IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA720/2020
[2021] NZCA 60

BETWEEN	NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION INCORPORATED Applicant
AND	FIRE AND EMERGENCY NEW ZEALAND Respondent

Court: French and Goddard JJ

Counsel: C R Carruthers QC and P Cranney for Applicant
V E Casey QC and G C Davenport for Respondent

Judgment: (On the papers) 11 March 2021 at 9 am

JUDGMENT OF THE COURT

A The application for leave to appeal under s 214 of the Employment Relations Act 2000 is declined.

B The applicant must pay the respondent costs on a standard application for leave with usual disbursements.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] The New Zealand Professional Firefighters Union Inc (the union) seeks leave under s 214 of the Employment Relations Act 2000 to appeal a decision of Chief Judge Inglis in the Employment Court.[1]

[2] The decision concerned the interaction between s 30 of the Fire and Emergency New Zealand Act 2017 (the Act) and the provisions of a collective agreement. The Judge held there was an inconsistency between the two in relation to re-deployment obligations in the event of redundancy and that s 30 must prevail.[2]

Background

[3] The respondent employer, Fire and Emergency New Zealand (FENZ) is currently embarking on a restructuring exercise. Its view is that by virtue of s 30, it is obliged to offer any suitable vacant positions to employees whose existing position is being made redundant.

[4] The applicant union does not represent any employee who has been classified as an affected employee under the restructuring. However, it contends that FENZ's approach to the restructuring is contrary to its obligations under its collective agreement with the union and will negatively impact on the union's membership.

[5] The collective agreement in question contains a clause, cl 1.21.8, that states:

> Whenever vacancies or any new positions occur in the Service, not less than 14 days' notice shall be posted inviting applications from the workers for the filling of such vacancies and such applications shall receive full consideration.

[6] In addition to this clause, the collective agreement also annexes a number of what are described as "core employment policies". These policies relevantly include an appointments policy and a review of appointments policy. Both policies pre-date the Act and refer to its predecessor the now repealed Fire Service Act 1975.

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1 *New Zealand Professional Fire Fighters Union v Fire and Emergency New Zealand* [2020] NZEmpC 197 [Employment Court judgment].

2 At [25].

The appointments policy provides for appointments to be made on merit. The review of appointments policy provides that any employee has the right to challenge an appointment and to utilise a review process.

[7] According to the union, the combined effect of cl 1.21.8 and the policies is that their members are entitled to be considered for all and any vacancies that arise and that FENZ is not bound by the Act to give preference to employees whose positions have been made redundant. Instead, in accordance with the collective agreement, it must notify the vacancy and appoint the person best suited to the position.

[8] As for the Act, that contains a statutory framework for appointments with provisions similar to the policies annexed to the collective agreement. The Act requires FENZ to make appointments on merit (s 26), to notify all FENZ employees of vacancies and appointments (ss 27 and 28) and to establish an appointments review process (s 29).

[9] However, s 30 states that ss 26 to 29 do not apply to appointments of FENZ employees in certain circumstances. The full text of the section, which is at the heart of this case, is as follows:

> **30 Sections 26 to 29 do not apply to appointments of FENZ employees in certain circumstances**
>
> Sections 26 to 29 (which relate to standard procedural steps in relation to appointments to FENZ) do not apply to the appointment of a person as a FENZ employee if—
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> (a) the person is a current employee of FENZ; and
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> (b) that FENZ employee has received a notice of redundancy; and
>
> (c) before that FENZ employee's employment has ended, the employee—
>
> (i) is offered and accepts another position in FENZ that—
>
> (A) begins before, on, or immediately after the date on which the employee's current employment ends; and
>
> (B) is on terms and conditions of employment (including redundancy and superannuation

conditions) that are no less favourable to the employee; and

(C) is on terms that treat service within FENZ as if it were continuous service; or

(ii) is offered an alternative position in FENZ that—

(A) begins before, on, or immediately after the date on which the employee's current employment ends; and

(B) is a position with comparable duties and responsibilities to those of the employee's current position; and

(C) is in substantially the same general locality or a locality within reasonable commuting distance; and

(D) is on terms and conditions of employment (including redundancy and superannuation conditions) that are no less favourable to the employee; and

(E) is on terms that treat service within FENZ as if it were continuous service.

[10] In the Employment Court, the union argued that correctly interpreted, s 30 is permissive. It does not impose any obligation on FENZ to complete the steps outlined in s 30(c). In particular, it does not preclude FENZ from issuing a notice of redundancy and then proceeding to make the affected employee redundant without more. It was thus open to FENZ and the union to agree to a different process than that contained in s 30 for appointments to vacancies in redundancy situations.

[11] The Chief Judge rejected that interpretation and declined to grant the union's application for declarations. She held that correctly interpreted s 30 conferred a benefit on all FENZ employees, namely that they enjoy preference for re-deployment opportunities in the event of redundancy.[3] It would, the Judge considered, be contrary to the express intention of Parliament were FENZ and the union to be able to contract in a way which removed this benefit.[4] As for safety concerns, the Judge considered this a weak argument. She noted that Parliament must

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3 At [27].
4 At [27].

be taken to have been aware that it was enacting s 30 into a safety-focused piece of legislation and further that there was no authority for the proposition that common law obligations of re-deployment should not apply or apply more weakly in safety sensitive industries.[5]

The application for leave to appeal

[12] The right of appeal to this Court from a decision of the Employment Court is limited to appeals on questions of law and is subject to a leave requirement.[6] Under s 214(3) of the Employment Relations Act, leave may be granted if in the opinion of this Court the proposed question of law is one that by reason of its general or public importance or for any other reason ought to be submitted for determination.

