**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA371/2021**
**[2022] NZCA 461**

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| BETWEEN | ATTORNEY-GENERAL<br>Appellant |
| AND | CHRISTINE FLEMING<br>Respondent |

Court: Brown and Courtney JJ

Counsel: S V McKechnie and T J Bremner for Appellant
P J Dale KC for Respondent

Judgment: (On the papers) 30 September 2022 at 11.30 am

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**JUDGMENT OF THE COURT**
**[Recall]**

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**A The decision in *Attorney-General v Fleming* [2021] NZCA 510 is recalled. It is to be reissued in a form that adds to the grounds of Ms Fleming's cross-appeal the questions set out at [20].**

**B Ms Fleming is entitled to costs for a standard application on a band A basis, with usual disbursements.**

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**REASONS OF THE COURT**

(Given by Courtney J)

## Introduction

[1] Christine Fleming obtained a declaration from the Employment Court that she was an employee of the Ministry of Health because she was providing full-time care

for her disabled adult son, Justin, the Ministry was aware of that fact, and the work was for the Ministry's benefit.[1] However, the Employment Court declined to impose a penalty on the Crown on the basis of the Crown's imposition of an employment relationship between her and Justin as a pre-requisite to its funding of Justin's care.[2] Ms Fleming argued that this was a breach of the employment contract, which exposed the Crown to a penalty under s 134 of the Employment Relations Act 2000 (ERA).

[2] The Crown and Ms Fleming applied, respectively, for leave to appeal and cross-appeal the Employment Court's decision. Leave was granted to both, but Ms Fleming was granted leave to cross-appeal on only one of the two questions for which she sought leave.[3] Leave was declined in respect of the following question:[4]

> (b) Whether the Crown breached the ERA in a way which allows the imposition of a penalty:
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> (i) for the purposes of s 133 of the ERA, by breaching an employment agreement;
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> (ii) for the purposes of a specific provision of the ERA allowing penalties, including ss 60A, 68, 69ZD, 69ZF and 104; or
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> (iii) for the purposes of ss 4 and 4(a) 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 v Minister of Health*[5]].

[3] Leave was refused in respect of this question because this Court was not satisfied that it raised a question of law, as required by s 214(3) of the ERA.[6] Ms Fleming has applied to recall the leave decision and invites the Court to reissue it, allowing leave on this second question.

[4] The limited grounds on which a decision of this Court may be recalled are well established. The recognised categories are first, that since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance

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1 *Fleming v Attorney-General* [2021] NZEmpC 77, (2021) 18 NZELR 67 [Employment Court decision] at [95]–[96].
2 At [103].
3 *Attorney-General v Fleming* [2021] NZCA 510 [Leave decision].
4 At [13] and [23].
5 *Chamberlain v Minister of Health* [2018] NZCA 8, [2018] 2 NZLR 771. Footnote not in original.
6 Leave decision, above n3, at [20]–[21].

and higher authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.[7]

[5] Ms Fleming advanced her application for recall under the first and third categories on the basis that the decision of this Court in *Labour Inspector v Southern Taxis Ltd* is inconsistent with the approach signalled in the leave decision.[8] The decision in *Southern Taxis* was delivered shortly after the leave decision in this case by a three member panel of this Court with the benefit of full argument.

## Application for recall

*Background*

[6] In *Chamberlain* this Court noted the Crown's agreement that a person who is so impaired as a result of disability that they lack the necessary capacity to employ another person cannot properly be viewed as an employer.[9] Ms Fleming submitted in the Employment Court that, in assessing funding for Justin's care, the Ministry failed to follow *Chamberlain* and consequently allocated only a small proportion of the hours needed for Justin's care, notwithstanding that Justin required round-the-clock care. This, she argued, was a breach of the duty of good faith imposed on parties to an employment contract by s 4 of the ERA. The Crown was therefore liable to a penalty under s 134 which renders every party to an employment agreement who breaches that agreement liable to a penalty.

