IN THE COURT OF APPEAL OF NEW ZEALAND

CA834/2013
[2015] NZCA 350

BETWEEN	ANDY NATHAN Appellant
AND	C3 LIMITED Respondent

Hearing:	21 July 2015
Court:	Randerson, White and Winkelmann JJ
Counsel:	S R Mitchell for Appellant P M Muir and R M Rendle for Respondent
Judgment:	4 August 2015 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The question of law is answered as follows:

Did the Employment Court err in law in concluding that the reasons relied on by the employer for Mr Nathan's dismissal do not amount to discrimination on the basis of his status as a union delegate and health and safety representative?

Answer: Yes

C Mr Nathan's personal grievance is remitted to the Employment Court for determination in light of this judgment.

D The respondent must pay the appellant's costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by White J)

Introduction

[1] The appellant, Mr Nathan, was dismissed from his employment as a stevedore by the respondent, C3 Limited (C3), in April 2012. He brought a personal grievance against C3 alleging that he had been unjustifiably dismissed in terms of s 103(1)(a) of the Employment Relations Act 2000 (the Act).

[2] The Employment Relations Authority (the Authority) decided in December 2012 that Mr Nathan and his similarly dismissed co-worker, Mr Nee Nee, had been justifiably dismissed.[1] They elected to challenge the Authority's decision in the Employment Court by way of a full hearing of the entire matter.[2] Their challenges were dismissed by the Employment Court in November 2013.[3]

[3] Mr Nathan then sought and obtained leave to appeal to this Court on the following question of law:[4]

> Did the Employment Court err in law in concluding that the reasons relied on by the employer for Mr Nathan's dismissal do not amount to discrimination on the basis of his status as a union delegate and health and safety representative?

[4] To answer this question, it is necessary to describe the factual background in a little detail before referring to the relevant provisions of the Act, summarising the Employment Court decision and addressing the submissions for the parties.

Factual background

[5] Mr Nathan was a senior permanent employee of C3. He was also a delegate for the Maritime Union of New Zealand and a health and safety representative.

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1 *Nee Nee v C3 Limited* [2012] NZERA Auckland 457.
2 Employment Relations Act 2000, s 179(3)(b).
3 *Nee Nee v C3 Limited* [2013] NZ EmpC 207 [Employment Court decision].
4 *Nathan v C3 Limited* [2014] NZCA 198.

[6] C3 had introduced a liquor ban at its worksite in September 2011 following a serious assault on site after alcohol had been consumed. The liquor ban was well-publicised through a text message to employees and a notice displayed prominently in the workplace.

[7] Mr Nathan was also aware of the liquor ban, the reasons for it and the fact that any breach would be viewed seriously as a result of his attendance at a health and safety meeting in September 2011 in his capacity as a health and safety representative.

[8] On 2 February 2012 Mr Nathan deliberately breached the liquor ban by engaging in a drinking session on site with Mr Nee Nee, two casual employees of C3, and two employees of another stevedoring company. The drinking session lasted several hours and approximately 66 bottles of beer were consumed.

[9] When the drinking session was investigated by C3 the two casual employees admitted their involvement, but Mr Nathan and Mr Nee Nee denied that they had drunk any beer. They lied about their involvement for approximately eight weeks, but ultimately admitted they had participated in the beer-drinking session in breach of the liquor ban.

[10] By letter dated 10 April 2012 C3 terminated Mr Nathan's employment on grounds of serious misconduct. The relevant parts of the letter read:

> TERMINATION OF EMPLOYMENT
>
> This letter serves to confirm our decision to terminate your employment effective immediately for serious misconduct.
>
> We have made the decision to summarily terminate your employment, because we have concluded that you had breached the liquor ban policy which is in place at the Auckland site. This amounted to a breach of our Code of Conduct: Section b. bringing or consuming liquor on company premises without the permission of management, and Section m. refusing to carry out an instruction from a manager (being non-compliance with the liquor ban policy). Both of these sections are specified as serious misconduct.
>
> We concluded that you had breached the liquor ban and that this was a breach of the Code of Conduct because:

- You acknowledged that you had consumed beer on company premises and others had told us that they observed you drinking beer. This was a clear breach of the liquor ban (which you acknowledged you knew was in place) and, therefore, the Code of Conduct.

- You are a Health and Safety delegate and a union representative and you have failed to display the behaviour that we would expect from you.

- Despite the alcohol consumed, you appeared to be the only one in the group who failed to remember details of the day's events.

- You were inconsistent in your accounts given during the process — for example, only mentioning ginger beer during the disciplinary process (you never referred to it during our investigation), and at the disciplinary meeting you started by saying you drank ginger beer, but then admitting to drinking beer.

- You acknowledged that you were intoxicated and said you did not drive home, but the other people present that night, Josh Iosua and Tangi Williams said that you did drive home.

