IN THE COURT OF APPEAL OF NEW ZEALAND

CA693/2013
[2014] NZCA 172

BETWEEN	AIR NEW ZEALAND LIMITED Applicant
AND	AVIATION AND MARINE ENGINEERS ASSOCIATION INCORPORATED First Respondent
	NEW ZEALAND AMALGAMATED ENGINEERING, PRINTING AND MANUFACTURING UNION INCORPORATED Second Respondent

Hearing:	7 April 2014
Court:	O'Regan P, White and Miller JJ
Counsel:	P G Skelton QC and P A Caisley for Applicant J M Roberts for First Respondent A M McInally for Second Respondent
Judgment:	8 May 2014 at 2 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondents one set of costs for a standard application on a band A basis and usual disbursements of both of the respondents. The respondents should share the costs award equally unless they agree otherwise.

REASONS OF THE COURT

(Given by O'Regan P)

Introduction

[1] This is an application for leave to appeal against certain aspects of a decision of the Employment Court.[1] That decision overturned an earlier determination of the Employment Relations Authority (ERA).[2]

[2] The applicant, Air New Zealand Ltd, wishes to challenge two aspects of the Employment Court decision. It says that the two questions on which it seeks determinations from this Court are questions of law that, by reason of their general or public importance or for any other reason, ought to be submitted to this Court for decision, and therefore meet the test for the grant of leave set out in s 214(3) of the Employment Relations Act 2000.

[3] In order to provide the necessary context for the consideration of the proposed questions of law, we set out a brief and necessarily simplified summary of the background to the Employment Court decision.

Background

[4] The underlying dispute is between Air New Zealand as employer and two unions representing engineers working for Air New Zealand. These are the first respondent, the Aviation and Marine Engineers Assoc Inc (AMEA) and the second respondent, the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc (EPMU).

[5] Air New Zealand aircraft engineering work was divided into two categories, line maintenance (essentially, minor repairs to, and checks of, aircraft while in service arriving at and departing from airports) and light and heavy maintenance

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1 *Aviation and Marine Engineers Assoc Inc v Air New Zealand Ltd* [2013] NZEmpC 172.

2 *New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2012] NZERA Auckland 399.

(essentially, maintenance of aircraft that are taken out of service for that purpose). Greater explanation of this distinction is given in the Employment Court decision.[3]

[6] Aircraft engineering workers engaged in line maintenance work were subject to a collective agreement between Air New Zealand and the AMEA, known as the Purple Book. Other engineering workers, who were engaged in heavy and light maintenance, as well as some line maintenance, were covered under two collective agreements known as the Blue Book (a collective agreement between Air New Zealand and the AMEA) and the Green Book (a collective agreement between Air New Zealand and the EPMU).

[7] In 2012 Air New Zealand proposed disestablishing the specialist line maintenance positions in favour of a single generalised aircraft engineering workforce.

Issues

[8] The decision of the Employment Court was lengthy and dealt with many issues. The focus of the intended appeal is on only two of these, and we will not comment on the others.

[9] The first issue arises from the findings at [312]–[321] of the Employment Court decision, in which the Employment Court found that the coverage clauses in the Blue Book and Green Book contracts limit the work that an employee covered by either of those collective agreements may be directed to undertake or agree to undertake.[4] Air New Zealand's position was that the coverage clause in a collective agreement merely defines the types of employees who may be subject to the collective agreement. It maintained that it was entitled to direct employees under the Blue Book and Green Book collective agreements to undertake line maintenance work, as long as the individual employment contracts relating to the relevant employees permitted this. The Employment Court found that the coverage clauses in the collective agreements were not limited to defining the class of employees represented by a union who may be subject to the collective agreement, but rather

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3 At [6]–[8].

4 See also the Employment Court's conclusion at [363].

extended to identifying the terms and conditions of employment applicable to existing employees.

