Employment Court of New Zealand

Faitala v Terranova Homes & Care Limited [2012] NZEmpC 199 (27 November 2012)

Last Updated: 2 December 2012

IN THE EMPLOYMENT COURT WELLINGTON

[2012] NZEmpC 199

WRC 22/12

IN THE MATTER OF proceedings removed in full from the

Authority

BETWEEN VASIVASI FAITALA First Plaintiff

AND DALRENE GOFF Second Plaintiff

AND TERRANOVA HOMES & CARE LIMITED

Defendant

Hearing: 2 October 2012 (Heard at Wellington)

Court: Chief Judge G L Colgan

Judge Christina Inglis

Counsel: Timothy Oldfield, counsel for plaintiffs

Elizabeth Coats, counsel for defendant

Judgment: 27 November 2012

JUDGMENT OF THE FULL COURT

Introduction

[1] This proceeding arises in the context of a claim for arrears of wages under the

Minimum Wage Act 1983 (MWA). It was removed to the Court for determination by the Employment Relations Authority.1

1 [2012] NZERA Wellington 100.

[2] The plaintiffs are employed by the defendant as caregivers at a rest home. They are paid the statutory minimum wage of $13.50 (gross) per hour. Both are members of a KiwiSaver scheme. The narrow point at issue is whether their employer is entitled to deduct the employer's compulsory KiwiSaver contribution from the employees' gross wages in circumstances where those wages are at the minimum level specified in the MWA.

Facts

[3] The plaintiffs are employed under individual employment agreements. The agreements are in materially the same terms. Both contain a schedule entitled "Your Remuneration." It provides that:

The employee's remuneration is inclusive of any KiwiSaver compulsory

employer contributions.

[4] This is said to reflect what is commonly known as a 'total remuneration'

approach to KiwiSaver contributions.

[5] The defendant's compulsory employer contributions to the plaintiffs' KiwiSaver accounts are offset against the plaintiffs' gross wages, as follows:

- Employer contribution paid in respect of each plaintiff under the KiwiSaver

Act 2006 (before tax) = 00.26/hour

- Gross wage paid to each plaintiff after payment of employer contribution to

KiwiSaver (before tax and any other relevant deductions) = 13.24/hour

Total remuneration (before tax and deductions) = 13.50/hour

Statutory framework

[6] The minimum wage is prescribed by the Governor-General by Order in

Council. The current hourly wage rate for an adult worker is $13.50.2

[7] Section 6 of the MWA provides that:

2 Minimum Wage Order 2012, cl 4(a).

Payment of minimum wages

Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7-9 of this Act, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[8] The way in which employer contributions to KiwiSaver are to be dealt with is specified within the KiwiSaver Act 2006 (KSA). Section 101B provides that:

(1) The purpose of this section is to ensure that, for contractual arrangements of parties to an employment relationship (as defined by section 4(2) of the Employment Relations Act 2000) compulsory contributions are paid in addition to an employee's gross salary or wages described in section 101D(3).

...

(4) However, on or after 13 December 2007, parties to an employment relationship are free to agree contractual terms and conditions that disregard the purpose of this section described in subsection (1), and, to the extent of such agreement, sections (1)-(3) do not apply, unless, in respect of the employer and the employee –

(a) Section 60(1)(a), (b) or (c) first applies on or after the day of assent for the Taxation (Urgent Measures and Annual Rates) Act 2008; and

(b) The contractual terms and conditions do not account for the amount of compulsory contributions the employer is required to pay.

(4A) In the circumstances described in subsection (4)(a) and (b), despite subsection (4),-

(a) Compulsory contributions must be paid in addition to an employee's gross salary or wages described in section 101D(3) in accordance with the purpose of this section described in subsection

(1); and

(b) Subsections (2) and (3) apply.

...

Summary of parties' positions

[9] The plaintiffs contend that the treatment of their remuneration as inclusive of the defendant's compulsory employer contribution constitutes a breach of s 6 of the MWA. The plaintiffs' alternative argument centres on s 101B(4) of the KSA. They submit that the clause contained within the remuneration schedule to each individual agreement does not comply with the requirement to account for the amount of

compulsory contributions the employer is required to pay, in breach of s 101B(4)(b). In these circumstances the plaintiffs say that the total remuneration approach which might otherwise be permitted by s 101B(4) does not apply.

