IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA226/2023
[2023] NZCA 492

BETWEEN	PUBLIC SERVICE ASSOCIATION, TE PŪKENGA HERE TIKANGA MAHI Applicant
AND	TE WHATU ORA – HEALTH NEW ZEALAND Respondent

Court: Brown and Wylie JJ

Counsel: P Cranney for Applicant
S L Hornsby-Geluk for Respondent

Judgment: (On the papers) 11 October 2023 at 11.30 am

JUDGMENT OF THE COURT

The application for leave to appeal is declined.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The applicant applies under s 214(1) of the Employment Relations Act 2000 (the ER Act) for leave to appeal against a decision of the Full Court of the Employment Court (Full Court) concerning the legality of proposed strike action.[1] Leave is thereby

[1] *Te Whatu Ora – Health New Zealand v Public Service Association, Te Pūkenga Here Tikanga Mahi* [2023] NZEmpC 56 [Full Court judgment].

also sought to appeal two prior judgments of Judge Corkill in respect of an application for an interim injunction.[2]

[2] Leave to appeal may be granted if, in the opinion of this Court, the proposed appeal involves a question of law which, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for decision.[3]

Background

[3] At the time of the events giving rise to these proceedings the former District Health Boards (DHBs) and the applicant were party to two Multi-Employer Collective Agreements (MECAs) which were due to expire on 31 October 2020. The MECAs cover the Allied Health, Public Health, Technical and Scientific workforces which provide a range of therapy, diagnostic, public health and technical services and other support to patients and clients. The applicant represents approximately 10,000 of the total Allied, Scientific and Technical (AST) staff who are employed by the respondent.

[4] Contemporaneously the parties and another union, the Association of Professional and Executive Employers (APEX), were in the process of progressing the Allied Scientific and Technical Pay Equity Claim (AST pay equity claim) in accordance with the Equal Pay Act 1972 (the EP Act).[4] It appears that the AST staff were frustrated that their pay equity claim was not being advanced under a timetable similar to that which applied to nurses and midwives who were pursuing pay equity issues under the EP Act.

[5] By two separate notices dated 1 September 2020 the applicant initiated bargaining under the ER Act in order to settle new collective agreements to replace the expiring MECAs. A Bargaining Process Agreement was agreed between the parties and bargaining progressed through to August 2021.

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2 *Capital & Coast District Health Board v Public Service Association, Te Pūkenga Here Tikanga Mahi* [2022] NZEmpC 32; and *Capital & Coast District Health Board v Public Service Association, Te Pūkenga Here Tikanga Mahi* [2022] NZEmpC 33.

3 Employment Relations Act 2000, s 214(3).

4 The AST Pay Equity Claim is a consolidated claim, incorporating claims raised in 2018 and 2020 by the applicant and in 2020 by APEX.

[6] In August 2021 in the context of the collective bargaining process the applicant formally raised matters relating to the AST pay equity claim. The DHBs' bargaining team declined to negotiate matters relating to the AST pay equity claim as part of the collective bargaining, contending that the appropriate place to address such matters was the pay equity process which was underway.

[7] The applicant notified strike action. Given that the DHBs considered the only outstanding matters between the parties related to pay equity matters they filed an urgent interim injunction application seeking to have the strike injuncted on the basis that it did not relate to collective bargaining and was therefore unlawful.

[8] The strike was injuncted. The substantive matter was subsequently heard by the Full Court. The application for leave to appeal relates to those decisions.

The Full Court judgment

[9] Central to the respondent's case in the Employment Court was s 83 of the ER Act which relevantly provides that participation in a strike is lawful if the strike relates to bargaining for a collective agreement that will bind each of the employees concerned. As the Full Court noted, at the heart of the respondent's submissions was the proposition that strike action in support of pay equity-related claims could never be lawful under s 83 since such action could not relate to "bargaining for a collective agreement".[5]

[10] It was common ground that pay equity settlement processes and collective bargaining processes are separate processes.[6] The Full Court noted that Parliament could have provided for pay equity claims to be advanced within collective bargaining but significantly did not do so.[7]

[11] After analysing the separate regimes the Full Court observed that in the absence of agreement between parties engaged in collective bargaining to also discuss pay equity matters, there is nothing in the reforms enacted in either the EP Act or the

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[5] Full Court judgment, above n 1, at [120].
[6] At [137].
[7] At [138].

