IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA501/2018
[2018] NZCA 575

BETWEEN	PORTS OF AUCKLAND LIMITED Applicant
AND	MARITIME UNION OF NEW ZEALAND INCORPORATED Respondent

Court: Cooper and Gilbert JJ

Counsel: J R Billington QC for Applicant
S R Mitchell for Respondent

Judgment: (On the papers) 12 December 2018 at 12.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

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

REASONS OF THE COURT

(Given by Cooper J)

Introduction

[1] Ports of Auckland Ltd (POAL) seeks leave to appeal against a decision of the Employment Court delivered on 31 July 2018.[1] The Employment Court judgment

[1] *Ports of Auckland Ltd v Maritime Union of New Zealand Inc* [2018] NZEmpC 86 [Employment Court judgment].

upheld a determination of the Employment Relations Authority which held that the manner in which POAL rostered employees for work did not comply with the terms of a collective employment agreement (the Agreement) which the parties had entered following extensive negotiations.[2]

[2] In broad terms, the dispute between the parties concerned the timing of notices that POAL was required give to stevedore employees of work they would be required to perform in the subsequent week. This required the Authority and the Employment Court to reach a view as to the proper interpretation of cl 5 of the schedule to the Agreement.

[3] POAL contends that the interpretation which found favour with the Authority and the Employment Court is incorrect. It says that in reaching its conclusion, the Employment Court failed properly to consider the wider context of the Agreement, the pre-contractual negotiations and other contextual matters claimed to be relevant.

[4] A second issue sought to be raised on appeal concerns the Employment Court's decision to adjourn an application made by the respondent, the Maritime Union of New Zealand Inc (the Union), for a compliance order. POAL says that the Employment Court made an error of law in failing to hold that a compliance order would be arbitrary and inappropriate, having regard to the fact that the parties are in the course of bargaining for a new collective employment agreement.

[5] The Union opposes the grant of leave. It says that neither of the issues raised by the company amounts to a question of law. If there is such a question in relation to the first issue, it also says that as that issue concerns the construction of a collective employment agreement, this Court does not have jurisdiction to entertain the appeal.[3]

[6] The relevant provisions which had to be construed for the purposes of the interpretation issue were contained in cl 5 of the schedule to the Agreement. They provided:

---

2 *Maritime Union of New Zealand Inc v Ports of Auckland Ltd* [2017] NZERA Auckland 350 [ERA decision]. The agreement applied for the period 18 February 2015 to 17 August 2017.

3 Employment Relations Act 2000, s 214(1).

5. Notification

5.1. **Stevedoring Roster**

5.1.1. The Port is bound to operate its services on a 24 hours a day, 7 days a week basis and the ordinary hours of work for each employee will be rostered by the Company to facilitate meeting this demand.

5.1.2. The roster may include provision for rotational and non-continuous shift work, with shift duration ranging from 4 to 12 hours per ordinary shift. A minimum of ten hours between the completion of one shift and the commencement of the next shift shall be rostered and a maximum of 60 hours being rostered in any one week.

5.1.3. An indicative schedule of shipping is available well ahead of each working week. Employees will be tentatively assigned on the basis of the indicative shipping schedule, with accounting for approved leave and, where practicable, personal requests that may be accommodated.

5.1.4. The actual weekly work roster will then be further confirmed no later than the Friday of the week preceding. Provided however, the Company necessarily reserves the right to vary the roster due to the unplanned/uncertain situations and incidental absences that belatedly arise from time to time. It shall endeavour to provide 24 hours minimum notice for shift changes (unless otherwise agreed) and 8 hours' minimum notice for shift cancellations.

