IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA24/2019
[2019] NZCA 146

BETWEEN	OVATION NEW ZEALAND LIMITED First Applicant
AND	TE KUITI MEAT PROCESSORS LIMITED Second Applicant
AND	NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INCORPORATED Respondent

Court:	Gilbert and Williams JJ
Counsel:	M D O'Brien QC for Applicants on extension of time J B M Smith QC, R E Brown and S J Leslie for Applicants on leave to appeal P Cranney and S N Meikle for Respondent
Judgment: (On the papers)	8 May 2019 at 11 am

JUDGMENT OF THE COURT

A The application for an extension of time to bring an application for leave to appeal is granted.

B The application for leave to appeal is declined.

C The applicants are jointly and severally liable to pay costs to the respondent on the application for leave to appeal on a band A basis and usual disbursements.

D The respondent must pay costs to the applicants on the application for an extension of time on a band A basis save for the costs of filing that application.

REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] The applicants, Ovation New Zealand Ltd and Te Kuiti Meat Processors Ltd, operate meat processing plants. Employees at these plants, which are located at Feilding, Gisborne and Te Kuiti, are covered by separate collective employment agreements. In the context of bargaining for new collective agreements, four issues common to each arose. These concerned whether the applicants had failed to pay those employees paid on piece rates for rest breaks as required by s 69ZD of the Employment Relations Act 2000 (ERA) and whether the applicants had failed to pay employees paid piece rates or on hourly rates for time spent donning and doffing protective gear and cleaning and sterilising gear and equipment (donning and doffing) at the beginning and end of shifts and breaks.

[2] The four issues the Employment Court was required to determine were:

(a) Is it lawful to incorporate paid rest breaks in piece rates?

(b) Were paid rest breaks incorporated in the piece rates in each of the collective employment agreements in compliance with s 69ZD of the ERA?

(c) Is donning and doffing "work" for the purposes of s 6 of the Minimum Wage Act 1983?

(d) Have sufficient breaks been provided as required under pt 6D of the ERA, taking into account time spent donning and doffing?

[3] In a decision delivered on 17 December 2018 the Employment Court answered (a) "yes", (b) "no" and (c) "yes".[1] The Court also found the employees were not

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[1] *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 151 [Employment Court decision] at [64], [194] and [272].

currently paid for donning and doffing.[2] The Court deferred issue (d) for later consideration.[3] The Court also deferred the question of remedies on the respondent's counterclaim concerning donning and doffing.[4]

[4] The applicants seek leave under s 214 of the ERA to appeal against the Employment Court's decision on the following questions of law:

(a) Did the Employment Court err in law by failing to apply or incorrectly applying the applicable principles of law in interpreting the collective employment agreements?

(b) Did the Employment Court err in law in determining that donning and doffing is "work" for the purposes of the Minimum Wage Act?

(c) Did the Employment Court err in law in deciding that the applicants' employees are not currently paid for donning and doffing in breach of s 6 of the Minimum Wage Act?

[5] The applicants submit the proposed questions raise matters of general or public importance because the three collective employment agreements apply to some 800 employees and the Employment Court's determinations are likely to have broader implications for other workers and employees in the meat industry and in other industries.

[6] The New Zealand Meat Workers and Related Trades Union Incorporated (the respondent) opposes leave. It says the Employment Court made no error of interpretive principle in construing the three collective agreements and the question whether donning and doffing is "work" is a question of fact, not law. It also claims the applicants' contention that the piece rates include an agreed payment for donning and doffing was not part of their argument in the Employment Court and cannot be raised on appeal.

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2 At [280].
3 At [285]–[286].
4 At [8] and [290].

Extension of time

[7] Section 214(2) of the ERA provides that an application for leave to appeal must be brought within 28 days after the date of issue of the decision, or within such further time as the Court of Appeal may allow. The 28-day period expired on 14 January 2019. The application for leave to appeal was not filed until 28 January 2019. The applicants have explained that the late filing was entirely due to an error made by their solicitors and counsel as to the relevant time limit. They understood the relevant time limit excluded the period between 25 December and 5 January in accordance with reg 74B of the Employment Court Regulations 2000 and that the application for leave to appeal was therefore filed within time. Upon being advised of the correct date, the applicants immediately filed an application for an extension of time supported by detailed affidavits explaining the reason for the delay. Mr O'Brien QC was retained specifically to deal with the application for an extension of time given the error was made by the solicitors and counsel acting for the applicants on the substantive issues.

