IN THE SUPREME COURT OF NEW ZEALAND

SC 26/2014
[2014] NZSC 62

BETWEEN	JOHAN AARTS Applicant
AND	BARNARDOS NEW ZEALAND First Respondent
	COMMISSIONER OF NEW ZEALAND POLICE Second Respondent
	MINISTRY OF SOCIAL DEVELOPMENT Third Respondent
	THE PRIVACY COMMISSIONER Fourth Respondent
	THE OMBUDSMAN Fifth Respondent
	LANCE LAWSON BARRISTERS AND SOLICITORS Sixth Respondent

Court: Elias CJ, William Young and Arnold JJ

Counsel: Applicant in person
J M Douglas for First Respondent
S V McKechnie for Second and Third Respondents
A M M Schulze and G B Burt for Sixth Respondent

Judgment: 28 May 2014

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay costs of $2,500 together with disbursements to be fixed by the Registrar to the second and third respondents (collectively) and to the sixth respondent.

REASONS

Background

[1] The applicant seeks leave to appeal against a judgment of the Court of Appeal delivered on 14 February 2014:[1]

> (a) dismissing his application for leave to appeal[2] against a judgment of the Employment Court[3] upholding a decision of the Employment Relations Authority[4] striking out his claims for penalties against the Commissioner of Police, the Ministry of Social Development, the Privacy Commissioner, the Ombudsman and Lance Lawson; and
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> (b) dismissing his application for leave to appeal against a later judgment of the Employment Court as to costs.[5]

[2] The Employment Court held that the claims against the Commissioner of Police and the Ministry of Social Development were out of time and that the claims against the Privacy Commissioner, the Ombudsman and Lance Lawson were both without foundation on the facts and out of time. In addition, the applicant seeks leave to appeal directly to this Court against the judgments of the Employment Court under ss 214A of the Employment Relations Act 2000 and 14 of the Supreme Court Act 2003.

[3] The applicant claims that he was unjustifiably dismissed by Barnardos New Zealand in 2006 and that the other respondents were parties to a breach of his employment agreement (being the unjustifiable dismissal). Under s 135(5) of the Employment Relations Act, such claims must be brought within 12 months of when the cause of action either became known to the person bringing the action or should reasonably have become known to that person.

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1 *Commissioner of Police v Aarts* [2014] NZCA 16.
2 This was technically a cross-appeal.
3 *Aarts v Barnardos New Zealand* [2013] NZEmpC 85, (2013) 10 NZELC 79-028.
4 *Aarts v Barnardos New Zealand* [2012] NZERA Auckland 22.
5 *Aarts v Barnardos New Zealand* [2013] NZEmpC 145.

[4] In a preliminary ruling by a Judge of the Court of Appeal, the applicant's request to be represented by a lay advocate in the Court of Appeal was refused.[6] And then in the judgment delivered on 14 February 2014 on the papers, the Court of Appeal declined the applicant leave to cross-appeal and appeal but set down for oral hearing an application by the Commissioner of Police to appeal against another aspect of the Employment Court's judgment.

The application for leave to appeal against the Court of Appeal decision and the proposed challenge to the representation decision

[5] The short answer to the application for leave to appeal against the judgment of the Court of Appeal declining leave to appeal is that, by reason of s 7(b) of the Supreme Court Act, this Court has no jurisdiction to hear an appeal from a decision of the Court of Appeal declining leave to appeal.

[6] The applicant is dissatisfied with the decision not to allow him to be represented by a lay advocate. As noted, this was made ahead of the leave decision which was made on the papers. There was thus nothing to preclude the applicant seeking assistance from his lay advocate in relation to his submissions. So the representation issue is irrelevant to the decision of the Court of Appeal refusing the applicant leave to appeal. In any event, even if it was relevant, it must be taken to have been overtaken by that decision and, to that extent, is subject to s 7(b).

