IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 2/2004

BETWEEN	PETER FRANCIS URBANI Applicant
AND	GILLIONS AND SONS LIMITED Respondent

Hearing: 13 July 2004

Coram: Keith J
Tipping J

Appearances: I G Hunt and A Isac for the Applicant
C S Withnall QC for the Respondent

Judgment: 15 July 2004

JUDGMENT OF THE COURT

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[1] Mr Urbani sued his former employer, Gillions, a funeral parlour, for negligence, breach of fiduciary duty and breach of statutory duty. He alleged that the employer's breaches caused him post-traumatic stress disorder (PTSD), depressive illness and post-traumatic stress reactions. John Hansen J rejected his claim and the Court of Appeal dismissed his appeal.

[2] Mr Urbani applies for leave to appeal on the ground that the appeal involves a matter of general or public importance – the criteria to be applied by the Court of Appeal as an intermediate appellate court when reviewing factual findings made by the High Court. The challenge in the Court of Appeal was limited in two ways. First, the challenge was only to factual findings on the extent of Mr Urbani's involvement in the procedures in the funeral parlour (especially embalming), the finding that he did not suffer from PTSD and the finding that his work at Gillions

was not a material contributing factor to his illness. Secondly, the challenge did not include the Judge's findings on credibility which had gone heavily in favour of the employer.

[3] In the oral hearing before us counsel were essentially in agreement about the test or approach to be applied by the Court of Appeal. Since no findings of primary fact based on conflicting oral evidence are involved (as in *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190, 197-198 (CA), and *Hutton v Palmer* [1990] 2 NZLR 260, 268 (CA)), the test well established by decisions of the Privy Council on appeal from New Zealand and the Court of Appeal itself is that the appellant has to satisfy the Court of Appeal that the factual findings are wrong; eg *Rangatira Ltd v Commissioner of Inland Revenue* [1997] 1 NZLR 129, 138-139 (PC), citing Cooke J in *Calkin v Commissioner of Inland Revenue* [1984] 1 NZLR 440 (CA), *Rae* and *Fowler v Wills* [2004] NZFLR 252, para [5] (CA). If the appellant can show that there was no evidence to support the finding then the finding will be set aside, but in a case like the present it is not necessary for the appellant to go so far.

[4] The real issue on this application accordingly becomes this : did the Court of Appeal state and, as a consequence, apply the wrong approach or test? There is a further question, which we do not reach, whether that issue would qualify for the grant of leave under s13 of the Supreme Court Act 2003. Mr Hunt for Mr Urbani said it did, calling attention to the use of such phrases as "this was a finding [the Judge] was entitled to make", "he was entitled to accept the evidence of [the employer's expert] as the proper test to apply" and, most importantly for the application, "the decision the Judge came to on the causation point was one available to him on the evidence". But as Mr Withnall said, these phrases have to be seen in their full context. The first and second appear in a paragraph concerning the finding about PTSD:

> [42] With regard to the Judge's finding that Mr Urbani does not suffer from PTSD, we consider this was a finding he was entitled to make. The Judge was faced with conflicting evidence as to the requirements of DSM-IV criterion A(1) from the two experts. He was entitled to accept the evidence of Dr Earthrowl as to the proper test to apply. This is particularly the case in light of the problems he identified with

> Mr Prosser's evidence and his findings as to Mr Urbani's exaggeration of his experiences, his reaction to those experiences, his symptoms and the link he made between those experiences and his work. All of these matters were in our view relevant and were validly taken into account by the Judge. We note too that the Judge did in any event consider an extended definition of PTSD and concluded that Mr Urbani's experiences could not have met that test either.

[5] We read that as a holding by the Court of Appeal that the appellant had not satisfied it that the Judge was wrong in his assessment of the experts and in his application of the opinion of the employer's witness to the primary facts he had found. No exception can be taken to that.

[6] The last phrase appears at the conclusion of three paragraphs about causation:

> [44] We move now to the Judge's findings on causation. As indicated above, the Judge considered that, given the indications of pre-employment difficulties, the other stressors in Mr Urbani's life and Mr Urbani's exaggeration of his experiences at Gillions, he had failed to prove that the Gillions' work was a material contributing factor to his illness.
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> [45] The Judge had to come to his own view on causation after taking into account all the evidence and paying due regard to the views of the experts. The Judge was not obliged to accept the views of the experts, particularly as those experts had based their views, at least in part, on what the Judge found to be Mr Urbani's exaggeration. With regard to the specific matters raised by Mr Hunt, we consider that there was ample evidence of pre-employment difficulties (as set out in para 24 above), some of which was not produced until trial. Significant other stressors in Mr Urbani's life arose after the employment had ceased (and we note that the Judge was clearly aware of the timing of the break up with the girlfriend - see para 26 above). We have also found that the Judge was aware of and accepted the level of involvement in embalming as described by Gillions' witnesses. His view as to causation was thus clearly founded on an acceptance of that level of involvement.
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> [46] Taking into account all of these factors, we consider that the decision the Judge came to on the causation point was one available to him on the evidence and should not be disturbed.

[7] We read those paragraphs as leading to the conclusion by the Court of Appeal that the finding on causation "should not be disturbed" because it was not satisfied it was wrong. The structure of that final sentence with its two distinct elements is the

same as the final substantive sentence of the judgment of the Privy Council in *Rangatira* (139, lines 40-41).

[8] The proposed appeal accordingly presents no matter of general or public importance, nor is there any basis for concluding that a substantial miscarriage of justice may have occurred. The application for leave is dismissed.

[9] We understand that Mr Urbani may be legally aided. Any issues about costs may be the subject of memoranda.

Solicitors:
Young Hunter, Christchurch for the Appellant
Lucas & Lucas, Dunedin for the Respondent