IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA208/2020
[2020] NZCA 339

BETWEEN	YOON CHEOL HONG Applicant
AND	CHEVRON TRAFFIC SERVICES LIMITED Respondent

Court: Miller and Clifford JJ

Counsel: Applicant in person
G M Pollak for Respondent

Judgment: (On the papers) 12 August 2020 at 9.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

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

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] In April this year the Employment Court dismissed claims made by the applicant, Yoon Cheol Hong, against the respondent, Chevron Traffic Services Ltd, for unjustified dismissal and related personal grievances.[1] Mr Hong now applies

[1] *Hong v Chevron Traffic Services Ltd* [2020] NZEmpC 44.

pursuant to s 214 of the Employment Relations Act 2000 (the Act) for leave to appeal that decision as being wrong in law.

[2] We may grant leave if the question of law proposed is one that, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for decision.

Background

[3] Mr Hong was employed by Chevron as a traffic controller between 12 September 2017 and 7 June 2018, on which date Mr Hong was summarily dismissed.

[4] Chevron is a traffic management business. As a traffic controller, Mr Hong worked in close cooperation with other traffic controllers, by use of radio telephones, to manage traffic through one-way sections of roads under repair. Mr Hong was dismissed following events on 25 May 2018. On that day he was observed, on at least three occasions, by the traffic superintendent of the head contractor at the site allowing traffic onto the one-way section of roadway when traffic was still coming from the opposite direction. The traffic superintendent said Mr Hong was clearly not listening on his radio telephone, and that he had seen similar incidents involving Mr Hong on another site. The traffic superintendent directed Mr Hong be removed to another part of the site. When similar incidents involving Mr Hong occurred later that same day, the traffic superintendent indicated that he did not wish to have Mr Hong back on his sites ever again.

[5] The traffic superintendent made a formal, written complaint to Mr Hong's employer, Chevron. An investigation by Chevron followed.

[6] During the course of that investigation Mr Hong, as well as asserting that the alleged incidents had never happened, raised a number of other personal grievances.

[7] As now relevant, one of those personal grievances raised a question as to the real nature of Mr Hong's employment relationship with Chevron, namely whether it was casual or ongoing. Related questions of entitlement to holiday pay, public holiday

pay and the lawfulness of relevant terms of Mr Hong's employment contract then arose.

[8] The Holidays Act 2003 entitles an employee to not less than four weeks paid annual holiday after the end of each completed 12 months of continuous employment.[2] Holiday pay is to be paid before the employee takes their annual holiday, or where the employer and the employee agree, in the pay that relates to the period during which the holiday is taken.[3] Where, however, an employee works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with four weeks annual holidays, s 28 of the Holidays Act provides that, by agreement, holiday pay at a rate not less than eight per cent of the employee's gross earnings may be paid as part of regular pay. Similarly, s 23 provides that an employee whose employment comes to an end less than 12 months after it began must be paid eight per cent of their gross earnings as holiday pay.

[9] In accordance with the express terms of Mr Hong's employment agreement, and in reliance on s 28, Chevron adopted the eight per cent approach to the payment of holiday pay. During the Authority's investigation Mr Hong said that, in fact, he was not a casual employee so that Chevron was not entitled, as a matter of law, to take that approach.

[10] Mr Hong also challenged Chevron's approach to payment for (non-worked) public holidays. Section 49 of the Holidays Act requires an employee to be paid for a public holiday he or she does not work if that day would otherwise have been a working day for that employee. Clause 5.2 of Mr Hong's employment contract provided that as Mr Hong was a casual employee he would "normally" not be entitled to be paid for a non-worked public holiday. Mr Hong said Chevron had failed to comply with s 49, given he had not been a casual employee. Moreover, cl 5.2 was contrary to s 49 and Chevron had accordingly breached s 65(2)(b)(i) of the Act, which prohibits individual employment agreements from containing anything "contrary to law". Mr Hong sought holiday pay compensation, and that Chevron pay a penalty, accordingly.

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2 Holidays Act 2003, s 16.
3 Section 27.

[11] The Authority agreed with Mr Hong as to the nature of his employment relationship: it was ongoing, rather than casual.[4] But, the Authority also found, at the outset of the employment relationship, as confirmed by the terms of the employment agreement, Chevron and Mr Hong believed the employment relationship was casual. That is, work would only be available to Mr Hong on an intermittent and irregular basis. As that was not the case in practice, Chevron had incorrectly adopted the eight per cent approach, because s 28 did not apply. Nevertheless, because Mr Hong's employment did not continue for 12 months or more he never became entitled to annual holidays. Furthermore, Mr Hong received the full payment of his annual holiday pay through the payment of the additional eight per cent that had been made as part of his regular pay.[5]

[12] The Authority agreed with Mr Hong that his entitlement to wages for public holidays had not been correctly determined by Chevron, and made an order — which Chevron has complied with — for the payment of additional wages for public holidays.

