IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 24
ARC 50/12

IN THE MATTER OF	an application for rehearing	
BETWEEN	IDEA SERVICES LIMITED Plaintiff (Respondent in rehearing)	
AND	VALERIE BARKER Defendant (Applicant in rehearing)	

Hearing: 8 February 2013
(Heard at Wellington)

Appearances: Les Taylor, counsel for the plaintiff (respondent)
Peter Cranney and Anthea Connor, counsel for the defendant (applicant)

Judgment: 5 March 2013

JUDGMENT OF JUDGE A D FORD

The application

[1] The defendant, Ms Valerie Barker, has made application for a rehearing of this proceeding which was heard by Judge Inglis in May 2012.[1] The application is made pursuant to cl 5 of sch 3 to the Employment Relations Act 2000 (the Act). The stated grounds are, "that there is a real or substantial risk a miscarriage of justice may have occurred."

[2] The issue in the case was whether the defendant had raised a personal grievance within the 90-day time frame specified in the Act. In a determination[2] dated 19 September 2011, the Employment Relations Authority (the Authority) concluded that Ms Barker had raised her personal grievance within time. The

[1] *Idea Services Limited (in Statutory Management) v Barker* [2012] NZEmpC 112.
[2] *Barker v Idea Services Limited (in Statutory Management)* [2011] NZERA Auckland 409.

plaintiff then successfully challenged that determination in this Court. The defendant in her present application now claims that, "for various reasons the Court overlooked that the personal grievance had been raised within the 90 days period by the filing of a statement of problem in the Authority, and the subsequent acknowledged service of it by the Authority on the respondent within 90 days."

[3] The provision in the Act allowing for retrials is cl 5(1) of sch 3 which provides:

> **5 Rehearing**
>
> (1) The Court has in every proceeding, on the application of an original party to the proceeding, the power to order a rehearing to be had upon such terms as it thinks reasonable, and in the meantime to stay the proceedings.

[4] Normally an application for a rehearing will be heard by the Judge before whom the proceedings were originally heard but that is not a statutory requirement nor is it invariably the case. Given her other fixture commitments, Judge Inglis considered it appropriate for this application to be referred to myself.

Background

[5] At all relevant times Ms Barker, who formerly lived in Taupo and is now residing in Australia, was employed by the plaintiff (Idea Services) as a community service worker at its Lakeland Branch. Her employment came to an end on 17 September 2010 when she was dismissed for alleged misconduct. At a meeting held on 17 September 2010, Ms Barker's then union representative, Ms Jacquie Hurst, an organiser with the Service and Food Workers' Union, advised the Idea Services Rotorua Manager that Ms Barker would be bringing a personal grievance.

[6] Under s 114(1) of the Act Ms Barker had 90 days in which to raise her personal grievance with Idea Services. The 90-day period expired on 16 December 2010. Section 114(2) of the Act provides that:

> **114 Raising personal grievance**
>
> ...

> (2) ... a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[7] On 7 December 2010, Mr Kerry Single, who was then acting as Ms Barker's advocate, lodged a statement of problem with the Authority. Significantly in terms of the present case, the statement of problem had an attachment headed "The facts that have given rise to the problem" which consisted of a 19-paragraph outline of the facts giving rise to Ms Barker's alleged personal grievance (the "factual statement"). The Authority forwarded a copy of the statement of problem, including the factual statement, to Idea Services on the same day. As service of the statement of problem, containing the factual statement, was effected prior to 16 December 2010, that should have ended any speculation as to whether or not Ms Barker had raised her personal grievance within the 90-day limitation period. However, it did not.

[8] The next development was on 9 December 2010, Mr Paul McBride, who was then acting as counsel for Idea Services, sent a letter to the Authority protesting the Authority's jurisdiction to deal with the application. The protest was based on s 42 of the Corporations (Investigation and Management) Act 1989 which provides that no person shall commence or continue any action or other proceedings against a corporation subject to statutory management unless leave is first obtained from the Statutory Manager or the High Court.

[9] On 16 December 2010, the Authority advised the parties that leave would need to be obtained from the Statutory Manager in order to continue the action and in the meantime the file "will be suspended until further notice from the applicant". On 25 February 2011, Sir John Anderson, the Statutory Manager granted leave to Ms Barker to proceed. On 11 May 2011, the Authority issued a minute dismissing a named second respondent as a party and requiring Ms Barker to file an amended statement of problem. Idea Services was directed to file a statement in reply following receipt of the amended statement of problem.

