had failed to consider s 128(2) of the Act, which limited the amount of compensation payable to the employee. The principles in s 128(2) of the Employment Relations Act 2000 needed to be applied when considering an award under s 128(3) of the Act. As the award of compensation in this case was nearly four times greater than the ordinary upper limit in s 128(3) of the Act it required justification. (paras 21-23)

(2) The appellant's submission that the total package of remedies must be considered when determining the amount of the award for compensation for lost

remuneration, must be rejected. Each remedy must be treated separately under the Act. Following the *Nutter* case (cited below), the Court of Appeal concluded that awards for lost remuneration were discretionary and moderation was appropriate. The upper limit of any award should be based on the amount of actual lost wages. There is no automatic entitlement to full compensation. Here, the Employment Court award exceeded the respondent's wages for his actual 10-month term of employment. Bearing in mind the factual circumstances of this case, a moderate award was found to be in the range of 25 to 30 weeks' remuneration. The respondent's employment relationship with the appellant was clearly dysfunctional and was unlikely to last 30 weeks. The sum of 26 weeks was substituted. (paras 24, 35-37, 39, 40)

*Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA), followed

**Cases referred to**

*Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union Inc* [2009] ERNZ 342 (EmpC)

*Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA)

*Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275, [1992] 1 ERNZ 711 (CA)

**Appeal**

This was a successful appeal against an Employment Court decision which awarded compensation for lost remuneration.

*S C Dench* for appellant (Sam's Fukuyama Food Services Ltd)
*G M Pollack* for respondent (Jian Zhang)

*Cur adv vult*

The judgment of the Court was delivered by

**STEVENS J**

**Introduction**

[1] The appellant, Sam's Fukuyama Food Services Ltd, sought and was granted leave to appeal on the following question of law:[1]

> Whether the Judge in the Employment Court failed to exercise the discretionary power in s 128(3) of the Employment Relations Act 2000 when awarding compensation for remuneration lost by the employee and, if so, what is the appropriate sum payable to the employee in the exercise of such discretion?

[2] At the hearing of the application for leave to appeal, we discussed with counsel the likelihood that the first part of the question would be answered in the affirmative. This is because, when the issue of compensation for remuneration lost by the employee was dealt with in the Employment Court,[2] the Judge gave no consideration to the provisions of s 128(2) of the Employment Relations Act 2000 (the Act). This subsection applies where an employee has lost remuneration as a result of a personal grievance and provides that the Employment Relations Authority (the Authority) must order the employer to pay to the employee "the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration".

[3] It is true that there is a discretionary power to order the employer to pay to the employee "a sum greater than that to which an order under that subsection [s 128(2)]

1 *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 464.

2 *Zhang v Sam's Fukuyama Food Service Ltd* [2011] NZEmpC 28.

may relate".[3] But when the remedy for compensation for loss of wages was discussed[4] the Judge, in addition to omitting any reference to s 128(2) of the Act, failed to exercise the discretion available under s 128(3). The basis upon which the discretion was exercised to award 47.4 weeks wages (being the full amount claimed) was not explained.

[4] Having granted leave to appeal the question of law identified, we stated:

> [2] In order to minimise the costs to the parties in respect of the appeal, counsel agreed that the substantive appeal could be dealt with on the papers. To assist the Court further, and to provide any submissions additional to those canvassed in argument at the hearing, counsel will each provide further written submissions of not more than three pages. Such submissions will be directed to the factors that ought to be considered in the exercise of the discretion under s 128(3) of the Act to award a sum greater than an amount equal to three months ordinary time remuneration as provided in s 128(2) of the Act.
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> …
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> [4] As discussed at the hearing, the parties are encouraged to endeavour to resolve their differences by agreement. But if the parties have not otherwise resolved the amount of remuneration in excess of three months ordinary time remuneration payable to the applicant, a judgment fixing the amount payable will be issued by the Court.

