

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA210/2023
[2023] NZCA 509**

BETWEEN ANJELA SHARMA
Applicant

AND GAIL FOSTER-BOHM and ANDREW
CORBIN
Respondents

Court: Miller and Mallon JJ

Counsel: L A Andersen KC for Appellant
J Moss for Respondents

Judgment: 20 October 2023 at 2.30 pm
(On the papers)

JUDGMENT OF THE COURT

- A The application for leave to appeal is declined.**
- B The applicant must pay the respondents' costs for a standard application on a band A basis, together with usual disbursements.**
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REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] Gail Foster-Bohm and Andrew Corbin were employees of IHC New Zealand Inc (IHC). Their employment was terminated as part of a restructuring. They engaged Anjela Sharma, a lawyer, to assist them in making a claim for unjustifiable dismissal.

By the time Ms Sharma raised their personal grievances, IHC was able to resist them as having been made outside the 90-day statutory timeframe for doing so.¹

[2] Ms Foster-Bohm and Mr Corbin brought a claim against Ms Sharma alleging negligence, breach of contract and breach of fiduciary duty. They were successful in the District Court and Ms Sharma was ordered to pay damages of \$37,500 plus interest.² Ms Sharma’s appeal to the High Court was dismissed.³ An application for leave to appeal to this Court was also declined by the High Court.⁴ Ms Sharma now seeks leave from this Court to bring a second appeal.⁵

Test for leave

[3] The well-established test for leave to bring a second appeal to this Court is as follows:⁶

[4] ... The proposed appeal must raise some question of law or fact capable of bona fide and serious argument, in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal. On a second appeal this Court is not engaged in the general correction of error. Its primary function is to clarify the law and to determine whether it has been properly construed and applied by the Court below. It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by a court.

Background

District Court

[4] In the District Court, the evidence was that Ms Foster-Bohm and Mr Corbin were initially given four weeks’ notice that their employment was terminated by a letter dated 4 August 2015. At a meeting with IHC on 4 August 2015 they agreed they would be paid in lieu of notice. On 5 August 2015 Mr Corbin advised Ms Sharma by email that they had been allowed “to take our notice period (four weeks) in lieu with

¹ Employment Relations Act 2000, ss 103(a) and 114.

² *Foster-Bohm v Sharma* [2021] NZDC 20189 [District Court judgment] at [135].

³ *Sharma v Foster-Bohm* [2022] NZHC 2871, (2022) 19 NZELR 376 [High Court judgment].

⁴ *Sharma v Foster-Bohm* [2023] NZHC 552.

⁵ Senior Courts Act 2016, s 60.

⁶ *Butch Pet Foods Ltd v Mac Motors Ltd* [2018] NZCA 276, (2018) 24 PRNZ 500 citing *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343 (CA) at 346–347; and *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413 (footnotes omitted).

our last day being this Friday”.⁷ They asked when their claim for unjustifiable dismissal should be made.⁸

[5] Ms Foster-Bohm and Mr Corbin received a further letter dated 6 August 2015 advising that their employment was terminated with payment in lieu of notice and they would finish on Friday 7 August 2015.⁹ Mr Corbin attempted to send this letter to Ms Sharma but was unsuccessful because his work email, unbeknownst to him, had been disestablished by then.¹⁰ On 10 August 2015, Mr Corbin emailed Ms Sharma to ask about next steps. The email commenced by stating “[l]ast Friday was our last day at IHC and we are now looking at our next step for making a claim of unjustified dismissal by way of redundancy”.¹¹

[6] Mr Corbin and Ms Foster-Bohm met with Ms Sharma on 23 October 2015 to organise next steps.¹² This date was arranged to meet Ms Sharma’s schedule.¹³ Their evidence was that they reiterated to Ms Sharma at this meeting that their employment ended on 7 August 2015 and asked about the 90-day period to make their claim.¹⁴ They said that Ms Sharma was unsure and so they asked her to err on the side of caution.¹⁵ On 10 November 2015 they provided documents to Ms Sharma. This included the 6 August 2015 letter. Ms Sharma disputed receiving the letter or said it was not drawn to her attention.¹⁶ However, Judge Farish preferred the evidence of Mr Corbin and Ms Foster-Bohm.¹⁷

[7] Ms Sharma raised the personal grievances with IHC on 25 November 2015.¹⁸ IHC objected on the basis that it was raised outside the 90-day period that ran from 7 August 2015.¹⁹ In January 2016 Ms Sharma was made aware of this problem.²⁰ On

⁷ District Court judgment, above n 2, at [101(c)]. The District Court judgment says the email was sent on 5 December but this appears to be a typographical error.

⁸ At [101(c)].

⁹ At [97].

¹⁰ At [21].

¹¹ At [101].

¹² At [22].

¹³ At [22].

¹⁴ At [22].

¹⁵ At [22].

¹⁶ At [16] and [55].

¹⁷ At [98].

¹⁸ At [4].

¹⁹ At [5].

²⁰ At [102].

