

IN THE SUPREME COURT OF NEW ZEALAND

SC 74/2011
[2011] NZSC 111

BETWEEN	DAVID MITCHELL Applicant
AND	BLUE STAR PRINT GROUP (NZ) LIMITED Respondent

Court: Blanchard, McGrath and William Young JJ

Counsel: Applicant in person
C Heaton for Respondent

Judgment: 22 September 2011

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Mitchell brought a personal grievance claim against his former employer, Bluestar, claiming for lost wages plus \$100,000 for hurt and humiliation and \$400,000 for exemplary damages. The Employment Relations Authority dismissed his claims. He appealed to the Employment Court,¹ where there was a de novo hearing. Judge Shaw found that he had been unjustifiably constructively dismissed and awarded him compensation of \$10,000 for humiliation etc. She dismissed the exemplary damages claim, saying it had been abandoned when Mr Mitchell accepted that such damages were not available as a remedy for a personal grievance.

[2] There had been a Calderbank offer by Bluestar before the matter came before the Authority in the sum of \$13,000. In awarding costs to Mr Mitchell, Judge Shaw disregarded that offer, saying that a feature of Mr Mitchell's case was his desire for

¹ *Mitchell v Blue Star Print Group (NZ) Ltd* EmpC Wellington 21/08, 23 December 2008.

personal vindication, which the offer had not addressed, and that his claim that he had been treated unfairly had been entirely successful. She awarded him costs of \$1,000 in respect of the Authority hearing, \$3,000 for the Employment Court hearing and \$1,510 disbursements.²

[3] Bluestar successfully challenged the costs order in the Court of Appeal. The Court accepted a submission from Bluestar that Mr Mitchell had not abandoned his exemplary damages claim, referring to a passage from the hearing transcript in the Employment Court and to the fact that after the costs decision Mr Mitchell had written to the Court denying that he had abandoned the exemplary damages claim. However, he brought no appeal in respect of it.

[4] The Court of Appeal found that Judge Shaw had exercised her discretion on a wrong principle.³ It said that:

[15] ... The finding that Mr Mitchell had abandoned the claim for a large sum of money was central to the Judge's reasoning that he was motivated primarily by vindication and not by money. But we are also satisfied that the Judge made a second error of principle in disregarding the Calderbank offer.

[5] It considered that the Calderbank letter should have been taken into account and quashed the costs order.

[6] Mr Mitchell's application to this Court is well out of time but he explains that he was not notified of the Court of Appeal's decision. Even so, his application was still not made until 4 July 2011, long after 29 November 2010 when he did receive a copy of the Court of Appeal judgment. He explains this delay as being because he was waiting for a copy of the transcript of the hearing in the Court of Appeal which he had been unaware of and did not attend. But he had that transcript two months before he made the present application.

[7] It could be said that Mr Mitchell has been unlucky in having his costs award taken away from him on the basis that he persisted in claiming exemplary damages when Judge Shaw seems to have considered that in reality he was accepting that he

² *Mitchell v Blue Star Print Group (NZ) Ltd* EmpC Wellington 2/09, 19 March 2009.

³ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 per O'Regan P, Randerson and Stevens JJ.

could not have them and was not pressing that aspect of his case. But whether the Calderbank letter should or should not have been disregarded seems largely to turn in the circumstances on that factual matter and to give rise to no question of public or general importance. Mr Mitchell's case is not of such obvious merit that he should be given leave to appeal out of time, especially when only a relatively small sum of costs is in issue.

Solicitors:
Morrison Kent, Wellington for Respondent