IN THE COURT OF APPEAL OF NEW ZEALAND

CA231/2010
[2010] NZCA 229

	BETWEEN	PORTS OF AUCKLAND LIMITED Appellant
	AND	MARITIME UNION OF NEW ZEALAND Respondent

Hearing: 20 May 2010

Court: O'Regan, Priestley and Ronald Young JJ

Counsel: R J McIllraith and K M Dunn for Appellant
S R Mitchell for Respondent

Judgment: 2 June 2010 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a Band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Ronald Young J)

Introduction

[1] The Ports of Auckland Limited ("POAL") and the Maritime Union of New Zealand ("MUNZ") have a current collective agreement for employees at the port. In early 2010 the POAL advised the MUNZ it intended to offer employment on a fixed term basis to six casual employees covered by the collective agreement. MUNZ challenged this decision before both the Employment Relations Authority and the Employment Court.

[2] MUNZ said the proposal was in breach of s 66 of the Employment Relations Act 2000 ("the Act") which deals with fixed term employment, in breach of s 61 of the Act as inconsistent with the collective agreement and in breach of the POAL's duty of good faith.[1]

[3] The Employment Court in part agreed with MUNZ. It found the arrangement did not breach s 66 as to fixed term employment but did breach s 61 as inconsistent with the collective agreement. The Court found POAL's actions were in breach of their duty to deal with MUNZ in good faith.

[4] In this Court POAL seeks leave to appeal the decision of the Employment Court and if successful to set aside the decision of that Court. Because of urgency the leave application and the merits of the appeal were heard together by us.

Leave

[5] To get leave the appellant must (as relevant in this case) show the decision was wrong in law and of general public importance.[2]

[6] The appellant identified three questions of law for the Court:

---

1 Employment Relations Act 2000, s 4(1A).
2 Section 214.

(a) whether MUNZ had legal standing to bring the causes of actions challenging:

(i) the validity of the additional terms agreed by POAL and the employees under s 66; and

(ii) the consistency of the additional terms with the collective agreement under s 61;

(b) whether the additional terms were consistent with the collective agreement under s 61; and

(c) whether POAL breached its good faith obligation to MUNZ under s 4 by failing to consult with MUNZ before agreeing to the additional terms with the employees.

[7] The appellant says these questions of law are matters of general or public importance because:

(a) whether a union is able to bring a claim to enforce rights under Part 6 of the Act (containing s 66 and s 61) dealing with individual employees' terms and conditions is of broad significance to employers and employees;

(b) the correct application of s 61 affects all employers and employees who agree on additional terms of employment outside of the collective agreement; and

(c) this is the first opportunity for this Court to consider the effect of a recent amendment to the duty of good faith.

Factual background

[8] The collective agreement covers permanent full time stevedores, permanent stevedores who undertake a full range of work but are only guaranteed three, eight hour shifts per week, (known as Axis Ancillary or AA employees) and casual stevedores who are employed on a day to day basis. There are agreed maximum percentages for employees in the AA and casual categories. There are special rules by which employees may move from casual to AA and to permanent employment.

[9] When AA employees work more than a specified number of shifts over 12 months then a number of AA employees will "click over" to full time permanent employees. It is generally accepted that when further AA employees are needed they will be chosen from casual employees.

[10] In early 2010 POAL told port employees that in a review of its operation it was considering contracting out part of its labour force. At the same time POAL advised it was proposing to employ six casual employees as AA employees on a fixed term basis to expire in June 2010. Until that announcement all AA employees had been permanent.

[11] MUNZ challenged POAL's right to offer such fixed term employment. The Employment Relations Authority determined that the proposed fixed term employment was neither a breach of s 66 or s 61 nor other than in good faith. As a result, by the time the dispute had reached the Employment Court POAL had engaged six previous casual employees as AA employees on a fixed term contract.

[12] In the Employment Court Chief Judge Colgan allowed the appeal in part. He concluded:

(a) MUNZ had standing to bring the s 66 and s 61 challenge;

(b) the agreement between POAL and the six employees complied with s 66 of the Act;

(c) the agreement between POAL and the six employees was inconsistent with the collective agreement;

(d) POAL's actions breached the good faith provisions of the Act.

POAL's challenge to findings [12](a), (c) and (d)

[13] We turn then to each ground of appeal. We consider the merits of each appeal ground before considering whether leave is appropriate.

Standing

[14] In the Employment Court POAL challenged MUNZ's standing to bring a claim that POAL had breached s 66 and s 61 of the Act. POAL conceded standing with respect to the good faith claim.

