

IN THE COURT OF APPEAL OF NEW ZEALAND

CA268/04

BETWEEN NEW ZEALAND FIRE SERVICE
 COMMISSION
 Applicant

AND NEW ZEALAND PROFESSIONAL
 FIREFIGHTERS' UNION INC
 Respondent

Hearing: 14 March 2005

Court: McGrath, Hammond and O'Regan JJ

Appearances: W M Wilson QC and G C Davenport for Applicant
 P Cranney and A J Hughes for Respondent

Judgment: 17 March 2005

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B We make no award of costs.

REASONS

(Given by O'Regan J)

Introduction

[1] This is an application for leave to appeal by the applicant, the New Zealand Fire Service Commission (the Commission) against a decision of the Employment Court dated 23 November 2004 (WC22/04). The application is opposed by the respondent, the New Zealand Professional Firefighters' Union Inc (the Union).

Employment Court decision

[2] The decision against which the Commission seeks to appeal was a decision of a Full Court of the Employment Court (Chief Judge Goddard, Judge Travis and Judge Shaw). In that decision the Employment Court dismissed an application by the Commission to strike out a claim made by the Union which related to entitlements under the Holidays Act 2003. The Union's claim had been transferred to the Employment Court from the Employment Relations Authority.

[3] The Commission's case was that the points at issue in the Union's proceeding had already been determined by the Employment Court in a decision made during the currency of the Holidays Act 1981, *Small v New Zealand Fire Service Commission* [1997] ERNZ 248, that decision having been upheld on appeal in this Court: *New Zealand Fire Service Commission v Small* CA133/96 23 April 1997. The Commission said that the *Small* decision established res judicata or, alternatively, issue estoppel. The Commission also argued that it would be an abuse of process for the points to be re-litigated.

[4] The Employment Court accepted that the present case involved the same parties as *Small* or their privies. It also accepted that, if the issue before it in the current case arose under the 1981 Act, the present case would have involved a determination of questions that had been determined in *Small*. However, the Union had argued that the advent of the 2003 Act had made substantive changes to the law which required a different approach to be taken to public holiday entitlement. The Court said it could not rule out that possibility. The Court highlighted a number of

the provisions of the 2003 Act which it said differed from the 1981 Act. These differences led it to conclude:

From the argument that we heard, it may be that some of the provisions in the 2003 Act give effect, although sometimes with modifications, to judicial interpretations of the 1981 Act. Other provisions, however, overrule curial decisions although we do not conclude that that is necessarily so in the areas in question in the present case. However, we are unable to be satisfied to the level required that there is no new argument under the 2003 Act in relation to the adequacy of the provisions embodied in the collective agreement [between the Commission and the Union]. It may be arguable that the 2003 Act has introduced a new regime.

[5] Accordingly the Court found that it was not appropriate to strike out the Union's claim on the basis of issue estoppel or res judicata. The Court also rejected the argument based on abuse of process, again on the basis that the Court was not satisfied that the law had not changed.

Section 214

[6] The application is made under s 214 of the Employment Relations Act 2000. Section 214(1) gives a right of appeal, by leave, to a party who is dissatisfied with a decision of the Employment Court "as being wrong in law". Under s 214(3) this Court is empowered to grant leave if, in its opinion, "the question of law involved in that appeal is one that, by reason of its general public importance or for any other reason, ought to be submitted to the Court of Appeal for decision."

Submissions by Commission

[7] In support of the application, Mr Wilson QC for the Commission noted that the Employment Court had said the present case and the *Small* case would have involved determination of some of the same questions had the present case been brought under the 1981 Act. Thus he said the crucial point was whether the 2003 Act had made any changes which meant that a re-litigation of these issues was not precluded by an issue estoppel or subject to res judicata. He said that this was a crucial issue and the Employment Court had failed to decide it. He referred to the

Court's reference at 28 that it was "distinctly arguable" that the 2003 Act had changed the law and its later conclusion in quoted in [4] above.

