IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA371/2021
[2021] NZCA 510

BETWEEN	THE ATTORNEY-GENERAL Appellant
AND	CHRISTINE FLEMING Respondent

Court:	Brown and Courtney JJ
Counsel:	S V McKechnie and T J Bremner for Appellant P J Dale QC for Respondent
Judgment: (On the papers)	6 October 2021 at 9.30 am

JUDGMENT OF THE COURT

A The Attorney-General's application for leave to appeal is granted.

B Ms Fleming's application for leave to cross-appeal is granted on the first question of law only. The application for leave to appeal on the second question is declined.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] The Attorney-General (sued on behalf of the Hon Andrew Little in his capacity as Minister of Health) and Christine Fleming apply, respectively, for leave to appeal

and to cross-appeal a decision of the Employment Court.[1] The decision determined Ms Fleming's claim that, in caring for her disabled adult son, she was an employee of the Ministry of Health and entitled to greater remuneration than the available funding models provided.

[2] The applications for leave are brought under s 214(3) of the Employment Relations Act 2000 (ERA) which provides that:

> The Court of Appeal may grant leave accordingly if, in the opinion of that court, the question of law involved in that 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.

[3] The Attorney-General has identified three grounds on which it wishes to appeal. Ms Fleming consents to the Attorney-General's application for leave to appeal on those grounds. Ms Fleming wishes to cross-appeal on two grounds. The Attorney-General consents to the first but opposes leave being granted in respect of the second.

The Employment Court's decision

[4] Ms Fleming's son, Justin, was born with severe physical and mental disabilities. He is now 40 years old. He cannot be left alone and requires constant supervision, as well as daily care needs met. Ms Fleming has cared for him throughout his life. For financial support Ms Fleming depended on a benefit from the Ministry of Social Development. She elected not to seek support through the Funded Family Care model introduced in 2013 (or through the alternative, Individualised Funding) under which funding could be provided to enable a person with high or very high needs (which Justin was) to be cared for by a family member.

[5] Ms Fleming chose to remain on a benefit rather than seek funding under the alternative models because she (apparently mistakenly) believed remaining on the benefit alone would make her better off financially and because of the uncertainties inherent in the funding models for a person in her situation. In particular, Funded Family Care was capped at 40 hours a week and purported to impose on the disabled

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1 *Fleming v Attorney-General* [2021] NZEmpC 77, [2021] ERNZ 279.

person and their caregiver an employment relationship under which the caregiver was employed by the disabled person.

[6] Ms Fleming applied to the Employment Court for a declaration that she was an employee of the Ministry of Health because she was providing full time care for Justin, the Ministry was aware of that and the work was for the Ministry's benefit. She applied for a declaration as to her employment status and the nature of the employment relationship that would have existed if Justin had received funding under Funded Family Care or Individualised Funding.[2]

[7] The Crown did not accept that the Employment Court had jurisdiction to inquire into the employment relationship requirements of the funding models. However the Employment Court held that it was not prevented from doing so.[3] Further, although it could not consider whether the Crown was entitled to require recipients of Funded Family Care to accept an employment relationship in order to receive funding, it was entitled to determine whether the employment relationship purportedly imposed by the funding model reflected the real nature of the relationship and, if it was an employment relationship, who the parties to the relationship were.[4]

[8] The Court held that Justin lacked the mental capacity either to enter into, or have imposed on him, a binding employment relationship with his mother.[5] Against that finding, it held that if Funded Family Care had been provided, Ms Fleming would have been employed by the Ministry of Health as a homeworker within the meaning of the ERA.[6] It held that Ms Fleming had a grievance for not having been appropriately funded since 1 October 2013.[7]

[9] In terms of remedies, the Employment Court:

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2 Employment Relations Act 2000, s 6(5).
3 *Fleming v Attorney-General*, above n 1, at [57].
4 At [106(b)].
5 At [40]–[41].
6 At [106(d)–(e)].
7 At [106(g)].