[5] Settlement of the dispute has not occurred. Submissions from counsel directed at how the discretion under s 128(3) of the Act ought to have been exercised have now been received. We now provide our reasons for allowing the appeal and fixing the compensation for remuneration lost by means of a discretionary award under s 128(3).

**Background facts**

[6] The background facts are not in dispute. We set them out in summary form, drawing largely on the outline in the decision under appeal. The appellant is a chicken processing and distribution company operating out of Panmure, Auckland. The respondent, Mr Zhang, commenced working for the appellant on 8 December 2008 as a truck driver. He was not given an employment agreement. After three months, Mr Zhang became a permanent employee and his hourly wages were increased. They were increased again in July 2009.

[7] On 7 August 2009 Mr Zhang made a delivery of goods to Rotorua. While in Rotorua, he met up with a driver from another company who told him that his truck was overloaded. Mr Zhang raised concerns with the managing director of the appellant that he was being required to overload his truck on a regular basis. The managing director did not say anything in reply but simply shook his head and Mr Zhang then left his office.

[8] On 1 September 2009 Mr Zhang (alone among the truck drivers working for the appellant) was given an individual employment agreement to consider. It contained disciplinary procedures including provisions for a first and then a final written warning prior to dismissal. Mr Zhang signed the agreement on 10 September 2009.

[9] At meetings on 24 August and 2 September 2009, Mr Zhang was told by the managing director that he was to change the system he had been using of loading the goods. Under the new system it took Mr Zhang considerably longer to load his truck.

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3 Employment Relations Act 2000, s 128(3).

4 At [42]-[43].

[10] On 3 September 2009 Mr Zhang received his first written warning for various alleged breaches of company policy, including failing to load his truck in a proper manner.

[11] On 11 September 2009 Mr Zhang was to take a delivery of goods to Rotorua. Mr Zhang knew that it was illegal for him to drive for over 13 hours in any one day. He was asked by the managing director's niece whether he would be back in Auckland by 8 pm, and he replied that he was not sure. When he had nearly finished loading the goods onto his truck, two other drivers arrived on the scene and Mr Zhang learned that they had been directed to make the delivery to Rotorua instead of him. Mr Zhang was told to go home as there was no job for him that day.

[12] On 14 September 2009 Mr Zhang received a second and final written warning from the appellant. It was alleged that he failed to carry out his responsibilities as an employee including working too slowly and not informing the company promptly when problems arose.

[13] On 13 October 2009 one of the directors mentioned to Mr Zhang that he was not wearing safety boots. Mr Zhang replied that he did not have any safety boots and proceeded to carry on with his duties. The next day, he was handed a letter of dismissal. The letter stated that the reason for his dismissal was because of his failure to wear safety boots.

[14] On 23 April 2010 the Authority determined that Mr Zhang had been unjustifiably dismissed. The Authority also concluded that Mr Zhang's contributory conduct was so serious that it disentitled him to any remedies. Mr Zhang challenged this determination in the Employment Court.

## Employment Court decision

[15] In the Employment Court Judge Ford held that Mr Zhang had been unjustifiably dismissed.[5] Moreover, the Judge found that there was no conduct on Mr Zhang's part that contributed to his dismissal. The Judge stated:[6]

> A reduction of remedy under s 124 is appropriate only in cases where the employee's contributing actions are culpable or blameworthy. If an employee's actions are lawful and reasonable then it cannot be said that they qualify under s 124 for a reduction in remedies. None of the particular matters identified by Mr Kurta amount to culpable or blameworthy conduct and I am not disposed to make any reduction under s 124 for contributory conduct.

[16] The Judge then ordered that Mr Zhang be reinstated by the appellant. He also ordered the appellant to reimburse Mr Zhang for lost remuneration for 47.4 weeks, being the period from the date of expiry of his two weeks' pay in lieu of notice until 27 September 2010, when Mr Zhang commenced working as a driver for another company. The Judge also awarded Mr Zhang $9,000 for humiliation, loss of dignity and injury to feelings.[7]

[17] On the issue of compensation for lost remuneration, the reasoning of the Judge was contained in the following two paras:

> [42] The second remedy sought by the plaintiff is compensation for his loss of wages since his dismissal. His claim under this head is based on his average weekly wage prior to his dismissal of $898.16. The amount claimed makes appropriate allowance for other income earned. In support of his claim, Mr Zhang told the Court:

5 *Zhang v Sam's Fukuyama Food Service Ltd* [2011] NZEmpC 28.

