IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA8/2021
[2021] NZCA 203

BETWEEN	SUHKJEET SANDHU First Applicant
	HUIPING WU Second Applicant
	SELLIAH NESUM NIRANJALA Third Applicant
	ROSALINA LEANNA Fourth Applicant
	SUTHARSHINI ANTHONY RUPS MIRANDA Fifth Applicant
AND	GATE GOURMET NEW ZEALAND LIMITED First Respondent
	SHAUN JOILS Second Respondent

Court: Clifford and Goddard JJ

Counsel: P Cranney for Appellants
E J Butcher for Respondents

Judgment: (On the papers) 21 May 2021 at 10.30 am

JUDGMENT OF THE COURT

Leave to appeal is granted on the following question of law:

> **Whether, in the absence of sickness, default, or accident, the minimum wage is payable for all of a worker's agreed contracted hours of work**

or whether it is lawful to make deductions from wages for lost time not worked at the employer's direction.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] This is an application by Suhkjeet Sandhu and others (the applicants) for leave to appeal a judgment of the Employment Court. In that judgment the Court held that the applicants were not, at the relevant time, working for the purposes of s 6 of the Minimum Wage Act 1983 (MWA) and therefore they had no statutory minimum wage entitlements.[1]

[2] The question for which leave is sought is:

> Whether, in the absence of sickness, default, or accident, the minimum wage is payable for all of a worker's agreed contracted hours of work or whether it is lawful to make deductions from wages for lost time not worked at the employer's direction.

Background

[3] Gate Gourmet New Zealand Ltd (Gate) provides in-flight catering services to passenger aircraft both domestically and internationally. On 23 March 2020, the date the first Level 4 COVID-19 lockdown was announced, the applicants were employed by Gate for a minimum 40-hour week on the minimum wage. The COVID-19 pandemic and Level 4 lockdown substantially impacted on Gate's business, resulting in it partially shutting down its operations. Thereafter, on many occasions, Gate did not require a number of employees, including the applicants, to work.

[4] Gate agreed, provided it received the wage subsidy, to pay employees who were not required to work 80 per cent of their normal wages. Gate did receive that

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1 *Gate Gourmet New Zealand Ltd v Sandhu* [2020] NZEmpC 237 [Employment Court decision].

subsidy and paid affected employees, including the applicants, accordingly. On that approach, employees such as the applicants who were normally paid the minimum wage under the MWA received 80 per cent of that minimum wage.

[5] The applicants, through the Aviation Workers' United Inc Union (AWU), filed a statement of problem with the Employment Relations Authority. They said Gate was breaching s 6 of the MWA by paying them below the minimum weekly wage. The Authority agreed.[2]

[6] Gate challenged the determination of the Authority. As the Employment Court put it:[3]

> [Gate's] challenge is directed at the correctness of the Authority's determination that the entitlements under the MWA applied to the [applicants], despite the [applicants], at the relevant times, performing no work for Gate.

[7] Because of the importance of the issue leave was granted to Business New Zealand and the New Zealand Council of Trade Unions (NZCTU) to appear and make submissions at the hearing. There, the applicants and NZCTU placed reliance on s 7(2) of the MWA to support the Authority's decision.[4] Section 7(2) provides:

> No deduction in respect of time lost by any worker shall be made from the wages payable to the worker under this Act except for time lost—
>
> (a) by reason of the default of the worker; or
>
> (b) by reason of the worker's illness or of any accident suffered by the worker.

[8] Gate and Business New Zealand disputed the relevance of s 7(2). They argued that s 7(2) is only engaged if s 6 covered the employee concerned, which was not the case at the relevant times here.[5]

[9] The Employment Court reached a majority decision. The majority, Judges Holden and Beck, found that Gate had not breached the MWA. The obligation under the MWA was to pay the minimum rate for work performed by an employee.

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2 *Sandhu v Gate Gourmet New Zealand Ltd* [2000] NZERA Auckland 259 [Authority decision].
3 Employment Court decision, above n 1, at [5].
4 At [35].
5 At [34].

As the employees were not working, s 6 did not apply and s 7 was not engaged.[6] The minority, Chief Judge Inglis, agreed with the Authority. She considered, in accordance with the common law rule that where an employer cancels agreed hours of work wages remain "payable", Gate was required to pay the applicants the minimum wage.[7] In her view, s 7(2) reinforced that conclusion, as the circumstances which led Gate to paying only 80 per cent of the minimum wage were not deductions the lawfulness of which s 7(2) provided for.[8]

Leave

[10] Section 214(3) of the Employment Relations Act 2000 provides that we may only grant leave if, in our opinion, "the question of law involved in [the] appeal is one that by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision".

