IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA633/2023
[2024] NZCA 139

BETWEEN	BIRTHING CENTRE LIMITED Applicant
AND	REBEKAH MATSAS First Respondent
AND	CHELSEA VAN DUIN Second Respondent
AND	JODI-ANN HANSEN Third Respondent
AND	RACHEL ROBBEN Fourth Respondent
AND	MICHELLE BABB Fifth Respondent

Court:	Ellis and Wylie JJ
Counsel:	S C Langton for Applicant S R Mitchell KC for Respondents
Judgment: (On the papers)	29 April 2024 at 11 am

JUDGMENT OF THE COURT

A The application for leave to appeal in respect of issues one, two and four in the decision of the Employment Court is declined.

B The applicant must pay costs to the respondents jointly for a standard application on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] The applicant, Birthing Centre Ltd (BCL), applies for leave to appeal a decision of the Employment Court[1] dismissing its challenge to a determination of the Employment Relations Authority.[2] The application is brought pursuant to s 214 of the Employment Relations Act 2000 (the Act).

Relevant facts

[2] BCL is owned by the Wright Family Foundation, a trust involved in the care and support of birthing mothers with an emphasis on the provision of primary care. BCL provides primary birthing services at various locations around New Zealand. Until the events which are the subject of this application, it used to provide birthing services at the Te Papaioea Birthing Centre (TPBC) in Palmerston North. The respondents, Rebekah Matsas, Chelsea van Duin, Jodi-Ann Hansen, Rachel Robben and Michelle Babb, were employed by BCL as midwives. They worked at TPBC.

[3] In April 2019, TPBC approached its funder, the MidCentral District Health Board (MDHB), seeking an increase in funding. In August 2019, MDHB raised with BCL the possibility of transferring TPBC's services to itself. MDHB required that this proposal be treated as strictly confidential. BCL agreed to this request.

[4] Ms Chloe Wright, on behalf of BCL and the Wright Family Foundation, had preliminary discussions with MDHB managers about the possible transfer. The need for confidentiality was reiterated during these discussions.

[5] On 19 September 2019, the Board of MDHB settled on its preferred way forward. It proposed that it would operate TPBC as a service of MDHB, that BCL employees working in TPBC would "transfer" to MDHB, and that MDHB would take a lease of TPBC's premises.

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1 *Birthing Centre Ltd v Matsas* [2023] NZEmpC 162, (2023) 19 NZELR 990.
2 *Matsas v Birthing Centre Ltd* [2022] NZERA 343.

[6] On 25 October 2019, the Board of MDHB was asked to approve a formal proposal to progress its proposed care model, as well as the necessary contractual arrangements with the Wright Family Foundation. The Board voted in favour of the proposal. This was advised to Ms Wright.

[7] At this stage, the respondents were not aware that a transfer of TPBC's birthing services to MDHB was proposed. Nor did they know that this had the potential to affect their employment by BCL.

[8] On 11 December 2019, MDHB and the Wright Family Foundation agreed a memorandum of understanding. This confirmed that MDHB would take over the management and provision of the birthing services offered by TPBC, that the Wright Family Foundation would cease to operate TPBC, and that the Wright Family Foundation would lease its premises in Palmerston North to MDHB. It was envisaged that the transfer would occur with effect from April 2020.

[9] MDHB and the Wright Family Foundation then publicly announced the agreement they had reached. The announcement came to the attention of local media representatives, and then, via the media, to the Midwifery Employment Representation and Advisory Service (MERAS) — the union to which the respondents belonged. The respondents become aware of the proposal through MERAS.

[10] On 12 December 2019, after the confidentiality requirement had been lifted by MDHB, the transfer was announced to BCL's employees, including the respondents. Ms Wright informed BCL's employees that MDHB had undertaken to offer positions to them. Thereafter, discussions and consultations ensued about the terms and conditions of the offer and various other concerns raised by the employees. MERAS became involved on their behalf.

