IN THE COURT OF APPEAL OF NEW ZEALAND

CA133/03

BETWEEN	MCCULLOCH AND PARTNERS Appellants
AND	VICKI SMITH Respondent

Hearing: 3 December 2003

Coram: Gault P
Blanchard J
McGrath J

Appearances: R T Chapman for Appellant
M J Thomas for Respondent

Judgment: 3 December 2003

JUDGMENT OF THE COURT DELIVERED BY GAULT P

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[1] This is an appeal, by leave, from a judgment of the Employment Court delivered by the Chief Judge on 11 June 2003. In that judgment it was held that the respondent had been unjustifiably dismissed from her employment with the appellant firm.

[2] On 8 August this year this Court gave leave to appeal on the first of four points of law outlined in an application for leave. In respect of the three other points the Court indicated that the issue of leave to appeal would be dealt with at the time of hearing the substantive appeal on the first point.

[3] The first point, in respect of which leave was granted, is directed to the quantum of the award by the Chief Judge as compensation for humiliation. The short point is that in the statement of claim the sum of $15,000 was sought whereas

the Chief Judge awarded $27,500. In normal circumstances it would be a simple matter of reducing the award to the amount claimed, there being no jurisdiction to award a greater amount. In this case, however, it is said for the respondent that the matter proceeded in the Employment Court on the basis that a greater award was being sought than had been claimed because of an event immediately before the hearing which aggravated the hurt and humiliation of the respondent. It was said, and accepted by Mr Chapman for the appellant, that prior notice had been given that the further aggravating conduct would be raised. Mr Chapman said, however, that the appellant proceeded on the basis that the additional claim was still within the original amount sought. He was not able to point to any strong ground on which he would have been able to resist an application to amend the claim had it been made at the hearing.

[4] In the circumstances we do not consider we can form any clear view on how the case was run before the Chief Judge, although the fact that he awarded more than was claimed suggests the contention for the respondent should not be too readily dismissed.

[5] We are satisfied that the correct course is to refer the matter back to the Employment Court under s215 of the Employment Relations Act to enable reconsideration of the award and any application that may be made to amend the claim.

[6] We turn to the application for leave to appeal on the other grounds. The second point said to raise a question of law warranting leave to appeal under s214 was that the Employment Court failed to correctly identify the substantive reason for the dismissal and the Court could not, and did not therefore, correctly address the question of whether or not the decision to dismiss was one which a reasonable and fair employer could have taken.

[7] It was submitted that the employer had determined to dismiss the respondent for dishonesty whereas the Employment Court had decided the matter with reference to action taken by the respondent to delete certain records from her computer. Having read the judgment, we are not convinced the Chief Judge did not correctly

identify the two related matters advanced by the employer as justifying the decision to dismiss. That he did so as appears from para 25 of his decision. We find no error of law in this respect. Having identified the grounds relied on, it was a matter for the Employment Court to evaluate the facts and, on an appeal on questions of law, it is not for this Court to review that evaluation.

[8] The third matter raised was that the Court erred in law in making critical findings of fact that were contrary to the evidence or were unsupported by the evidence. The essential point is that the Chief Judge is said to have misstated the facts when referring to the respondent handing to her employer printouts of the files in issue, whereas not all of the files deleted from the computer were copied and handed over. The Chief Judge clearly found there was no obligation on the respondent to provide her employer with any of the files since they related to pro bono work that was not part of the employer's business. We cannot accept, therefore, that, had he recognised (if he did not in fact do so) that some part of the file was not handed over, it could have affected his decision. Any error of fact was not material and cannot constitute a ground for leave to appeal.

[9] The final ground was that the Chief Judge erred in law in finding that the conduct of the respondent did not contribute to the dismissal in such manner as justified reduction of the amount of the remedy. This was not a matter overlooked by the Chief Judge. He addressed it and, on his assessment, found that reduction was not justified even though the respondent had accepted that she had been unwise to act as she did. This again was an evaluation of the facts. There was no error in principle. There is no point of law on which leave should be granted.

[10] Accordingly, on the first ground, the appeal is allowed and the matter is referred back to the Employment Court for reconsideration. On the remaining grounds, leave to appeal is refused.

[11] As the outcome constitutes something of an indulgence for the respondent, costs on the appeal will lie where they fall.

Solicitors:
Cruickshank Pryde, Invercargill, for Appellant
Preston Russell Law, Invercargill, for Respondent