[7] The Employment Court treated the possible sources of liability for penalty as either s 133 or s 4A.[10] Section 133 simply provides the Authority with exclusive jurisdiction to deal with actions for penalties under the Act. The Employment Court considered that this section did not apply. Section 4A of the ERA provides that every party to an employment agreement who fails to comply with the duty of good faith

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7 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 at 633; and *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [2].

8 *Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705, (2021)18 NZELR 623.

9 *Chamberlain*, above n 5, at [48].

10 Employment Court decision, above n 1, at [102].

imposed by s 4 is liable to a penalty if, relevantly, the established failure was deliberate, serious and sustained. The Employment Court held that this was not a source of liability because the Ministry's failure to approach funding in accordance with *Chamberlain* was not a deliberate failure but, rather, based on a genuine belief that no employment relationship existed between it and Ms Fleming.[11]

[8] In seeking leave to appeal, Ms Fleming's counsel, Mr Dale KC, submitted that, although the question whether the Crown was innocent because it wrongly understood that there was an employment relationship between it and Ms Fleming was arguably a question of fact, the proposed appeal would be advanced on the basis that the Employment Court's finding nevertheless amounted to an error of law.[12]

*Labour Inspector v Southern Taxis Ltd*

[9] As noted, the recall application rests on this Court's decision in *Southern Taxis*, which was delivered some weeks after the leave decision in this case. Mr Dale acknowledges that *Southern Taxis* is concerned with different provisions of the ERA. He relies on s 134, whereas *Southern Taxis* concerned the penalty regime under pt 9A of the ERA, which provides additional enforcement measures to promote the more effective enforcement of employment standards, especially minimum entitlement provisions. Relevantly, it provides for a Labour Inspector to apply for pecuniary penalty orders for serious breaches of minimum entitlement provisions. Nevertheless, Mr Dale submits that the question that was determined in *Southern Taxis* has implications for the current case.

[10] In *Southern Taxis* the Employment Court found that the company's drivers were employees, not independent contractors.[13] The company had failed to pay the drivers their minimum entitlements. The company had stopped trading and could not pay. The question became whether its directors could be said to have been "knowingly concerned in" the breaches of employment standards under s 142W so as to render them liable to a penalty under ss 142X and 142Y.[14] The Employment Court held that

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11 Employment Court decision, above n 1, at [102]–[103].

12 Relying on *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 36; and *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [21]–[23].

13 *Southern Taxis Ltd v Labour Inspector* [2020] NZEmpC 63, (2020) 17 NZELR 413.

14 *Labour Inspector v Southern Taxis Ltd*, above n 8, at [42].

the directors were not knowingly involved in the company's breaches because they genuinely believed that the drivers were not employees.[15]

[11] Leave was granted to appeal that finding on the following question of law: "[w]hat is the level of knowledge required to establish liability for a person involved in a breach of employment standards under s 142W(1) of the [ERA]?"[16] This Court held that knowledge of the essential facts that established contravention by the company was required. It was irrelevant that the directors believed the drivers were not employees.[17]

**Recall application**

[12] In submissions filed in support of the recall application Mr Dale says that Ms Fleming relies only on s 134 and references to other provisions of the ERA (presumably ss 4 and 4A) are only relevant to identify the breaches giving rise to the claim for a penalty. He submits that *Southern Taxis* is relevant to the question whether the Crown can avoid the penalty provision in s 134 by asserting a belief that Ms Fleming was not an employee, notwithstanding the finding that she was an employee. He submits that recall is justified because (1) *Southern Taxis* confirms that the status of the employment relationship and the issue of knowledge are questions of law; and (2) the present case falls between the earlier decision in *Brill v Labour Inspector (MacRury)* and *Southern Taxis*, neither of which are decisive as to whether the Crown's assertion of mistaken belief as to its employment status is sufficient to relieve it from liability under s 134.[18]

[13] Mr Dale also raises the question of public interest on the basis that there are currently a number of cases before the ERA in which the same question arises.