[11] On 9 March 2020, the majority of BCL's employees who wanted to receive an offer from MDHB received a pack from MDHB containing an offer of employment together with a letter from BCL confirming that their employment by BCL would terminate on 31 March 2020 — either because they had accepted MDHB's offer of employment or, if they had not accepted the offer, because TPBC would no longer be

running a birthing service. No redundancy compensation or payment in lieu of notice was offered.

[12] Each of the respondents commenced employment with MDHB on 1 April 2020. They were not paid redundancy compensation, nor did they receive a payment in lieu of notice from BCL.

[13] The respondents raised personal grievances. They claimed to have been unjustifiably dismissed and that their employment had been affected to their disadvantage by BCL's unjustifiable actions. In particular, they asserted that BCL had breached the duty of good faith it owed to them under s 4 of the Act. BCL accepted that the employment of each of the respondents had ended but said that the employment of each of the respondents was justifiably terminated following the transfer of TPBC's services to MDHB.

The Employment Relations Authority's decision

[14] After an investigation meeting and the receipt of submissions in early August 2021, the Authority issued its determination on 25 July 2022.[3]

[15] The Authority recorded that BCL had ceased to operate in Palmerston North and that, as a result, it no longer needed its employees who worked at TPBC. It found that the termination of their employment at BCL's initiative was a dismissal.

[16] The Authority considered that the issue for it was whether or not the dismissal was justified.[4] The respondents were claiming that their dismissal was unjustified, first because BCL had failed to comply with the duty of good faith before and after the announcement of its decision to transfer the management and operation of TPBC's services to MDHB, and secondly, because BCL had failed to comply with relevant provisions in their employment agreements. BCL accepted that it did not consult before the decision to transfer TPBC's services to MDHB was announced. It said it was not required to do so, because MDHB approached BCL and asked it to consider the transfer. BCL said that, therefore, it was not itself proposing to make a decision

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3 *Matsas v Birthing Centre Ltd*, above n 2.
4 At [45].

that was, or was likely to, have an adverse effect on the continuation of its employees' employment and that, in any event, it could justify its approach because of the need for confidentiality, relying on s 4(1B) of the Act. BCL denied breaching the employment agreements.

[17] The Authority rejected BCL's approach to the matter. It discussed s 4(1A)(c) of the Act.[5] Relevantly, it provides:

> **4 Parties to employment relationship to deal with each other in good faith**
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> (1A) The duty of good faith in subsection (1)—
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> …
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> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
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> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
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> (ii) an opportunity to comment on the information to their employer before the decision is made.

[18] The Authority considered that, by the time BCL's employees became aware of what was proposed, matters had moved beyond being a recommendation or proposal — they had become a "fait accompli".[6] It was the public announcement which resulted in MERAS, and subsequently its members, becoming aware of the transfer. By then, the memorandum of understanding had been agreed and the matter was in the public domain. The proposal could not have progressed to this point without active participation and agreement from BCL. The Authority considered that it was clear that the arrangement had the potential to have an adverse effect on BCL's employees working at TPBC.[7] It concluded that the requirement to consult had been triggered before the discussions with the respondents on 12 December 2019.[8]

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5 At [52]–[59].
6 At [54].
7 At [55].
8 At [59].

[19] The Authority then turned to consider BCL's argument that it did not need to comply with s 4(1A)(c) because s 4(1B)(c) of the Act applied.[9] Relevantly, it provides:

> **4 Parties to employment relationship to deal with each other in good faith**
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> (1B) However, subsection (1A)(c) does not require an employer to provide access to confidential information—
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> …
>
> (c) where it is necessary, for any other good reason, to maintain the confidentiality of the information (for example, to avoid unreasonable prejudice to the employer's commercial position).

