IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA562/2022
[2023] NZCA 160

BETWEEN	DAVID IAN BACH Appellant
AND	PRISON DIRECTOR, AUCKLAND SOUTH CORRECTIONS FACILITY (SERCO) First Respondent
	ATTORNEY-GENERAL Second Respondent

Court:	Brown and Gilbert JJ
Counsel:	D J Ryken for Appellant J K Scragg and A A Sawant for First Respondent S M Kinsler and S L K Shaw for Second Respondent
Judgment: (On the papers)	8 May 2023 at 2.30 pm

JUDGMENT OF THE COURT

A The application to adduce further evidence is granted.

B Costs are reserved.

REASONS OF THE COURT

(Given by Gilbert J)

[1] Mr Bach applies for leave to adduce further evidence in support of his appeal which is to be heard on 18 July 2023. Miller J made a direction on 27 February 2023

that this application is to be dealt with on the papers by two judges. This judgment responds to that application.

Background

[2] Mr Bach, who was then a serving prisoner at the Auckland South Corrections Facility, claims that on 19 December 2020 he was sexually assaulted by a prison officer during the course of a routine "pat-down" prior to visiting time. He claims the prison officer poked his finger through his shorts into his anus. Mr Bach said that he asked at the time to speak to the officer in charge, but the officers present just laughed at him. Mr Bach lodged a formal complaint with Serco New Zealand Ltd (Serco) the following day. Three days later, he requested the officer's name and stated that he wanted to "file charges with [p]olice for sexual assault and violation".

[3] Mr Bach was eventually advised by the Acting Deputy Director of the prison on 11 April 2021 that the staff involved with the search had been spoken to and all stated that the rub down process had been conducted correctly in accordance with set guidelines. He advised that there was no CCTV footage recording the search. He expressed regret if Mr Bach found the process uncomfortable but explained that such searches are necessary to ensure safety for everyone. In conclusion, he said the complaint was unfounded and the matter would be closed. He advised Mr Bach that he could raise the matter through the Inspector/Ombudsman if he wished.

[4] Mr Bach was not satisfied with Serco's handling of his complaint. Among other things, he says his complaint should have been referred to the police but was not. He filed judicial review proceedings in the High Court at Auckland claiming his right to natural justice under s 27 of the New Zealand Bill of Rights Act 1990 was breached in the complaint process. This claim (along with other unrelated claims Mr Bach pursued) was dismissed by the High Court.[1]

[5] Mr Bach wishes to adduce further evidence on appeal in order to respond to one of the reasons given by the Judge for dismissing this aspect of his claim. We set out the relevant part of the judgment below, with the specific comment italicised:

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1 *Bach v Prison Director, Auckland South Corrections Facility – SERCO* [2022] NZHC 2420.

> [84] There is a separate question of whether there was a breach of s 27 as Mr Bach alleges because, he says, his complaint should have been referred to the Police and it was not.
>
> [85] Neither the Act nor Regulations provide the source of a duty to refer a complaint to the Police. There must be an underlying framework that guides the process. Here, the claim under s 27 is untethered to any statutory powers. It is effectively a free-floating claim under s 27. In the absence of a breach of a statutory power there is no standard to enable a measurement of what s 27 requires. Even construing the words "rights" and "interests" broadly it is difficult to see what rights were engaged. *The complaint was investigated and there is no suggestion that Mr Bach was unable to contact the Police himself, either in custody or on release on parole.*
>
> [86] Further, there was no "determination", in terms of s 27 by [a Serco officer] after [they] received Mr Bach's written complaint in which he said he wanted to make a complaint to the Police.
>
> [87] In conclusion there was no breach of s 27 arising from the fact that the Prison Director did not refer Mr Bach's complaint to the Police.

Application to adduce further evidence

[6] Mr Bach's first ground of appeal is that the Judge erred in finding that he had the power to complain directly to the police. He claims that as a prisoner he could only make calls to pre-approved numbers and no prisoner is able to call the police at any time. He applies for leave to adduce a short affidavit in which he deposes:[2]

> 2. Although there was a phone in my cell, the phone could only be used to dial out pre-approved numbers.
>
> 3. The formal complaint that I made to the Prison was that I wanted my allegation of sexual assault dealt with by the police. At no time was I ever physically able to ring the police myself.

[7] The respondents oppose the application. They contend the evidence is neither fresh nor cogent. They argue that the question of whether Mr Bach could complain directly to the police was not pleaded or dealt with in any detail in the evidence and accordingly did not form an essential part of the Court's reasoning.

[8] We have decided on balance to allow the evidence in. We accept that the issue of whether Mr Bach could have contacted the police himself at the time and made a complaint was not raised in the pleadings. In particular, the respondents did not raise this prospect by way of defence to his complaint that they did not facilitate this.

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[2] Court of Appeal (Civil) Rules 2005, r 45.

There was therefore no need for either party to address the issue in evidence. The respondents may prove to be correct that the further evidence will not alter the outcome of the appeal given that the issue was not addressed in the pleadings and the Judge's comment might ultimately prove to be inconsequential, even if shown to be incorrect.

[9] However, as a matter of natural justice, litigants should not discover when reading a judgment that their claim has been dismissed for reasons that were not addressed in the pleadings, the evidence, or the submissions. We therefore consider the interests of justice are best served by allowing Mr Bach to adduce his further brief affidavit. The respondents will have an opportunity to respond to it, although they have not so far suggested that what Mr Bach says in his affidavit is incorrect, only that it has not yet been tested.

Result

[10] The application to adduce further evidence is granted.

[11] Costs are reserved.

Solicitors:
Ryken & Associates, Auckland for Appellant
Duncan Cotterill, Wellington for First Respondent
Meredith Connell, Wellington for Second Respondent