[10] In reaching its conclusion about this effect of the coverage clauses, the Employment Court made the following observation about s 61 of the Employment Relations Act:

> [316] Section 61 of the Act provides for employers and employees subject to a collective agreement to agree upon additional (individual) terms and conditions which are "not inconsistent with the terms and conditions in the collective agreement": s 61(1)(b). It would be such an inconsistency, and therefore a breach of s 61, for Air New Zealand to direct an employee who is a member of either the AMEA or the EPMU, and whose work is covered by the Blue or Green Book collective agreements' coverage clauses, to perform work covered by another collective agreement, ie line maintenance work under the Purple Book.

[11] This is the second specific aspect of the decision challenged by Air New Zealand.

[12] The questions of law in respect of which leave to appeal is sought are as follows:

- Do coverage clauses define the scope of work employees may agree to undertake and/or be directed to undertake, or do they merely determine who is bound by the terms of the applicable collective employment agreement?

- Did the Employment Court err in its interpretation and application of the requirement in s 61(1)(b) of the Employment Relations Act by failing to properly identify any inconsistency between the terms and conditions of the collective agreement and the terms and conditions of any additional agreement binding on the employees covered by the collective employment agreement?

Events since the Employment Court decision

[13] Air New Zealand and the respondent unions have replaced the Blue Book, Green Book and Purple Book agreements with new collective agreements that cover

both line maintenance and light and heavy maintenance. The dispute that led to the ERA and Employment Court proceedings are effectively resolved by that development.

Mootness

[14] The respondents therefore argue that the questions Air New Zealand seeks to raise are now of no practical significance, there no longer being any live issue between Air New Zealand and the respondents. Air New Zealand argues that the issue remains live because the applications made by the respondents for compliance and injunctive orders remain to be determined by the Employment Court, and the outcome of the proposed appeal will have some bearing on that. However, we were told at the hearing that the need for compliance orders or injunctive relief has disappeared with the event of the replacement collective agreements, so to the extent there was a live issue in relation to that, there is no longer one now.

[15] Alternatively Air New Zealand argues that the questions it seeks to raise address issues that are applicable to other agreements and other industries, and have considerable significance in the employment relations field. We accept that it may be appropriate to hear an appeal in some circumstances, despite there being no practical issue between the parties. This was made clear by the Supreme Court in *Gordon-Smith v R*:[5]

> In general, appellate courts do not decide appeals where the decision will have no practical effect on the rights of parties before the court in relation to what has been at issue between them and lower courts. This is so even where the issue has become abstract only after leave to appeal has been given. But in circumstances warranting an exception to that policy, provided the court has jurisdiction, it may exercise its discretion and hear an appeal on a moot question.

[16] We are not satisfied that the present case is one that warrants an exception to the policy of not hearing appeals that are moot. The questions depend on the wording of the particular coverage clauses and the interrelationship of those clauses and the individual employment contracts of the relevant employees. Even if the appeal were not moot, it would be doubtful that the questions meet the "general or

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5 *Gordon-Smith v R* [2008] NZSC 56, [2009] 1 NZLR 721 at [16] (footnote omitted).

public importance" test in s 214(3) of the Employment Relations Act. The fact that the wording concerned appeared in contracts that are no longer in force puts the proposed appeal well outside the scope of s 214.

Other arguments

[17] We record that the respondent unions also argued that:

- the proposed questions were question-begging because Air New Zealand was not seeking to appeal the key finding of the Employment Court that the coverage clause effectively trumped the individual employment contracts;[6]

- the second question challenges the application of the law (correctly articulated) to the facts and so is not a question of law; and

- the first question is a question of construction of the collective agreements and therefore not amenable to appeal because such matters are excluded from amenability to appeal by s 214(1).

[18] It is not necessary for us to address those points and we express no view on them.

Result

[19] The application for leave to appeal is dismissed.

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6 At [140].

Costs

[20] Air New Zealand must pay the respondents one set of costs for a standard application on a band A basis (to be shared by the respondents equally unless they agree otherwise) and the usual disbursements of both of the respondents.

Solicitors:
Kiely Thompson Caisley, Auckland for Applicant
Hesketh Henry, Auckland for First Respondent
New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc, Auckland for Second Respondent