[20] The Authority concluded that BCL could not rely on this provision. First, on the evidence, the primary consideration was MDHB's demand that confidentiality be maintained. MDHB was not the employer — thus the exemption was not available.[10] Secondly, while Ms Wright gave evidence that confidentiality also protected BCL's interests, the evidence in this regard was sparse.[11] The Authority considered that this was far from an adequate ground for depriving BCL's employees of their statutory right.[12]

[21] The Authority concluded that the exemption created by s 4(1B)(c) did not apply and that, accordingly, BCL had been under a duty to consult with the respondents when considering whether it should enter into the agreement with MDHB.[13]

[22] The Authority then turned to the issue of redundancy.[14] BCL conceded that redundancies had occurred. The Authority went on to consider whether there had been a breach of the employees' individual employment agreements. The agreements provided that, if the employees' employment was terminated for redundancy, they would be given four weeks' notice or pay in lieu of such notice. The Authority considered that the evidence was clear that, after 12 December 2019, what was in issue was not whether the respondents' employment with BCL would end, but rather the

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9 At [60]–[66].
10 At [62].
11 At [63] and [64].
12 At [65].
13 At [66].
14 At [67]–[75].

terms the respondents were being offered by MDHB, or indeed whether an offer would be forthcoming at all. The Authority concluded that consultation was, by this point, taking place between MERAS, the respondents and MDHB.[15] BCL had effectively abdicated its duty to consult with its staff by passing responsibility to MERAS. The Authority considered that this failure confirmed its earlier conclusion that the dismissals were unjustified.[16]

[23] The Authority then addressed the issue of notice.[17] It accepted that BCL had not given formal notice. The Authority did not consider that the terminations occurred by mutual agreement.[18] It noted that there was no evidence that the respondents had agreed to the cessation of their employment and that they were not given a choice, as their positions would no longer exist. Rather, they accepted employment with MDHB, having been told by BCL that their tenure at TPBC had ended. The Authority found that the terms of their employment by MDHB were not sufficiently similar to the terms of their employment by BCL, such that they could be considered no less favourable.[19]

[24] A claim by the respondents for a penalty for the breach of the good faith obligation failed.[20] While the Authority considered that the breach was established, it did not consider that a penalty was appropriate.

[25] The Authority then went on to consider remedies.[21] It concluded that each respondent had a personal grievance because each was unjustifiably dismissed. It directed BCL to make the following payments:

(a) to Ms Matsas, $5,000 as compensation for humiliation, loss of dignity and injury to feelings, and a further four weeks' wages being the unpaid notice period;

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15 At [72].
16 At [73].
17 At [74]–[78].
18 At [75].
19 At [76].
20 At [79] and [80].
21 At [81]–[96].

(b) to Ms van Duin, $3,421.54 to recompense her for wages lost as a result of the dismissal, together with $5,000 as compensation and a further four weeks' wages;

(c) to Ms Hansen, $8,000 as compensation and a further four weeks' wages;

(d) to Ms Robben, $5,000 as compensation, together with a further four weeks' wages; and

(e) to Ms Babb, $5,000 as compensation, together with a further four weeks' wages.

The Employment Court's decision

[26] Before Judge Corkill in the Employment Court, four of the findings made by the Authority were challenged, namely:

(a) whether the respondents were dismissed by BCL;

(b) whether BCL was required to provide the respondents with notices of termination in circumstances where they went on to work for MDHB;

(c) if there was a failure to provide the contractual notice, whether the remedy for not providing notice was payment of the notice period; and

(d) if there were dismissals, whether they were unjustified, because of a breach of s 4(1A) of the Act.[22]

[27] The Judge summarised the findings made by the Authority and referred to some of the evidence.[23] He then turned to consider, as a *first issue*, the application of s 4(1A)(c) of the Act.[24] We have set out this provision above at [17]. The Judge summarised the submissions and referred to relevant authority — namely the decision

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22 *Birthing Centre Ltd v Matsas*, above n 1, at [2].
23 At [3]–[54].
24 At [55]–[72].