6 October 2016 the Employment Relations Authority determined that a claim for unjustifiable dismissal was not actionable as it was outside the 90-day period.²¹ Matters were referred to mediation but no agreement was reached because IHC maintained the claim was out of time.

[8] Having received no compensation from IHC, Mr Corbin and Ms Foster-Bohm brought a claim for negligence, breach of contract and breach of a fiduciary duty against Ms Sharma. The District Court held that Ms Sharma owed a duty of care to act competently and in a timely way under her retainer and in negligence.²²

[9] The Judge found the duty was breached because Ms Sharma had been specifically told that Mr Corbin and Ms Foster-Bohm had agreed to be paid in lieu of notice.²³ She claimed to have accepted what Mr Corbin had told her about when the 90-day period would start,²⁴ but it was her obligation to investigate the issue.²⁵ The legal position was well known,²⁶ but if Ms Sharma remained uncertain, then she ought to have assumed that it started from their final day of employment and lodged the claim on that basis.²⁷ These were basic research and risk management steps to be expected of a competent lawyer.²⁸

[10] Further, the Judge found that, once it became apparent that the claim had been raised outside the 90-day period, Ms Sharma ought to have applied for an extension of time to raise the claim on the basis that the mistake was hers rather than her clients.²⁹ The Judge considered it was distinctly possible that an extension would have been granted as there were many examples of extensions being granted in analogous situations.³⁰ The Judge considered that failing to pursue this obvious remedy was negligent.³¹ Moreover, the Judge considered that Ms Sharma ought to have advised

²¹ *Corbin v IHC New Zealand Inc* [2016] NZERA Christchurch 181.

²² District Court judgment, above n 2, at [103]. The District Court Judge referred to “the terms of the retainer and the duty to take reasonable care”. In context, the Judge was referring to a duty of care owed in contract and in negligence.

²³ At [104]–[116].

²⁴ At [105].

²⁵ At [108].

²⁶ At [109].

²⁷ At [110].

²⁸ At [110].

²⁹ At [111].

³⁰ At [111]–[112].

³¹ At [113].

Mr Corbin and Ms Foster-Bohm that they might have a claim against her and to seek independent advice. Had she done so, the Judge considered it was likely that Mr Corbin and Ms Foster-Bohm would have been advised to apply for an extension to make their claim out of time.³²

[11] The Judge then assessed what Mr Corbin and Ms Foster-Bohm had lost from Ms Sharma's negligence on the basis of the likely settlement they would have received from IHC if she had not breached her duties.³³ In making this assessment, the Judge relied on expert evidence from Mr Zindel. He was the lawyer who acted for Mr Corbin and Ms Foster-Bohm in the mediation that was unsuccessful because IHC was able to rely on the claim being made too late.³⁴ He gave evidence as to the settlement range he would have recommended to IHC if he had been acting for it in a mediation where IHC could not rely on the claim being made too late.³⁵ The Judge tested that evidence against case law.³⁶ The Judge also considered the apparent strengths of the claim and IHC's likely attitude to it.³⁷ This led her to conclude that they had a 75 per cent chance of recovering their full claim of \$50,000, that is a total sum of \$35,000 (a sum with the range that Mr Zindel provided in his evidence).³⁸ The Judge divided this between Mr Corbin (\$20,000) and Ms Foster-Bohm (\$17,500) based on their respective lengths of employment.³⁹

[12] Lastly, the Judge considered Ms Sharma's claim for legal fees charged prior to Mr Corbin and Ms Foster-Bohm cancelling the contract of retainer on 12 May 2017.⁴⁰ The Judge determined that the work Ms Sharma carried out for them was substantially wasted because it was carried out negligently.⁴¹ The Judge therefore determined that they were not required to pay for that work.⁴²

³² At [113].

³³ At [117]–[130].

³⁴ Referred to above at [7].

³⁵ District Court judgment, above n 2, at [123].

³⁶ At [124]–[126].

³⁷ At [127]–[128].

³⁸ At [129].

³⁹ At [130].

⁴⁰ At [134].

⁴¹ At [133].

⁴² At [134].

High Court

[13] It was argued for Ms Sharma on appeal that the claim for unjustified dismissal was not in fact statute-barred because the 90-day period commenced at the end of the four-week period they would have been required to work if they had not been paid in lieu. Palmer J rejected this, noting it had not been pleaded, but in any case the argument failed on its merits.⁴³ The cases relied on upon by Ms Sharma did not support the point on the facts of the case.⁴⁴

[14] It was also argued for Ms Sharma that the Judge was wrong to accept Mr Zindel's evidence. This was because it was said that he was not sufficiently independent to give expert evidence when he had acted for Ms Foster-Bohm and Mr Corbin in the mediation and appeared to have some involvement in the decision to sue Ms Sharma. Palmer J rejected this argument.⁴⁵ He noted that Mr Zindel was plainly an expert.⁴⁶ Mr Zindel's prior involvement in the case, which had been disclosed to the Court, was relevant to the weight Judge Farish might give to it, but was not disqualifying.⁴⁷ Palmer J was not satisfied that Judge Farish was wrong in her approach to this evidence.⁴⁸

[15] It was also argued that a letter written by the former Chief Judge of the Employment Court should have been admitted as evidence once it was admitted for the purposes of cross examination. This was rejected by Palmer J and is not one of the grounds for a second appeal so we discuss it no further.⁴⁹

[16] It was next argued that Ms Sharma was not negligent based on the information she knew. Palmer J considered Judge Farish was correct to find negligence.⁵⁰ On the information Ms Sharma accepted she had received, she ought to have taken the straightforward step of making the claim within 90 days of 7 August 2015.⁵¹ Further,

⁴³ High Court judgment, above n 3, at [16].