[11] At the hearing before the Employment Court C3's General Manager at the time, Mr Warren Pritchard, accepted in cross-examination that the fact that Mr Nathan was a union delegate and a health and safety representative was a "factor in his thinking" or "an additional factor" taken into account in deciding to dismiss him. Mr Pritchard also gave evidence to the effect that Mr Nathan would have been dismissed even if he had not been a union delegate or representative.

Employment Court decision

[12] Applying the test for justification prescribed by s 103A of the Act, the Employment Court decided that C3's decision to dismiss Mr Nathan was justifiable because, objectively, it was "plainly one C3 Limited could make in all the circumstances, having regard to fairness and reasonableness."[5]

[13] The Court found that C3's procedures were in full compliance with the requirements of s 103A(3).[6]

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5 Employment Court decision, above n 3, at [50] and [54]

6 At [38].

[14] The Court rejected Mr Nathan's claim that C3's reliance on the fact that he was a union delegate and health and safety representative amounted to discrimination. The Court considered that C3 was entitled to take "a sterner view" of Mr Nathan's behaviour because of the positions he held and the fact that he could not claim "to be unaware of the seriousness by which the company would view a breach of the liquor ban."[7] On this basis the Court held that it was "a factor" taken into account by C3 not by way of discrimination but rather as going to the s 103A criteria.[8]

[15] The Court also held that Mr Nathan had not been dismissed on the basis of any "prejudicial attitude" adopted by C3 because he was a union delegate and health and safety representative.[9]

[16] The Court did not, however, address the question of discrimination in the context of ss 103(1)(c) or 104 of the Act which are the provisions that specifically address discrimination. In particular, the Court did not consider whether Mr Nathan would have been dismissed even if he had not been a union delegate or a heath and safety representative. The Judge apparently accepted the submission for C3 that, because Mr Nathan's personal grievance had been brought as a claim for unjustifiable dismissal under s 103(1)(a), the Court was limited to applying the criteria under s 103A.[10]

The Employment Relations Act 2000

[17] The relevant provisions of the Act are contained in Part 9 which is headed "Personal grievances, disputes and enforcement".

[18] Under s 103(1) of the Act an employee may have a "personal grievance" against an employer because of a claim:

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7 At [40], [47], [51] and [52].
8 At [40], [44] and [52].
9 At [47] and [52].
10 At [39] and [44].

(a) that the employee has been unjustifiably dismissed; or

…

(c) that the employee has been discriminated against in the employee's employment; or

…

[19] When the question is whether a dismissal was justifiable under s 103(1)(a), s 103A(1) provides that the claim must be determined, on an objective basis, by applying the test in subs (2). Under s 103A(2):

> The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[20] When the question is whether an employee has been discriminated against under s 103(1)(c), the provisions of s 104 relating to discrimination are applicable. For present purposes, the relevant parts of s 104(1) provide:

> For the purposes of section 103(1)(c), an employee is **discriminated against in that employee's employment** if the employee's employer … by reason directly or indirectly of that employee's ... involvement in the activities of a union in terms of section 107,—
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> (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
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> (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; …
>
> …

[21] The expression "involvement in the activities of a union" is relevantly defined in s 107:

107 Definition of involvement in activities of union for purposes of section 104

(1) For the purposes of section 104, **involvement in the activities of a union** means that, within 12 months before the action complained of, the employee—

(a) was an officer of a union or part of a union, or was a member of the committee of management of a union or part of a union, or was otherwise an official or representative of a union or part of a union; or

…

(g) was a delegate of other employees in dealing with the employer on matters relating to the employment of those employees.

(2) An employee who is representing employees under the Health and Safety in Employment Act 1992, whether as a health and safety representative or a site health and safety representative (as those terms are defined in that Act) or otherwise, is to be treated as if he or she were a delegate of other employees for the purposes of subsection (1)(g).

[22] Then s 119 creates a rebuttable presumption in discrimination cases by providing:

119 Presumption in discrimination cases

(1) Subsection (2) applies if, in any matter before the Authority or the court,—

(a) the employee establishes that the employer or the employer's representative took any action or omitted any action as described in any of paragraphs (a) to (c) of section 104(1) in relation to that employee; and

(b) if it is a case where the employee alleges that the discrimination was by reason directly or indirectly of the employee's involvement in the activities of a union, the employee establishes that he or she was a person described in section 107.

(2) If this subsection applies, there is a rebuttable presumption that the employer or representative of the employer discriminated against the employee on the grounds, or for the reason, specified in section 104(1) and alleged by the employee.

[23] Finally, s 122 provides:

> Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged.