[10] In its statement in reply dated 8 June 2011, Idea Services through its counsel Mr McBride, alleged that Ms Barker had not raised a personal grievance in accordance with s 114 of the Act. Mr McBride dealt at some length with the facts of the case leading up to the dismissal. On the issue of whether or not a personal

grievance had been raised, counsel referred to a letter the union representative, Ms Hurst, had sent to Idea Services dated 10 October 2010 which he alleged failed to raise any personal grievance because it contained insufficient detail for the employer to address any complaint. The statement in reply then said:

> 2.31. The Applicant did not otherwise raise any personal grievance about the matters now complained of within the period of 90 days after the events giving rise to same, and nor does the Respondent consent to her doing so out of time.

[11] No reference was made in Idea Services' statement in reply to the statement of problem and factual statement which had been filed and served in December 2010, within the 90-day limitation period.

[12] The letter from the union organiser dated 10 October 2010, which was referred to in the statement in reply assumed some significance in the narrative. After confirming that she had been authorised to represent Ms Barker in the matter, Ms Hurst stated in that letter:

> ...
>
> We take this opportunity to invoke, facilitate and submit a Personal Grievance. We confirm in writing our verbal submitting of a Personal Grievance on the 17 August 2010 at 11.35 a.m.
>
> We invoke the Personal Grievance as follows:
>
> 1. Section 103(1)(a) of the Employment Relations Act and Amendments 2000 unjustifiable dismissal.
> 2. Section 103(1)(b) of the Employment Relations Act and Amendments 2000 disadvantage by the unjustifiable actions of the employer (Idea Services)
>
> ...

The letter also stated that Ms Barker would be seeking remedies under s 123 of the Act.

[13] The reference to Ms Hurst's letter to "17 August" was an unfortunate error. Ms Barker was dismissed on 17 September 2010 and the documentary evidence before the Court established that the "verbal" submissions[3] Ms Hurst referred to took place on 17 September 2010. There was another problem with the letter of

[3] Detailed in [5] above.

10 October 2010. During the Authority investigation, it was alleged on behalf of the defendant that the letter had had 24 pages of attachments, including the factual statement.[4] The Authority stated in its determination that if the letter had contained the attachments referred to then that alone would have constituted the raising of a personal grievance but it concluded, on the evidence before it, that the letter had not been accompanied by any enclosures or attachments. That finding is now common ground.

The Authority determination

[14] On 13 July 2011, the Authority issued a minute confirming that it would make a determination on the papers on the preliminary issue of whether a personal grievance had been raised in time. A timetable was fixed for the filing of written submissions. The minute also made reference to a without prejudice letter dated 16 November 2010 which Ms Barker's advocate, Mr Single, had written to Idea Services. This letter alleged that a personal grievance had been raised on behalf of Ms Barker by Ms Hurst in her letter of 10 October 2010 and he suggested an informal without prejudice meeting to progress the issues. The November letter had been attached to Ms Barker's statement of problem and Mr Single wished to rely on it. An issue arose as to whether the letter of 16 November 2010 could be relied upon because it had been headed "without prejudice". Another Authority Member gave a ruling that, as Mr Single was the author of the letter, he was entitled to waive the without prejudice privilege.

[15] Written submissions were presented to the Authority on behalf of both Ms Barker and Idea Services. In his submissions, Mr Single correctly noted that the dismissal had occurred on 17 September 2010 and he made mention of the fact that the statement of problem had been filed within the 90-day limitation period. Mr McBride, in his submissions, made no mention of either of these matters but he did refer more than once to the 17 August 2010 date which Ms Hurst had wrongly mentioned in her letter of 10 October 2010.[5]

[4] At [7] above.
[5] At [13] above.

[16] On 19 September 2011, the Authority issued its determination, addressing the preliminary issue of whether Ms Barker had raised her personal grievance within 90 days. Inexplicably, given the importance of correctly identifying the start date for calculating the 90-day period, the Authority seems to have been quite confused over the correct date of Ms Barker's dismissal. The Authority member stated:

> [23] I find that Ms Barker's dismissal was effective 17 September 2010...

But she went on to state:

> [38] At the meeting on 17 August 2010 when Ms Barker was dismissed...