of this Court in *Auckland City Council v New Zealand Public Service Assoc Inc*.[25] There, this Court was considering a decision of the full Employment Court.[26] The Employment Court had held that a "proposal" for the purposes of s 4, as it then stood, did not include a consultant's proposal or recommendation for an employer to consider but if the proposal was adopted or pursued by the employer, it was a proposal for the purposes of the section.[27] This Court allowed the appeal, but the status of the consultant's report was not in issue.[28] Speaking generally, this Court outlined the nature of the obligation of good faith:

> [24] There can be no dispute that the parties to an employment relationship must deal with each other openly and fairly. They must communicate and, where appropriate, consult in the sense of imparting and receiving information and argument with an open mind when that still realistically can influence outcomes. To adopt an approach calling for mandatory consultation at specified times risks inflexibility. What is practicable in the exigencies of particular business operations and workplaces must be kept in mind. Similarly the issue in question may affect the nature and timing of the provision of information and consultation. Redundancy of particular positions presents different issues than does the formulation of business plans.

[28] The Judge recorded that the section has been amended since that decision and he went on to consider its application in light of the new statutory framework.[29] He considered that this Court's comments in *New Zealand Public Service* as to the flexibility of timing of consultation about a proposal, in the context of the obligations contained in s 4(1A)(c), remain valid.[30]

[29] The Judge referred to the various decisions made by MDHB, noting that there was express recognition given to the selection of staff in the papers presented to MDHB's Board in September 2019 and again in October 2019.[31] It was recorded that the midwives would become employees of MDHB under the workforce model that was being developed. The Court found that the circumstances fell squarely within s 4(1A)(c) and that the Authority had not erred in reaching this conclusion.[32]

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25 *Auckland City Council v New Zealand Public Service Assoc Inc* [2004] 2 NZLR 10 (CA).
26 *New Zealand Public Service Assoc Inc v Auckland City Council* [2003] 1 ERNZ 57 (EmpC).
27 At [101].
28 *Auckland City Council v New Zealand Public Service Assoc Inc*, above n 25, at [30].
29 *Birthing Centre Ltd v Matsas*, above n 1, at [65]–[69].
30 At [69].
31 At [70] and [71].
32 At [72].

[30] The Judge then turned to the *second issue* — the application of s 4(1B) and s 4(1C) of the Act.[33] We have set out s 4(1B)(c) out above at [19]. Relevantly s 4(1C)(b) provides:

> **4 Parties to employment relationship to deal with each other in good faith**
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> …
>
> (1C) To avoid doubt,—
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> …
>
> (b) an employer must not refuse to provide access to information under subsection (1A)(c) merely because the information is contained in a document that includes confidential information.

[31] The Judge set out the submissions and referred to another decision of the full Employment Court — *Vice-Chancellor of Massey University v Wrigley*.[34] Again, there had been statutory amendments since that decision, which the Judge noted.[35] The Employment Court, considering the then applicable provision, discussed what constitutes "good reason" in some detail.[36] It observed that, if the confidentiality of any particular relevant information is to be maintained, there must be sufficiently good reason to do so. In any particular case, whether a sufficiently good reason exists will require consideration of the likely effects of giving access to the information and of maintaining confidentiality. How serious those effects are likely to be, and how likely they are to occur, will be important. Equally, an employer must consider means of reducing possible adverse effects and restrict access to information only to the extent necessary to reduce the adverse effects of sharing the information to a level which no longer constitutes a sufficiently good reason to maintain confidentiality of the remaining information.

[32] The Judge considered that the full Court's discussion was unaffected by the amendments, as was the concept of the confidentiality of an employer's commercial

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33 At [73]–[99].

34 At [81], citing *Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 37, [2011] ERNZ 138 at [81].

35 *Birthing Centre Ltd v Matsas*, above n 1, at [77]–[85].

