

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA116/2021
[2021] NZCA 299**

BETWEEN COMMISSIONER OF POLICE
Applicant

AND NEW ZEALAND POLICE ASSOCIATION
INCORPORATED
Respondent

Court: Cooper and Collins JJ

Counsel: P J Radich QC and H P Kynaston for Applicant
S L Hornsby-Geluk for Respondent

Judgment: 6 July 2021 at 9.30 am
(On the papers)

JUDGMENT OF THE COURT

A The application for leave to appeal under s 214 of the Employment Relations Act 2000 is granted on the following question of law:

Are generic rotational positions, whether agreed between Police and employees or otherwise, and whether through an expression of interest process or otherwise, able to be established only in accordance with s 65(1)(d)(v) or can they be established under s 18 of the Policing Act 2008?

B Costs on the application are reserved pending determination of the substantive appeal.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] The Commissioner of Police (the Commissioner) seeks leave to appeal a decision of the Employment Court on a question of law pursuant to s 214 of the Employment Relations Act 2000.¹

[2] The present dispute between the Commissioner and the New Zealand Police Association Inc (the Association) concerns whether employees are entitled to be reimbursed for motor vehicle expenses under the Police Collective Employment Agreement (the CEA).

[3] We can grant leave only if we are satisfied that:

- (a) the applicant has identified a question of law that does not concern the construction of an individual employment agreement or a collective employment agreement;²
- (b) the question of law is genuinely arguable;³ and
- (c) the question of law 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.⁴

The dispute

[4] Clause 4.9.1(ii) of the CEA provides that work-related motor vehicle reimbursement (MVR) must be paid to Police employees required to travel to an “alternative place of work that requires them to travel a greater distance than they would normally travel to their normal place of work”.

¹ *Commissioner of Police v New Zealand Police Association Inc* [2021] NZEmpC 8, [2021] ERNZ 21 [Employment Court judgment].

² Employment Relations Act 2000, s 214(1).

³ See for example *Kidd v Cowan* [2020] NZCA 681 at [32].

⁴ Employment Relations Act, s 214(3).

[5] Section 18(4) of the Policing Act 2008 (the Act) states that unless provided to the contrary in the Act, the Commissioner has all the rights, duties, and powers of an employer in respect of Police employees. Section 65(1)(d)(v) of the Act enables the Commissioner to relocate an employee in order to “rotate an employee within the district in which he or she is stationed”.

[6] The proposed appeal concerns the application of the MVR clause to “generic rotational positions”, where Police employees are appointed to positions on the basis that they will move through different portfolios, work groups and potentially places of work on an ongoing basis. Such positions have been increasingly held by Police employees since 2012. The Commissioner’s position in the Employment Court was that MVR is not payable where employees hold generic rotational positions, because the rotation is not to an “alternative” place of work.⁵ The Commissioner contended that such generic rotational positions were allowed under s 18(4) of the Act.

[7] The Employment Court ruled that:

- (a) section 18(4) of the Act does not authorise the Commissioner to create “generic” rotation positions and that any system of rotation of employees needs to comply with s 65(1)(d)(v) of the Act;⁶ and
- (b) employees subject to rotation under s 65(1)(d)(v) of the Act are entitled to receive MVR.⁷

[8] The Commissioner applies for leave to appeal the Employment Court’s judgment. It is contended that the appointment of Police employees to generic rotational positions is undertaken pursuant to the Commissioner’s general powers as an employer under s 18(4) of the Act, not the power provided in s 65(1)(d)(v).

⁵ Employment Court judgment, above n 1, at [63(i)].

⁶ At [98]–[99].

⁷ At [129]; and *Commissioner of Police v New Zealand Police Association Inc* [2021] NZEmpC 34 [Supplementary Employment Court judgment] at [18].

[9] The question of law posed by the Commissioner is:

Are generic rotational positions, whether agreed between Police and employees or otherwise, and whether through an expression of interest process or otherwise, able to be established only in accordance with s 65(1)(d)(v) or can they be established under s 18 — and will the answer to that question then have the potential to make a difference to the Court’s construction of clause 4.9.1(ii) of the collective agreement?

Analysis

[10] A question of law relating to statutory interpretation, as distinct from the interpretation of a collective employment agreement, falls within this Court’s appellate jurisdiction.⁸ In this case, while the proposed question of law does engage to some degree the proper interpretation of the MVR clause in the CEA, the primary focus of the proposed question is upon the correct interpretation of ss 18(4) and 65(1)(d)(v) of the Act. We are therefore satisfied that the primary focus of the proposed question is upon the correct statutory interpretation of the Act, and the second aspect of the question need not be posed as part of the question for determination by this Court.

[11] We are also satisfied that the arguments raised by the Commissioner are genuinely arguable. We consider that the proposed question raises a matter of general or public importance because the dispute concerns a significant number of employees in an important public organisation.⁹

[12] We accordingly grant the Commissioner’s application for leave to appeal on the following question of law:

Are generic rotational positions, whether agreed between Police and employees or otherwise, and whether through an expression of interest process or otherwise, able to be established only in accordance with s 65(1)(d)(v) or can they be established under s 18?

⁸ *New Zealand Air Line Pilots’ Association Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 at [55] and [62].

⁹ See *New Zealand Professional Firefighters Union Inc v Fire and Emergency New Zealand* [2021] NZCA 60, [2021] ERNZ 54 at [19].

[13] Costs on the application are reserved pending determination of the substantive appeal.

Solicitors:

Buddle Findlay, Wellington for Applicant

Dundas Street Employment Lawyers, Wellington for Respondent