[17] This confusion in dates may well be the explanation as to why the Authority did not give any consideration to Mr Single's submission that the statement of problem, filed on 7 December 2010, had been filed within the 90-day period but in any event the Authority concluded that Ms Barker had raised her personal grievance within time. As Mr Cranney, counsel for the defendant, submitted before me:

> 29. In any event the overlooking of the filed statement of problem (if that is what occurred) did no harm at that stage, because Ms Barker won in any event on other grounds.

[18] The "other grounds" Mr Cranney referred to were the Authority's conclusions that while individually, the union representative's statement at the time of the dismissal;[6] Ms Hurst's letter of 10 October 2010[7] and Mr Single's without prejudice letter of 16 November 2010,[8] were not sufficiently detailed to raise a personal grievance, collectively the three communications (which the Authority referred to as the "totality of communications") were sufficiently specific to raise a personal grievance which Idea Services was able to address.

[19] On 16 December 2011, Idea Services filed a statement of claim challenging the Authority's determination on a non de novo basis. There were four particular findings the company took issue with but only the fourth is relevant to the present application. The fourth finding was the Authority's determination that the totality of

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[6] At [5] above.
[7] At [12] above.
[8] At [14] above.

communications between the parties[9] specified sufficiently the personal grievance to enable the employer to address it. The Court allowed the challenge to that fourth finding. It concluded that the three communications making up the "totality of communications" neither individually nor collectively specified the nature of the personal grievance Ms Barker wanted her employer to address and hence she had failed to raise a personal grievance within the 90-day limitation period.

[20] After reviewing the relevant authorities, Judge Inglis confirmed that in any consideration of whether a personal grievance had been raised within time, under s 114(2) of the Act the focus was required to be on, "the extent to which the employee had drawn (or reasonably attempted to draw) that grievance to the employer's attention". Her Honour stated:

> [40] The underlying purpose of the personal grievance procedures is to identify and address employment relationship issues expeditiously and by direct communication between the parties to it. It is evident to that the grievance process is designed to be informal and accessible. ... The raising of a grievance is distinct from the more formal requirements attaching to the filing of a statement of problem, or a statement of claim. Both necessitate particularisation of the relief sought. That is not a requirement imposed under s 114(2).

[21] The application for a rehearing does not relate to the Court's findings or conclusions on the "totality of communications" issue. The alleged injustice Ms Barker claims to have suffered, which forms the basis of her application for a rehearing, arises from the fact that in its consideration of the issues the Court confined itself to the three communications described as the "totality of communications" and it allegedly "overlooked" the fact that the statement of problem containing the factual statement had been filed with the Authority and responded to by Idea Services within the 90-day limitation period.

Submissions

[22] In his submissions in opposition to the application for rehearing counsel for Idea Services, Mr Taylor, submitted that there was no miscarriage of justice because the filing of the statement of problem was not a live issue before the Court. Mr Taylor stressed the fact that the challenge was a non de novo challenge, limited in

[9] At [18] above.

the statement of claim to the four issues identified by the Court, which did not include any issue about the filing of the statement of problem within the 90-day period. Mr Taylor contended that if Ms Barker wished to rely on the filing of the statement of problem, which he described as a matter or evidence "outside the scope of the challenge", then a cross-challenge needed to be filed specifying the grounds relied upon but no such cross-challenge had been filed.

[23] As Mr Taylor expressed it:

> 16. ... The fact that the challenge was clearly a non de novo challenge was made clear in the statement of claim. The law relating to non de novo challenges is clear. If a respondent wishes to rely on matters or evidence which are outside the scope of the challenge a cross challenge must be filed specifying the grounds relied upon. This is made clear in the judgment of then Chief Judge Goddard in *Pacific Plastic Recyclers Ltd v Foo* [2002] 2 ERNZ 75 where he said:
>
> > [19] ... It follows that it is not open to a defendant to insist that the hearing be widened beyond the scope for it chosen by the plaintiff. The defendant's remedy is to file, in time, a separate challenge and to specify a different part of the determination (or the whole of it) as the subject of the challenge. It is unfortunate and clumsy that this cannot be done by way of reply to the original challenge but it cannot.

[24] Mr Taylor pointed out that more than one statement of defence had been filed in response to the challenge and Mr McBride, who was then acting as counsel for Idea Services, had put the Court on notice of his concern that the statements of defence were deficient in so far as they dealt with matters outside the scope of the non de novo challenge made in the statement of claim. Mr Taylor noted that in a minute dated 26 March 2012, Chief Judge Colgan recorded:

> 1. I do not require the defendant to re-plead her statement of defence but record that she is not bringing a cross challenge to the Authority's determination but, rather, supports the decision made.