[10] The defendant submits that it applies a total remuneration approach to its KiwiSaver compulsory employer contributions which is permitted under s 101B(4) of the KSA and its individual employment agreements with the plaintiffs. It contends that the employer contribution that the plaintiffs receive comprises payment for their work and that they are accordingly paid not less than the minimum wage. The defendant further submits that, to the extent that s 6 might otherwise apply, s

101B(4)(b) must be read as impliedly overriding, or constituting an exception to, that provision.

[11] Determination of which of these contentions is correct reduces to an exercise in statutory interpretation.

Discussion

[12] The starting point is s 5 of the Interpretation Act 1999. It emphasises that text and purpose are the key drivers of statutory interpretation. In determining purpose the Court must have regard to both the immediate and the general legislative context. The social, commercial or other objectives of the enactment may also be relevant.3

[13] The MWA is designed to prevent the exploitation of vulnerable workers. It is part of a suite of important protective statutes, imposing minimum conditions of employment. Statutory minimum conditions of employment have been part of New Zealand's industrial relations landscape for more than a century. The first Minimum Wage Act was enacted in 1945. More recently other so-called safety net provisions can be found in statutes such as the Equal Pay Act 1972, Wages Protection Act 1983, Parental Leave and Employment Protection Act 1987, Health and Safety in

Employment Act 1992, Employment Relations Act 2000, and the Holidays Act 2003.

3 *Commerce Commission v Fonterra Co-operative Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22], citing *Auckland City Council v Glucina* [1997] NZCA 353; [1997] 2 NZLR 1 at 4 (CA).

[14] The MWA has been described by a full Court of the Employment Court as a minimum code.4 It confers an entitlement on each eligible worker within New Zealand to a minimum rate of pay. The Act has its genesis in international conventions to which New Zealand, along with virtually every other developed country, is party. We return to these international instruments, and their relevance to the interpretative exercise, later.

[15] It is readily apparent that the underlying purpose of the MWA is to ensure that workers receive a living wage, to meet the basic day-to-day living expenses of the worker and his/her family.5 The rate must be reviewed annually by the Minister.6

An employer who fails to pay the minimum wage is liable to a penalty, recoverable by the Labour Inspector.7

[16] The importance of s 6 is emphasised by its introductory words, which provide that the minimum entitlement is to apply notwithstanding anything to the contrary in "any other enactment, award, collective agreement, determination, or contract of service."

[17] It is also notable that the MWA has not been subject to any significant amendment since its inception. It remains the oldest piece of employment legislation still in force,8 underscoring its status as a fundamental cornerstone of the statutory framework guiding the interrelationship between employers and employees, and reflecting a Parliamentary concern to redress issues of unequal bargaining power of workers, particularly those on low pay.9 This is reinforced by the express prohibition on contracting out of the requirement to pay the minimum wage.

[18] The entitlement conferred on an employee by s 6 is to receive payment for his/her work from his/her employer at not less than the minimum rate. This raises

two issues in the present case. Firstly, whether payment of an employer's

4 *Idea Services v Dickson* [2009] ERNZ 116 at [39].

5 Sir Frank Holmes "Policy Paper No 19: The Quest for Security and Welfare in New Zealand" (2004)

Institute of Policy Studies Victoria University Wellington at 7.

6 Minimum Wage Act 1983, s 5.

7 Minimum Wage Act 1983, s 10.

8 It was effectively re-enacted in 1983 in the same terms as originally drafted.

9 *Idea Services v Dickson* [2009] ERNZ 116 at [39].

contribution through the Inland Revenue Department to an employee's KiwiSaver fund, is a payment received by an employee from his/her employer. Secondly, whether such a payment constitutes payment for the employee's work, for the purposes of s 6 of the MWA. If an employer's contribution to KiwiSaver is a payment received by the employee from the employer for his/her work the plaintiffs' primary case must fail.

[19] As we have said, the purpose of the MWA is to ensure that workers receive a base wage for their work to enable them to meet their daily living expenses for themselves and their family. There is nothing to suggest that it builds in a component for saving for retirement. Rather it is designed to meet the basic necessities of day-to-day living. Thus s 7 provides an express exception that an employer may deduct, at a specified rate, payment in lieu where board and lodgings are provided.