ER Act which would require parties to "bargain" about pay equity issues in the context of a collective bargaining process.[8] The Court stated:

> [152] In summary, Parliament has not ruled out the ability of the parties to engage in pay equity discussions during collective bargaining if they choose to do so, but equally there is nothing in either statute that would allow one party or the other to insist on this occurring. Forcing the issue would be contrary to the carefully prescribed process of obtaining and assessing information relating to historic undervaluation of female work, by reference to a set of principles that will in due course allow the parties to reach a conclusion themselves; but if this does not prove possible, then with the assistance of the prescribed dispute resolution provisions.
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> …
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> [154] In this particular case, there was consensus between the parties to a pay equity issue being addressed in bargaining, namely, the resourcing for the PSA's pay equity claims. The parties were, however, at odds on back pay entitlements. The DHBs took the view that the separate processes of the EP Act should be followed given the work that had yet to be undertaken to advance the pay equity claims. We consider that as a matter of law, the DHBs were permitted to decline to engage in discussions about possible back pay as encroaching on the equal pay process.

[12] Because the Full Court concluded that the second limb under s 83(b) was not satisfied, it followed that the intended strike could not satisfy the statutory test of lawfulness.[9] The Full Court declared that the applicant and its members intended to participate in strike action which was unlawful because it related to a pay equity settlement claim and not to bargaining for a collective agreement.[10] The Full Court dismissed the applicant's application for a declaration that the proposed strikes were not unlawful.[11]

The application for leave to appeal

[13] The notice of application specifies three grounds of appeal:

(a) The Full Court erred in granting the respondent's application for a declaration that the intended strike action was unlawful.

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8 At [151].
9 At [172].
10 At [184].
11 At [185].

(b) The Full Court erred in dismissing the applicant's application for a declaration that the respondent was not entitled to refuse to bargain about the pay equity matters raised.

(c) The Full Court erred in dismissing the applicant's application for a declaration that the intended strike action as not unlawful.

[14] In its application the applicant proposed two questions of law:

(i) Whether the Full Court erred in its conclusion that bargaining about pay equity during collective bargaining is unlawful without the employer's consent?

(ii) Whether the Full Court erred in concluding that strike action relating to pay equity issues raised in collective bargaining is unlawful?

Submissions

[15] In its written submissions the applicant contended that the Full Court's conclusions weakened collective bargaining, gravely undermined workers' rights and tipped the balance in collective bargaining heavily against the female works involved. It was submitted that this could well undo the beneficial effects of *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Inc*.[12]

[16] Mr Cranney, counsel for the applicant, submitted that this Court should grant leave for the following reasons:

> a. There are very large groups of female employees (many tens of thousands) who rely on collective bargaining, being in the main either direct or indirect employees of the State — teachers, nurses, childcare workers, clerical and administrative workers, rest home workers and many others; and
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> b. the effect of the Court's judgment is:

[12] *Terranova Homes & Care Limited v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437.

> i. to severely limit the right of female employees to bargain collectively about wage increases, by excluding any right to bargain or strike about gender-based wage inequality;
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> ii. to weaken collective bargaining on a gendered basis;
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> iii. to alleviate pressure on mainly State employers to pay wage increases to rectify gender-based wage inequality relating to large female workforces in ordinary collective bargaining;
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> iv. to remove any obligation on employers to bargain about gender-based wage inequality in individual or collective bargaining (whether or not a pay equity claim has been raised under the EPA);
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> v. to eliminate union rights to bargain about gender-based wage inequality in collective bargaining; and
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> vi. to discourage the raising of pay equity claims under the [EP Act].

[17] At the conclusion of his submissions the questions of law were reformulated in the following form:

> a. whether the passing of the Equal Pay Amendment Act 2020 limited collective bargaining rights in the manner determined by the Employment Court;
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> b. whether the passing of the Equal Pay Amendment Act 2020 limited the right to strike in the manner determined by the Employment Court;
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> c. what is the correct legal relationship between the rights conferred by the [ER Act] and those conferred by the [EP Act].