[25] In reference to the judgment of Judge Inglis in this Court, Mr Taylor submitted:

> 27. The Court, quite properly, did not consider some matters argued by the applicant including an argument that the lodging of the ... statement of problem on 7 December 2010 and service thereafter constituted raising the personal grievance in time. This was not an issue in the challenge by the respondent. Because there was no cross-challenge it was not open to the Court to address the issue. It was properly, "put ... to one side.

[26] The reference to putting the issue "to one side" was a reference back to the following passage in the Court's judgment:

> [14] Because this is a non de novo challenge, the focus is on the Authority's determination rather than the entire matter that was before the Authority. The Court is limited to hearing the issues that were actually decided by the Authority, which are the subject of challenge. *No cross-challenge was filed. In so far as the defendant takes issue with various other findings of the Authority, that is outside the scope of the challenge before the Court and I put them to one side.*
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> (Emphasis added by counsel)

[27] Mr Taylor, in other words, contended that it was not open to the Court to consider "other grounds" such as whether the filing and service of the statement of problem in December 2010 constituted the raising of a personal grievance because that was not one of the issues raised by Idea Services in its non de novo challenge nor had the issue been raised by Ms Barker in the form of a cross-challenge. Mr Taylor submitted:

> 37. ... The simple fact is that, absent a cross challenge, the applicant was not entitled to "support the decision on other grounds" nor was the Court, (as it clearly accepted) entitled to address those 'other grounds'.

[28] Mr Taylor referred to *Realtycare Corporation Ltd v Cooper*,[10] which was a case where application had been made for a rehearing based on the grounds of an alleged miscarriage of justice. The alleged miscarriage of justice was that the defendant allegedly had a defence which could have been relied upon but it had not been pleaded or raised at the trial. The Court found that no miscarriage of justice had occurred. In his review of the authorities, Tompkins J cited with approval the following statement of the full Court of the High Court of Australia in *Metwally v University of Wollongong*[11] where the Court said:[12]

> It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case has been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.

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[10] (1989) 2 PRNZ 426 (HC).
[11] (1985) 60 ALR 68.
[12] At 71.

[29] In seeking to apply that principle to the present case, Mr Taylor submitted:

> 47. It is submitted that this is not a rare and extraordinary case such that a rehearing can be granted. On the contrary the applicant was very clearly put on notice that if she wished to rely on other grounds she must file a cross challenge. Through her representative she made it clear that no cross challenge would be made. She is, clearly, bound by the conduct of her case. There is no injustice in that.

[30] In the concluding section of his submissions, Mr Taylor stated:

> 62. In short, the applicant must accept responsibility for the conduct of her case by an experienced advocate. If she has a problem with the way her case was conducted her remedy, if any, is against the representative she employed (see *Parker v Silver Fern Farms Ltd* [2009] ERNZ 301 and *Stanaway v Pacific Forum Line Ltd* [1994] 1 ERNZ 276, 297). There is no justice in attempting to visit any such deficiencies on the respondent.

[31] Mr Taylor also made the observation that even if a rehearing was granted, "it would not solve the defendant's problems". The point counsel made is that the application seeks a rehearing of the non de novo challenge and for that reason, if granted, it would be confined to the particular issues that had been identified in the plaintiff's statement of claim. As Mr Taylor put it: "it would not be an opportunity to re-open the case as a whole".

[32] The thrust of Mr Cranney's submissions on behalf of Ms Barker was that as she did not challenge or take issue with any part of the Authority's determination, it was not necessary for her to have to file a cross-challenge. His argument was that the Authority had concluded that the totality of communications it referred to had specified sufficiently the personal grievance to enable Idea Services to address it and, hence, Ms Barker had raised her personal grievance within time. Mr Cranney submitted that Ms Barker did not have any issue with that finding and so it was not necessary for her to file a cross-challenge but she was entitled to defend the Idea Services' challenge "anyway she wanted". In this regard, Ms Barker sought to raise the positive defence that the "totality of communications" relied on by the Authority did not include the "important matter" that the statement of problem had been filed within the 90-day limited period.[13] As Mr Cranney expressed it:

[13] Oral submissions.