[20] Other deductions may also be made from an employee's pay, such as liable parent contributions and PAYE. However these represent obligations that may or may not be owed by an employee personally. The payment of a compulsory employer contribution under the KSA is of a different character. It is the employer's contribution, not the employee's contribution (which is payable by the employee personally). The employer contribution is not paid directly to the employee, rather it is paid to a KiwiSaver provider via the Inland Revenue KiwiSaver Holding

Account.10 The contribution is then held, for the benefit of the employee, until that

employee reaches the age of 65 years11 (subject to limited circumstances in which early withdrawal is permitted).12 Accordingly, an employee is likely to wait many years (perhaps up to 50) after the contribution is paid to the provider before he/she receives the benefit of it.

[21] There is no guarantee of receipt of the benefit of the employer contribution

(or indeed of the employee's own contribution) by the employee under the Scheme.13

The monetary value of the contribution may never be realised at all or in full. Nor is

10 KiwiSaver Act 2006, s 72.

11 KiwiSaver Act 2006, sch 1, cl 4.

12 See KiwiSaver Act 2006, sch 1, cls 7-14.

13 KiwiSaver Act 2006, s 205.

the money paid out as salary when it is ultimately received by the employee. Rather it is paid out as a pension.

[22] Salary or wages are not defined in the MWA. However, they are defined in s

4 of the KSA as follows:

salary or wages, in relation to any person, means salary or wages as defined in section RD 5(1)(a) to (c) of the Income Tax Act 2007 (whether the salary or wages are primary or secondary employment earnings) except that, in this Act,—

(a) it excludes—

(i) salary or wages described in section RD 5(4), (6)(b), (6)(c), and (8) and RD 68 of the Income Tax Act 2007; and

(iv) for the purposes of contributions to complying superannuation funds, bonuses, commissions, and other amounts not included in an employee's gross base salary or wages by the relevant complying superannuation fund;

...

[23] Section RD 5(1)(a) to (c) of the Income Tax Act 2007 provides that wages and salary:

(a) means a payment of salary, wages, or allowances made to a person in connection with their employment; and

(b) includes—

(i) a bonus, commission, gratuity, overtime pay, or other pay of any kind; ...

(c) does not include—

...

(v) an employer's superannuation contribution other than a contribution referred to in subsection (9):

...

[24] Section RD 5(9) provides that an amount of an employer's superannuation cash contribution that an employee chooses to have treated as salary or wages under section RD 68 is included in salary or wages.

[25] Section RD 68 states that with the agreement of an employer who makes an employer's superannuation cash contribution on an employee's behalf, an employee may choose to have some or all of an employer's superannuation cash contribution made on their behalf treated as salary or wages under the PAYE rules.

[26] However, the definition of salary and wages for the purposes of the KSA *excludes* salary or wages described in RD 68 of the Income Tax Act 2007.14 It follows, by a somewhat circuitous route, that an employer's compulsory contribution to KiwiSaver is excluded from the definition of salary or wages for the purposes of the KSA.

[27] On the defendant's analysis of the legal position, the employer's compulsory contribution is effectively paid by the plaintiffs, by deduction from the gross minimum wage that they would otherwise receive. In this sense the defendant is not paying to the plaintiffs the compulsory employer contribution, rather the plaintiffs are paying twice – their own contribution and, in addition, their employer's contribution. The phrase 'compulsory employer contribution' becomes a complete misnomer in this context.

[28] There is a nexus between the employer's contribution to KiwiSaver and the employee's work, given that the contribution would not be payable but for the employee's work. It is not payable if, for example, the employee is not at work or takes a KiwiSaver "holiday". However, the contribution is payable by virtue of the employee's election to join KiwiSaver. The trigger is the operation of statute rather than the work performed. And the amount payable is calculated on the basis of a statutory formula (the employee's gross salary or wages). The employer contribution is not money paid in exchange for labour, and no consideration is provided in exchange for it.

[29] We conclude that a deferred payment to an employee of a compulsory statutory employer contribution does not constitute payment by an employer for

work performed by an employee for the purposes of the MWA.

14 KiwiSaver Act 2006, s 4(a)(i).

[30] We turn to the issue of how s 6 is to be read with s 101B of the KSA.