36 *Vice-Chancellor of Massey University v Wrigley*, above n 34, at [81].

position being maintained to avoid unreasonable prejudice.[37] He concluded that the Authority had been correct to reject an approach which allowed the employer's subjective belief to be determinative.[38] He considered that the evaluation to be carried out by the Court must be informed by s 103A of the Act, which provides the test of justification. He held that he was required to consider was whether a fair and reasonable employer could have concluded that disclosure of the information would cause unreasonable prejudice to the employer's commercial position and if so, whether there was good reason for the non-disclosure.

[33] After reviewing the respective arguments, the Judge concluded that a fair and reasonable employer would, in the circumstances, have explored whether it could maintain the integrity of its commercial position (as well as MDHB's commercial position), while informing its employees of the proposal in a confidential way.[39] He considered that there were several mechanisms by which this could have occurred. However, he found that there was no consideration by BCL of any of these options. He was not persuaded that BCL was entitled to proceed without exploring the various possibilities that a fair and reasonable employer could have been expected to have taken in all the circumstances.[40]

[34] Next, the Judge turned to consider *issue three* — were there dismissals?[41] Leave to appeal is not sought in respect of the Employment Court's findings in this regard and we take this issue no further. Suffice to say, the Judge concluded that the respondents were dismissed and the applicable redundancy provisions applied.

[35] Finally, the Judge concluded — on *issue four* — that there was a breach of the respondents' employment contracts because four weeks' notice of termination for redundancy was not given and no payments were made in lieu of notice.[42]

[36] It was argued for BCL that the respondents mitigated their losses by taking new employment immediately. It was said that as a result, they did not suffer any loss

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37 *Birthing Centre Ltd v Matsas*, above n 1, at [86]–[89].
38 At [91].
39 At [92]–[95].
40 At [99].
41 At [100]–[129].
42 At [132].

because of the notice period not being paid out. In response, the respondents submitted that the amount ordered by the Authority was not a damages award. Rather, it was a compensatory award under s 123(1)(c)(ii) of the Act.

[37] The Judge considered s 123(1)(c)(ii).[43] He noted that four of the respondents were awarded four weeks' wages, this being the unpaid notice period. He also noted that the Authority stated the order was intended to compensate for the failure to give notice. The Judge considered the language used in the individual employment agreements, observing that four weeks' notice was not given as required by the agreements. He referred to *GFW Agri-Products Ltd v Gibson*, in which this Court noted that it is a mixed question of fact and law as to when a contract of employment comes to an end.[44] The Judge considered that, properly interpreted, the provision in the individual employment agreements which applied to the respondents provided for a benefit which became payable if the respondents were not required to work out the specified notice period. The obligation to make the payments crystalised on the date when their employment ceased because four weeks' notice of termination was not given. Accordingly, the Judge considered that the benefit provided under each employment agreement for payment in lieu became payable and that no issue of mitigation arose in light of the contractual entitlement. The Judge observed that the payment should not be characterised as an award akin to damages for breach of contract. Consequently, he found that the Authority did not err in awarding the sums involved to the respondents who were entitled to receive them.

[38] The challenge to the Authority's decision was dismissed.

Application for leave to bring appeal

[39] BCL seeks to appeal against the Court's findings on issues one, two and four, as noted above. The questions of law which BCL wishes to raise are as follows:

(a) In respect of the *first issue* — did the Employment Court err in its interpretation and application of s 4(1A)(c) of the Act, or in the

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43 At [135]–[145].
44 At [140], citing *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323 (CA) at 329.

alternative, was the Employment Court's finding so insupportable as to amount to an error of law?

(b) In relation to the *second issue*:

(i) did the Employment Court err in its interpretation of s 4(1B)(c) of the Act, and in finding that the test to be applied by the Court in assessing whether s 4(1B)(c) applies is the test of justification set out in s 103A of the Act; and

(ii) if the correct test to be applied in assessing whether s 4(1B)(c) of the Act applies is the test of justification set out in 103A of the Act, did the Court err by misapplying the test in s 103A?

