IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA748/2020
[2021] NZCA 111

BETWEEN	IDEA SERVICES LIMITED Applicant
AND	LEANNE GAYE DAVIS Respondent

Court:	Brown and Gilbert JJ
Counsel:	G G Ballara and S P Radcliffe for Applicant P Cranney for Respondent
Judgment: (On the papers)	14 April 2021 at 9.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant is to pay costs to the respondent for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Gilbert J)

[1] The respondent, Leanne Davis, was formerly employed by the applicant, Idea Services Ltd (ISL) as a support worker. In the early hours of 5 December 2016, she was attacked by Mr A, an intellectually-disabled man she was caring for in the course of her employment. Ms Davis suffered physical injuries, including concussion, and possible post-traumatic stress disorder.

[2] Ms Davis brought a personal grievous claim, on the basis of unjustified disadvantage, against ISL alleging it failed to meet its health and safety obligations to her.[1] Her claim was dismissed by the Employment Relations Authority (the Authority) on 29 October 2019.[2]

[3] Ms Davis challenged the Authority's determination in the Employment Court. She claimed she was disadvantaged in her employment and/or ISL breached the terms of the applicable collective employment agreement. In a judgment delivered on 11 December 2020, Judge Corkill set aside the Authority's determination and upheld Ms Davis' claims.[3] The Judge found that ISL failed to comply with its health and safety obligations to Ms Davis under the Health and Safety at Work Act 2015 and that disadvantage was suffered, including physical injuries and significant distress.[4] Alternatively, the Judge found that ISL breached the health and safety obligations set out in the collective employment agreement.[5] The Judge made declarations accordingly and awarded costs to Ms Davis.[6]

Application for leave to appeal on a question of law

[4] ISL now applies under s 214 of the Employment Relations Act 2000 for leave to appeal to this Court. It contends there are three questions of law arising out of the Employment Court's judgment of general or public importance justifying the delay and expense of a further appeal. Specifically, ISL says the Employment Court erred in law by:

(a) placing health and safety obligations on ISL which were properly those of third-party agencies (government and private health services providers that were required to assess and treat Mr A);

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1 Employment Relations Act 2000, s 103(1)(b).
2 *Davis v Idea Services Ltd* [2019] NZERA Wellington 610.
3 *Davis v Idea Services Ltd* [2020] NZEmpC 225 [Employment Court judgment].
4 At [178].
5 At [179].
6 At [181].

(b) conducting an impermissible assessment based on hindsight rather than foreseeability of harm and ISL's obligation to take all reasonably practicable steps to address such harm; and

(c) taking insufficient account of Ms Davis' own health and safety obligations to take all reasonably practicable steps to address such harm.

Background

[5] ISL operates three residences situated in close proximity to each other. Mr A occupied one of these residences, described in the Employment Court judgment as Residence 2. The Judge noted that, as a result of Mr A's intellectual disability, his behaviours can be very challenging, including shouting, swearing, verbal abuse, banging walls, throwing objects around and physical aggression. The Judge also noted that Mr A has a history of "nocturnal issues" and, at 195 cm tall, he can appear very imposing.[7] On the other hand, Mr A enjoys chatting, laughing and joking, helping at the residence and engaging in other activities that appeal to him.[8]

[6] ISL developed and maintained support information relating to Mr A, including a behavioural support plan, personal support information and an Alerts and Crisis Response document. The behavioural support plan contained high level information about how to respond in the event of adverse behaviour escalating. This document identified the possibility that Mr A may attempt to hit a staff member. The personal support information included details of Mr A's bedtime routine (noting the need for consistency) and general information about how to provide support for reducing anxiety. The Alerts and Crisis Response document described how to respond to particular types of behaviour, including verbal or physical aggression.[9]

[7] On the night of the attack, Ms Davis was working a sleepover shift. Mr A had been experiencing difficulties sleeping over an extended period and he had difficulty settling that evening. His behaviour deteriorated to the point he was ranting and

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7 At [44].
8 At [45].
9 At [46].

throwing items out of the residence. Ms Davis was hit in the head by some footwear. She decided to extricate herself by running to the neighbouring facility, also operated by ISL. However, before she could gain entry to this residence, Mr A, who was chasing her, tackled her to the ground, winding her. Mr A then hit Ms Davis around the head, shoulder and arm causing her to lose consciousness for a short time.[10]

[8] Ms Davis pleaded several breaches by ISL of its health and safety obligations.[11] The essence of her claim was that Mr A demonstrated an escalating pattern of aggressive behaviour which placed staff at risk.[12] ISL's response in summary was that although there were discrete examples of aggressive behaviour, there was no escalating pattern and there were no red flags suggesting its systems and processes were inadequate. Moreover, ISL contended Ms Davis was an experienced support worker who had placed herself at risk by failing to meet her own health and safety responsibilities.[13]

[9] The Judge reviewed in some detail the background leading up to the night of the attack, including the protocols established by ISL and the steps taken to address Mr A's behavioural problems over the course of 2016.[14] At a team meeting on 13 October 2016 attended by the service manager, Ms Davis, other support workers and Mr A's father, it was noted that most staff were having trouble getting Mr A to sleep at night. The situation had become sufficiently serious that staff were maintaining sleep charts.[15] The following night, Mr A grabbed Ms Davis' arm very tightly. As a result of this incident, Ms Davis locked herself in the office at the residence.[16] The service manager was on duty for the next three nights and observed the issues himself. He discussed Mr A's sleeping problems with Ms Davis and Mr A's father and suggested a referral to a third-party agency specialising in behavioural support. Although this was agreed to, it could not take place immediately and did not occur prior to the attack on Ms Davis on 5 December 2016.[17]

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10 At [108]–[120].
11 At [5].
12 At [137].
13 At [138].
14 At [59]–[135].
15 At [74] and [142].
16 At [145].
17 At [146].