[14] The Crown opposes the recall. In her memorandum for the Crown, Ms McKechnie submits that *Southern Taxis* is not relevant because it determined only the level of knowledge required to establish whether a person is "knowingly involved

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15 *Southern Taxis Ltd v Labour Inspector*, above n 13, at [189]–[190].
16 *Labour Inspector v Southern Taxis Ltd* [2020] NZCA 337 at [13].
17 *Labour Inspector v Southern Taxis Ltd*, above n 8, at [57]–[59].
18 *Brill v Labour Inspector (MacRury)* [2017] NZCA 169, (2017) 14 NZELR 460. This case addressed personal liability under the now repealed s 234 of the Employment Relations Act 2000.

in a breach" for the purposes of s 142W(1) of the ERA (a question of law), not whether the requisite knowledge was actually held (a question of fact). She says that the recall application conflates these questions.

[15] Ms McKechnie also emphasises that *Southern Taxis* is concerned with the very different provisions of pt 9A of the ERA. Further, to the extent the application for recall relies on grounds of general or public importance, it effectively seeks to relitigate matters raised in the application. Finally, Ms McKechnie points out that the proposed question on which leave is sought remains defective.

*Decision*

[16] We accept that *Southern Taxis* was concerned with different penalty provisions of the ERA than arise in the present case. However, it is generally expected that the various provisions of an Act will reflect the scheme of the Act consistently and that the interpretation of any particular provision will be considered against the Act in its entirety. Therefore, if similar issues arise in relation to different parts of an Act it can be expected that a consistent approach will be taken, unless that is otherwise indicated. The fact that the present case and *Southern Taxis* were concerned with different provisions in the ERA does not necessarily mean that *Southern Taxis* has no relevance.

[17] In *Southern Taxis* the Employment Court decided that the directors' belief that the drivers were not employees did not preclude them from being "knowingly concerned" in the company's breach of the employment agreement. In the present case the Employment Court held that the Crown's belief that Ms Fleming was not an employee precluded a deliberate failure to comply with the duty of good faith imposed by s 4A. It did not consider ss 133 or 134 relevant and therefore did not consider whether the Crown had breached an employment agreement or whether a (wrong) belief as to Ms Fleming's employment status would result in a finding of no breach.

[18] The conclusion reached in *Southern Taxis* about the effect of a wrong belief as to employment status on a party's liability for breach of an employment agreement has potential application to, or at the least will have the capacity to influence, the determination of the basis for liability under other provisions in the Act. Currently, this Court's decision in *Southern Taxis* and the Employment Court's decision in

*Fleming v Attorney-General* take inconsistent approaches to the effect of a wrong belief as to employment status in determining liability for breach of an employment agreement. Such inconsistency is not in the public interest.

[19] It can be expected that the issue will arise in other cases and there will be an opportunity for both the Employment Court and this Court to consider the issue in relation to s 134 (and s 4A) of the ERA. However, the present appeal and cross-appeal are set down for hearing in November 2022. This issue can conveniently, and appropriately, be considered in that context. The interests of justice would be best served by this course.

[20] The questions framed for the proposed appeal are, however, not appropriate. The following more aptly addresses the issues arising from the *Southern Taxis* case:

(a) Did the Employment Court err in failing to consider the imposition of a penalty under s 134 of the ERA?

(b) What is the level of knowledge required to establish a breach of an employment agreement for the purposes of s 134?

[21] Any refinement of the questions that counsel consider might be necessary can be addressed at the hearing.

**Result**

[22] The decision in *Attorney-General v Fleming* [2021] NZCA 510 is recalled. It is to be reissued in a form that adds to the grounds of Ms Fleming's cross-appeal the questions set out at [20] above.

[23] Ms Fleming is entitled to costs for a standard application on a band A basis, with usual disbursements.

Solicitors:
Simpson Grierson, Wellington for the Respondent