[15] The Court concluded that MUNZ was adversely affected by the agreement between POAL and the employees and therefore had sufficient interest in claims that the agreement had breached s 61 and s 66. The Court concluded that s 137(4) gave MUNZ standing to apply for an enforcement order alleging breaches of s 66 and s 61.

[16] Sections 61 and 66 are in Part 6 of the Act headed "Individual employees terms and conditions of employment". This Part of the Act the appellant argues is therefore not concerned with union rights or interests.

[17] Further, the appellant says that s 129 provides that only those parties directly bound by an agreement may pursue a dispute about the agreement. The parties in this case who are bound by the agreement are the individual employees and POAL and not MUNZ. POAL stresses the dispute is about an agreement containing additional employment terms and not about the collective agreement.

[18] In the proceedings before the Authority, MUNZ sought an enforcement order that effectively declared the agreement between POAL and the six employees inconsistent with the collective agreement and therefore in breach of s 61 and outside s 66. This action was permitted by s 137, which authorises a union to apply for an enforcement order when it alleges non compliance with a collective agreement.

[19] Section 137(1) identifies what matters may be the subject of a compliance order. They include (at (a)(i)) employment agreements which include (by virtue of s 4) a collective agreement. Section 137(4) authorises a union to apply for an enforcement order if it alleges it has been affected by the non observance (as relevant here) of the collective agreement.

[20] Section 61(1)(b) permits an individual agreement between an employer and employee where there is an applicable collective agreement as long as the additional agreement is not "inconsistent with the terms and conditions in the collective agreement".

[21] This case is not a dispute about the individual employment agreement itself. This is a dispute about the relationship between the agreement and the collective agreement. Section 129 is not therefore relevant to the current dispute. We are satisfied a union has standing to seek an enforcement order where it alleges an agreement between an employer, and an employee covered by a collective agreement, is inconsistent with the collective agreement. MUNZ has a legitimate interest in protecting the terms and therefore the integrity of its collective agreement. In our view MUNZ therefore clearly had standing to bring enforcement proceedings alleging a s 61 inconsistency. We accept that the standing point may have some importance for future cases. We therefore grant leave but dismiss the appeal.

[22] We are less certain about MUNZ's standing with respect to the alleged breach of s 66. Section 66 is designed to limit the circumstances in which employers and employees enter into fixed term contracts. Ordinarily therefore the employee affected could be expected to bring proceedings based on an alleged s 66 breach. While those employees who are union members may choose to have the union

represent them in any s 66 dispute there is no suggestion that that was the position in this case.

[23] Given the Employment Court concluded s 66 had not been breached and that there is no challenge to that conclusion in this Court it is unnecessary for us to reach a final conclusion about standing in this case with respect to s 66.

Inconsistency: s 61(1)(b)

[24] Section 61 of the Act permits individual employees who are subject to a collective agreement to agree additional employment terms with their employer as long as they are "not inconsistent with the terms and conditions in the collective agreement".

[25] Here, the six individual employees who were classified as AA employees agreed to a fixed term contract.

[26] The Employment Court said:

> [35] ... As the Authority found, the collective agreement neither addresses expressly fixed term employment of employees, nor prohibits expressly such arrangements. It is a question of determining objectively whether they are inconsistent with the collective agreement.

[27] And further:

> [36] ... I agree that the comparison to be undertaken for the purpose of assessing inconsistency is between the terms and conditions of AA/P24 employees of indefinite duration (as provided for in the collective agreement) and the new category of AA/P24 employees on the fixed term individual agreements under the collective. These employees have been "promoted" or their employment varied so that they are, for all intents and purposes, AA/P24 stevedores although with fixed terms. Absent the circumstances that brought about their new status, they would ordinarily have expected to have moved to the AA/PR24 status under the collective agreement when further stevedoring labour was required. Some casual stevedores did so earlier in the year.

[28] The Judge concluded the fact the individual employment agreements were fixed term was inconsistent with the collective agreement. He said:

> A fixed term and its implications deprive those employees of a number of benefits under the collective agreement to which they would otherwise be entitled. Their individual terms and conditions both conflict with relevant provisions in the collective agreement and are less favourable than those that but for the fixed term they would enjoy under the collective agreement.

[29] He concluded that this was a true inconsistency. The Judge compared the terms of employment for AA stevedores who were permanent employees against the employment agreements where the new AA stevedores were fixed term employees. In particular he identified the effective loss of the ability to participate in the promotion process affected by the click over system, other benefits of employment attaching to permanent full time employees and access to the benefits of the redundancy provisions as being pivotal to the assessment of inconsistency.