[8] The respondent has not been prejudiced by the delay. The delay was short and has been satisfactorily explained. The applicants were not responsible for the delay. They would have applied for leave to appeal on or before 14 January 2019 had they been advised this was the time limit. They should not be prejudiced by the error made by their legal advisors. Although the application for an extension of time is opposed, we consider it should not have been. The principles summarised by the Supreme Court in *Almond v Read* are applicable by way of analogy.[5] We are satisfied the interests of justice require that an extension of time should be granted so the application for leave to appeal can be considered on its merits.

Jurisdiction

[9] Appeals against decisions of the Employment Court are restricted to questions of law.[6] Leave will not be granted unless the proposed question of law is one that ought to be submitted to the Court of Appeal for determination by reason of its general or public importance or for some other sufficient reason.[7]

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5 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.
6 Employment Relations Act 2000, s 214(1).
7 Section 214(3).

[10] There is no right of appeal against a decision on the construction of a collective employment agreement and accordingly this Court has no jurisdiction to entertain any such appeal. However, it is well-settled that if material errors of interpretive principle have been made by the Employment Court in construing a collective agreement, this is a question of law amenable to appeal. So, for example, if the Employment Court incorrectly recites, or recites but then fails correctly to apply, the applicable principles of contractual interpretation, this Court may intervene if the errors are operative.[8] The Supreme Court in *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd (NZALPA)* emphasised it is always necessary to identify the error of interpretive principle and not to find there has been an error of principle merely because the Court prefers a different interpretation.[9]

Error of law in interpreting the collective agreements?

[11] The applicants contend the Employment Court made three errors of interpretive principle in construing the agreements:

(a) failing to make any finding as to what the relevant provision in each agreement meant, namely whether the piece rate included payment for rest breaks (error 1);

(b) failing to apply the correct approach to extrinsic evidence by treating the applicants as having an obligation to prove their interpretation was correct with evidence as to how piece rates were calculated before s 69D was introduced in 2009 (error 2); and

(c) failing to apply the correct approach to the interpretation of the agreements in the light of the statutory benefit by treating the applicants as having to show their practice had changed since 2009 when their case was that paid rest breaks were already being provided at that time (error 3).

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8 *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 at [51], [105] and [155].

9 At [65].

Error 1

[12] The applicants rely on William Young J's judgment in the *NZALPA* case where he said the Employment Court was required to determine what the relevant clause meant.[10] The applicants argue the Judge failed to do that here. Instead, they say the Judge merely recorded that the agreements respectively were "incomplete", evinced "doubt", and "did not resolve" which possible meaning was correct. The applicants are particularly critical of the Judge's conclusion in relation to the Feilding collective that it was "not established as a matter of interpretation of relevant CEAs that piece workers at Feilding have been provided with paid rest breaks".[11] The applicants say this confuses the onus of proof with the proper approach to contractual interpretation. The clause must mean one thing or another; either rest break payments are included in piece rates or they are not. The Court had to come down on one side or the other. In saying only that it was "not established" the Judge failed to determine the meaning as he was obliged to do.

[13] No issue is taken with the Judge's recitation of the relevant principles to be applied in interpreting the agreements. The question is whether he applied them. We accept the Judge was required to determine what the relevant provisions in the agreements meant. We are satisfied he did so. The Judge asked the correct question — 'were paid rest breaks incorporated in the applicable piece rates'[12] — and his answer to this question was an unequivocal 'no' — "under the relevant CEAs, such payment was not incorporated in the agreed piece rates".[13] Any infelicities in the wording of particular passages in the judgment are inconsequential and likely explained by the fact the applicants were seeking declarations that they were paying piece workers for their breaks and therefore bore the onus of proving this. We can see no material error of interpretive principle giving this Court jurisdiction to entertain the proposed appeal on error 1.

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10 At [138].
11 Employment Court decision, above n1, at [126].
12 At [66].
13 At [287(b)].

Error 2

[14] The applicants submit that evidence as to how the piece rates were calculated before 2009 might have been relevant and helpful, but the absence of such evidence did not alter the interpretive task, nor does it hint at the result. The Judge was still required to determine the meaning of the relevant provisions in the absence of this evidence.

[15] As the applicants acknowledge, this point is connected to the first alleged error. While we agree the Judge had to determine the meaning on the relevant and admissible evidence before him, he did not shrink from that duty, as we have shown. We do not consider there was an arguable error of interpretive principle founding jurisdiction for the proposed appeal on error 2.

