

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA475/2020
[2020] NZCA 681**

BETWEEN CHARLES KIDD IN PARTNERSHIP
WITH GEOFFREY KIDD TRADING AS
KIDD PARTNERSHIP
Applicant

AND GEORGE ROBERT COWAN
Respondent

Court: Clifford and Gilbert JJ

Counsel: S N McKenzie for Applicant
P G Skelton QC and J R Copeland for Respondent

Judgment: 21 December 2020 at 4.00 pm
(On the papers)

JUDGMENT OF THE COURT

- A The application for leave to appeal is declined.**
- B The applicant is to pay the respondent costs for a standard application on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] This is an application by the Kidd Partnership (the Partnership) for leave to appeal the decision of the Employment Court that the transfer of land valued at

\$80,000 by the Partnership to Mr Cowan could not be offset against wages that the Partnership owed to Mr Cowan.¹

Background

[2] The Partnership comprises Mr Kidd and his son, Geoffrey. It operates businesses, including farms and a rest home, and owns property in and around Winton.

[3] Mr Kidd and Mr Cowan were once friends. Concerned about Mr Cowan's living situation after he was left without a home, in April 2009 Mr Kidd invited Mr Cowan to stay with him and his partner in a separate apartment forming part of their home. Mr Cowan accepted that offer. Mr Cowan lived in that apartment, and later in a cottage at the rest home owned by the Partnership, rent-free until October 2016.

[4] For most of that period Mr Cowan worked part time for the Partnership. He drove trucks, and assisted with Partnership building projects. Mr Cowan last worked for the Partnership in May 2016. Mr Cowan never had a written employment agreement, nor did he receive wages.

[5] In July 2010 the Partnership transferred a parcel of land to Mr Cowan near the Partnership's rest home.² The arrangement was structured as a sale, with an assigned value of \$80,000 for the land. Mr Cowan paid no money for that land.

[6] The relationship between Mr Cowan and the Partnership deteriorated and eventually completely broke down. In late 2015 or early 2016 Mr Cowan claimed wages from the Partnership. The Partnership refused that claim. In July 2016 Mr Cowan lodged a personal grievance, claiming he was in an employment relationship with the Partnership and for wages owing for the period 27 July 2010 to 23 May 2016. In his claim for wages, Mr Cowan did not recognise he had been provided with free accommodation and the piece of land in return for the work he performed.

¹ *Cowan v Kidd* [2020] NZEmpC 110 [Employment Court decision].

² At [16].

[7] Before the Employment Relations Authority, the Partnership accepted there had been an employment relationship, denied Mr Cowan had worked all the hours he claimed, disputed the hourly wage he sought, and said that he had been provided with the free accommodation and the piece of land in exchange for the work he had performed. Therefore, the Partnership said, the value of that land and accommodation should be set off against any debt for wages owed.

[8] The Authority resolved matters largely in the Partnership's favour. It found that Mr Cowan had only worked for approximately half the hours he claimed, and fixed Mr Cowan's wage at the minimum hourly adult rate.³

[9] As to the significance for wages owed of the free accommodation the Authority first concluded a set-off was available as provided for by s 7 of the Minimum Wage Act 1983, notwithstanding there was no agreement to that effect between Mr Cowan and the Partnership.

[10] The correct treatment of the land transferred was more difficult. The parties had, the Authority concluded, some form of understanding the value of the section "would somehow represent the equivalent of money wages for work performed by Mr Cowan for the partnership".⁴ The Authority then reasoned:

[90] Whatever else is true, it is abundantly plain that the section is neither board nor lodgings and therefore it seems to me unlikely that it can be treated in the same way as the calculation of lodgings in terms of the 1983 Act.

[91] That notwithstanding, it is equally plain that the parties intended, on my reading of the evidence, that the value of the section be taken into account and I am not persuaded that in equity and good conscience I can simply ignore it.

[92] So I conclude that the parties' intention was that the value of the section be taken into account as if it were money wages paid while the value of the accommodation in terms of the provision in the 1983 Act, must be calculated as the statute sets out and deducted from the wages that would otherwise have been payable.

³ *Cowan v Kidd Partnership* [2018] NZERA Christchurch 50 [Employment Relations Authority decision].

⁴ At [88].

[11] On that basis the Authority, concluding it had the power to do so pursuant to s 161(1)(r) of the Employment Relations Act 2000 (the Act), ordered Mr Cowan to pay the Partnership the sum of \$80,000.⁵ In doing so, the Authority also relied on the provisions of the Contract and Commercial Law Act 2017, imported into the Act by s 162(a).⁶

Employment Court decision

[12] Mr Cowan challenged the Authority's determination on a de novo basis: accordingly, all aspects of Mr Cowan's dispute with the Partnership were considered afresh by the Employment Court. At the same time, the Partnership withdrew the concession it had made before the Authority and disputed that there had been an employment relationship between it and Mr Cowan.