> 31. There was no cross-challenge, and Ms Barker took the approach of (i) supporting the determination as it stood and (ii) supporting it on other grounds (that is relying on the 7 December filing and [9] December 2010 acknowledgement of that by Mr McBride).
>
> 32. Ms Barker did this in her pleadings, in her submissions, and in evidence she filed.

[33] Mr Cranney referred to the "nightmare" Ms Barker would have had, "if she was not allowed to raise a positive defence unless she had cross challenged." He referred to reg 20(2) of the Employment Court Regulations 2000 which sets out the details to be included in a positive defence and he made specific reference to reg 21(2) which provides that in a non de novo hearing situation, a defendant may include a response in the statement of defence. That provision reads:

> **21 Response where hearing *de novo* not sought**
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> ...
>
> (2) If this regulation applies, the defendant may, in addition to complying with regulation 20, include in the statement of defence filed in accordance with regulation 19, an indication of the defendant's view of the appropriate nature and extent of the hearing.

[34] Mr Cranney submitted that, by including in her statement of defence a reference to the filing of the statement of problem within the 90-day period, Ms Barker was raising a positive defence within the permissible terms of the regulations. Counsel also stressed that in a hearing de novo, the Court is required under s 182(3)(b) of the Act to "direct, in relation to the issues involved in the matter, the nature and extent of the hearing". Mr Cranney said that Ms Barker had "properly pleaded her affirmative defence" and when Chief Judge Colgan issued his directions minute on 26 March 2012, he "let the statement of defence stand" meaning that the filing of the statement of problem was a matter properly before the Court.

[35] Finally, although it was not referred to in his written submissions, Mr Cranney made reference to s 189 of the Act which deals with the Court's equity and good conscience jurisdiction and submitted that, as Ms Barker had filed her statement of problem within time, it would be "very very unjust" not to allow her case to proceed. One of the authorities Mr Cranney relied upon was the decision of

this Court in *Saipe v Waitakere Enterprise Trust Board*[14] where, in response to a statement of claim seeking a non de novo hearing, the defendant had filed a statement of defence specifying, "certain further matters upon which the defence to the challenge is based". The Court allowed the statement of defence to stand. Mr Cranney referred to and relied upon the following passage from the judgment of Judge Perkins:

> [18] It is clear that it is the prerogative of Mr Saipe to decide the findings and determinations of the Employment Relations Authority he wishes to challenge. However, despite his submissions to the contrary, it is not for him to limit the extent of the evidence the Court may hear in respect of those issues. In deciding the extent and nature of the hearing the Court has to have regard to the overall justice and equity of the matter not only as that applies to the plaintiff but also to the defendant.

Discussion

[36] Both counsel accepted the principle, confirmed by the Court of Appeal in *Ports of Auckland Ltd v New Zealand Waterfront Workers Union*,[15] that the mere possibility of a miscarriage of justice is not a sufficient ground for granting a rehearing. What is required is an actual miscarriage of justice or at least a real or substantial risk of a miscarriage of justice.

[37] Although the statements were made in a different context and in a different Commonwealth jurisdiction, it appears to me that the principles referred to by the High Court of Australia in *Autodesk Inc v Dyason (No 2)*,[16] have particular relevance to a number of the submissions advanced by counsel in the present case. After emphasising that the exercise of the jurisdiction to reopen a judgment and to grant a rehearing is to be exercised "with great caution" and the need to have regard "to the importance of the public interest in the finality of litigation", Mason CJ stated:

> These examples indicate that the public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts of the law. ... However, it must be emphasised that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to

[14] AC40/06, 25 July 2006.
[15] [1995] 2 ERNZ 85 (CA).
[16] (1993) HCA 6; (1993) 173 CLR 300.

> present the argument in all its aspects or as well as it might have been put. What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to re-argue their cases.[17]

[38] In the present case, one of the issues associated with the application for a rehearing was the allegation made on behalf of Ms Barker and expressed in various forms, that the then counsel for Idea Services, Mr McBride, had misled the Court by concentrating his written submissions on the "totality of communications" and failing to refer to the filing of the statement of problem on 7 December 2010, within the 90-day period. At one stage, Mr Cranney raised the issue of whether it was proper for McBride to make submissions about the facts without revealing the existence of the filing of the statement of problem. Mr Taylor took strong exception to these allegations which led to Mr McBride having to stand down and new counsel being instructed. Apart from stressing that the filing of the statement of problem was not a live issue before the Court because there had been no cross-challenge, Mr Taylor submitted that, in any event, "the existence and alleged significance of the 7 December statement of problem was clearly brought to the attention of the Court." I accept Mr Taylor's submissions in this regard. It was up to Ms Barker's advocate at the Court hearing to try and persuade the Court about the alleged significance of the filing of the statement of problem and, as noted in the judgment of Mason CJ, any failure on his part to present argument on behalf of Ms Barker as well as it might have been put is insufficient to establish grounds for a retrial.

