IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2022] NZEmpC 106
EMPC 429/2021

IN THE MATTER OF	an application for special leave to remove Authority proceedings
BETWEEN	LYN SOAPI First Applicant
AND	DANNY LAU Second Applicant
AND	MARY LAU Third Applicant
AND	PICK HAWKE'S BAY INCORPORATED Respondent

Hearing:	13 June 2022 (Heard at Christchurch via Audio Visual Link)
Appearances:	T Oldfield, counsel for applicants E Brown and J Bates, counsel for respondent
Judgment:	21 June 2022

JUDGMENT OF JUDGE K G SMITH

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[1] Lyn Soapi, Danny Lau and Mary Lau are Solomon Island citizens who work in New Zealand seasonally in the horticulture and/or viticulture industries as participants in the Recognised Seasonal Employer (RSE) scheme.

[2] The applicants lodged claims in the Employment Relations Authority alleging breaches by Pick Hawke's Bay Inc of the Wages Protection Act 1983, Minimum Wage Act 1983, and Employment Relations Act 2000 (the Act).[1]

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[1] Wages Protection Act 1983, ss 4, 5A, 11 and 13; Minimum Wage Act 1983, ss 6, 7, 11 and 11B; Employment Relations Act 2000, s 130. Penalties are also claimed.

[3] They applied to the Authority under s 178 of the Act seeking to have the proceeding removed to the Court without an investigation meeting being held.[2] The application was not opposed by Pick Hawke's Bay but was declined by the Authority.

[4] The applicants have now applied for special leave to remove the matter to the Court. The grounds of the application are:

> (a) Important questions of law are likely to arise in the matter other than incidentally within the meaning of s178(2)(a) Employment Relations Act 2000, being:
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> i. What is the correct interpretation of the phrase "unreasonable deductions" under s5A Wages Protection Act 1983 and are deductions for personal protective equipment or deductions made in breach of applicable immigration instructions "unreasonable"?
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> ii. Is it unlawful to make deductions (other than deductions for board, lodging or time lost by the worker under s7 Minimum Wage Act 1983) from the applicable minimum rate set by the Minimum Wage Act 1983, even if those deductions are otherwise made in compliance with the Wages Protection Act 1983?
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> iii. What is the meaning of the phrase *"cash value thereof as fixed by or under any Act, determination, or agreement relating to the worker's employment*" in s7 Minimum Wage Act 1983, and does the word *"agreement"* in that phrase include an individual employment agreement?
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> iv. What is the correct interpretation and application of s11B Minimum Wage Act 1983 and is a penalty available for a breach of this section?
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> (emphasis original)

[5] Pick Hawke's Bay is not opposed to leave being granted.

[6] To place the questions into context a brief explanation of the circumstances which have given rise to these claims is necessary.

[7] The RSE scheme allows workers from Pacific Island countries to work in New Zealand to fill labour shortages in certain industries. The workers are issued with a special visa and return home at the end of the season.

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[2] *Soapi v Pick Hawke's Bay Inc* [2021] NZERA 521 (Member Kennedy).

[8] The Ministry of Business, Innovation and Employment has oversight of the RSE scheme through Immigration New Zealand. To participate in the scheme employers must be accredited. After gaining that status employers apply to Immigration New Zealand to obtain permission to recruit employees under an Agreement to Recruit.[3]

[9] Both the Agreement to Recruit and Immigration New Zealand's Operations Manual contain terms and conditions to be met by employers under the RSE scheme. They are reflected in standard individual employment agreements approved by Immigration New Zealand. At the time of the hearing there was a cap on RSE work visas of 14,400.

The test for removal

[10] Section 178 of the Act empowers the Authority to remove a matter to the Court without first investigating it. Four criteria need to be taken into account before the Authority may order removal:[4]

(a) If an important question of law is likely to arise in the matter other than incidentally; or

(b) The case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or

(c) The Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

(d) The Authority is of the opinion that in all the circumstances the Court should determine the matter.