[10] A further night-time incident occurred on 28 October 2016 when Mr A became aggressive and threw books at Ms Davis. After a discussion with Ms Davis, on-call staff and Mr A's father, it was agreed that Mr A should attend his doctor to address his sleeping problems and for prescription medication to be administered as necessary. The drug Clonazepam was prescribed and was used to help settle Mr A, but there was no evidence this medication was intended to address the problem of sleeplessness.[18]

[11] A further incident occurred on 3 November 2016 when Mr A was unsettled and became agitated. As a result, a referral was made to the DHB Mental Health Disability Team but, again, a prompt appointment could not be arranged.[19] Mr A attended another doctor's appointment on 28 November 2016, but this was to address skin and rash issues only.[20]

[12] A further incident was reported by Ms Davis on 29 November 2016. Mr A became agitated, was throwing things around, slamming doors and swearing. Ms Davis noted on the incident report that this behaviour was "becoming a pattern".[21]

[13] The Judge found that these and other events strongly suggested a pattern of sleep deprivation which was adversely affecting Mr A's mood and behaviour and there was an obvious need to address this issue.[22] The Judge noted that ISL provided no evidence to explain why it did not do so.[23] The Judge found that by late November 2016, a fair and reasonable employer could be expected to have followed up on the issue of night-time medication, especially given that appointments with external agencies could not be obtained in the meantime.[24]

[14] A further significant incident, concerning another support worker, occurred two days prior to the attack, on Saturday, 3 December 2016. When the support worker, a male, arrived at work, Mr A came outside and started swearing at him. As the support worker walked past him, Mr A punched him in the shoulder from behind. Later, while

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18 At [147] and [150].
19 At [148].
20 At [149].
21 At [98].
22 At [151].
23 At [150]–[152].
24 At [153].

the support worker was reading relevant diary entries as part of a staff handover, Mr A seized the diaries and hit the support worker on the head with them. As this worker accompanied the staff member he was replacing to her car, Mr A came up behind him and punched him in the lower back. Mr A punched him again inside the facility with enough force to cause him to hit a wall outside the office.[25] Following telephone instructions of on-call support staff, the support worker left the residence and relocated to the neighbouring facility because it appeared Mr A was not going to stop attacking him. When relief staff could not be arranged, Mr A's father was contacted and asked to come and pick Mr A up.[26]

[15] Despite the serious nature of this incident, the Judge noted there was no evidence that senior staff became involved in reviewing or addressing the safety issues over the weekend. Nor was there any evidence of any steps being taken at that time.[27] The Judge considered that a fair and reasonable employer could be expected to regard these events as sufficiently serious as to warrant an immediate review of Mr A's care arrangements. Mr A's level of aggression had plainly increased from that described in the Alerts and Crisis Response document.[28]

[16] Ms Davis was attacked by Mr A two days later. This was her first sleepover shift with Mr A since the incident reported on 29 November 2016.[29] The Judge noted there was no evidence Ms Davis had been forewarned that Mr A's behaviour had escalated to the point where safety issues needed to be addressed.[30]

[17] The Judge was not persuaded that Ms Davis failed to meet her own health and safety obligations. In finding there were no failures of judgement on her part, the Judge observed that a senior service manager concluded in a subsequent review of the attack that "the whole incident was well handled by [Ms Davis]".[31] There was no suggestion in the review that Ms Davis ought to have taken the steps referred to at the hearing, such as using her car to get away. The Judge regarded these points as

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25 At [102]–[103].
26 At [104].
27 At [162].
28 At [163].
29 At [108].
30 At [164].
31 At [168].

having been made with the benefit of hindsight and without sufficient regard to the contemporaneous evidence. The Judge also observed there was no suggestion that Ms Davis had failed to follow her training, which was up-to-date.[32]

Assessment

[18] There is no right of appeal from a decision of the Employment Court. An appeal is restricted to a question of law and requires leave. Leave may only be granted if, in the opinion of this Court, the proposed question of law raises an issue of general or public importance or for some other reason ought to be submitted for determination by this Court.[33]

[19] We do not consider that any of the proposed questions of law meet the criteria justifying leave. The Judge applied settled law to the facts found following a comprehensive review of the relevant evidence. The outcome on all issues was intensely fact-specific. In our view, no question of general or public importance arises.

[20] Specifically, it does not appear to us to be reasonably arguable that the Judge placed health and safety obligations on ISL which were instead owed by third-party agencies (government and private health services providers that were required to assess and treat Mr A). The first proposed question of law has insufficient prospect of success to justify leave being granted. There is nothing in the judgment to suggest that the Judge made his assessment with the benefit of hindsight rather than focusing on the foreseeability of harm. This second proposed issue does not raise any question of general or public importance, nor does it appear to be seriously arguable. The third proposed question — that the Judge failed to take sufficient account of Ms Davis' own health and safety obligations — is not a question of law. The Judge's assessment of this issue was purely one of fact. We also do not see any seriously arguable error in the Judge's careful analysis.

Result

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

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[32] At [168].
[33] Employment Relations Act, s 214(3).

[22] The applicant is to pay costs to the respondent for a standard application on a band A basis and usual disbursements.

Solicitors:
McBride Davenport James, Wellington for Applicant
Oakley Moran, Wellington for Respondent