

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA234/2012
[2012] NZCA 341**

BETWEEN AIR NEW ZEALAND LIMITED
 Applicant

AND CLINT FOAI
 Respondent

Hearing: 17 July 2012

Court: Glazebrook, White and Simon France JJ

Counsel: T P Cleary for Applicant
 J M Greally for Respondent

Judgment: 1 August 2012 at 3.00 pm

JUDGMENT OF THE COURT

- A The application is dismissed.**
- B The applicant must pay the respondent costs for a standard application on a band A basis plus usual disbursements.**
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REASONS OF THE COURT

(Given by Glazebrook J)

Introduction

[1] Air New Zealand Ltd applies for leave to appeal against a decision of Judge Ford in the Employment Court, *Foai v Air New Zealand Ltd*.¹ Mr Foai is a former employee of Air New Zealand.

¹ *Foai v Air New Zealand Ltd* [2012] NZEmpC 57.

Background

[2] Mr Foai commenced employment with Air New Zealand in 2002, initially as a casual loader at Wellington Airport, moving to a permanent part-time loading role, and then starting in 2007 in a temporary full-time role as a Time and Attendance Administrator. Following an investigation carried out into allegations of misconduct against Mr Foai in 2008, he was dismissed.

[3] Air New Zealand discovered that Mr Foai had been overpaid and withheld Mr Foai's final pay to off-set the debt. Mr Foai proceeded in the Employment Relations Authority with a claim of unjustified dismissal and a claim that his final pay had been unlawfully withheld. Air New Zealand denied the claim and counterclaimed for recovery of the overpayment.

[4] On 30 June 2010, the Authority found that Mr Foai had been justifiably dismissed.² There was a specific finding that Mr Foai had agreed that there had been an overpayment. On 8 November 2010, the Authority made orders for Mr Foai to recover his final pay (\$9,363) and for Air New Zealand to recover the sum of the overpayment (\$42,635).³

[5] Mr Foai challenged the 8 November determination in the Employment Court. On 4 April 2012, Judge Ford held that Mr Foai had made out the requirements of the equitable defence of change of position and the statutory defence under s 94B of the Judicature Act 1908. Accordingly, Air New Zealand was not entitled to recover the overpayment of wages.

Grounds

[6] Air New Zealand seeks to raise the following questions:

- (a) Failure to plead or prove mistake: Did the Employment Court err in ruling that Air New Zealand was required to prove a mistaken

² *Foai v Air New Zealand Ltd* ERA Wellington WA120/10, 30 June 2010.

³ *Foai v Air New Zealand Ltd* ERA Wellington WA120A/10, 8 November 2010.

overpayment when there was no challenge to the Employment Relations Authority's determination⁴ that found Mr Foai had agreed he had been overpaid?

- (b) Good faith: Was the Employment Court's finding that Mr Foai had acted in good faith throughout one which was inconsistent with Mr Foai's evidence about being told by Air New Zealand of an overpayment in August 2008?
- (c) Scope of jurisdiction: Did the Employment Court err in relying on *Avon County Council v Howlett*⁵ when estoppel by representation had not been pleaded by Mr Foai and the case was not raised by either party in submissions?
- (d) Elements of change of position: Did the Employment Court correctly apply the tests for the equitable defence of change of position and the statutory defence under s 94B of the Judicature Act 1908?

Relevant leave provision

[7] Under s 214 of the Employment Relations Act 2000 leave may only be granted on a question of law and then only if 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 this Court for decision.

Failure to plead or prove mistake

[8] While the procedural history of this matter is somewhat complicated, it does appear that Mr Foai accepted before the Employment Relations Authority that there had been an overpayment. It also appears that this was not challenged in the Employment Court pleadings.

⁴ *Foai v Air New Zealand Ltd* ERA Wellington WA120/10, 30 June 2010.

⁵ *Avon County Council v Howlett* [1983] 1 WLR 605 (CA).

[9] Ms Greally attempted to draw a distinction between Mr Foai accepting there had been an overpayment and accepting this was a mistaken overpayment. This is a distinction without a difference. Mr Foai was not suggesting a deliberate overpayment.

[10] It is therefore arguable that there was an error of law in this regard.

Good faith

[11] Judge Ford's finding of good faith was clearly a factual finding. A question of law therefore can only arise if the finding was not available on the evidence.⁶ That high threshold is not met in this case.

Estoppel

[12] We accept (as did Judge Ford) that estoppel by representation was not pleaded. However, Mr Foai's case on good faith was always that he had relied on his payslips and the results of certain enquiries he had made of various Air New Zealand employees. Those employees were called by Air New Zealand.

[13] What Air New Zealand is really complaining about is that Judge Ford accepted Mr Foai's evidence. This is a factual issue.

Change of position

[14] This proposed question is not a question of law. The Judge correctly identified the test and proceeded to apply that test to the facts as he saw them.

Conclusion

[15] The only possible point of law at issue in this case is that relating to mistake. Even if Air New Zealand were successful on that point, however, there would be no practical outcome (given that the Judge's findings on change of position must stand).

⁶ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [26]–[28].

Further, the facts and procedural history are highly unusual and so there is no question of public or general importance involved.

Result

[16] The application is dismissed.

[17] The applicant must pay the respondent costs for a standard application on a band A basis plus usual disbursements.

Solicitors:
Brendan McDonnell, Wellington for Respondent