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3 At [6].
4 See s 178(2).

[11] Applications to the Court for special leave are made under s 178(3). In considering such an application the Court takes into account the criteria in s 178(2)(a)–(c) (inclusive).

[12] What is required to satisfy s 178(3) was considered by the Court in *Johnston v Fletcher Construction Co Ltd*.[5] There is no presumption in favour of, or against, removal to the Court.[6] In that case the Court held that a question of law required to satisfy s 178(2)(a) does not need to be complex, tricky or novel to warrant being called "important". It may be important if the answer is likely to have a broad effect or assumes significance in employment law generally.[7]

[13] Before leaving this analysis there is one further point to make about s 178(3). The Court does not have a discretion of the sort conferred on the Authority by s 178(2)(d). *Johnston* held that while there is no discretion available to order removal there is one to allow an application for special leave to be declined.[8] I agree with that analysis.

Test applied

[14] This application is confined to important questions of law under s 178(2)(a). The first question identified by Mr Oldfield, counsel for the applicants, was the correct interpretation of the phrase "unreasonable deductions" in s 5A of the Wages Protection Act 1983. Section 5 allows certain deductions to be made from a worker's pay by consent. Section 5A reads:

> An employer must not make a deduction under section 5 from wages payable to a worker if the deduction is unreasonable.

[15] Mr Oldfield submitted that the applicants' employment agreements were intended to comply with the Agreement to Recruit and New Zealand Immigration requirements. Clause 9.3 of the agreements dealt with deductions in the following way:

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5 *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157, [2017] ERNZ 894.
6 At [21]. See also *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 (EmpC).
7 *Johnston*, above n 5, at [22].
8 At [30]–[33].

(a) The employer had to submit the proposed pay deductions or any changes to them to Immigration New Zealand for approval.

(b) Relevant New Zealand employment legislation, in particular the requirements of the Wages Protection Act must be complied with.

(c) The employer must obtain the written consent "freely given" of the worker before any deductions are made.

(d) The employee must be informed that consent may be withdrawn to any of the deductions at any time.

(e) They must be for a specified purpose and are for actual, reasonable, verifiable expense in relation to that purpose.

(f) The amount deducted is no greater than that deducted, in comparable circumstances, from the pay of New Zealand staff.

[16] Despite the requirement to comply with New Zealand law the applicants' case will be that the deductions approved by Immigration New Zealand, and reflected in their employment agreements, do not comply. For example, Mr Lau's October 2018 employment agreement required him to wear suitable clothes and appropriate footwear in the workplace. Deductions were made from his wages for wet-weather gear and footwear supplied to him.

[17] The intended argument is that wet-weather gear and work gear qualify as personal protective equipment under s 16 of the Health and Safety at Work Act 2015. If that is correct, it follows that supplying it is a cost the law imposes on the employer to meet and it cannot be passed on to the employee.[9] On this analysis, the deductions for work gear and wet-weather gear would be unreasonable within the meaning of s 5A.

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[9] And see Health and Safety at Work Act (General Risk and Workplace Management Regulations) 2016, reg 15 which requires a person in charge of a business unit to provide personal protective equipment.

[18] Mr Oldfield was unable to find any authority where s 5A had been considered despite it being in force for about five years. He acknowledged the section was touched on briefly in *Labour Inspector v Tech5 Recruitment Ltd* but in the context of a discussion about an unlawful premium.[10]

[19] There is a second part to this claim and it arises from what were described as the unique circumstances of the RSE scheme. The argument intended to be run is that under the scheme any deductions from a worker's wage must be submitted to Immigration New Zealand for approval and recorded in the Agreement to Recruit. The applicants consented in writing to some deductions from their wages which it will be claimed were not approved as part of the recruitment terms.

[20] The question arising in relation to those deductions was whether the absence of that approval meant they were "unreasonable deductions" within the meaning of s 5, despite having been consented to by the applicants.