Error 3

[16] The applicants contend the Judge failed to appreciate that s 69ZD of the Act was not intended to provide additional paid break entitlements in workplaces that already did so. The Judge therefore erred in principle in treating the applicants as having to show their practice had changed since 2009. The applicants' case was they were providing paid rest breaks before the legislation was amended to require this. They say this is a classic example of a case where the interpretation of the agreement turns on the correct construction of a statute. Had the Judge recognised that the statute required no change if paid rest breaks were already being provided, he would not have insisted that the applicants' practice had to change in response.

[17] We do not consider there is anything in this point. It is clear from the Judge's discussion of the relevant background that he understood the legislative change was not intended to affect employers who were already providing rest breaks meeting statutory requirements.[14] As the Judge found, this did not assist his enquiry as to whether the applicants were in this category. The Judge ultimately concluded they were not based on his interpretation of the agreement. Again, we see no error of interpretive principle giving jurisdiction for the proposed appeal on alleged error 3.

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[14] At [100].

Error of law in concluding that donning and doffing is work?

[18] The Judge applied this Court's decision in *Idea Services Ltd v Dickson* in determining whether donning and doffing constitutes work.[15] In finding it is work, the Judge rejected the applicants' contention that the time spent carrying out these tasks at the beginning and end of each shift was so minimal it should be disregarded as *de minimis*.

[19] The question of whether donning and doffing is work is a question of mixed fact and law — what does the activity entail and how long does it take? (questions of fact) and does the activity constitute work? (a question of law). There can be no appeal against the Judge's factual findings as to the nature of the activity and the time required to undertake it. In view of the Judge's factual findings, the applicants' primary argument based on the *de minimis* principle appears to us to be untenable.

[20] The Judge followed an orthodox approach in analysing whether donning and doffing constitutes work. The applicants make no real attempt to demonstrate any error of law in his analysis. While we accept the question of whether donning and doffing is work is potentially an issue of general or public importance, we see no arguable error in the Judge's approach or in his conclusion on this issue. For that reason, we do not consider leave should be granted for an appeal to this Court on this issue.

Error of law in concluding that employees are not currently paid for donning and doffing?

[21] The Judge found the applicants were not currently paying their employees for donning and doffing.

[22] There seems to be no real dispute with the Judge's finding that the applicants do not pay employees on hourly rates for donning and doffing at the beginning and end of each shift. However, the applicants argue their employees are mostly paid well in excess of the minimum wage for every hour and that "[e]xtending those hours to include a small amount of time spent donning and doffing gear at the beginning and

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15 *Idea Services Ltd v Dickson* [2011] NZCA 14, 2 NZLR 522.

end of shifts does not put the applicants in breach of the Act". The Judge rejected this approach as being contrary to this Court's decision in *Idea Services*.[16] The applicants contend the Judge erred in equating their calculations to what this Court rejected as impermissible averaging in *Idea Services*.

[23] The correct approach is settled by this Court's decision in *Idea Services*. We see no arguable error of law in the approach taken by the Judge in his consideration of this issue.

[24] The applicants contend that the analysis in *Idea Services* does not easily apply to piece rates, where payment is determined by output, not time spent working. They submit there is no reason why the parties could not agree that time spent donning and doffing is incorporated in the piece rate. Here, they say the relevant collective agreements provided that breaks (which include time spend donning and doffing) include time spent "leaving and returning to work". Mr Cranney, for the respondent, says the applicants did not raise this argument in the Employment Court and therefore cannot raise it now. The applicants respond that they understood the only issues before the Employment Court were whether donning and doffing was work and whether the applicants' approach constituted impermissible averaging. They say that if this Court grants leave for the proposed appeal, it should also determine this issue.

[25] The question of remedies in respect of donning and doffing has not yet been determined. The Employment Court has directed a fully particularised counterclaim if these are pursued. In all the circumstances, we do not consider this Court should grant leave to appeal on this issue.

Result

[26] The application for an extension of time to bring an application for leave to appeal is granted.

[27] The application for leave to appeal is declined.

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16 Employment Court decision, above n 1, at [274]–[280].

[28] The applicants are jointly and severally liable to pay costs to the respondent on the application for leave to appeal on a band A basis and usual disbursements.

[29] The respondent must pay costs to the applicants on the application for an extension of time on a band A basis save for the costs of filing that application.

Solicitors:
Bell Gully, Wellington for Applicants
Oakley Moran, Wellington for Respondent