[11] The applicants say the question posed meets both limbs of that test. The core issue in their view is whether, in the absence of time lost for sickness, default, or accident, the minimum wage is payable for all of a worker's agreed contracted hours of work, or whether it is lawful to make deductions in respect of time lost for other reasons. The resolution of that issue goes to the role of the minimum wage, and the protections provided by the MWA in s 7. Both the majority and the minority of the Employment Court recognised the public importance of that issue.[9]

[12] The respondents do not agree that the leave criteria are met. They say first there is no live issue between the parties. They point to the fact that, following the Authority's decision, Gate agreed to pay the additional amount calculated as owing on the basis of the Authority's decision. It has not asked, and has no intention to ask, for that money back. Moreover, the interpretation of the requirements of the MWA, and of ss 6 and 7 in particular, are matters of well settled law which support the majority's decision.[10]

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6 At [38]–[45].
7 At [60], citing for example *Inspector of Awards v Duncan* (1919) 14 MCR 53.
8 At [54].
9 At [7] per Judges Holden and Beck, and [50] per Chief Judge Inglis.
10 This is a reference to the decision of this Court in *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522.

[13] Finally, the respondents say that even if this Court was to answer the question for which leave was sought in the applicants' favour, that would not determine the dispute between the parties. The agreed statement of facts filed in the Authority records the AWU having agreed, on the applicants' behalf, that the applicants would remain away from the work place while receiving 80 per cent of their usual wages.[11] Further the Employment Court had concluded Gate had not made deductions from minimum wages otherwise due. Those factual findings were unable to be challenged.

Analysis

[14] We are satisfied that the question for which leave is sought is one of general and public importance. Minimum conditions of employment, including the minimum wage for hourly work, are fundamental elements of New Zealand's workplace legislation. The issue here, essentially whether s 6 applied where employees who whilst employed do not work for reasons other than the circumstances referred to in s 7(2), is of significance not only in circumstances such as those that arose as a result of the COVID-19 pandemic. It could arise in a variety of other circumstances. The difference in the views of the majority and the Chief Judge reinforce the legal significance of the question.

[15] But, the respondents argue, the appeal is moot. Gate's decision not to seek the return of the monies paid following the Authority's decision means that there is no matter remaining in actual controversy which requires decision. As the applicants point out, however, there are ongoing proceedings seeking remedies for non-compliance with the Authority's determination. If the Employment Court's decision is correct, there would have been no non-compliance. The outcome of the appeal would, therefore, determine whether those proceedings continue or come to an end. There are also ongoing issues as to costs. In particular, the respondent seeks costs against the minimum waged applicants. The Employment Court granted the applicants a stay of the respondent's cost application, pending the outcome of this application and any subsequent appeal. That outstanding issue provides further support for a grant of leave.

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[11] Authority decision, above n 2, at [24]. See also Employment Court decision, above n 1, at [14]–[15].

[16] Nor do we consider that this Court's decision in *Idea Services Ltd v Dickson* addresses the particular issue that arises here.

[17] Nor are we persuaded leave would infringe the bar against appeals on questions of fact. The Authority noted a dispute of fact as to whether or not the AWU had agreed to the Gate proposal, and put that to one side to reach its view on the applicability of s 6: the issue did not need to be determined because it was not open to the parties to contract out of the MWA.[12] The applicants were before the Employment Court on a non-de novo basis. Consequently the matters for that Court to consider were "significantly more limited than those that were before the Authority".[13] While it would have been open to the applicants to seek determination on that factual dispute,[14] it would not appear that issue came squarely before the Employment Court. It was not relevant to the questions addressed by that Court. Nor would it be relevant to the question before this Court.

[18] Finally, the Employment Court's majority view that the circumstances did not involve any deduction from the minimum wage reflected a finding on a legal point: namely, there being no requirement as a matter of law to pay wages in the first place, conceptually there could be no deduction from applicable (minimum) wages.

Result

[19] Leave to appeal is granted on the following question of law:

> Whether, in the absence of sickness, default, or accident, the minimum wage is payable for all of a worker's agreed contracted hours of work or whether it is lawful to make deductions from wages for lost time not worked at the employer's direction.

Solicitors:
Oakley Moran, Wellington for Appellants
Langton Hudson Butcher, Auckland for Respondents

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12 Authority decision, above n 2, at [35].
13 Employment Court decision, above n 1, at [5].
14 Employment Relations Act 2000, s 179(4)(b).