[31] While the MWA is directed at ensuring a base standard for a day-to-day living wage, the KSA is directed at a longer term objective, namely to promote savings by New Zealanders generally. Section 3 provides:

Purpose

The purpose of this Act is to encourage a long-term savings habit and asset accumulation by individuals who are not in a position to enjoy standards of living in retirement similar to those in pre-retirement. The Act aims to increase individuals' well-being and financial independence, particularly in retirement, and to provide retirement benefits.

To that end, this Act enables the establishment of schemes (KiwiSaver schemes) to facilitate individuals' savings, principally through the workplace.

[32] Section 101B(1) makes it clear that the 'default' position is that employer compulsory contributions to KiwiSaver are to be paid in addition to gross salary or wages. Section 101B(4) provides that the parties may agree contractual terms and conditions that disregard the purpose set out in subs (1) unless s 101B(4)(a) and (b) apply.15 It is apparent that the exception contained within subs (4) reflects a Parliamentary intention that employers and employees have some latitude to structure an employer's KiwiSaver contribution arrangements as they choose.

[33] The scope of s 101B(4) is not clear, in particular whether (despite not expressly saying so) it is restricted to off-setting the amount of compulsory employer contributions against a worker's wage in future pay movements and whether it requires that the employer contribution be a genuine addition to normal pay.

[34] The defendant submits that under s 101B an employer and an employee enrolled in KiwiSaver are at liberty to agree that

the employer's contribution is not incorporated into the employee's gross pay. In such circumstances an employee in KiwiSaver may receive less in the hand than an employee who is not a member of KiwiSaver. On this analysis employee A is effectively paying both his/her

contribution and the employer's contribution. The result contended for by the

15 The exception applies from 13 December 2007. The employment agreements at issue in these

defendant seems surprising, and is at odds with statements made by the Minister during the first reading of the Bill, where she made it clear that such an outcome would not be permitted under the Act.16 And the fact that the compulsory contribution must be paid by the employer, and must be accounted for, tells against such a construction. An interpretation of s 101B which enables the parties to incorporate into an agreed rate of remuneration the employer's (identifiable) contribution as a component of, rather than a reduction to, the employee's regular pay, would appear to be more consistent with the underlying purpose of the

legislation. We do not, however, need to express a concluded view on this broader issue in order to determine the questions before us.

[35] Both parties submitted that the KSA and the MWA can be read consistently with one another, although arriving at different destinations. The defendant submitted that if the Court concluded that ss 6 and 101B could not be read consistently, the KSA should prevail as a specific statute and one that was later in time. The plaintiffs argued the converse position, on the basis that the MWA was specific and included "trump card" introductory wording, excluding anything to the contrary in any other enactment, including the KSA.

[36] Rules of statutory interpretation, including priority rankings to be given to statutes dependent on their age and specificity, ought not to be applied in a mechanical or formulaic manner.17

[37] Section 101B of the KSA does not refer to the MWA. It does not purport to deal with the way in which an employer contribution for an employee who is on the minimum wage is to be dealt with. Section 101B(4) states that parties are "free to agree contractual terms and conditions that disregard the purpose of this provision", but it does not state that they are free to agree contractual terms and conditions that

override the minimum wage legislation. Relevantly, s 6 of the MWA expressly

16 (9 December 2008) 651 NZPD 318.

17 *R v Pora* [2000] NZCA 403; [2001] 2 NZLR 37 (CA). Both counsel referred to *Pora*, although for different propositions. Unlike *Pora* this case does not involve the interface between a starkly drafted provision in apparent conflict with a right recognised in the New Zealand Bill of Rights Act 1990.

prohibits such an approach. It is notable too that s 101B is expressed in permissive terms. Section 6 of the MWA is not. Its requirements are mandatory.

[38] Reading ss 6 and 101B in the way contended for by the defendant would undermine two key purposes of the KiwiSaver legislation for those on the minimum wage, namely to encourage all workers to join the KiwiSaver Scheme to make provision for their retirement, and to make the Scheme affordable.