…

Construction of the Agreement issue

[7] The Employment Relations Authority determined that cl 5.1 required stevedores to be tentatively assigned to an actual roster with confirmation of the actual roster occurring on the Friday preceding the week of work. At the time of confirmation, stevedores should be notified of the days they would work and their start and finish times on those days.[4] The Authority held that the existing practice of POAL, which involved the provision of text notification of start and finish times the day before the working day could not amount to the provision of an actual roster as it was not provided by the Friday preceding the week of work.[5]

---

4 ERA decision, above n 2, at [115].

5 At [116].

[8] The Employment Court arrived at the same conclusion. Referring to cl 5.1.1, Judge Perkins said:[6]

> The clause provides that the ordinary hours of work will be rostered to meet this demand and that can only mean specifying commencement and end times of such hours in a roster. If that is not done, the balance of the clause's provisions are unjustifiably fettered. Clause 5.1.2, by providing for rotational and non-continuous shift work being included in the roster and the mandatory provision of rest time between shifts, cannot be rationally specified in the roster as required without the start and end times being included. The remaining clauses provide a process whereby the actual weekly roster is finally concluded on the Friday of the week preceding commencement of the work and then operates for seven days. The balance between day and night work and recognition of fatigue factors is to be maintained. Complete flexibility is then provided to POAL by the proviso in cl 5.1.4, which recognises POAL's requirement to be able to vary or cancel rosters to accommodate unpredictability of shipping movements into the ports and other variable factors. "Change", "variation" and "cancellation" are unnecessary words to have included unless, from the outset, the actual roster already specifies the times of work. The proviso also recognises that whereas 24 hours' notice is desirable, where shorter notice is only possible, that is permitted because the company is only required to "endeavour" to provide the 24 hours minimum notice.

[9] In its application for leave to appeal on this issue, POAL identified no fewer than 10 findings in which it claimed the Employment Court had made an error of law. They were that:

(a) The methodology of texting start and finish times within a period less than 24 hours prior to a shift beginning rendered the proviso in cl 5.1.4 of the Agreement "otiose".[7]

(b) The objective documentary material did not "alter the interpretation which can be given to the words of [cl 5.1] itself".[8]

(c) The use of the word "confirmed" in text messages meant that work times were being confirmed rather than varied and this suggested that POAL was "under an obligation prior to the issuing of the text messages

---

6 Employment Court judgment, above n 1, at [42].
7 At [19].
8 At [29].

to have already notified employees of their start and finish times for rostered shifts".[9]

(d) It was "hard to see how the later confirmation or notification of hours could make the stevedores' planning easier".[10]

(e) There was "nothing arising in comparing the two collective agreements, particularly when the exact wording of the present agreement is considered, which would justify the argument that start and finish times would not need to be included in the final roster".[11]

(f) POAL had "abrogated the clear meaning of the words of [cl 5.1] and the proviso".[12]

(g) The words of cl 5.1 were "clear and [provided] a logical progression in the establishment of a final roster where days of work, hours of work, leave requirements and the right to vary or cancel to maintain flexibility for unpredictable shipping movements are all included".[13]

(h) Use of extrinsic material did not lead to an alternative conclusion as to interpretation.[14]

(i) POAL's evidence that "if the present system of notification could not be maintained and the company was ordered to comply by including commencement and end times of work in the roster, that would result in a reversion to the old system, where employees were onsite without work being available but being paid", was a "clear misconception of the operation of [cl 5]".[15]

---

9 At [30].
10 At [37].
11 At [39].
12 At [41].
13 At [43].
14 At [44].
15 At [46].

(j) POAL was required to notify the hours of work in the Friday actual roster.[16]

[10] This Court's jurisdiction to entertain appeals from decisions of the Employment Court is conferred and confined by s 214(1) of the Employment Relations Act 2000. That provides:

> **214 Appeals on question of law**
>
> (1) A party to a proceeding under this Act who is dissatisfied with a decision of the court (other than a decision on the construction of an individual employment agreement or a collective employment agreement) as being wrong in law may, with the leave of the Court of Appeal, appeal to the Court of Appeal against the decision; and section 56 of the Senior Courts Act 2016 applies to any such appeal.
>
> …