Submissions

[24] For Mr Nathan, Mr Mitchell submits that the Employment Court erred in law because:

(a) the letter of dismissal and the evidence of Mr Pritchard established that C3 took into account amongst other matters the fact that Mr Nathan was a union delegate and health and safety representative;

(b) in terms of the Supreme Court decision in *McAllister v Air New Zealand Ltd*,[11] this fact was a "material factor" or "ingredient" in the dismissal decision which meant that C3 had dismissed Mr Nathan "by reason directly or indirectly" of his "involvement in the activities of a union" which amounted to discrimination;[12]

(c) the knowledge that Mr Nathan had acquired about the importance of the liquor ban in his capacity as a union delegate and health and safety representative was so intertwined with those roles that it could not be considered separately or justify him being held to a higher standard than other employees who also knew about the liquor ban but did not have those roles without putting the discrimination prohibition in jeopardy;[13] and

(d) in focussing exclusively on the issue whether C3's actions were what a fair and reasonable employer could have done in terms of s 103A(2) of the Act, the Employment Court failed to consider the discrimination issue in the context of the relevant provision of the Act as it ought to have done.[14]

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11 *McAllister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153 at [40] and [49].
12 Employment Relations Act 2000, ss 103(1)(c), 104(1)(b) and 107.
13 *Air New Zealand Ltd v Wulff* [2010] NZ EmpC 158 at [105].
14 Section 122.

[25] Mr Mitchell submitted that for these reasons the dismissal was unjustified and the case should be remitted to the Employment Court for that Court to determine the appropriate remedies.[15] In the course of argument Mr Mitchell accepted, however, that if the case were remitted to the Employment Court that Court would need to consider first whether Mr Nathan had been discriminated against in terms of ss 103(1)(c) and 104(1)(b).

[26] For C3, Ms Muir sought to uphold the decision of the Employment Court on the basis that it had decided correctly, in the context of Mr Nathan's personal grievance of unjustifiable dismissal under s 103(1)(a), that C3's actions were, in terms of s 103A(2), what a fair and reasonable employer could have done in all the circumstances. She pointed out that Mr Nathan's status as a union delegate and health and safety representative was only one factor and that all the other circumstances more than justified his dismissal.

[27] In the course of argument, however, Ms Muir accepted that:

(a) the Employment Court ought to have considered the discrimination issue in the context of ss 103(1)(c) and 104(1)(b);

(b) the evidence suggested that Mr Nathan had been dismissed, at least in part, "by reason directly or indirectly" of his "involvement in the activities of a union"; and

(c) there was no finding by the Court that Mr Nathan would have been dismissed even if he had not been a union delegate or health and safety representative.

[28] At the same time Ms Muir opposed the suggestion that in these circumstances the case should be remitted to the Employment Court. She submitted that:

(a) there was sufficient evidence for this Court to find that Mr Nathan would have been dismissed in any event;

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[15] Employment Relations Act 2000, ss 123–128.

(b) the Supreme Court in *McAllister v Air New Zealand Ltd* had made it clear that in considering the "comparator" under s 104(1)(b) all relevant circumstances should be taken into account;[16] and

(c) there would be practical difficulties for the parties in a further hearing before the Employment Court as Mr Nathan had left the stevedoring industry, Mr Pritchard had left C3 and significant further costs would be incurred by the parties.

An error of law?

[29] There is little doubt that the Employment Court made an error of law in concluding that the reasons relied on by C3 for Mr Nathan's dismissal did not amount to discrimination on the basis of his status as a union delegate and health and safety representative.

[30] The statement in the second bullet point in C3's letter of dismissal to Mr Nathan made it plain that his role as "a Health and Safety delegate and a union representative" had been taken into account because he had "failed to display the behaviour that we would expect from you".[17] C3 was holding Mr Nathan to a higher standard than other employees because of these roles. Any doubt as to the relevance of this factor in C3's thinking was dispelled by the evidence of Mr Pritchard.[18]

[31] In terms of s 104(1) of the Act the evidence therefore established that Mr Nathan had been dismissed "by reason directly or indirectly" of his "involvement in the activities of a union" as defined in s 107. This conclusion is reinforced by the Supreme Court decision in *McAllister* that the phrase "by reason of" in s 104(1) refers to a "material factor" or "ingredient".

[32] The next question in terms of s 104(1)(b) is whether C3 would have dismissed Mr Nathan even if he had not had these roles. The correct approach to the

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16 *McAllister v Air New Zealand Ltd*, above n 11, at [39].
17 See above at [10].
18 See above at [11].
19 *McAllister v Air New Zealand Ltd*, above n 11, at [40] per Elias CJ, Blanchard and Wilson JJ, and at [49] per Tipping J.

interpretation and application of this "comparator" provision is explained by the Supreme Court in *McAllister* which was an age discrimination case where s 104(1)(a) was relevant. On s 104(1)(b) the Court said:[20]

> We should add that it does not necessarily follow that, if para (b) had applied, the same comparator would be appropriate. In para (a) the comparison involves qualifications. In para (b) it involves types of work and there are no available checks and balances equivalent to ss 30 and 35. The comparator, as Mr Harrison QC [counsel for the appellant] put it, must allow the surrounding circumstances to work on both sides of the comparison. Having stressed the need for the comparator to be addressed to the context, we do not consider it is presently appropriate to pursue how a comparison might be made under para (b) as the selection of a comparator is driven in large measure by the particular circumstances and the manner in which an alleged discrimination occurs. The circumstances which may arise under para (b) are likely to be quite different from those in the present case.