(a) made a declaration that Ms Fleming is an employee of the Ministry of Health;[8]

(b) made an order that Ms Fleming was entitled to lost wages and holiday pay, subject to the dates on which pt 4A of the New Zealand Public Health and Disability Act 2000 was in force;[9]

(c) made an order that Ms Fleming had made out a claim for personal grievance on the basis of discrimination and so was entitled to compensation for non-pecuniary losses, though reserved the quantum of such compensation;[10] and

(d) dismissed Ms Fleming's claim for a penalty against the Ministry based on its failure to recognise the effect of this Court's decision in *Chamberlain v Minister of Health* in its funding models.[11]

The Attorney-General's application for leave to appeal

[10] The Attorney-General seeks leave to appeal three questions of law:

(a) Was Ms Fleming a "homeworker" as defined by s 5 of the ERA and therefore an employee of the Ministry of Health when she cared for her son?

(b) Was the Employment Court wrong in finding that the "well-established test for what constitutes work" as set out in *Idea Services Ltd v Dickson*[12] applies to Ms Fleming as a homeworker?

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8 At [96].

9 At [97]. Part 4A (now repealed) was introduced in response to this Court's decision in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 and precluded payment by the Crown or any District Health Board to a person for support services to a family member unless permitted by an applicable family care policy or expressly authorised under an enactment.

10 At [99].

11 At [103], citing *Chamberlain v Minister of Health* [2018] NZCA 8, [2018] 2 NZLR 771.

12 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522.

(c) Did the Employment Court err in finding that Ms Fleming has a personal grievance for discrimination?

[11] The Attorney-General says all three issues are of general and public importance. Multiple families are in similar care arrangements as Ms Fleming and Justin so the case has legal ramifications for many, as well as costs issues for the government.

[12] As noted, Ms Fleming consents the Attorney-General's application for leave to appeal on these proposed questions of law. She accepts the judgment is of general importance and raises a genuine issue of law. We agree.

Ms Fleming's application for leave to cross-appeal

[13] Ms Fleming seeks leave to cross-appeal on the following questions:

(a) Did the Employment Court err in finding that pt 4A of the New Zealand Public Health and Disability Act prevented her from being entitled to payment for any lost wages and holiday pay for the period that pt 4A was in force?

(b) Whether the Crown breached the ERA in a way which allows the imposition of a penalty:

(i) for the purposes of s 133 of the ERA, by breaching an employment agreement;

(ii) for the purposes of a specific provision of the ERA allowing penalties, including ss 60A, 68, 69ZD, 69ZF and 104; or

(iii) for the purposes of ss 4 and 4A of the ERA, whether the Crown and/or the Ministry of Health has failed to actively comply with its obligations of good faith towards the applicant and/or family carer employees since *Chamberlain*?

[14] The Attorney-General consents to leave being granted in respect of the first question. We agree that it is an appropriate question of law for the purposes of leave to appeal.

[15] However, the Attorney-General opposes leave being granted on the second question. He says it is not a question of law; does not identify which aspect of the judgment below it considers to be wrong in law; is broadly-framed; appears to seek a wide-ranging advisory opinion on matters which are fact-dependent; and the decision not to impose a penalty was based on a factual finding that the failure complained of was not deliberate which cannot be challenged on appeal. He also says the issue is not seriously arguable and not of general or public importance.

[16] Before considering the question of leave, we briefly explain the nature of Ms Fleming's claim for a penalty. Ms Fleming received funding to provide "household management" and "personal care" to Justin. The penalty claim was based on the fact that the relevant Funded Family Care provisions failed to reflect this Court's decision in *Chamberlain* which held that, for the purposes of funding, the definitions of "household management" and "personal care" extended to supervision.[13]

[17] In *Chamberlain*, this Court described "the language of employment" used to describe the relationship between a person with disabilities and the family carer as "a mere fiction", noting that many persons with disabilities are so impaired that they do not have the necessary capacity in law to employ another person.[14] It also held that, for the purposes of a needs assessment, "personal care" and "household management" can include supervision of a disabled person.[15] But the Ministry's Funded Family Care model did not reflect *Chamberlain*. As a result, when Ms Fleming applied for an assessment post-*Chamberlain*, she received an allocation of only 22 hours per week, notwithstanding that it was accepted that Justin required round-the-clock care and supervision.