[39] We have already referred to the importance of the MWA in the employment sphere. Plainly it does not bear the same constitutional status as the New Zealand Bill of Rights Act 1990 (at issue in *R v Pora*), but it is a statute of fundamental importance in the sphere of employment law in New Zealand. It is a statute that is designed to impose a floor below which employers and employees cannot go. It is directed at preventing the exploitation of workers, and is a statutory recognition of the diminished bargaining power of those in low paid employment. If Parliament had intended to engraft an additional exception on to the MWA, by making it permissible for an employer to deduct its contribution from the minimum wage paid to an employee, we consider that it would have done so expressly. We are fortified in that view having regard to the way in which Parliament dealt with similar issues when passing the recent Sleepover Wages (Settlement) Act 2011. Section 6 specifically provides that the Act applies despite anything to the contrary in the MWA, as follows:

Relationship between this Act and other law

This Act applies despite anything to the contrary in the following: (a) The Minimum Wage Act 1983

(b) Any other enactment

(c) Any rule of law.

[40] The interpretation is also consistent with New Zealand's international

obligations.18 A number of conventions have been ratified, including the Minimum

Wage Fixing Machinery Convention 1928 which makes clear the purpose of

18 See *Tranz Rail Ltd v Rail and Maritime Transport Union (Inc)* [1999] NZCA 63; [1999] 1 ERNZ 460 (CA) at [40].

minimum wage legislation and states that minimum wages shall not be subject to abatement by individual agreement.19

[41] When ss 6 and 101B are read together, and in light of their respective purposes, it is apparent that the latter is to be read subject to the former. That means that, for an employee on the minimum wage, an employer is obliged to pay the 2% contribution in addition to the minimum wage or (if the parties agree) the gross wage must amount to the minimum wage plus 2%.

[42] For completeness we have cross-checked our conclusion against the legislative history. Parliamentary material relating to the introduction of the MWA reinforces the underlying purpose of that legislation to ensure that workers receive sufficient pay to meet their day to day costs of living. We have been unable to gain any real assistance from a perusal of the material relating to the debates surrounding various iterations of the KSA.

Issue 2

[43] Section 101B(4) does not apply unless the parties' contractual terms and conditions account for the amount of compulsory contributions the employer is required to pay.

[44] The part of the remuneration schedule in the plaintiffs' individual

employment agreements relied on by the defendant as meeting the requirements of s

101B(4)(b) is in the briefest of terms:

The employee's remuneration is inclusive of any KiwiSaver compulsory

employer contributions.

[45] The defendant submits that the plaintiffs' contractual terms and conditions

include (by way of necessary implication) the amount of the employer contribution set out in s 101D(1) of the KSA and that it is implicit that the reference to the

19 C026 - Minimum Wage-Fixing Machinery Convention, 1928, art 3(3).

plaintiffs' total wage includes the employer contribution to be calculated in

accordance with the KSA.20

[46] Counsel for the plaintiffs essentially submits that a numerical figure is required.

[47] The term "account for" is not defined within the Act. The apparent purpose of s 101B(4)(b) is to require the calculation to be set out with sufficient particularity within the written terms and conditions of the agreement to enable the parties (and any third party) to identify the amount of the compulsory contribution (as opposed to any other payments, such as a voluntary contribution) and to assess whether it matches the amount that the employer is statutorily required to pay. The statement contained within the remuneration schedule achieves this end. The requirement to "account for the amount of compulsory contributions" does not require a statement of a numerical figure, simply a statement as to how that figure is arrived at. In the present case it is clear that the amount of contribution is determined by reference to the prevailing statutory rate contained within the KSA. While it would have been open to the parties to include reference to a numerical amount, which would have required amendment each time the minimum wage was altered, that degree of specificity is not required on a plain reading of s 101B(4)(b).

[48] It follows that we consider that the reference in the remuneration schedule sufficiently accounts for the amount of the compulsory contributions the defendant is obliged to pay.

Conclusion

[49] The defendant is in breach of s 6 of the MWA. The plaintiffs are being paid for their work at a rate that is less than the statutorily prescribed minimum wage.

[50] The contractual terms and conditions account for the amount of compulsory contributions that the employer is required to pay.

20 Counsel for the defendant conceded that the plaintiffs' wage and time records were not relevant for

the purposes of s 101B(4)(b).

[51] The employer's compulsory contributions must be paid in addition to the plaintiffs' gross salary or wages which are set at the minimum rate. The parties are encouraged to resolve any outstanding issues relating to wage arrears between themselves, and did not ask the Court to consider this issue. However, for completeness leave is reserved for the parties to bring any residual matters relating to wage arrear calculations back before the Court for determination.

[52] Neither party sought costs and were responsibly content for them to lie where they fall.

Christina Inglis for the full Court

Judgment signed at 2pm on 27 November 2012