[39] The claim by Mr Taylor that "the existence and alleged significance of the 7 December statement of problem was clearly brought to the attention of the Court" is of crucial significance in terms of Ms Barker's application for a rehearing. If it is an accurate statement of the position then it undermines Mr Cranney's submission that there was a miscarriage of justice because, as he expressed it, "the Court had overlooked that the personal grievance had been raised within the 90 days period by the filing of a statement of problem in the Authority, and the subsequent acknowledged service offered by the Authority on the respondent within 90 days."

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[17] At 302-303.

In oral submissions Mr Cranney submitted: "The problem is that the Judge did not address the issue at all. She simply did not address it."

[40] In my view, Mr Taylor's analysis of the position is correct. I say that for two reasons. First, reference to the filing of the statement of problem had been made in each of the three statements of defence filed on behalf of Ms Barker. As Mr Cranney put it, the first statement of defence "squarely raised the issue of the statement of problem filed within 90 days." In the subsequent statements of defence, the reference to the filing of the statement of problem was, for some reason, more discreet but, as Mr Cranney acknowledged, they both referred to the statement of problem that had been filed. As it was a matter expressly referred to in the pleadings, I cannot accept that it was overlooked by the presiding Judge. Secondly, reference is specifically made in [35] of the judgment to the filing of the statement of problem (and its various attachments) with the Authority. It is clear, in other words, that the Judge was aware of the filing of the statement of problem with the Authority and it is axiomatic that she, therefore, would have known that it had been filed within 90 days of the dismissal.

[41] I accept Mr Taylor's submission that the reason why no consideration was given as to whether or not the filing of the statement of problem in December 2010 and service thereafter constituted raising the personal grievance in time was because, after analysing the authorities, the Court concluded that, in the absence of a cross-challenge, it was not an issue open to the Court to address. That indeed would appear to be the point made in [14] of the judgment,[18] in particular the statement:

> No cross-challenge was filed. In so far as the defendant takes issue with various other findings of the Authority, it is outside the scope of the challenge before the Court and I put them to one side.

[42] The conclusion of the Court, as stated in [26] above, is a finding on the law. In *Yong t/a Yong and Co Chartered Accountants v Chin*,[19] Judge Couch stated:[20]

> It has only been in exceptional circumstances that any Court has entertained an application for rehearing on grounds that the judgment contained an error of law.

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[18] At [26] above.
[19] [2008] ERNZ 1.
[20] At [27].

It was further stated in *Yong*:

> [24] It will be apparent from this analysis that the scheme of the Employment Relations Act 2000 is to provide two specific processes to address dissatisfaction with a judgment: appeal and judicial review. In addition the Act provides a general power to order a rehearing and the Court has an inherent power of recall.
>
> [25] As a matter of principle, where a specific process is available, a party should not seek to invoke the exercise of a general power to achieve the same result. The general power should be reserved for those cases in which no other process is available. Thus, where a party is dissatisfied with the judgment of the Employment Court on grounds which may be the subject of appeal under s 214 of the Employment Relations Act 2000 or an application for judicial review under s 213, the Court should be very reluctant indeed to entertain an application for rehearing on those grounds.

I respectfully agree with that statement of principle which was also affirmed and applied by this Court in *Katz v Mana Coach Services Ltd*.[21]

[43] Finally, given my finding that there was no oversight on the part of the Court but the issue raised by the defendant relates to her dissatisfaction over a point of law, I do not consider this to be an appropriate case for the invocation of the Court's equity and good conscience jurisdiction.

Conclusions

[44] For the reasons stated, the application for a rehearing is declined. The plaintiff is entitled to costs and if they cannot be agreed upon then Mr Taylor is to file and serve his submissions on costs within 28 days from the date of this judgment and Mr Cranney will have a like period from the date of service in which to file submissions in response.

A D Ford
Judge

Judgment signed at 9.00 am on 5 March 2013

[21] [2011] NZEmpC 92 at [6].