[7] The decision as to representation does, however, have some continuing effect as the Court of Appeal adjourned for oral hearing an application for leave to appeal by the Commissioner of Police in relation to the production of certain evidence relating to the substantive hearing of the applicant's claim against Barnardos. The decision as to representation in this context is not within the letter of s 7(b). It would therefore be open for this Court to grant leave to appeal.[7] We are, however, of the view that leave should be declined. Given the interlocutory character of decision under challenge, s 13(4) of the Supreme Court Act is engaged. The Court of Appeal has directed that if the applicant does not engage counsel, the Registrar is to appoint

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6 Minute of Randerson J, dated 1/11/13.

7 The situation is broadly similar to that in *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309.

counsel to assist the Court. If the Commissioner is unsuccessful in obtaining leave or, if leave is obtained, unsuccessful on the substantive appeal, the applicant will have no basis for continuing concern. If, on the other hand, the Commissioner succeeds on the proposed appeal, the representation issue can be addressed on an appeal to this Court against that decision (should this Court grant leave for such an appeal). In these circumstances, the s 13(4) criterion has not been satisfied.

The application for leave to appeal against the Employment Court judgments

[8] The applicant did not initially apply under s 214A of the Employment Relations Act for leave to appeal against the judgments of the Employment Court. In response to submissions from the respondents as to jurisdiction, however, the applicant signalled a wish to challenge those judgments directly and we invited submissions from him accordingly. It should be noted at the outset, however, that this Court will be cautious in granting leave to appeal from a court other than the Court of Appeal where the Court of Appeal has already declined leave.[8]

[9] On the s 135 issue, the applicant maintains that his state of mind (and that to be imputed to a reasonable person in his position) never went beyond suspicion and thus s 135 has not been engaged. We accept that what the applicant "reasonably knew" as to his causes of action might be the subject of some legal argument. The reality, however, is that the Employment Court's conclusions were primarily determinations of fact and to this extent immune from challenge by reason of s 214A. To the limited extent, if any, to which the applicant's proposed appeal on this ground is not precluded by s 214A, we do not see it as meeting the stringent test in s 14 of the Supreme Court Act.

[10] The applicant's other complaint about the substantive Employment Court judgment is that the Chief Judge determined the challenge on a de novo basis despite the applicant having chosen to proceed otherwise, that is, on a "non de novo" basis. As it turned out, however, the Court heard oral evidence in relation to the claim against Lance Lawson, solicitors who had acted for the applicant after the dismissal. The judgment records, and this was not specifically challenged by the applicant, that

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[8] See, for instance, *White v Auckland District Health Board* [2007] NZSC 64, (2007) 18 PRNZ 698 and *C v Air Nelson Ltd* [2010] NZSC 110.

this was with the applicant's consent. The judgment also refers to evidence given by the applicant in relation to a disclosure issue which is not before us. Conceivably evidence may have been given on other issues too. To the extent that the giving of evidence meant that the hearing before the Employment Court was on a de novo basis, this must have been with the consent of the applicant and his subsequent complaints do not warrant a grant of leave to appeal to this Court.

[11] The applicant also challenges the awards of costs made against him. The applicant's case against Barnardos is, to some extent, complicated by the disclosure issue already adverted to. That issue apart, the case looks reasonably straight-forward. It was made much more difficult by the applicant's claims against the Commissioner of Police and the Ministry of Social Development and even more so by the never plausible claims against other respondents (including, but not confined to, the present third, fourth, fifth and sixth respondents). They came into the picture only because they did not resolve to his satisfaction his concerns in relation to Barnardos, the Commissioner of Police and the Ministry of Social Development. Their relevant actions (or inaction) took place after the allegedly unjustified dismissal to which they were said to be parties. The applicant maintains, and we are prepared to accept, that the costs awarded against him are substantial given his limited resources. That said, given the context to which we have just referred, we see no point of law of general or public importance and no appearance of a miscarriage of justice.

Solicitors:
EMA Legal, Auckland for First Respondent
Crown Law Office, Wellington for Second and Third Respondents
Lance Lawson, Rotorua for Sixth Respondent