(c) In relation to *issue four* — did the Employment Court err in law by not applying the duty to mitigate in respect of the respondents' claims for compensation for a lost benefit pursuant to s 123(1)(c)(ii) of the Act?

[40] The respondents oppose the grant of leave.

Analysis

[41] Relevantly, s 214 of the Act provides:

> **214 Appeals on question of law**
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> (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.
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> (2) A party desiring to appeal to the Court of Appeal under this section against a decision of the Employment Court must, within 28 days after the date of the issue of the decision or within such further time as the Court of Appeal may allow, apply to the Court of Appeal, in such manner as may be directed by rules of court, for leave to appeal to that court.

> (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.
>
> (4) The Court of Appeal, in granting leave under this section, may, in its discretion, impose such conditions as it thinks fit, whether as to costs or otherwise.
>
> …

[42] Appeals under s 214 are limited to questions of law that, by reason of their general or public importance, or for any other reason, ought to be submitted to this Court. Not every error of law will qualify. Further, care has to be taken in determining whether a question of law arises in any proposed appeal. As the Supreme Court observed in *Bryson v Three Foot Six Ltd*:[45]

> [25] An appeal cannot however be said to be on a question of law where the factfinding court has merely applied law which it has correctly understood to the facts of an individual case. It is for the court to weigh the relevant facts in the light of the applicable law. Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable.

[43] To establish that a conclusion was so clearly insupportable as to amount to an error of law, an applicant must show that there was no evidence to support the determination, or that the true and only reasonable conclusion contradicts the determination. This is a very high hurdle.[46]

[44] Section 214(1) prevents this Court from construing the terms of an employment agreement, but it does not preclude a challenge to the interpretative principles stated by the lower court.[47] In practice however, this distinction can prove elusive. This Court has noted:[48]

> [23] We see the position thus: if the Employment Court correctly states and applies orthodox principles of contractual interpretation, this Court cannot intervene. But if the Employment Court misstates the principles, or

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45 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
46 At [26]–[27].
47 *New Zealand Airline Pilots Association Inc v Air New Zealand Limited* [2017] NZSC 111, [2017] 1 NZLR 948, at [48]–[49].
48 *New Zealand Airline Pilots Association Inc v Air New Zealand Limited* [2016] NZCA 131, [2016] 2 NZLR 829, at [23].

> misapplies them, this Court will intervene to ensure the law is correctly applied.

This approach was not disturbed in the appeal to the Supreme Court.[49]

[45] Although it applies to the determination of an appeal, s 216 of the Act is also broadly relevant to an application for leave. It provides as follows:

> **216 Obligation to have regard to special jurisdiction of court**
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> In determining an appeal under section 214 or section 218, the Court of Appeal must have regard to—
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> (a) the special jurisdiction and powers of the court; and
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> (b) the object of this Act and the objects of the relevant Parts of this Act; and
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> (c) in particular, the provisions of sections 189, 190, 193, 219, and 221.

One of the objects of the Act — s 3(a)(vi) — is to reduce the need for judicial intervention. Against this, the objective in s 143(g) of pt 10 of the Act (which contains ss 214 and 216) recognises that difficult issues of law need to be determined by the higher courts.

Submissions

[46] BCL says that leave to appeal should be granted because the questions of law it seeks to raise are of general or public importance and that they ought to be submitted to this Court for consideration. It says that the issues in this case have broad implications for all commercial transactions which can affect employees and which are frequently kept confidential for legitimate business reasons. It says that the proposed questions of law potentially affect a significant number of employers and employees and that the appeal raises novel issues relating to the interpretation and application of ss 4(1A), 4(1B), 103A and 123(1)(c)(ii) of the Act.