6 At [33].

7 At [45].

> My dismissal has been a nightmare for me. After I was dismissed I tried my best to find a new job and have tried everywhere without a great deal of success. I applied for Chinese teacher roles, installation positions, salesman, building sites, postie, self-employed contractors and I borrowed some money to take driving lessons to improve my driver's licence from class 2 to class 4. I have applied for approximately 121 jobs but other than the odd bit of work I have not received regular employment.

Mr Zhang produced an exercise book which contained a record of every position he had applied for. It was an impressive production.

[43] Expanding in his examination-in-chief on his reference [para 42] to "the odd bit of work", Mr Zhang told the Court that one of the positions he obtained was with Johnson Group (NZ) Ltd. Documents produced recorded that he worked as a driver for the Johnson Group between 27 September 2010 and 19 November 2010. The circumstances surrounding the termination of that employment relationship were not disclosed to the Court. Mr Zhang said that a confidential settlement agreement was entered into and Mr Kurta was directly involved in so far as he acted for the Johnson Group. I am prepared to allow the plaintiff's claim for lost remuneration from the date of the expiry of his two weeks' pay in lieu of notice down to 27 September 2010 in a sum based on his average weekly wage less his earnings from any other source. …

## Applicable statutory provisions

[18] The remedies available in relation to personal grievances are provided for in s 123 of the Act. One of the remedies to which an employee may be entitled is the reimbursement of a sum equal to the whole or any part of the wages or any other money lost as a result of the grievance.[8] The remedy of reimbursement is dealt with specifically in s 128 as follows:

> **128. Reimbursement**
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> (1) This section applies where the Authority or the Court determines, in respect of any employee,—
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> (a) that the employee has a personal grievance; and
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> (b) that the employee has lost remuneration as a result of the personal grievance.
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> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
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> (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[19] Although ss 128(2) and (3) only refer to "the Authority", the Employment Court has held that this must be a drafting error. To confine such provisions only to the Authority, and not also apply to the Court, would be a "nonsensical result".[9] We agree and adopt the same approach.

[20] Accordingly, where the Authority or the Court determines that an employee has lost remuneration as a result of a personal grievance, the Authority or the Court must (whether or not the Authority or Court provides for any of the other remedies

8 Section 123(1)(b).

9 *Norske Skog Tasman Ltd v Manufacturing and Construction Workers Union Inc* [2009] ERNZ 342 (EmpC) at [36].

provided for in s 123) order the employer to reimburse the employee for the remuneration lost as a result of the personal grievance. The amount of the reimbursement must be whichever is the lesser amount of the lost remuneration or 3 months' ordinary time remuneration.[10] However, pursuant to s 128(3) of the Act, the Authority or Court may, in its discretion, order an employer to pay the employee a greater sum for lost remuneration.

**Conclusion on first part of question**

[21] When dealing with the question of the remedy of reimbursement for loss of remuneration, the Judge did not refer to the provisions of s 128(2) of the Act. Given that the subsection sets a limit on the amount that the employer must pay the employee, we are satisfied that he ought to have dealt with this provision.

[22] Neither did the Judge refer to or purport to apply the discretionary power in s 128(3) of the Act to award a sum greater than that provided for in s 128(2). This Court has discussed the principles applicable to the exercise of such discretion.[11] In a case such as this, these principles needed to be considered and applied when determining the amount of any award under s 128(3). In the context of an award of compensation for remuneration nearly four times greater than the upper limit in s 128(2), we consider that such omissions are significant. The absence of any reasons explaining the basis for the exercise of the discretion compounds the error.