[13] Like the Authority, the Employment Court found the real nature of the relationship between the Partnership and Mr Cowan was, at least in part, an employment relationship.⁷ That employment relationship had evolved alongside Mr Kidd and Mr Cowan's friendship. That employment relationship covered, in particular, the truck driving and general construction work that Mr Cowan had done for the Partnership. On the question of the time worked by Mr Cowan, the Court agreed with the Authority that Mr Cowan was not entitled to wages for all the hours he claimed, but reached a conclusion somewhat more favourable to Mr Cowan than the Authority had on the proportion of those hours for which he was entitled to be paid.⁸ Like the Authority, the Court concluded that the appropriate hourly rate for Mr Cowan was the minimum adult rate.⁹

[14] The Employment Court, however, reached different conclusions from the Authority on the significance of the free accommodation and the transfer of the section

⁵ At [128]–[129]. Section 161(1)(r) provides that the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including “any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort)”.

⁶ At [130]. In particular, the Authority concluded s 24(1)(a)(ii) applied as both parties were influenced by the same mistake when entering into a contract.

⁷ Employment Court decision, above n 1, at [33]–[36].

⁸ At [44]–[46].

⁹ At [52].

for the amount of any wages owed by the Partnership to Mr Cowan. Its reasoning on the point was succinct:

[54] Despite Mr Kidd's evidence that the transfer of the property represented a gift to Mr Cowan, Kidd Partnership submits any amount due to Mr Cowan ought to be reduced by \$80,000, being the stated value of the section transferred to him in July 2010.^[10] However, while I have accepted that the transfer in part recognised work done by Mr Cowan, its value cannot be taken into account in the calculation of wages due to him.* In any event, it is not possible to establish what portion of the value of the property might have reflected recognition for Mr Cowan's ongoing work for the period before the Court.

[55] I also consider the provision of accommodation was a personal arrangement entered into between Mr Kidd and Mr Cowan. That is particularly clear for the accommodation in the flat above Mr Kidd's home, but I view the move to the cottage as on the same basis.

* Wages Protection Act 1983, s 7. If Kidd Partnership has a claim, it would be in another jurisdiction.

[15] Thus the Employment Court denied recognition of the value of the land by reference to s 7 of the Wages Protection Act 1983, whereas the Employment Authority had recognised a set-off for the value of accommodation by reference to s 7 of the Minimum Wage Act. In reaching its conclusion on the significance of the value of the land, the Employment Court made no reference to the "equity and good conscience" jurisdiction found in s 189 of the Act nor to ss 161 and 162.

The Partnership's leave application

[16] In applying for leave, the Partnership no longer asserts the Employment Court was wrong on the conclusion it reached as to the significance of the value of accommodation Mr Cowan received, either from Mr Kidd personally or from the Partnership. However, as to the value of the land transferred, the Partnership says

¹⁰ That assessment of matters appears to reflect a different approach taken by the parties, and in particular Mr Cowan, in the Employment Court to their understanding as to the significance of the free accommodation and transfer of land. The Judge had earlier summarised the position:

[18] Mr Cowan claims that the provision of the section and the assistance with the house was payment for work he had performed, and would continue to perform for Kidd Partnership. Mr Kidd's evidence on this point was somewhat conflicting. On the one hand he said that the transfer of the property and offer of assistance recognised that Mr Cowan had assisted the business, but he also said that it was provided to Mr Cowan essentially as a gift to help him out. I accept that there were mixed motives in the provision of the property and promised assistance with the house. Mr Kidd was concerned that his friend Mr Cowan was at or near retirement age without any home and in somewhat straitened circumstances. I also accept, however, that Mr Kidd recognised that Mr Cowan had been helping Kidd Partnership.

that the Employment Court, having accepted that transfer was in part recognition for work undertaken by Mr Cowan, erred by determining that the value of that land could not be taken into account in the calculation of wages due to Mr Cowan or to offset any wages due.

[17] The proposed question of law raised on appeal is:

Whether the Court can exercise its inherent jurisdiction to act in equity and good conscience and take into account the provision of the section (or other valuable consideration) by way of an offset when calculating wage arrears.

[18] The Court's inherent jurisdiction to act in equity and good conscience is said to come from s 189 of the Act, which provides:

189 Equity and good conscience

(1) In all matters before it, the court has, for the purposes of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.

...