[47] The respondents oppose the application for leave. They characterise the findings which BCL seeks to challenge, particularly in respect of the *first issue*, as

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[49] *New Zealand Airline Pilots Association Inc v Air New Zealand Limited*, above n 47, at [48]–[66].

being findings of fact, not of law. They also say that the questions of law identified by BCL cannot be said to be of general or public importance, or questions which, for any other reason, ought to be submitted to this Court. In relation to the *fourth issue*, they say that s 214(1) of the Act precludes any appeal in respect of the issue of whether payments in lieu of notice were due, as this was a decision on the construction of the respondents' individual employment agreements.

[48] Against this background, we consider each of the proposed issues BCL wishes to raise on appeal.

Issue one

[49] BCL wishes to argue that the Employment Court misinterpreted what constitutes a proposal for the purposes of s 4(1A)(c) and in particular, that it misinterpreted the words "an employer who is proposing to make a decision". It contends that:

(a) the Court misapplied the subsection by focusing on the actions of MDHB and its Board in September and October 2019;

(b) there was a failure to identify the specific point in time when BCL was "proposing to make a decision" or even whether BCL was at any stage an employer proposing to make a decision; and

(c) in the alternative, the Court's finding was so insupportable, that it amounted to an error of law.

[50] The respondents argue that the issue of whether there was a proposal is an issue of fact and that, on the facts, the proposal became a decision on 25 October 2019. They say that the Court did not inappropriately focus on the actions of MDHB, rather, it focused on the arrangement between the parties. They also say that there can be no credible challenge to the Court's finding that there was a potential adverse effect on the continuing employment of the respondents. They assert that no important issue of law has been identified.

[51] We agree with the respondents' submissions. The Court applied settled law, as determined by this Court, to the facts of this case. We do not consider that there is any question of law involved in relation to the Court's interpretation of s 4(1A)(c), let alone a question of law that qualifies for an appeal to this Court under s 214(3).

[52] Nor, in our view, is there any basis for BCL's assertion that the Court's finding was so insupportable on the evidence that it amounted to an error of law. As noted in *Bryson*, to establish that a conclusion was so clearly insupportable as to amount to an error of law is a very high hurdle.[50] In our clear view, this assertion simply cannot be made on the facts of this case. The Authority and the Court found that MDHB and BCL announced publicly that they had reached agreement before any steps were taken to advise the respondents. This finding cannot be challenged on an appeal under s 214.

[53] Leave to appeal in respect of the first issue is declined.

Issue two

[54] BCL wishes to submit that the words "good reason" in s 4(1B)(c) should be determined subjectively and that the Employment Court misinterpreted this section by applying the test of justification for personal grievances found in s 103A of the Act. BCL further says that there was a failure to appreciate that the s 103A(2) test applied only for the purposes of s 103A(1)(a) and (b), and not for breaches of the duty of good faith under s 4.

[55] The respondents argue that BCL overstates the Court's reliance on s 103A and that, while the Court drew upon s 103A, it did so only in the context of the objective test it was applying. They say that it is conventional to use an objective test, rather than a subjective test (or a hybrid subjective/objective test) as proposed by BCL, and that the Court did not apply s 103A in a manner that overrode or determined the approach to s 4.

[56] We accept that whether the approach to the exceptions to the information disclosure requirements found in s 4(1)(B) should be interpreted subjectively or

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50 *Bryson v Three Foot Six Ltd*, above n 45, at [26]–[27].

objectively is a question of law. However, we are not persuaded that this question of law involves a matter of public or general importance in the circumstances of this case.

[57] We note as follows:

(a) Section 103(1)(a) and (b) records that a personal grievance is any grievance that an employee has against the employer, because of a claim that an employee has been unjustifiably dismissed or that the employee's employment or conditions of employment were affected to the employees' disadvantage by some unjustifiable action by the employer.

(b) Section 103A(1) requires that, for the purposes of s 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable has to be determined on an objective basis by applying the test in s 103A(2).