[8] Mr Wilson said this was an error of law because the Court ought to have decided this question, which was an issue of law capable of being resolved at the time of a strike out application: *Gartside v Shieffield Young & Ellis* [1983] NZLR 37 at 45 per Richardson J.

[9] The second question of law identified by Mr Wilson was the question as to whether there were material differences between the 1981 Act and the 2003 Act impacting on the points at issue in the *Small* case and the present case.

[10] Mr Wilson said both of these were issues of public importance: he said the legal approach to a strike out application is critically important and the issue as to whether there were material differences affecting entitlements to holiday pay between the 1981 Act and the 2003 Act is also important. He said that, if the interpretation of the law suggested by the Union in its statement of claim were adopted, the cost to the Commission could be between \$3.5m and \$6.5m per annum.

Submissions for the Union

[11] On behalf of the Union, Mr Cranney said the Employment Court had adopted the right approach. He said the test for issue estoppel/res judicata was whether the course of action in the earlier proceeding was identical to that in later proceedings, and the Court was justified in finding this was not so in the present case because of the advent of the 2003 Act. He said it was for the Commission to prove identity of issues and it had failed to do so. He said that the Employment Court had, in fact, decided that there were material differences between the treatment of "days in lieu" under the 1981 Act as that Act was interpreted by the Courts, and the treatment of "alternative holidays" under the 2003 Act.

Discussion

[12] We disagree with Mr Cranney that the Employment Court decided that there were material differences between the 1981 Act and the 2003 Act which were relevant to the present case. Mr Cranney was unable to point to anything in the Employment Court's decision to that effect. We agree with Mr Wilson that, in order to determine whether the issues raised in the present case amounted to *res judicata* or issue estoppel, it was necessary for the Employment Court to make such a finding. It may have been that the Employment Court thought that a finding would not be possible without hearing evidence, but there is no statement to that effect in the decision. Mr Cranney suggested that there may be a need for evidence as to how the firefighters' rostering system works, but, as there has been no material change to that system from that in-operation at the time of the *Small* decision, that would seem to be unlikely. The Employment Court decision itself describes the rostering system in some detail.

[13] We accept therefore, that there was an error of law in the Employment Court's approach to the issue. As this Court has often made clear, where a claim depends on a question of law which is capable of decision on the material before the Court, the Court should determine the question at the strike out stage, even though extensive argument may be necessary to resolve it: *Gartside* at 45, and the cases there referred to. That principle is missing from the list of principles set out at [21] of the Employment Court decision. We can see no reason for the Employment Court to approach strike out applications on any basis other than that applying to the High Court.

[14] As the question of law has not been decided, we are left in a difficult position. If this Court were to grant leave, and hear the Commission's appeal, it would be in the position of needing to determine the substantive issue as to the existence or otherwise of material differences between the 2003 Act and the 1981 Act without the benefit of the views of the Employment Court on that issue. We do

not consider it would be appropriate to refer the matter back to the Employment Court for further consideration.

[15] We accept that the issues relating to the entitlements of firefighters to holiday pay are important issues both for the Commission and for the Union's members. But we are not convinced that it is appropriate to grant leave to appeal at this stage of the proceeding. The issues relating to the test to be applied to the striking out of proceeding are not matters of general public importance which justify an appeal at this stage of the proceeding. And the declining of leave to appeal at this stage does not deprive the Commission of the chance to have the substantive issues, which, we accept, are matters of public and general importance, determined by this Court if it is dissatisfied with the final outcome of the Employment Court proceeding.

[16] We realise that puts the Commission to the cost of a full hearing in the Employment Court, which may have been able to be avoided. But that appears to us to be preferable to the consideration of the issues by this Court at the current stage of the proceedings, which would not avoid such a hearing if we determined that evidence was required or if we decided the substantive issue against the Commission.

Result

[17] We therefore decline the Commission's application for leave to appeal.

Costs

[18] While we have declined leave to appeal, we are satisfied that the Commission has correctly identified an error in the approach of the Employment Court. In view of that, we make no award of costs, which should lie where they fall.

Solicitors:
Broadmore Barnett, Wellington for Applicant
Oakley Moran, Wellington for Respondent

