IN THE COURT OF APPEAL OF NEW ZEALAND

CA386/2011
[2011] NZCA 610

BETWEEN	BEATRICE KATZ Applicant
AND	MANA COACH SERVICES LTD Respondent

Hearing: 20 October 2011

Court: Glazebrook, Arnold and Ellen France JJ

Counsel: P McBride and T Kennedy for Applicant
B A Corkill QC and B Scotland for Respondent

Judgment: 2 December 2011 at 2:30 PM

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs for a standard application on a band A basis plus usual disbursements.

REASONS

ARNOLD AND ELLEN FRANCE JJ

(Given by Arnold J)

Background

[1] The applicant, Ms Katz, seeks leave to appeal from a decision of the Employment Court dated 25 May 2011.[1] In that decision Judge Ford held that Ms Katz' employer, Mana Coach Services Ltd (Mana), was not liable to indemnify her for legal costs which she incurred when she was prosecuted for careless driving. The prosecution arose out of a traffic accident that occurred while Ms Katz was driving a bus on her assigned route in the course of her employment. The Employment Relations Authority had also dismissed Ms Katz' claim.[2]

[2] The accident happened when Ms Katz was attempting a right turn at an intersection and came into contact with a stationary car which was waiting to cross the intersection. Both the bus and the car suffered damage. In an insurance claim form which she completed on the day of the accident, Ms Katz admitted responsibility, saying that she simply did not see the car.

[3] Ms Katz was charged with operating a vehicle carelessly. She entered a plea of guilty and was discharged without conviction, presumably under s 106 of the Sentencing Act 2002. In terms of s 106(2), such a discharge is deemed to be an acquittal.

[4] Ms Katz received a fee note from her lawyer for $562.50, which covered advice and three court appearances in relation to the prosecution. Ms Katz then sought, through her union, to recover this sum from Mana. There being no express indemnity clause in her employment agreement, Ms Katz relied on what she described as "the general rule of law that an employee is to have an indemnity acting in the execution and reasonable performance of duty" and an implied term in her employment contract. Mana refused to indemnify her.

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1 *Katz v Mana Couch Services Ltd* [2011] NZEmpC 49.

2 *Katz v Mana Coach Services Ltd* ERA Wellington WA192/10 5302084, 30 November 2010.

Basis of application

[5] This Court may grant leave to appeal on a question of law where the question is one that "by reason of its general or public importance or for any other reason" ought to be submitted to the Court for decision.[3] For Ms Katz, Mr McBride submitted that three questions of law were raised, each of which was of general or public importance and should be dealt with by this Court.

[6] He put the questions in this way:

> Did the Employment Court err in determining:
>
> (i) That there was no common law indemnity where the bringing of the charges was linked to the performance of the employee's duty?
>
> (ii) The obligation to indemnify at common law is lost if there is some mere act of negligence on the part of the employee?
>
> (iii) The discharge without conviction did not affect the above?

[7] In support of his submission that the scope of the common law indemnity was an important issue, Mr McBride referred to an affidavit by Ms McAra, the General Secretary of the New Zealand Merchant Service Guild. The Guild includes among its membership maritime pilots, ships' masters and deck officers. Ms McAra said that the members of the Guild place significant reliance on being indemnified by their employer if things go wrong. The Employment Court's ruling, she said, "will potentially have a significant impact on employees generally".

Discussion

[8] While we accept that the scope of the common law indemnity owed by an employer to an employee does have general importance, we note that this Court has previously stated the relevant principle. In *Christchurch City Council v Davidson*[4] the Christchurch City Council appealed against various judgments of the Employment Court which dealt with claims against it by four employees at its Civic Crèche. They had been prosecuted for the sexual abuse of children in their

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3 Employment Relations Act 2000, s 214(3).

4 *Christchurch City Council v Davidson* [1997] 1 NZLR 275 (CA).

care at the crèche but were discharged by the trial Judge. Included in the employees' claims was a claim for indemnity for the legal costs they incurred in defending the charges.

[9] The Employment Court Judge had found that the employees were entitled to be indemnified for these costs under the terms of their collective agreement as well as at common law. A Full Bench of this Court dismissed the Council's appeal against the indemnity finding, as the Court is precluded from considering an appeal against a decision on the construction of a collective agreement. Despite this, the Court said that it had concluded that the Employment Court had erred in its view of the indemnification of agents at common law.[5] The Court went on to say:[6]

> While the appeal on the indemnity question must accordingly fail, we should record that the indemnification of agents at common law does not extend to expenses incurred in defending an allegation that the person charged did something which he or she did not in fact do and which it was not his or her duty to do. The reason is that such expenses were not incurred by the worker as an agent of the employer in the reasonable performance of the worker's duties (*Tomlinson v Adamson* [1935] Session Cas 1 (HL); *Nathan v Kiwi Life & General Mutual Assurance Co Ltd* (1982) 1 BCR 416).

