IN THE COURT OF APPEAL OF NEW ZEALAND

CA651/2017
[2018] NZCA 82

BETWEEN	SOUTH CANTERBURY DISTRICT HEALTH BOARD Applicant
AND	STUART SANDERSON First Respondent
	SARAH SANDERSON Second Respondent
	DIANE BEACH Third Respondent
	MAUREEN CHAMBERLAIN Fourth Respondent
	JOHN SNUGGS Fifth Respondent
	BETHAN WILLIAMS Sixth Respondent

Hearing:	19 March 2018
Court:	Kós P, Brown and J Williams JJ
Counsel:	S L Hornsby-Geluk and C N Luscombe for Applicant P Cranney and C A Mayston for Respondents
Judgment:	10 April 2018 at 12.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant must pay the respondents' costs for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The applicant, South Canterbury District Health Board, applies for leave to appeal under s 214(1) of the Employment Relations Act 2000 against a decision of the Employment Court in which Judge Corkill held that the respondent anaesthetic technicians ought to be regarded as undertaking work for the purposes of s 6 of the Minimum Wage Act 1983 (the Act) when they were on call on week nights and on weekends.[1]

[2] Leave to appeal may be granted if, in the opinion of this Court, a question of law involved in the proposed appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for decision.[2]

Background

[3] Because Timaru Public Hospital delivers theatre services outside normal business hours when there is a need to do so, such services are potentially available for 24 hours in each day. Consequently, the applicant maintains a call-back roster for theatre staff including anaesthetic technicians outside of business hours. The applicant's expectation is that, when on call, anaesthetic technicians must attend the hospital within ten minutes of being called back for theatre duties.

[4] For the respondents who resided well outside the boundaries of Timaru and who could not travel from their homes to the hospital within ten minutes, the hospital provided free accommodation at or adjacent to the hospital in which the out of town anaesthetic technicians could stay when they were rostered on call. The issue for determination in the Employment Court was whether those technicians who resided at a distance from the hospital and who stayed in the free accommodation when on call were then considered at work for the purposes of the Act.

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1 *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127.
2 Employment Relations Act 2000, s 214(3).

[5] The Employment Relations Authority determined that in the circumstances the time spent by the respondents on call should be regarded as work.[3] In reaching the same conclusion Judge Corkill applied the so-called 'sleep-over principles' approved by this Court in *Idea Services Ltd v Dickson*:[4]

(a) the constraints placed on the freedom the employee would otherwise have to do as he or she pleases;

(b) the nature and extent of responsibilities placed on an employee; and

(c) the benefit to the employer of having the employee perform the role.

[6] After undertaking what he viewed as an inevitably case-specific assessment Judge Corkill was satisfied that the three *Idea Services* factors were sufficiently significant as to lead to the conclusion that when on call the respondents ought to be regarded as undertaking work for the purposes of s 6 of the Act.[5]

Questions of law

[7] The application did not formulate proposed questions of law. Instead it identified as grounds of appeal five respects in which it contended that the Employment Court erred in determining that the respondents were undertaking work for the purposes of the Act whilst on call:

(a) In finding that the choice of the individual respondents to live at a distance from their employment was not a particularly significant factor in assessing the constraints on them when they were on call.

(b) In concluding that the constraints on the respondents when they were on call were significant.

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3 *Sanderson v South Canterbury District Health Board* [2017] NZERA Christchurch 37.
4 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 at [7] and [10].
5 *South Canterbury District Health Board v Sanderson*, above n 1, at [136].

(c) In finding that the sole requirement to be available to respond to an emergency call during on call periods amounted to a significant and at times very significant responsibility.

(d) In finding that s 56 of the Holidays Act 2003 was of no assistance in the interpretation application of s 6 of the Act.

(e) In failing to determine whether s 67D of the Employment Relations Act 2000 was of relevance in the interpretation and application of s 6 of the Act.

Analysis

[8] The first, second and third alleged errors were simply matters of factual evaluation undertaken in the course of considering the three *Idea Services* factors. They do not involve questions of law.

[9] The consideration of the interplay between different statutory provisions can constitute a question of law. But the significance for the statutory interpretation task of provisions in other statutory contexts will be dependent at least in part on the degree of relatedness. With reference to s 56 we note that this Court observed in *Idea Services* that the Holidays Act is quite different legislation from the Act.[6] Similarly Judge Corkill did not consider that the Holidays Act, enacted many years after the Act, was intended to impact on the interpretation or application of s 6.[7]

[10] Nor is it apparent why the recently enacted[8] provision in s 67D of the Employment Relations Act relating to availability provisions should be accorded significance in the context of the intensely practical inquiry which the Employment Court undertakes in deciding whether a person is working for the purposes of s 6 of the Act. Judge Corkill recorded that he was not referred to any extrinsic materials which would support the contention that Parliament had addressed or intended in s 67D to make a distinction between on-call and sleep-over arrangements. Nor had

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6 *Idea Services Ltd v Dickson*, above n 4, at [16].
7 *South Canterbury District Health Board v Sanderson*, above n 1, at [131].
8 Employment Relations Amendment Act 2016, s 9.

any relevant amendment been made to the Act, a possibility which the Judge thought might well have required consideration were it the case that such a distinction was to apply.

[11] We can discern no error in the manner in which Judge Corkill addressed these other two statutory provisions.[9] This Court will not grant leave where the proposed question of law is not seriously arguable.[10]

[12] The Employment Court decision concerns only the six respondents. We were informed that the issue does not arise in relation to the other 17 anaesthetic technicians who live within ten minutes travel time of Timaru Public Hospital. However an affidavit of Mr K G McFadgen of DHB Shared Services suggested that the impact of the decision would be significant not just for South Canterbury District Health Board but for the sector generally.

[13] By contrast Mr Cranney submitted that the case is very specific and is limited to the actual parties. Any subsequent cases would be determined on a fact-based analysis in accordance with the *Idea Services* approach. He pointed to the affidavit of Mr A Shankar, the National Organiser for the health sector of the New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi, who explained in some detail the use of on call arrangements across the 20 District Health Boards, both within and outside the union's membership. For the reasons he explained Mr Shankar did not agree that the Employment Court decision would have a significant effect on the health sector.

[14] Having reviewed the evidence, we are not satisfied, even if the fourth or fifth alleged errors were framed as questions of law which were arguable, they would qualify as questions which ought to be submitted to this Court for decision whether by reason of either general or public importance or for any other reason.

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9 *South Canterbury District Health Board v Sanderson*, above n 1, at [130]–[135].

10 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZCA 453 at [10].

Result

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

[16] The applicant must pay the respondents' costs for a standard application on a band A basis and usual disbursements.

Solicitors:
Dundas Street, Wellington for Applicant
Oakley Moran, Wellington for Respondents