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13 *Chamberlain v Minister of Health*, above n 11, at [72] and [83]–[85].
14 At [48].
15 At [72] and [83]–[85].

[18] In the judgment under appeal, the Employment Court held that the jurisdiction to award penalties is limited to the circumstances set out in s 133 of the Act — breach of an employment agreement or breach of a provision of the Act for which a penalty is provided. However, it did not consider that either were met. In particular, s 4A, which permits a penalty to be imposed for breach of the duty of good faith in an employment relationship, only applies where the conduct is deliberate, serious and sustained.[16] The Court found that the Ministry's failure was not deliberate.[17]

[19] Ms Fleming maintained that the Crown's breach must have been deliberate because it cannot claim, legitimately, to have thought Justin was Ms Fleming's employer, given this Court's comments in *Chamberlain*. A penalty is justified on this basis. Ms Fleming recognises that whether the Crown acted deliberately in not implementing *Chamberlain* is a question of fact, not law, but argues it falls within the category of factual errors so great as to amount to an error of law.

[20] There are difficulties with the proposed second ground of appeal. It is not couched so as to identify any error in the decision of the Employment Court nor any question of law. It appears that Ms Fleming accepts that only deliberate conduct by the Crown would attract a penalty. But the finding that the Crown did not act deliberately does not given rise to a question of law unless it satisfies the test in *Bryson v Three Foot Six Ltd*, where the Supreme Court held an ultimate conclusion of a fact-finding body can sometimes be so insupportable as to amount to an error of law.[18] Such situations will be rare and the standard requires there to be "no evidence to support the determination".[19]

[21] We are not satisfied that this threshold can be met. The finding that the Crown did not act deliberately was not based on an assertion that Justin was or was not capable of being an employer — that question did not arise because Ms Fleming was not funded under either of the funding models. Rather, it was based on the Crown's belief that no employment relationship existed between it and Ms Fleming.

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16 *Fleming v Attorney-General*, above n 1, at [102].
17 At [103].
18 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [26].
19 At [26], citing *Edwards v Bairstow* [1956] AC 14 (HL) at 36.

Decision on leave

[22] Leave is granted to the Attorney-General to appeal on the grounds sought.

[23] Leave is granted to Ms Fleming to cross-appeal only on the first of her grounds. Leave to appeal on the second ground is declined.

Administrative issues

[24] Ms Fleming had wished to have the quantum and costs issues still outstanding in the Employment Court resolved before the appeal and cross-appeal are heard. However, subsequent to the parties' submissions being filed, the Ministry successfully applied for orders in the nature of a stay, namely that (1) determination of remedies will be undertaken after the appellate process has come to an end and (2) the Ministry is not required to give effect to the judgment pending the outcome of the appeal and cross-appeal.[20] Ms Fleming's counsel has advised that she does not intend to appeal that decision. She has, however, sought a direction from this Court that the issues of quantum and costs be resolved prior to the hearing of the appeal.

[25] Ms Fleming does not identify the jurisdictional basis for the direction she seeks. Given the Employment Court's decision declining to determine quantum issues prior to the disposition of the appeal and Ms Fleming's advice that she is not challenging that decision, there is no basis on which we would consider making a direction of the kind suggested.

[26] Ms Fleming also seeks to have the appeal and cross-appeal heard urgently. The Fast Track Practice Note 2015 does not readily apply to this case because of its complexity and the fact that it will require two days for hearing. Further, it is likely that it will be heard together with another case raising similar issues. [21] We do, however, accept that the case is of great importance to the disability sector and to Ms Fleming personally. Steps will be taken to ensure that a hearing date is allocated as promptly as possible.

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[20] *Fleming v Attorney-General* [2021] NZEmpC 143.
[21] *Humphreys v Humphreys* EmpC 471/2019.

Solicitors:
Simpson Grierson, Wellington for Appellant
Mark Jeffries, Auckland for Respondent