[23] Accordingly, we answer the first part of the question (set out at [1] above) in the affirmative. The Judge failed to exercise the discretionary power in s 128(3) of the Act.

**Principles applicable to determining the appropriate sum**

[24] We now deal briefly with the applicable principles. In *Telecom New Zealand Ltd v Nutter*, this Court approved the principle[12] that compensation for lost remuneration is discretionary and that there is no automatic entitlement to an award reflecting the balance of the expected working career of an employee.[13] The Court said:[14]

> it is now well-established in New Zealand that a "full" assessment of the financial loss suffered by an employee as a result of an unjustifiable dismissal merely sets the upper limit on an award of compensation (in that no award can be for more than has been lost) and there is no automatic entitlement to "full" compensation.

[25] The Court said that moderation is appropriate in setting awards for lost remuneration because:[15]

1. The discretionary nature of the remedy is obviously inconsistent with any principle requiring "full" compensation to be awarded.
2. The concept of unjustifiable dismissal is flexible and a full compensation approach may be disproportionate to the nature of the wrong.
3. Full compensation may be unnecessarily and inappropriately damaging to the employer (and indirectly to the position of other employees of the same employer).
4. Rules of thumb as to appropriate measures of compensation can facilitate both the efficient dispatch of litigation and reasonably predictable outcomes …

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10 Employment Relations Act 2000, s 128(2).

11 See *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [70]-[79].

12 Set out in *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275, [1992] 1 ERNZ 711 (CA) at 280-281, 285-286; 717, 722-723.

13 *Telecom New Zealand Ltd v Nutter* at [78].

14 At [74].

15 At [79].

5. A community expectation of "full" compensation extending to compensation for years of foregone remuneration could discourage employment and personal rehabilitation.

[26] The Court said that the employee's actual loss "sets an upper ceiling on any award and it is plainly a logical starting point for assessment".[16] The assessment of compensation in any particular instance "must be individualised to the circumstances of the case",[17] and the assessment "must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment" (that is, counter-factual analysis).[18] We note that the observations in *Nutter* were made in the context of a case in which the employee had not been reinstated. Nevertheless they are logically applicable even where the employee has successfully obtained an order for reinstatement. We therefore apply such principles to the present case.

**Submissions on appropriate sum**

*For the appellant*

[27] For the appellant, Mr Dench emphasises that, while awards as long as 47.4 weeks are occasionally made, they are comparatively rare. Here the employment only lasted for 10 months so the compensation ordered was for longer than the entire period of employment. The respondent had not earned any special consideration as a long-term employee. Therefore counsel submits that an award of just under a year was excessive and failed to apply the necessary element of moderation.

[28] Counsel also submits that the amount of the award needs to be considered in the context of the total package of remedies obtained by the respondent. Not only was he reinstated but he also was awarded $9,000 for humiliation, loss of dignity and injury to feelings. On top of that the respondent received an award amounting to the full extent of his loss of wages.

[29] Counsel submits that any award must achieve a balance between the parties and an award of full compensation would be disproportionate to the nature of the wrong. While counsel acknowledges the appellant must accept the Employment Court's finding that the timing and haste of the disciplinary process amounted to retaliatory action,[19] that does not mean any award should be punitive at the expense of other considerations.

[30] Finally, counsel submits that any award must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employment in any event.

*For the respondent*

[31] Mr Pollak for the respondent submits that, although the Judge did not expressly refer to the relevant sections of the Act, it is implicit that he nevertheless exercised the discretion under s 128(3). Having done so, this Court should not lightly interfere with the way in which the discretionary power was exercised.

[32] Counsel submits that the Judge was dealing with a compelling situation of unjustifiable dismissal both procedurally and substantively. Not only did the Judge prefer the respondent's evidence over that of the directors, but also he was impressed by the extraordinary efforts made by the respondent to find alternative employment following his dismissal.

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16 At [81].