[13] A further limit on the right to appeal is that a party cannot appeal a decision of the Employment Court relating to the construction of an individual employment agreement or a collective employment agreement.[7]

[14] In this case the Chief Judge found that cl 1.21.8 of the union's collective agreement (obligation to notify vacancies) must be read as applying in situations other than where the pre-conditions set out in s 30 have been met.[8] As regards the contract's annexation of policies which referred to repealed legislative provisions, the Judge said one possible explanation was that no agreement was able to be reached.[9]

[15] No doubt conscious of the inability to directly challenge findings about the interpretation of contractual documents, the union's proposed question of law focuses on the interpretation of s 30 itself. The proposed question is thus formulated in the following terms:

> "whether s 30 properly interpreted operates to defeat the employment agreement entitlements".

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5 At [24].
6 Employment Relations Act 2000, s 214(1).
7 Section 214(1).
8 Employment Court judgment, above n 1, at [25].
9 At [22].

[16] The wording reflects the union's central contention which is that the Judge erred in her interpretation of s 30 by "finding that [FENZ] and [the union] cannot contract in a way which removes the benefit of s 30 from some employees of FENZ, so as to protect the entitlement of the great majority to long established career progression right[s] and the right of any firefighter to challenge potentially unsafe appointments."

[17] Although the union emphasises the importance of the contractual rights at issue, it does not however seek to argue that in the event of a conflict between a statutory provision and an employment agreement, the contract must prevail. And nor could it because of s 54(3)(b)(i) of the Employment Relations Act which states that a collective agreement must not contain anything contrary to law. But what in effect the union does seek to argue is that there is no direct conflict between statute and agreement in this case because s 30 does no more than confer a power on FENZ. It does not require FENZ to exercise the power. Thus it follows, so the argument runs, that it was open to the parties to agree a different process for appointments in the event of redundancy which they did in the policies.

[18] The union further points out that the collective agreement which is binding on both the union and FENZ was entered into after s 30 came into force. FENZ could have incorporated s 30 into the collective agreement but chose not to.

Our view

[19] A question relating to the interpretation of a statutory provision — as distinct from a question relating to the interpretation of an employment agreement — is a question of law within the purview of this Court's jurisdiction. It is also correct that the union's argument is of general importance in the sense that it relates to a significant number of people and the functioning of an important public organisation.

[20] However, in order to qualify as a question of law that ought to be submitted for determination by this Court, the question must also be a seriously arguable question. And in our view the question which the union seeks to raise in this proceeding is not.

[21] That is because the union's argument stands and falls on an excessively literal and narrow interpretation of s 30 which in our view is untenable. It is not supported by the wording of the section, its underlying purpose and the legislative history. In fact, it would render the section pointless. That is because the contractual provisions relied upon purport to apply to all vacancies arising within FENZ and therefore if those provisions prevent FENZ from offering vacancies to potentially redundant employees without having to go through a selection and review process, the section would seldom if ever have any work to do.

[22] Yet, as the Judge noted, s 30 is at its heart a protective provision and the introductory words of s 30 could not be plainer.[10] They make clear that the three procedural steps — advertising, merit-based selection and review — that usually apply to all appointments do not apply to re-deployment on redundancy. The question thus arises why would Parliament having deliberately conferred that benefit permit it to be abrogated by a contract reinstating those very same standard procedural steps.

[23] As the Judge also noted, the context is important. Section 30 was part of reforming legislation designed to change the way in which fire services were organised.[11] Those reforms included bringing several disparate fire organisations together under the one umbrella of a newly created entity (FENZ). Restructuring would have been in contemplation. And hence the perceived need for the protection of a re-deployment provision.

[24] That contention is supported by a Supplementary Order Paper issued while the Fire and Emergency New Zealand Bill that was to become the Act was passing through Parliamentary processes. The Paper states that the provision which was to become s 30 was inserted for the benefit of any FENZ employee who may be affected by redundancy and who may be given preference over others for appointment to any other relevant position in FENZ.[12]

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10 At [17] and [20].
11 At [20].
12 Supplementary Order Paper 2017 (262) Fire and Emergency New Zealand Bill 2016 (148-2) (explanatory note) at 3.

[25] If it had been Parliament's intention to render s 30 subject to any employment agreement, it is reasonable to expect there would have been an express statement to that effect. It would have been an easy thing for Parliament to have done that as it has in fact done in provisions under the Public Service Act 2020.[13] The absence of any similar wording in s 30 is thus significant.

[26] Like the Judge, we also consider it telling that although the repealed Fire Service Act did contain provisions similar to ss 26 to 29 of the new Act, it did not contain a provision equivalent to s 30.[14] The way s 30 is formulated reflects developments in the common law that have taken place in the intervening years relating to an employer's re-deployment obligations.[15] As the Judge put it, it can safely be inferred that the Parliament was alive to the particular employment context which existed within the fire service and the common law surrounding redundancy and re-deployment at the time it decided to overhaul the legislation.[16] Section 30 ensures that the Act is in harmony with the current common law principles.

[27] Drawing all those threads together, the Judge's conclusion that the union's interpretation was inconsistent with the intent of the legislation and would undermine the legitimate rights and interests of non-union members was in our view unassailable.

Outcome

[28] There being no seriously arguable question, the application for leave to appeal is accordingly declined.

[29] The application having failed, the applicant must pay the respondent costs as for a standard application for leave with usual disbursements.

Solicitors:
Oakley Moran, Wellington for Applicant
Fire and Emergency New Zealand, Wellington for Respondent

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13 Public Service Act 2020, ss 86(2) and 89.
14 Employment Court judgment, above n 1, at [23].
15 See *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142, [2010] ERNZ 468; and *Jinkinson v Oceana Gold (NZ) Ltd (No 2)* [2010] NZEmpC 102, (2010) 7 NZELR 677.
16 Employment Court judgment, above n 1, at [23].