[13] The Authority also acknowledged cl 5.2 of the employment agreement did not reflect the terms of s 49. But the use of the word "normally" reflected, again, the joint understanding of Chevron and Mr Hong at the outset that Mr Hong was to be a casual worker. Given Chevron had in fact paid Mr Hong for some of the public holidays he did not work in accordance with s 49, albeit not others, the presence of the clause itself was not a breach of s 65(2)(b)(i).[6]

[14] On that basis, the Authority concluded Mr Hong had failed to establish a breach of the Holidays Act as it pertains to Chevron's obligations under ss 16, 28 or 49 of the Holidays Act, or s 65(2)(b)(i) of the Act.

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4 *Hong v Chevron Traffic Services Ltd* [2019] NZERA 14 at [30].
5 At [35]–[37].
6 At [51]–[52].

Employment Court decision

[15] In the Employment Court, Mr Hong challenged the Authority's findings that he had not been unjustifiably dismissed, that Chevron had not breached the Holidays Act or the Act and that no penalties were to be paid.

[16] The Employment Court was satisfied that Chevron's decision to dismiss Mr Hong summarily was a reasonable response in all the circumstances.[7] Although in his "close and intensive cross-examination of the witnesses" for Chevron some inconsistencies arose, the witnesses did not resile from their primary evidence.[8] In the Court's view the evidence against Mr Hong was overwhelming.[9] It agreed that, in the context of Chevron's operations and responsibilities to the public, Mr Hong's actions amounted to serious misconduct. Mr Hong had not, therefore, been unjustifiably dismissed.[10]

[17] As regards the breaches of ss 16 and 28 of the Holidays Act and s 65(2)(b)(i) of the Act, the holiday pay and pay for public holiday issues, the Employment Court noted that issue had been resolved by the Authority's determination. The Employment Court agreed with the Authority that Chevron's breaches were unintentional, reflecting the initial mutual understanding Mr Hong was to be a casual employee.[11] It went on to note that the relevant provisions of the Act and the Holidays Act were difficult and concluded this was not a situation that called for a penalty. Moreover, Mr Hong's contention Chevron breached its duty of good faith could not be considered as it had not been advanced before the Authority.[12]

Leave application

[18] Mr Hong seeks leave to appeal on the grounds that, given the evidence, no reasonable Employment Court Judge could have made the decision that his dismissal was not unjustified; that the Judge's finding that cl 5.2 of his employment contract had not involved a breach of s 65(2)(b)(i) of the Act was plainly wrong; and that no

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7 *Hong v Chevron Traffic Services Ltd*, above n 1, at [23].
8 At [19].
9 At [23].
10 At [24].
11 At [26].
12 At [25].

reasonable Employment Court Judge could have reached the conclusion that Chevron had not acted in bad faith.

[19] He says leave should be granted because the errors of law he identified are ones of general or public importance.

Assessment

An error in finding Mr Hong's dismissal not unjustified?

[20] An appeal on a point of law can be brought on the ground there was insufficient evidence upon which the Judge could reach the challenged conclusion: here, the Judge's finding Mr Hong's dismissal was not unjustified. We are satisfied, as the Judge was as regards the Authority's decision, that the evidence against Mr Hong was formidable. That Mr Hong made some progress with witnesses does not affect that conclusion. In particular, the evidence of the traffic superintendent was clear and the inquiry which Chevron undertook following the receipt of his complaint was a proper one. Leave is declined to challenge that decision.

An error in finding no breach of s 65(2)(b)(i)?

[21] The essence of the Judge's finding was that, whilst cl 5.2 as worded did not accurately reflect s 49 of the Holidays Act, the use of the word "normally", and Chevron's actions in fact in paying Mr Hong for some but not all of the public holidays for which he was entitled to be paid, meant that the clause was not necessarily inconsistent with s 49. Rather, the clause reflected the initial understanding that — because as a matter of fact Mr Hong was expected to be a casual employee only — it would be unusual if his pattern of work entitled him to pay for a public holiday. But, as Mr Hong had complained, the Judge went on to find Chevron had not followed the requirements of s 49 as regards some, but not all, of the occasions on which Mr Hong said that he had wrongly not been paid for a public holiday. The Judge ordered payment by Chevron to the extent of that error, and Chevron has made that payment. On that basis, no question of law of general or public importance is raised and leave to appeal is declined.

An error in finding no bad faith?

[22] Finally, Mr Hong challenges the Judge's ruling that he did not have jurisdiction to find Chevron had not acted in good faith because that claim had not been raised before the Authority, as was the legislative requirement, and that there had not, in fact, been a breach of the employer's duty to act in good faith.

[23] As Mr Hong had elected for the Employment Court to hear his challenges de novo, the Court would have had jurisdiction to consider Mr Hong's claim for a breach of the duty of good faith.[13] To that extent, there would appear to have been an error of law in the Employment Court's decision. Having said that, it was on the basis of the strength of the evidence against Mr Hong, and Chevron's properly conducted inquiry, that the Judge was able to conclude — irrespective of that error of law — that Chevron had not acted in breach of its duty of good faith. For similar reasons as those set out as regards the first ground of appeal for which leave is sought, we also decline leave on this third point as well.

Result

[24] Mr Hong's application for leave to appeal to this Court is declined.

[25] Mr Hong is to pay costs to Chevron for a standard application on a band A basis and usual disbursements.

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13 *Silby v Christchurch City Council* [2002] 1 ERNZ 476 (EmpC) at [47].