17 At [80].

18 At [81].

19 At [26].

[33] As to the appropriate sum, counsel accepts that the principles in *Nutter* mean that assessment of any compensatory award for reimbursement necessarily involves answering hypothetical questions as to how the employee would have been placed but for the unjustifiable dismissal. But the facts in *Nutter* were different, given that the employee there was seeking compensation for a considerable period of time extending through until retirement at the age of 65. Thus counsel submits that there was no evidence in the present case of any other factors that would weigh against compensating the respondent for the full amount of his actual economic loss.

[34] Finally counsel submits that no account should be taken of the previous warnings given to the respondent. These were just part of the factual matrix that rendered the dismissal unjustifiable both procedurally and substantively. Moreover it cannot be said that on the facts of this case it is doubtful that the respondent's employment would have continued for a year. Accordingly the Judge's award of compensation for economic loss should not be reduced.

*Discussion*

[35] We are not satisfied that the Judge properly exercised his discretion under s 128(3) of the Act. We therefore reject the respondent's submission that there was in fact an exercise of the discretion. Similarly, we reject the submission on behalf of the appellant that the total package of remedies must be considered when determining the amount of the award for compensation for lost remuneration. Each remedy is treated separately under the Act and the full suite of remedies available to employees in relation to personal grievances is set out in s 123 of the Act. In the circumstances of this case, we prefer to approach the question of the appropriate level of compensation for lost remuneration as a discrete exercise.

[36] It is axiomatic that the full financial losses suffered by the respondent as a result of the unjustifiable dismissal merely set the upper limit on an award of compensation. But there is no automatic entitlement to full compensation. As the decision of this Court in *Nutter* makes clear, moderation is required in setting awards for lost remuneration. Any award of compensation in a particular case must have regard to the individual circumstances of the particular case. Having said that, as with any awards of compensation which involve a discretionary element, precision is difficult and the award will inevitably involve a broad brush approach.

[37] Bearing in mind the factual circumstances of this case summarised above, we are of the view that a moderate award, based on the discretionary power under s 128(3) of the Act, would be in the range of 25 to 30 weeks of ordinary time remuneration. But that is not the end of the analysis. It is also necessary to have regard to the counter-factual analysis and make an allowance for all contingencies that might, but for the unjustifiable dismissal, have resulted in the termination of the respondent's employment.

[38] In this context, we do not consider that we are required (as the respondent argues) to ignore the factual events that occurred during the period of employment. The fact that those events were relevant to another aspect of the case, such as whether or not a personal grievance was established, does not make such matters irrelevant on the very different question of remedies. What actually happened, if relevant, cannot be ignored. The key feature on appeal is that this Court must respect the factual findings of the Judge. But as we have already noted, the Judge made no findings on the s 128(3) point.

[39] Having regard to the individualised aspects of the respondent's employment history with the appellant over the period of 10 months, we consider that it is likely that his employment would not have continued for a further 30 weeks, being the top

end of the range we have identified above. We are satisfied from the evidence that the relationship between Mr Zhang and the employer had plainly broken down and was dysfunctional. If follows that the employment relationship would not have continued indefinitely into the future.

[40] We therefore consider that it is appropriate to make an allowance for contingencies and we fix compensation at 26 weeks, taking the award towards the lower part of the range.

**Conclusions and result**

[41] The result is that we consider that a proper exercise of the discretion under s 128(3) of the Act would mean an award to the respondent of 26 weeks ordinary time remuneration rather than the period of 47.4 weeks. The appropriate sum that the employer must pay to the respondent by way of compensation for the remuneration lost is fixed by awarding a sum of 26 weeks ordinary time remuneration.

[42] It follows that the appeal must be allowed. We have already concluded that the first part of the question for which leave to appeal was granted is answered in the affirmative.

[43] The respondent must pay the appellant by way of costs a sum amounting to two thirds of the costs for a standard appeal on a band A basis and usual disbursements. This reduction in the costs order is made to recognise the fact that, by the agreement of both parties, the appeal was dealt with on the papers. The parties were therefore spared the need for a second hearing.

*Sum of 26 weeks ordinary time remuneration substituted for award period of 47.4 weeks remuneration; appeal allowed*