[30] The error of law alleged by the appellant was that the Court's approach to the analysis of inconsistency was too narrow. The appellant claimed that the new employment conditions must be assessed against the whole of the collective agreement and not just one part of the terms and conditions in the agreement, as the Court did. The appellant says the casual employment section of the collective agreement encompasses short term fixed employment arrangements. Thus, it was wrong to say that the individual agreements were inconsistent with the collective agreement. The appellant's case was that if the Judge had adopted the correct approach, and compared the conditions in the individual agreements with the collective agreement overall, he could not have concluded they were inconsistent.

[31] Further, the appellant stressed there were a number of benefits to casual employees from such contracts; they had a guaranteed number of shifts per week; overtime was available; their pay increased and they had training.

[32] In deciding whether the fixed term agreement was inconsistent with the collective agreement the Court properly considered the terms and conditions of AA employees in the collective agreement. The six casuals were being employed as AA employees and thereby essentially on the terms and conditions in the AA employee schedule in the collective agreement.

[33] There were fixed term employment arrangements in the collective agreements with casual employees as POAL identified. But there were no fixed term employment arrangements with AA employees in the collective agreement. Comparing the conditions of casual employees with AA employees as the appellant invited us to do is inapt. The six employees were not being employed as casual labour.

[34] Finally, the appellant suggested that the Employment Court's finding that the employer had not breached s 66 was undermined by its s 61(1) conclusion and therefore cannot be correct. We disagree. The agreement between POAL and the six employees had to comply with the statutory requirements for fixed term employment[3] and not be inconsistent with the requirements for collective agreements[4] before it could be a concluded enforceable agreement. It was not a case of "either or".

[35] Section 61(1)(b) is concerned with inconsistency with the terms and conditions in the collective agreement. A proper analysis requires an identification of the terms and conditions of the additional agreement and a comparison with the terms and conditions of like employment within the collective agreement to identify any inconsistency. This was the Employment Court's approach. We are satisfied therefore there was no error of law.

[36] The appellant also disputed whether some of the alleged inconsistencies identified by the Employment Court were in fact so. These claims were disputes of fact rather than questions of law.

[37] On this ground we give leave to appeal. We accept that there was a question of law raised by the appellant and that it was of public interest. The appeal, however, is dismissed on this point.

---

3 Section 66.
4 Section 61.

Good faith

[38] Finally as to the good faith issue. Section 4(1A) of the Act provides as follows:

> **4 Parties to employment relationship to deal with each other in good faith**
>
> ...
>
> (1A) The duty of good faith in subsection (1)—
>
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
>
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
>
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
>
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
>
> (ii) an opportunity to comment on the information to their employer before the decision is made.

[39] Before the Employment Court MUNZ alleged that given a history of negotiations between the union and the employer, and that the question of fixed term agreements could have been the subject of negotiations, the effect of the new employment arrangement was to undermine the benefit of the collective agreement, and was thus in breach of good faith obligations. Secondly, MUNZ says that POAL breached its good faith obligations by not consulting it before employing fixed term employees. The Judge agreed.

[40] We do not consider that leave should be given with respect to POAL's challenge to the Judge's conclusions. They were fact specific and have no general application beyond the facts of this case. As a result they do not raise either a question of law or a matter of public importance.

[41] Counsel for the appellant made strong submissions that the Judge's decision had ramifications for other cases and could be interpreted as requiring employers to consult unions on every point of their employment policy. We disagree. We do not see the decision as anything more than the application of the good faith requirement to the specific situation as the Judge found it to be.

[42] Leave to appeal this part of the judgment is therefore refused.

Summary

[43] We have refused to give leave to POAL on the question of its challenge to the Court's ruling that MUNZ had standing to challenge the agreement pursuant to s 61 of the Act. We have given leave to appeal against the Employment Court's decision regarding MUNZ's challenge to the terms of the employment agreement being in breach of s 61(1)(b) of the Act. We have dismissed this appeal.

[44] We have refused to give leave to POAL's challenge to the Judge's conclusion as to lack of good faith given no question of law has been identified nor any issue of public importance.

Costs

[45] We heard argument both on the application for leave and the substantive appeal points. In those circumstances we consider it appropriate that the costs award be calculated as for an appeal, rather than as for an application for leave. We therefore award MUNZ costs for a standard appeal on a Band A basis and usual disbursements.

Solicitors:
Russell McVeagh, Auckland for Appellant
Oakley Moran, Wellington for Respondent