

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA556/2021
[2022] NZCA 195**

BETWEEN

DAVINIA LOUISE CADDY
Applicant

AND

VICE CHANCELLOR, UNIVERSITY OF
AUCKLAND
Respondent

Court: French and Clifford JJ

Counsel: S R Mitchell for Applicant
P M Muir and R E Judge for Respondent

Judgment: 18 May 2022 at 4 pm
(On the papers)

JUDGMENT OF THE COURT

- A The application for leave to appeal under s 214(3) of the Employment Relations Act 2000 is declined.**
- B The applicant must pay the respondent costs for a standard application on a band A basis with usual disbursements.**
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REASONS OF THE COURT

(Given by French J)

Introduction

[1] Dr Caddy has applied under s 214 of the Employment Relations Act 2000 (the Act) for leave to bring an appeal against a decision of Judge Beck in the Employment Court.¹

[2] In her decision, the Judge held that the termination of Dr Caddy's employment on the grounds of redundancy was a justifiable dismissal.

Background

[3] Dr Caddy was employed by the respondent University under a collective employment agreement as a senior lecturer in musicology. Following an external review in 2017, the University commenced a restructuring process as a result of which Dr Caddy's role was disestablished and she was made redundant.

[4] Dr Caddy brought a claim for unjustifiable dismissal. Her claim was rejected by the Employment Relations Authority,² prompting Dr Caddy to challenge that determination in the Employment Court.

[5] Judge Beck found there were genuine reasons for the disestablishment of the role held by Dr Caddy and that the process followed by the University was one open to a fair and reasonable employer. She summarised her conclusions at the end of her judgment as follows:

[156] There were genuine reasons for the disestablishment of the role held by Dr Caddy. It occurred in the midst of a comprehensive review and restructure of the School of Music and was necessitated by both the financial performance of the School and the strategic objectives underlying the restructure. The redundancy decision was substantively justified.

[157] The process followed was one open to a fair and reasonable employer. If any defects were present, they were minor and did not result in Dr Caddy being treated unfairly. Any allegations of bias or inadequacy in the processes used are not established.

[158] The University investigated options in good faith that would have prevented the loss of employment for Dr Caddy. Reasonable efforts were

¹ *Caddy v Vice-Chancellor, University of Auckland* [2021] NZEmpC 129, [2021] ERNZ 573.

² *Caddy v Vice Chancellor, University of Auckland* [2019] NZERA Auckland 275.

made to redeploy Dr Caddy and she was given the opportunity to participate in the selection process for the new Music Studies role.

[159] The terms of the Collective Agreement and the Review and Restructure Policy and Procedures were complied with. There was no obligation to redeploy Dr Camp into the Music Education role that he was unsuitable for in order to facilitate Dr Caddy's continued employment.

[160] The University exhibited a willingness to discuss further outplacement or redeployment opportunities. As was her right, Dr Caddy chose not to engage in that discussion.

[6] Dissatisfied with that outcome, Dr Caddy seeks to bring an appeal in this Court.

The application for leave to appeal

[7] The right of appeal to this Court from a decision of the Employment Court is limited to appeals on questions of law and is subject to a leave requirement. Under s 214(3), leave may be granted if in the opinion of this Court, the proposed question of law is one that by reason of its general or public importance or for any other reason ought to be submitted for determination.

[8] The proposed question of law is:

Did the Employment Court apply the test required by s 103A when it found the applicant's dismissal to be justified?

[9] Section 103A of the Act provides:

103A Test of justification

- (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
- (3) In applying the test in subsection (2), the Authority or the court must consider—
 - (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
 - (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
 - (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
- (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
- (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
- (a) minor; and
 - (b) did not result in the employee being treated unfairly.

[10] Mr Mitchell on behalf of Dr Caddy advanced several arguments to support the central contention that the Judge did not apply the s 103A test of whether the decision was open to a fair and reasonable employer. The key points can be conveniently summarised as follows:

- (a) The Judge wrongly undertook a tick box exercise. She separately considered each of the factual issues that had been raised, such as whether there were good reasons for the change, whether professors should have been excluded from selection for redundancy and whether Dr Caddy's position was in fact surplus, but never considered whether there was justification taking into account all of those factors in their totality.
- (b) Whether the redundancy was genuine is not the statutory test for justification.
- (c) The Judge failed to take into account that the University's decision resulted in the dismissal of a highly successful academic.

- (d) The Judge wrongly approached the issue of process entirely separately from the question of justification.
- (e) The Judge failed to consider whether the consultation process that was followed was designed to prevent the loss of employment as required by the provisions of the collective agreement.

[11] These issues are said to be of general importance because the correct application of s 103A impacts on the parties to every employment relationship. Mr Mitchell also emphasised the importance of this case to Dr Caddy personally, the dismissal effectively ending her academic career in New Zealand.

Our view

[12] In our view, the application fails to meet the threshold required under s 214 before leave to appeal may be granted.

[13] First, correctly analysed, the various arguments raised on behalf of Dr Caddy are essentially challenges to findings of fact dressed up as questions of law.

[14] On a superficial level, the wording of some aspects of the judgment viewed in isolation might be interpreted to support Mr Mitchell's argument.³ However, the judgment must be read in its entirety. We are satisfied that a proper reading of the judgment as a whole shows beyond argument that the Judge was well aware of the s 103A test and that she did apply it. All of the factors she addressed clearly bore on the question of what a fair and reasonable employer could have done. The applicant herself must have thought so because they were issues that she alleged had contributed to the dismissal being unjustified. The critical findings of fact were all in favour of the University and together led inexorably to the conclusion that the s 103A test had been satisfied. It is not reasonably arguable in our view to suggest otherwise.

[15] As for process, what the Judge said was that if an employer can show a redundancy is genuine and the consultation requirements have been complied with,

³ See for example [156], quoted above.

then that could be expected to go a long way towards satisfying the s 103A test.⁴ It is not in our view seriously arguable to contend that this was an error.

[16] Nor in our view is it seriously arguable to contend that the Judge did not apply the provisions of the collective agreement. They are expressly addressed in the judgment, the Judge noting that the purpose of the consultation requirements was “to allow the parties sufficient opportunity to investigate options in good faith which would prevent any loss of employment”.⁵ The Judge then went on to address in some detail whether the University had discharged its obligation to avoid redundancy.⁶

[17] Finally, for completeness we record that Dr Caddy’s academic standing was also expressly mentioned in the judgment.⁷

[18] The Court will not grant leave to hear an appeal which has no reasonable prospect of success and this case is, in our assessment, very much in that category.

[19] We are also not persuaded that the proposed issues are ones of general or public importance. We acknowledge the importance of this case to Dr Caddy. But that on its own is not enough. The proposed appeal is entirely case-specific. It does not raise any legal issues of general or public importance that warrant determination by this Court.

Outcome

[20] The application for leave to appeal under s 214(3) of the Employment Relations Act 2000 is declined.

[21] The respondent seeks costs. There is no reason why these should not follow the event and accordingly we also order that Dr Caddy must pay the respondent costs for a standard application on a band A basis with usual disbursements.

⁴ At [88].

⁵ At [113].

⁶ At [117]–[128].

⁷ At [76].

Solicitors:
Garry Pollak & Co, Auckland for Applicant
Simpson Grierson, Auckland for Respondent