[21] The second question of law was regarded by Mr Oldfield as the most significant of those to be advanced by the applicants and arises from the fact that they are, generally speaking, paid at the prevailing minimum rate of pay. The argument was described as simple. It will be that under s 6 and 7 of the Minimum Wage Act the only lawful deductions from wages that can take them below the applicable minimum rate of pay are for board, lodging or time lost by the employee. Other deductions, even if they have been consented to, are not able to be made if the pay received by the employee drops below the minimum wage.

[22] Under the employment agreement the applicants consented to deductions said to drop their pay below the minimum wage. Those expenses comprised deductions such as half an international return airfare, travel insurance, domestic travel, accommodation, miscellaneous costs such as reimbursement for missing kitchenware and wage advances. Some of these deductions were recouped by Pick Hawke's Bay in the first few weeks of work and that led to the applicants receiving no pay for a

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[10] *Labour Inspector v Tech5 Recruitment Ltd* [2016] NZEmpC 167, [2016] ERNZ 552 at [57].

period at the beginning of the season. On Mr Oldfield's analysis these deductions cannot be made lawfully.

[23] Sections 6 and 7 have been considered in different contexts in the Court of Appeal, but the submission was that there has been no authoritative decision on the relationship between them.[11]

[24] The third question was about s 7(1) of the Minimum Wage Act providing for deductions from wages for accommodation and in particular the meaning of "cash value thereof as fixed by or under any Act, determination, or agreement relating to the worker's employment". Mr Oldfield submitted that there is no statute or determination fixing the cash value of the accommodation supplied to the applicants. That means unless the value is fixed by agreement it cannot exceed five per cent of the employee's wages. Two issues were identified. First, the applicants' contention will be that the amount deducted from their wages exceeded the five per cent threshold. The second issue is whether "agreement" in s 7 means an employment agreement or something else.

[25] The final question arises from the application of s 11B of the Minimum Wage Act. That section requires every employment agreement to fix at not more than 40 the maximum number of hours that may be worked in any week excluding overtime.[12] In this case the employment agreements, approved by Immigration New Zealand, contain no fixed maximum hours per week but instead use average hours. The intended argument is that averaging hours is not permitted and the employment agreements breach s 11B.

Analysis

[26] I accept that each of the four questions identified by Mr Oldfield are important questions of law in the sense described in *Johnston*. Even though some disagreement

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11 *Terranova Homes and Care Ltd v Faitala* [2013] NZCA 435, [2013] ERNZ 347; *Sandhu v Gate Gourmet New Zealand Ltd* [2021] NZCA 203, [2021] ERNZ 255.

12 Minimum Wage Act 1983, s 11B(1).

on the facts is possible, resolving these questions is likely to be determinative of the proceeding. The issues have not been considered by the Court previously.

[27] Additionally, the questions of law will have a broader relevance beyond the applicants because they are likely to apply to other workers employed under the RSE scheme.

[28] Mr Oldfield's further point was that some of the issues raised by these questions about deductions from pay are likely to resonate with the wider New Zealand workforce. He gave two examples that are not uncommon. One of them was where an employee receiving a minimum wage had a deduction from his or her final pay for not returning a work uniform. Such a deduction may reduce the employee's earnings received from the employer to an amount below the minimum wage. The other was where an employee on minimum wage failed to work out his or her notice and then suffered a pay deduction from the final pay with the same effect. Both examples fall within the questions posed in this case.

[29] The applicants have satisfied the test in s 178(2)(a). The remaining issue is whether it would be appropriate, nevertheless, to decline the application for special leave. Nothing in the submissions or information presented by the applicants persuades me that it would be appropriate to take that course.

Outcome

[30] The application for special leave is granted. The matter is removed to the Court.

[31] By agreement between the parties there is no order for costs.

K G Smith
Judge

Judgment signed at 12.05 pm on 21 June 2022