

IN THE COURT OF APPEAL OF NEW ZEALAND

CA424/2012
[2014] NZCA 512

BETWEEN NEW ZEALAND CARDS LIMITED
Appellant

AND COLIN RAMSAY
Respondent

Hearing: 22 October 2014
Court: Miller, Heath and Dobson JJ
Counsel: No appearance for Appellant
S G Wilson for Respondent
Judgment: 23 October 2014 at 4.00 pm

JUDGMENT OF THE COURT

- A The appeal was dismissed at the hearing.**
- B Costs are reserved. The respondent is to file a memorandum in support of an application for costs by 29 October 2014. The appellant must file submissions by 12 November 2014. Costs will be determined on the papers.**
-

REASONS OF THE COURT

(Given by Miller J)

[1] This judgment addresses an appeal from the Employment Court¹ in respect of which leave has previously been given. The question is whether the facts as found by the Employment Court Judge could amount to a constructive dismissal on the

¹ *New Zealand Cards Ltd v Ramsay* [2012] NZEmpC 51.

basis of the duty and good faith under s 4(1)(A) of the Employment Relations Act 2000. Leave to appeal was granted in a judgment delivered on 28 June 2012.²

[2] Mr Beresford was permitted to represent New Zealand Cards Ltd on the leave application, but it was made clear to him that no fixture would be granted unless the Registrar was satisfied that the company was legally represented. That was reinforced in a minute of 8 August 2013, in which Wild J also directed that future communications with the Court had to come from a lawyer instructed by the company.

[3] We observe that the company has pleaded impecuniosity in support of its attempts to appear by Mr Beresford rather than by counsel. So it is of moment to record that Stevens J dismissed applications to review the Registrar's decisions declining to dispense with security and waive the setting down fee, finding in two judgments that financial hardship had not been established.³

[4] At various times the company has engaged counsel. We note that the case was filed by Lane Neave, and Mr Beck was subsequently briefed. He appeared on an unsuccessful stay application⁴ and was briefed for the appeal.

[5] The appeal was set down, initially for 20 February 2014, a fixture which had to be adjourned because the company proposed at a late juncture to change counsel, and then for 31 July 2014. On 23 June 2014 Mr Beck sought leave to withdraw. O'Regan P granted leave in a minute of 3 July. He indicated that having regard to the proximity of the fixture Mr Beresford could seek dispensation allowing him to represent the company at the fixture. Contrary to Mr Beresford's recent claims, O'Regan P did not grant dispensation.

[6] Mr Beresford then sought an adjournment. The adjournment having been granted, O'Regan P recorded in a minute of 11 July that there was no longer any reason to go back on the Court's order requiring that New Zealand Cards be

² *New Zealand Cards Ltd v Ramsay* [2012] NZCA 285.

³ *New Zealand Cards Ltd v Ramsay* [2012] NZCA 456 (relating to security for costs) and *New Zealand Cards Ltd v Ramsay* [2013] NZCA 72 (relating to the setting down fee).

⁴ *New Zealand Cards Ltd v Ramsay* [2013] NZCA 582.

represented by counsel. He directed that a fixture be allocated for October or November 2014, which would allow sufficient time for the company to instruct counsel, and he repeated that only counsel, and not Mr Beresford, should communicate with the Court. A fixture was set for 23 October 2014.

[7] New Zealand Cards subsequently failed to file submissions. The respondent was accordingly excused from filing submissions. By email of 1 October 2014 the registry notified the company that Harrison J had directed that the matter would be called on 22 October 2014 and no adjournments would be granted.

[8] Mr Beresford responded in a fax to the registry suggesting that he had the rights both to represent New Zealand Cards in court and to “cancel” the hearing, by which he clearly meant have it adjourned so that it could be brought on at some future date. I issued a minute on 20 October reiterating that he could not appear for the company and explaining that while it may abandon its appeal it was not entitled to suspend proceedings or dictate when the hearing would be held. I cautioned that absent an appearance on 22 October the appeal might be dismissed.

[9] Mr Beresford responded by faxes and email. Initially he indicated both that the appeal is to be abandoned and that he sees such abandonment as temporary. He appeared to envisage that, the appeal having been abandoned, he may pursue it in the Supreme Court. We were unwilling to accept this as a notice of abandonment; the ordinary consequence of abandonment is that no further proceedings in respect of the appeal are possible. Mr Beresford then indicated that he anticipated the appeal would be dismissed. If, as he reiterated, he means to appeal to the Supreme Court, that would seem to be the better course.

[10] The appeal was duly called at 10.03 am on 22 October. Mr Wilson appeared by AVL from Christchurch, and there was no appearance for the appellant. The appeal was dismissed accordingly.

[11] Mr Wilson sought additional costs having regard to the expense to which his client has been put through Mr Beresford’s conduct of the appeal. He is to file and serve a memorandum accordingly, by 29 October 2014. The company may file

submissions in opposition; they are to be filed by 12 November 2014. The decision will be made on the papers.

[12] By way of postscript, we record that when the matter was called before us Mr Wilson assured us that he had just checked outside the courtroom at Christchurch and no one was there. After the hearing the Registrar advised us that at 10.15 am Mr Beresford entered the courtroom, saying he had been unable to find it and that it was locked and in darkness. The Registrar states that it had been open and lit since 9.45 am.

Solicitors:
Duncan Cotterill, Christchurch for Respondent