⁴⁴ At [18].

⁴⁵ At [20]–[24].

⁴⁶ At [24].

⁴⁷ At [24].

⁴⁸ At [24].

⁴⁹ At [25]–[27].

⁵⁰ At [28]–[31].

⁵¹ At [30].

Palmer J agreed with Judge Farish that Ms Sharma ought to have advised Ms Foster-Bohm and Mr Corbin to seek independent legal advice and, if she had done so, they would likely have been advised to apply for an extension.⁵²

[17] It was next argued that Ms Foster-Bohm and Mr Corbin did not suffer any loss because their claim for unjustifiable dismissal (which was out of time) did not add anything to the claim for unjustifiable disadvantage (which was not out of time). Palmer J rejected this claim because Ms Sharma offered no evidence as to the damages that might have been available on such a claim.⁵³

[18] Lastly, it was argued that Ms Sharma was entitled to be paid for her work because the contract was not cancelled. Further, even if it was cancelled, Judge Farish was wrong to find that Ms Sharma was not entitled to payment for her work up to the point of the cancellation. Palmer J rejected this argument.⁵⁴ He agreed with Judge Farish that Mr Corbin and Ms Foster-Bohm had made their intentions clear that the contract was at an end.⁵⁵ He considered that s 42 of the Contract and Commercial Law Act 2017 (the CCL Act) did not assist Ms Sharma.⁵⁶ He considered it was open to the Judge under ss 43 and 45 of the CCL Act to decline to order Mr Corbin and Ms Foster-Bohm to pay for the negligently performed work.⁵⁷

Assessment

[19] Ms Sharma seeks to raise the same arguments that were raised and rejected in the High Court, if granted leave for a second appeal, except she does not pursue the point about the letter written by the former Chief Judge. She says: the Judge was wrong that her pleading accepted the personal grievance claim was lodged out of time; Ms Sharma was correct that the claim was not out of time; there was no proper basis for the finding that she was negligent; Mr Zindel could not be an expert because he was not impartial having acted as an advocate for Ms Foster-Bohm and Mr Corbin; Ms Foster-Bohm and Mr Corbin did not prove that could not have recovered the same

⁵² At [31].

⁵³ At [32]–[34].

⁵⁴ At [35]–[39].

⁵⁵ At [37].

⁵⁶ At [39].

⁵⁷ At [39].

sum from a claim for unjustified disadvantage; and Ms Sharma's right to payment had accrued and was not abrogated by s 42(1) of the CCL Act.

[20] Ms Sharma says that leave is justified because of the serious consequences to her of being held to be negligent. She also says that there is a public interest in an authoritative decision on: the date of termination when an employee does not work the notice period; whether a person who acts as an advocate may be an expert witness for that party; and whether s 42(1) of the CCL Act prevents a lawyer from recovering fees for work done prior to cancellation of the contract.

[21] As to Ms Sharma's breach of duty, we are satisfied that leave should not be granted. The pleading point is of no moment if it is not seriously arguable that Ms Sharma acted with reasonable care and we consider it is not. Quite apart from whether it is seriously arguable that the 90-day period had not elapsed when the personal grievance claims were made, the lack of reasonable care was the reason why Mr Corbin and Ms Foster-Bohm were unsuccessful in achieving a settlement with IHC. Faced with IHC's reliance on the expiration of the 90-day period, a reasonably competent lawyer would have applied for an extension of time on the basis that it was her error that caused the claim to be out of time, or advised Mr Corbin and Ms Foster-Bohm to instruct another lawyer to make that application on their behalf. In that event, Mr Corbin and Ms Foster-Bohm would likely have been able to continue with their claim.

[22] As to loss, we are also satisfied that leave should not be granted. It is not seriously arguable that the District Court Judge assessed loss in a manner that was not open to her. Mr Zindel's evidence was cross-checked against cases and the Judge's own assessment of the strength of Mr Corbin and Ms Foster-Bohm's claim for unjustifiable dismissal.⁵⁸ Ms Sharma did not adduce admissible evidence that a claim for unjustifiable disadvantage would have resulted in a successful settlement of the same quantum and we are satisfied that Ms Sharma's claim for her legal fees for work performed negligently was properly denied.

⁵⁸ District Court judgment, above n 2, at [121]–[129].

Result

[23] The application for leave to appeal is declined.

[24] The applicant must pay the respondents' costs for a standard application on a band A basis, together with usual disbursements.

Solicitors:

Anjela Sharma, Nelson for Applicant

Patient & Williams, Christchurch for Respondents