IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA306/2021
[2021] NZCA 483

BETWEEN	KEANU HEAD AND OTHERS Applicants
AND	CHIEF EXECUTIVE OF THE INLAND REVENUE DEPARTMENT First Respondent
AND	MADISON RECRUITMENT LIMITED Second Respondent

Court: Miller and Cooper JJ

Counsel: P Cranney and S R Mitchell for Applicants
S L Hornsby-Geluk for First Respondent
G Service and S J Howard-Brown for Second Respondent

Judgment: (On the papers) 22 September 2021 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

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

REASONS OF THE COURT

(Given by Miller J)

[1] This judgment responds to an application for leave to bring an appeal on a question of law under s 214 of the Employment Relations Act 2000. A Full Court of

the Employment Court found that each of the applicants was employed by the second respondent under a labour-hire agreement with the Inland Revenue Department, and not by the first respondent.[1]

[2] The applicants must point to a question of law that, by reason of general or public importance or for any other reason, ought to be submitted to this Court for its decision.[2] They assert that the Employment Court erred by:

(a) not concluding that the labour hire arrangement was unlawful as contrary to s 41 of the State Sector Act 1988 (SSA) unless they were employees of the first respondent;

(b) concluding that the first respondent's control of the applicants while they were working was a neutral factor;

(c) concluding that the applicants were not integrated into the IRD;

(d) concluding that the fundamental test had no application; and

(e) concluding that the approach taken by the first respondent did not deprive the applicants of employment rights.

[3] We observe that these are framed as grounds of appeal rather than questions of law. It is incumbent on an applicant for leave to frame specific questions of law that this Court is to answer, rather than leave us to extract questions of law from grounds of appeal which are partly or substantially factual in nature.[3]

[4] The first ground of appeal undoubtedly raises a question of law, but the outcome for the applicants cannot depend on it. Section 41 of the SSA establishes how delegations may be implemented by a chief executive. It does not of itself determine employment status, as the Employment Court held.[4] At most the applicants

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1 *Head v Chief Executive of Inland Revenue Department* [2021] NZEmpC 69.
2 Employment Relations Act 2000, s 214(3).
3 See, for example, *Porirua Whanau Centre Trust v Ngawharau* [2015] NZCA 585 at [2].
4 *Head v Chief Executive of Inland Revenue Department*, above n 1, at [178].

could establish that the Chief Executive was not authorised to act as she did. It would not follow that they were her employees.

[5] In our view, the remaining grounds of appeal are properly characterised as questions of fact.[5] We include in that the issue of control while working; it is not disputable that control is, as the Employment Court put it, a necessary component of a working relationship, whatever its composition, and the question whether a line is crossed is one of fact and degree, applying settled law.[6] It is we think clear that what the applicants really want is to have this Court examine for itself how the relationship between the employees and the Chief Executive operated in practice.

[6] To the extent the grounds of appeal also raise questions of law, they do not merit consideration by this Court. The fundamental test is irrelevant, because there is no doubt that the applicants were not contractors but employees. The question was which of the respondents was their employer. Nor is there any need to reconcile the Employment Court's approach in this case with that the Court itself had taken in *Prasad v LSG Sky Chefs New Zealand Ltd*;[7] the two cases are distinguishable on their facts, as the Court carefully explained.[8]

[7] Finally, the issues raised in the grounds of appeal are not of general or public importance. We acknowledge that a large number of workers were affected by this arrangement. But this is not a case in which there was any attempt to deprive the applicants of employee status, or (on the Employment Court's findings of fact) any question of bad faith.[9] We also recognise that there may be a policy question about use of labour-hire agencies such as the second respondent in the discharge of state sector functions. This was of concern to the principal public service union, the PSA, of which the applicants are or were at relevant times members. But such arrangements are not illegal, and the legislature has since regulated them to the extent it thinks

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5 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25].
6 *Head v Chief Executive of Inland Revenue Department*, above n 1, at [251], citing *TNT Worldwide Express (New Zealand) Ltd v Cunningham* [1993] 3 NZLR 681 (CA) at 714 and *Leota v Parcel Express Ltd* [2020] NZEmpC 61, [2020] ERNZ 164 at [46]–[47].
7 *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835.
8 *Head v Chief Executive of Inland Revenue Department*, above n 1, at [284]–[287].
9 At [277]–[278].

appropriate, in the Employment Relations (Triangular Employment) Amendment Act 2019.

[8] The application is declined.

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

Solicitors:
Oakley Moran, Wellington for Applicants
Dundas Street Employment Lawyers, Wellington for First Respondent
MinterEllisonRuddWatts, Auckland for Second Respondent