[10] In the present case, Judge Ford reviewed the authorities, including *Davidson*, and concluded:

> [38] From the foregoing authorities, it seems clear that at common law an employee may lose his or her right of indemnity or reimbursement where the liabilities or expenses sought to be recovered arise out of some breach of duty, negligence or other fault on the part of the employee.
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> [39] The fact that Ms Katz is deemed to have been acquitted of the traffic offence with which she was charged is not the end of the matter. It is still necessary for this Court to look at all the circumstances of the case and determine, in accordance with the standard of proof in civil cases, whether the defendant has established that the expenses Ms Katz seeks to recover arose out of some breach of duty, negligence or other fault on her part.
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> [40] [Counsel] contended that the admission of fault made by Ms Katz in the insurance form was "irrelevant" because she was in a state of shock when she completed the form. Even if that submission were accepted, however, I have now heard evidence from witnesses called by both parties and I have been able to form my own judgment in relation to the incident that gave rise to the indemnity claim. I am satisfied that the accident in question was caused solely through [Ms Katz'] negligence, in other words,

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5 At 277.
6 At 294.

> through a breach of her obligations to take all reasonable skill and care in the course of her employment.

[11] Mr McBride expressed concern that, if the Judge's summary of the law at [38] – [39] of the extract above is taken literally, employers might sue employees for damage inflicted on the employers' property, or for which the emplyers are liable, that results from the employees' negligence: in this case, the damage to the bus and the stationary car.

[12] However, there is no suggestion of that in the present case. What Ms Katz seeks to recover are the legal costs of dealing with her prosecution. Although the discharge without conviction is deemed to be an acquittal, that did not preclude the Judge from considering the evidence in order to reach a view about the cause of the accident. Having heard that evidence, he concluded that the accident was caused solely through Ms Katz' negligence. In other words, there was conduct that constituted the offence.

[13] On the basis of the principle which the Court articulated in *Christchurch City Council v Davidson*, and given the facts that he found, we consider that the Judge was right to reach the decision that he did. We do not see how it can sensibly be argued that Ms Katz' conduct fell within the reasonable performance of her duties. In any event, that does not involve a question of law, but rather the application of a settled legal principle to the particular facts. Accordingly, we decline Ms Katz' application for leave to appeal.

[14] That does not mean, however, that we necessarily accept that Mana could recover the losses it has suffered from Ms Katz. The considerations relevant to whether an employee is entitled to be indemnified for legal costs following a prosecution for a fault-based offence may be different from those which arise where an employer seeks to recover its losses from its employee. That question should be addressed when, if ever, it arises.

Decision

[15] We dismiss the application for leave to appeal. Ms Katz must pay Mana costs for a standard application on a band A basis plus usual disbursements.

GLAZEBROOK J

[16] I agree that the application for leave to appeal should be dismissed and I also agree with the costs order made. I would, however, dismiss the application for different reasons from the majority.

[17] I accept that there may be a good argument that Ms Katz was performing her duties (driving) at the time of the accident and that mere negligence may not affect her right to indemnity. I also accept that the comments of this Court in *Christchurch City Council v Davidson* may not be the last word on the issue of indemnity or that there is an issue as to how the comments should be interpreted and applied in cases of negligence. However, in my view there are good public policy reasons why indemnity should not be available for defending criminal charges where a person is guilty of the offending.[7]

[18] In this case, Ms Katz was discharged without conviction. While this is deemed to be an acquittal, under s 106(1) of the Sentencing Act, an offender must first be found guilty or plead guilty. Furthermore, under s 107, the test for discharge without conviction is that the direct and indirect consequences of a conviction would be out of proportion to the gravity of the offence. This relates to the consequences of conviction and does not detract from the fact an offence has been committed. Further, under s 106(3), a court may make certain orders similar to those made in the case of a conviction, including orders relating to reparation, costs and the restitution of property.

[19] In my view this means that the costs incurred by Ms Katz, despite the deemed acquittal, can essentially be equated with costs incurred in defending a charge where

[7] I recognise that this principle may not apply to strict liability offences.

the offender is guilty. It thus runs into the public policy issue set out above. Leave to appeal is accordingly not appropriate.

Solicitors:
McBride Davenport James for Applicant