[18] Mx Hornsby-Geluk first addressed the questions of law proposed in the notice of application. She submitted that the first question was not a question of law arising out of the decision of the Full Court, contending that that decision simply concluded that in the circumstances of the case the employer was entitled to refuse to engage in bargaining on the pay equity issues. With reference to the second question she submitted that it was well settled law that the test is one of dominant motive, and there was no suggestion made by the applicant that that test was not properly applied by the Full Court. There was no genuinely arguable error of law in the approach taken by the Full Court. Rather the proposed appeal comprises a challenge to the application of the law to the facts.

[19] Turning to the additional three forms of question in Mr Cranney's submissions, in relation to questions (a) and (b) Mx Hornsby-Geluk reiterated her latter submission above. In respect of question (c) she submitted it was a theoretical question that went far beyond the scope of the Full Court's decision.

[20] Responding to Mr Cranney's "severe limitation of right" submission,[13] Mx Hornsby-Geluk emphasised that the Full Court decision does not prevent bargaining in relation to gender-based wage inequality. Rather it provides support for the two separate statutory processes that exist and safeguards their distinct purpose and integrity.

Discussion

[21] In *NZ Employers Federation Inc v National Union of Public Employees* this Court observed that the determination of what comprises a question of law and of the question of whether that question of law is of general or public importance is not to be diluted.[14] The Supreme Court in *Bryson v Three Foot Six Ltd* reiterated that appeals under s 214 of the ER Act are limited to significant questions of law.[15]

[22] From our reading of the judgment it appears that the Full Court properly applied settled authority in reaching its determination on the dominant purpose question for the purposes of the s 83(b) analysis. It considered the evidence before it and the available parliamentary materials and undertook a comprehensive analysis of the legislative scheme. We do not consider that the judgment is susceptible to criticism as having reached an incorrect legal or factual outcome on the basis of the material before it.

[23] In our view, save for the third additional question in the applicant's submissions, the proposed questions of law do not satisfy the stringent requirements of s 214. Those questions appear to involve either issues of fact or, to the extent they

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13 At [16] above.
14 *NZ Employers Federation Inc v National Union of Public Employees* [2001] 1 ERNZ 212 (CA) at [27].
15 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [19].

involve a question of law, they are of insufficient importance to merit consideration by this Court on appeal.

[24] That leaves the third of the additional questions in the applicant's submissions. While there is force in the respondent's submission that it is a theoretical question that goes beyond the judgment of the Full Court, this Court is not bound by the formulation of the question. It may be possible to identify a narrower question of law more closely tied to the circumstances of the case before the Full Court.

[25] However, as the Full Court noted at the outset of its judgment, the proposed strikes did not take place. There were no outstanding claims in relation to them before the Full Court. The Full Court nevertheless elected to proceed to determine the proceeding, observing that it is well established that although a matter may in effect be moot, the issue could still be of importance in the future. In doing so the Full Court relied on the approach taken in this Court's decision in *NZ Professional Firefighters Union v NZ Fire Service Commission*[16] (where the application for leave and the appeal were heard concurrently).

[26] However even if the questions met the general or public importance test in s 214(3) (which in our view they do not), following the approach of this Court in *Air New Zealand Limited v Aviation and Marine Engineers Association Inc*,[17] we are not satisfied this case is one that warrants an exception to this Court's policy of not hearing appeals in respect of matters that are moot.

[27] For these reasons we are not satisfied that the proposed appeal is one which ought to be submitted to this Court for decision.

Result

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

Solicitors:
Oakley Moran, Wellington for Applicant
Dundas Street Employment Lawyers, Wellington for Respondent

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[16] *NZ Professional Firefighters Union v NZ Fire Service Commission* [2011] NZCA 595, [2011] ERNZ 359 at [30].

[17] *Air New Zealand Limited v Aviation and Marine Engineer Association Inc* [2014] NZCA 172, [2014] ERNZ 61 at [16].