[19] The Partnership says the proposed appeal raises a matter of general or public importance, as the scope of the equity and good conscience provision has not been considered as regards the provisions of the Wages Protection Act. Further, the Partnership claims the Employment Court's decision conflicts with another decision, *Kidd v Beaumont*, and it is a matter of public importance that this Court clarify the correct approach.¹¹

[20] Mr Cowan, in response, contends that the grounds of appeal seek to challenge factual findings and do not raise any point of law. In any event, he says the law is clear: s 7 of the Wages Protection Act specifies that wages may be paid in money only, the wording of the provision is unambiguous, and the Judge correctly interpreted and applied it. Mr Cowan also notes the qualification in s 189(1) of the Act, which provides the Court cannot exercise its jurisdiction in a way that is inconsistent with

¹¹ *Kidd v Beaumont* [2016] NZEmpC 158, [2016] ERNZ 257.

that, or any other, Act. In this regard, Mr Cowan submits the “equity and good conscience” provision is not untrammelled, and does not allow the Court to contradict s 7 of the Wages Protection Act.

[21] Mr Cowan draws this Court’s attention to differences between *Kidd v Beaumont*, relied on by the Partnership, and the present case. Namely, in *Kidd v Beaumont* the reward offset against wages was accommodation, expressly allowed by s 7 of the Wages Protection Act. Further, Mr Kidd was also receiving a cash sum for his work as contemplated by s 7 of that Act. Accordingly, Mr Cowan says no broad principle that non-monetary benefits may be deducted for the purposes of calculating wages can be gleaned from the judgment.

[22] To the extent the Partnership’s application does raise a question of law, Mr Cowan says it does not give rise to any question of general or public importance that would justify granting leave to appeal: the matter is confined to its facts.

Analysis

[23] The relevant provision is s 214 of the Act, which provides as follows:

214 Appeals on question of law

- (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.
- (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.

Kidd Partnership must therefore demonstrate that the question of law proposed is one of sufficient general or public importance to warrant a further appeal to this Court.

[24] The Employment Court did not rely on the Authority’s analysis under ss 161(1) and 162(a), and that analysis was not referred to by the applicant in its submission regarding significance of the Employment Court’s equity and good conscience jurisdiction. We have, accordingly, not considered the significance, or otherwise, of that analysis with regards that application.

[25] Rather, the challenge was to the Employment Court’s conclusion there was no power to deduct any amount from the wages due from the Partnership to Mr Cowan by reference to the value of the land transferred.

[26] In reaching her conclusion that set-off for the stipulated value of the section was not available to the Partnership, the Judge relied on the provisions of s 7 of the Wages Protection Act, which reads:

7 Wages to be payable in money

Subject to sections 8 to 10, an employer shall pay the wages of every worker in money only.

[27] “Money” is defined in s 2 to mean New Zealand coin or New Zealand bank notes. In effect, s 7 requires wages to be paid in cash, subject to agreement to the contrary. It does not, in our view, address the question of deductions from wages otherwise payable in cash.

[28] Rather, the extent to which amounts may be deducted from wages payable is addressed by ss 4–6 of the Wages Protection Act. As relevant here, deductions may only be made for lawful purposes with the written consent of a worker.¹² The unchallenged finding of fact below is there was no written employment agreement, or any other form of agreement in writing, between the Kidd Partnership and Mr Cowan. There would appear to be no possibility of Mr Cowan having consented to a lawful deduction.

[29] Whilst s 7 of the Minimum Wage Act allows for a deduction with respect to board and lodging, as recognised by the Authority and acknowledged by the

¹² Wages Protection Act 1983, s 5(1).

Employment Court in *Kidd v Beaumont*,¹³ that is not an issue which the Partnership seeks to raise in its appeal.

[30] Furthermore, the section on which the Partnership would base its appeal, s 189 of the Act, does not — on its own terms — provide an untrammelled discretion to act in equity and good conscience where that would be contrary to express statutory provisions. Given these terms, and as Judge Inglis stated in *8i Corp v Marino*:¹⁴

[16] While s 189(1) confers an equity and good conscience jurisdiction, it does not entitle the Court to rewrite the statute or cut across other statutory provisions on the basis that it considers it appropriate, for reasons of equity and/or good conscience, to do so.

[31] The outcome the Partnership seeks is inconsistent with both s 7 of the Minimum Wage Act, being outside the type of deduction possible, and with s 5 of the Wages Protection Act, not being one agreed to by Mr Cowan in writing.

[32] Whilst, therefore, we are satisfied that — contrary to Mr Cowan’s submission — the proposed question is one of law and not one of fact, in our view that question is not one that is seriously arguable.

[33] We therefore decline the Partnership’s application for leave to appeal the decision of the Employment Court.

Result

[34] The application for leave to appeal is declined.

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

Solicitors:
Preston Russell Law, Invercargill for Applicant
Copeland Ashcroft Law, Invercargill for Respondent

¹³ *Kidd v Beaumont*, above n 11, at [122]; and Employment Relations Authority decision, above n 3, at [86].

¹⁴ *8i Corp v Marino* [2017] NZEmpC 69, [2017] ERNZ 315.