IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA458/2023
[2023] NZCA 631

BETWEEN	HOWARD TEMPLE, SAMUEL VALOR, FAITHFUL PILGRIM, NOAH HOPEFUL AND STEPHEN STANDFAST Applicants
AND	SERENITY PILGRIM, ANNA COURAGE, ROSE STANDTRUE, CRYSTAL LOYAL, PEARL VALOR AND VIRGINIA COURAGE Respondents

Court: Miller and Collins JJ

Counsel: P G Skelton KC and C B Pearce for Applicants
B P Henry, D J Gates and O K Thomas for Respondents

Judgment: (On the papers) 8 December 2023 at 10.00 am

JUDGMENT OF THE COURT

A Leave to appeal on the four questions of law identified by the applicants, listed at [3] below, is declined.

B We invite submissions on whether leave should be granted on the two questions of law set out at [17] below. Having regard to the impending vacation we direct that the Registrar liaise with counsel and set a timetable for the exchange of submissions (limited to 10 pages).

REASONS OF THE COURT

(Given by Miller J)

[1] The applicants seek leave to appeal to this Court from a judgment of the Employment Court finding that the respondents were employees.[1] This finding entitled the respondents to the protection of employment law.

[2] No general appeal lies from the Employment Court. The applicants must point to a question of law which, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for decision.[2]

[3] The applicants have posed four questions:

> (a) Did the Employment Court err by misdirecting itself on the requirements of s 6 of the ERA2000 (the meaning of "employee"), which incorporates the legal concept of a contract of service? (**Q1**)
>
> (b) Did the Employment Court err by misapplying the test in s 6, or in the alternative was the Court's conclusion (that the Plaintiffs were employees) so insupportable as to amount to an error of law? (**Q2**)
>
> (c) Did the Employment Court err by making an order under s 6(5) declaring that the plaintiffs were employees, without determining the identity of the plaintiffs' employer? (**Q3**)
>
> (d) Did the Employment Court err by conducting the trial in a manner that breached natural justice? (**Q4**)

[4] The first three of these questions concern s 6 of the Employment Relations Act 2000, which relevantly states that:

> **6 Meaning of employee**
>
> (1) In this Act, unless the context otherwise requires, **employee**—
>
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
>
> …
>
> (c) excludes a volunteer who—
>
> (i) does not expect to be rewarded for work to be performed as a volunteer; and

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1 *Pilgrim v Attorney General* [2023] NZEmpC 105, (2023) 19 NZELR 793 [judgment under appeal].

2 Employment Relations Act 2000, s 214(3). Any question of law must also be one that is seriously arguable: *Kidd v Cowan* [2020] NZCA 681 at [32].

(ii) receives no reward for work performed as a volunteer.

…

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority—

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[5] The respondents were all members of Gloriavale, a Christian community which has isolated itself from the wider community. In the judgment which is the subject of this application, Chief Judge Inglis described the Community as patriarchal and strictly hierarchical.[3] It draws a sharp distinction between men's work and women's work.[4]

[6] A Labour Inspector investigated the working conditions at Gloriavale, and following two site visits, concluded that the people who worked at Gloriavale were not employees. This led to a finding by the Labour Inspector that there was no jurisdiction for those working at Gloriavale to pursue a claim for minimum worker entitlements. Following this, two groups of former Gloriavale members brought proceedings against the Labour Inspector, through the Attorney-General, for breach of statutory duty. To establish the jurisdiction of the Labour Inspector, both groups sought recognition as employees. One group, in what are known as the *Courage* proceedings, are men.[5] The group in these proceedings, the present respondents, are women.[6]

[7] The respondents were born into the community and began to work there as children. They worked full time when they left school at around 15 years of age. Their

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3 Judgment under appeal, above n 1, at [4].
4 See [19].
5 *Courage v Attorney-General* [2022] NZEmpC 77, (2022) 18 NZELR 746.
6 Judgment under appeal, above n 1.

work was "domestic" in nature. They were assigned to Teams which undertook duties including cooking and laundry.[7]

[8] Judge Inglis heard both proceedings. Her judgment in *Courage*, in which she found the male plaintiffs were employees, has not been the subject of an application for leave to appeal.[8]

[9] In the judgment which is the subject of the proposed appeal, the Judge found that the present respondents were not volunteers.[9] Rather, they expected to be, and were, rewarded for their work through: being allowed to remain in the community; receiving the necessities of life, religious support and guidance; and the promise of spiritual redemption.[10] She found that an employment relationship existed but, as she had done in *Courage*, left the identity of the employer for later decision.[11] She did that because legal and operational structures at Gloriavale are complex, requiring further evidence and analysis.[12] She did not accept that it is impossible to find that an employment relationship exists without first identifying the employer.[13]