[33] While Mr Pritchard did give evidence to the effect that Mr Nathan would have been dismissed even if he had not been a union delegate or representative, the Employment Court made no finding in terms of s 104(1)(b) and the Supreme Court decision in *McAllister*. The Employment Court did not consider the relevant evidence in this context or decide whether to accept Mr Pritchard's evidence. In these circumstances we do not agree with Ms Muir that this Court should determine this issue on appeal without the benefit of a lower court decision.[21]

[34] We agree with Mr Mitchell that the Employment Court, in focussing exclusively on the issue whether C3's actions were what a fair and reasonable employer could have done in terms of s 103A(2), failed to consider the discrimination issue in the context of ss 103(1)(c), 104(1)(b) and 107. As there is no doubt that the discrimination issue was raised in the Employment Court, it ought to have been considered in the context of the latter provisions.

[35] The fact that Mr Nathan's personal grievance was a claim for unjustifiable dismissal under s 103(1)(a) did not mean that the Employment Court was precluded from considering the discrimination issue in the correct statutory context. A pleading point of that nature would be contrary to s 122 which expressly permits the Court to

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[20] At [39].

[21] *Dandelion Investments Ltd v Commissioner of Inland Revenue* [2003] 1 NZLR 600 (CA) at [71]; *Sestan v Director of Area Mental Health Services, Waitemata District Health Board* [2007] 1 NZLR 767 (CA) at [83].

make a finding that a personal grievance is of a type other than that alleged.[22] We also consider that in terms of s 103A a fair and reasonable employer could not justify dismissal if the decision made was discriminatory in terms of s 104.

[36] The discrimination provisions of the Act are of considerable importance. They reflect New Zealand's international obligations under the International Labour Organisation conventions that have been ratified.[23] In particular, art 1 of the Right to Organise and Collective Bargaining Convention 1949 provides:

> (1) Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
>
> (2) Such protection shall apply more particularly in respect of acts calculated to—
>
> (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
>
> (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

[37] The specific provisions in the New Zealand Act proscribing discrimination for involvement in union activities reflect the underlying policy of the legislation that participation in such activities should not be held against employees.[24]

[38] It was therefore incumbent on the Employment Court to consider the discrimination issue raised by Mr Nathan and to decide whether he had been discriminated against in terms of s 104(1). The Court erred in deciding that there was no discrimination in terms of s 103(1)(a).

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22 *New Zealand Van Lines Ltd v Gray* [1999] 2 NZLR 397 (CA) at 405–406.

23 Employment Relations Act 2000, s 3(b); Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) (signed 9 July 1948, entered into force 4 July 1950), art 11; and Right to Organise and Collective Bargaining Convention 1949 (No 98) (signed 1 July 1949, entered into force 19 July 1951), art 1.

24 *Air New Zealand Ltd v Wulff*, above n 13, at [103]–[105]; *Gilbert v Transfield Services (New Zealand) Ltd* [2013] NZ EmpC 71, [2013] ERNZ 135 at [59]; and Stephen Evans and Roy Lewis *Anti-Union Discrimination: Practice Law and Policy* (1987) 16 Indus LJ 88 at 93.

Remit to Employment Court?

[39] In the absence of any consideration by the Employment Court of the discrimination issue in the context of the correct provisions of the Act and the Supreme Court decision in *McAlister*, we have no option but to remit the case to that Court to reconsider Mr Nathan's personal grievance in the context of ss 103(1)(c), 104(1)(b) and 107 of the Act and, if necessary, to consider what remedies should follow. It will be for the Court to decide whether, in light of all the relevant evidence, C3 would have dismissed Mr Nathan even if he had not been a union delegate and health and safety representative.

Result

[40] Accordingly, for these reasons:

(a) The appeal is allowed.

(b) The question of law is answered as follows:

> Did the Employment Court err in law in concluding that the reasons relied on by the employer for Mr Nathan's dismissal do not amount to discrimination on the basis of his status as a union delegate and health and safety representative?
>
> Answer: Yes

(c) Mr Nathan's personal grievance is remitted to the Employment Court for determination in light of this judgment.

[41] As costs should follow the event, C3 must pay Mr Nathan's costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Oakley Moran, Wellington for Appellant
Simpson Grierson, Auckland for Respondent