(c) Section 103A(2) provides that the test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[58] We do not see that any criticism can be levelled at the Court for the approach it took. The respondents raised personal grievances against BCL. They relied on the matters set out in s 103(1)(a) and (b). One of the employer's actions challenged as part of the personal grievances was BCL's failure to comply with the information disclosure requirements in s 4. In considering this issue, an objective test was mandated by s 103A(1). It does not appear to us to be reasonably arguable that the Court applied s 103A in a manner that overrode or determined the approach to s 4. On the facts of this case, we cannot see that the correct the approach to the exceptions to the information disclosure requirements contained in s 4(1B) raises a matter of public or general importance. Nor is there any other reason that requires that the issue be referred to this Court.

[59] BCL also seeks to argue, in relation to *issue two*, that if the correct test for the purposes of s 4(1B)(c) is the test of justification found in s 103A, the Court erred in its application of the "could" test in s 103A, by:

(a) finding that there was only one reasonable course of action;

(b) determining that BCL's failure to take that course was unjustified; and

(c) failing to consider whether BCL's actions were how a fair and reasonable employer would have acted.

[60] The respondents submit that this proposed ground of appeal overlooks the s 4 obligation on an employer to provide access to information if a decision is being made that would, or would be likely to, have an adverse effect on employees. that on the facts in this case, no information was provided until after the decision was made and that the Court did not mandate a single way of upholding the good faith obligation. Rather, it identified that there were a number of possible ways in which BCL could have complied with its obligation.

[61] In our view, the third ground of appeal does not meet the appropriate criteria for the grant of leave. Again, the good faith obligation is clear. The Court simply applied the law to the facts of this case. Further, this proposed ground of appeal appears to be based on a misapprehension of the Court's decision. The Court identified, albeit briefly, that there were a number of possible options that BCL could have taken, all of which might well have satisfied the core obligation to assess whether (confidential) disclosure could have occurred. The Court held that the failure to consider these various possibilities was not what a fair and reasonable employer would have done in the circumstances. That is a factual finding. It does not raise a question of law and, in any event, the proposed ground of appeal does not raise any matter of importance or significance. Nor should leave be granted for any other reason.

[62] Leave to appeal the second issue in either of the respects raised by BCL is declined.

Issue four

[63] In relation to the fourth issue, BCL wishes to submit that the Court erred by finding that the respondents were entitled to payments in lieu of notice and that they could have expected such payments if the personal grievances had not arisen. It also wishes to argue that the Court erred by finding that a compensatory award for the loss of the benefit did not require the respondents to mitigate and that there was a failure to reduce the compensation payments.

[64] The respondents submit that there was no duty to mitigate, that there was a contractual entitlement to notice or pay in lieu of notice in the event of redundancy, that the payments due to the respondents crystalised at determination and that there was no requirement to mitigate. They also say that the fourth issue raises matters going to the interpretation of the respondents' individual employment agreements and, accordingly, this Court has no jurisdiction pursuant to s 214(1).

[65] We agree with the respondents. In our view, the Court has no jurisdiction. If leave was given to appeal in relation to the fourth issue, the Court would be required to determine the construction of the respondents' individual employment agreements. This would be contrary to s 214(1) of the Act.

[66] As for mitigation, the amounts in question are relatively minor and the point BCL wishes to argue is tied to the respondents' specific employment agreements. We do not consider that the proposed issue raises any matter of general or public importance, or that, for any other reason, it ought to be submitted to this Court for decision.

[67] Leave to appeal in respect of the fourth issue is also declined.

Result

[68] The application for leave to appeal in respect of issues one, two and four in the Employment Court's decision is declined.

[69] The applicant must pay costs to the respondents jointly for a standard application on a band A basis together with usual disbursements.

Solicitors:
Langton Hudson Butcher, Auckland for Appellant
Garry Pollak, Auckland for Respondent