[11] As can be seen, appeals may only be brought to this Court alleging legal error. Further, s 214(1) effectively enacts that it is insufficient simply to allege that the Employment Court has adopted an erroneous construction of an individual employment agreement or a collective employment agreement. But previous decisions of the Supreme Court and of this Court have determined that it is appropriate for this Court to consider questions of *principle* extending beyond a particular term of a contract even though the context is that of an individual employment agreement or collective employment agreement. The relevant decisions were recently discussed by the Supreme Court in *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd*, where the Court quoted its earlier decision in *Bryson v Three Foot Six Ltd* to the effect that the limit in s 214(1) of the Act does not prevent the Court on appeal from considering "questions of interpretive principle".[17]

[12] The Court in *New Zealand Air Line Pilots' Association Inc* emphasised that the error alleged must extend beyond construction of an individual or collective agreement "to the principles and the approach in general that is taken".[18] It also acknowledged that it can be difficult to draw the line. The difficulty was a reason to "reiterate the

---

16 At [48].

17 *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 at [48], quoting *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

18 At [62].

need for the appellate court to identify the error and resist 'the temptation of turning errors of interpretation into errors of principle merely because [the Court] sees the result reached as wrong'".[19]

[13] We note in addition that s 214(3) provides as follows:

> (3) 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.

[14] Because of this provision it is clear that even if an appeal meets the requirements of s 214(1), the question of law raised must be of general or public importance or have some other quality making it an appropriate subject of an appeal to this Court. Because of s 214(3) it is good practice for parties to identify the actual question of law said to be of general or public importance. In the present case, the notice of application for leave simply said that the specific grounds of appeal set out as paragraphs (a) to (j) (quoted above) involve questions of law of general and/or public importance "including the principles applicable to the interpretation of collective employment agreements". However, no specific questions were identified until, prompted by submissions made by the respondent, counsel for POAL said that the question of law (relevant to the construction issue) was whether the Employment Court identified the proper principles of contractual interpretation relating to collective agreements.[20]

[15] We have not been satisfied that POAL has identified a question or questions of law appropriately the subject of an appeal to this Court. Clearly, the company disagrees with the construction that the Employment Court has placed on the relevant provisions of the Agreement. However, it has not demonstrated any relevant error of principle or methodology in the process followed by the Employment Court.

[16] Of the matters listed as paragraphs (a) to (j) of the notice of application for leave to appeal, none suggests an error in the application of relevant principles of

---

19 At [66].

20 We refer below to the question of law claimed to arise concerning the adjournment of the compliance order application.

construction. At [31] of the synopsis of submissions provided in support of the present application, counsel says:

> … the learned Judge erred in his summary and assessment of the relevant principles of interpretation, in particular by having insufficient regard to extrinsic materials in ascertaining the "objective intention" of the parties.

[17] And in the subsequent paragraph:

> … the approach taken by the Employment Court did not give sufficient import to the requirement that the Collective Agreement be interpreted so as to be commercially effective, workable and in accordance with the parties' intentions.

This was followed by a quotation from a decision of the English Court of Appeal to the effect that "when alternative constructions are available one has to consider which is the more commercially sensible".[21]

[18] However, the basis of the submission that the Employment Court had "insufficient regard" to extrinsic material is not clear. An applicant for leave to appeal must do more than assert the outcome of the Court's reasoning was wrong.

[19] It is plain that the Court did take into account the position which applied under the previous collective agreement. It thought a comparison between the expired collective agreement and the agreement which it was required to construe showed a "comprehensive variation" in the way that work was now allocated and notified at the port.[22] The Court also noted that there was a dispute between the parties as to the extent to which it was appropriate for the Employment Court to refer to extrinsic material. It was in this context that it discussed the relevant Supreme Court authorities of *Vector Gas Ltd v Bay of Plenty Energy Ltd* and *Firm PI 1 Ltd v Zurich Australian Insurance Ltd (Zurich)*.[23] Applying *Zurich*, the Judge said:[24]

> [27] While a different more nuanced approach arises from *Zurich*, that did not exclude the suggestion that, even where there is no ambiguity in the

---

21 *Barclays Bank Plc v HHY Luxembourg SARL* [2010] EWCA Civ 1248, [2011] 1 BCLC 336 at [25].

22 Employment Court judgment, above n 1, at [13].

23 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444; and *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.

24 Employment Court judgment, above n 1.

> contractual provision, background material should be explored and should still be considered for context and as a cross-check.

[20] The Judge recorded that it would be improper for the Court to consider any purely subjective statement as to intended meaning. He held, however, that there was objective documentary material against which the context could be considered and the cross-check made. He reached the conclusion that apart from confirming the positions taken by the parties in negotiations, the oral evidence called did not alter the interpretation which could be given to the words of the clause itself. [25]

[21] The Judge recorded that three matters in particular had been relied on by POAL as relevant contractual background. These were the fact that it was attempting to increase the flexibility of the roster, the need to consider workers' health and safety and the difference between the previous collective agreement and the current agreement.[26] For reasons which he gave, the Judge was not persuaded by the issues raised under these headings to depart from the view he took about the clear meaning of the clause.[27] Further, the material relating to negotiations confirmed that "the wording in the Schedule, read in its entirety, represents the final position negotiated between the parties".[28] Reference to the extrinsic material, in summary, did not lead to any alternative conclusion as to the appropriate interpretation.

[22] The complaint that the Court had insufficient regard to the extrinsic materials does not in any event give rise to a question of law. Providing in an appropriate case extrinsic materials have not been ignored, it is not possible to turn a complaint that insufficient regard has been had to them into a question of law unless reference to the extrinsic materials must have inevitably led to a result contrary to that reached by the Employment Court. We are far from satisfied that is arguable. The same applies to the argument that the Employment Court did not give "sufficient import" to the requirement that the collective agreement be interpreted so as to be commercially effective. There are limits to how far arguments based on commerciality can be

---

25 At [29].
26 At [31].
27 At [32]–[39].
28 At [44].

taken.[29] But in any event, the complaint that "insufficient import" was given to a relevant consideration is not a complaint going to error of principle.

[23] For these reasons, we are satisfied that leave should not be granted to appeal to this Court on the construction issue.

Compliance order issue

[24] We are also satisfied that leave should not be granted against the decision of the Court to adjourn the application that had been made for a compliance order.[30] The Authority had taken the same approach, noting as it did so that although the term of the collective agreement had expired, it was continuing in effect for the purposes of s 53 of the Employment Relations Act.[31]

[25] Counsel for POAL now suggests that a question of law could properly be posed asking whether the Court should have made findings regarding the appropriateness of a compliance order, which it failed to do. We find that hard to accept, since the Court did not make an order and simply adjourned it. The only possible question of law that could be raised in the circumstances is whether the Court was obliged to either grant or decline the order, rather than adjourning it. We see that as very much a matter in the Employment Court's discretion.

[26] It is possible that in some circumstances an appropriate question of law might be fashioned along these lines, but POAL does not explain the source of the obligation it now suggests the Court had. Given that despite the expiry of the Agreement, the provisions construed would continue to govern the relevant obligations of the parties,[32] and given that the Court had found that POAL was not complying with the Agreement, the effect of the Court's decision on the compliance order application was to give POAL time to meet its obligations without a formal order to that end. We do not see how this could possibly be described as a legal error.

---

29 *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd*, above n 17, at [77].
30 Employment Court decision, above n 1, at [48].
31 ERA decision, above n 2, at [117]–[122].
32 Employment Relations Act, s 53.

Result

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

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

Solicitors:
Jennifer Mills & Associates Ltd, Auckland for Applicant
Garry Pollak & Co, Auckland for Respondent