[10] The first question is an attempt to have this Court adopt a contract-centric rather than relationship-centric approach to s 6(1). We do not consider that the question merits leave. The legislation enjoins the Employment Court to take a substantive approach, focusing on the real nature of the relationship.[14] To do otherwise would be contrary to the social purpose of the legislation, as the United Kingdom Supreme Court held in *Uber BV v Aslam*.[15] This Court took a similar view when declining leave in *LSG Sky Chefs New Zealand Ltd v Prasad*.[16]

[11] The second question rests on the proposition that a judgment may be so unsupportable as to amount to an error of law. We accept the proposition, but the

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7 At [22].
8 See *Courage*, above n 5.
9 Judgment under appeal, above n 1, at [129].
10 At [122] and [127]–[129].
11 At [163], [183] and [185]–[186].
12 At [180], [183] and [184] referring to *Courage*, above 5, at [23].
13 At [183]–[184].
14 Employment Relations Act, s 6(2).
15 *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209 at [75].
16 *LSG Sky Chefs New Zealand Ltd v Prasad* [2018] NZCA 256 at [23].

threshold is very high.[17] We do not consider that it is capable of serious argument in this case. On the face of the judgment there is an evidential foundation for the findings made by the Judge with respect to the indicia of an employment relationship.[18] Notably, she found that the respondents worked and did so at the direction of a team led by the Overseeing Shepherd, the principal leader of the Community.[19] The relationship was long term and work was not optional.[20] She found that the respondents understood they were working for reward.[21] We return to this last point below.

[12] We find that the third question does not merit leave. We do not accept that it is impossible to find that an employment relationship exists without specifying which of a number of related entities under the ultimate control of the same people is the employer. The Employment Court should be left to complete its inquiry. We add that leave has been granted to appeal *E Tū Inc v Rasier Operations BV*, in which the Employment Court found that a number of entities were "sufficiently connected" such that the point of joint employment did not need to be decided.[22] The judgment in that appeal may inform the further decision of the Employment Court in this case.

[13] The fourth question concerns the conduct of the hearing by the Chief Judge. It is said that she denied the applicants natural justice in three respects. First, she ought to have recused herself because she had decided *Courage*. Second, she admitted irrelevant and prejudicial evidence, notably "allegations" of sexual abuse in the Community.[23] Third, she appointed an expert to give psychiatric evidence on the effects of being raised in a community such as Gloriavale and did so part way through the hearing, which meant the applicants could not cross-examine the respondents' witnesses with knowledge of the questions the expert was instructed to answer.

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17 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [27].

18 See judgment under appeal, above n 1, at [130]–[140].

19 At [140].

20 At [133]–[140].

21 At [129].

22 *Rasier Operations BV v E Tū Inc* [2023] NZCA 216; and *E Tū Inc v Rasier Operations BV* [2021] NZEmpC 192, (2022) 19 NZELR 475 at [89].

23 We note that Hopeful Christian, the Overseeing Shepherd during much of the time the respondents resided in Gloriavale, was sentenced to prison for sex offences against young women in Gloriavale in 1995, and did not pursue an appeal against his convictions: *R v Christian* CA594/95, 16 May 1996. Evidence relating to these events was admitted on a provisional basis, notwithstanding the objections of the applicants in these proceedings: *Pilgrim v Attorney-General* [2022] NZEmpC 145, [2022] ERNZ 622.

[14] We are prepared to assume that a serious breach of natural justice might amount to an error of law meriting review by this Court. But the mere fact that the Judge had heard *Courage* and made adverse factual findings is not enough to justify recusal. There must be reason for an objective observer to think she was not open to persuasion. We add that the evidence heard in each proceeding was not the same. The female respondents were in a different position to the men, and in *Courage* the Overseeing Shepherd did not give evidence.[24] In this case he did.

[15] There is no reason, on the face of the judgment, to think that allegations of abuse within Gloriavale had any bearing on the decision beyond being "relevant to an understanding of the background factual matrix".[25] And our attention has not been drawn to anything showing that the applicants were disadvantaged by the timing of the expert evidence. We have not been told, for example, that the Chief Judge was asked to recall witnesses for further cross-examination but declined to do so.

[16] For these reasons we decline to grant leave to appeal the four questions identified by the applicants.

[17] However, we are disposed to think there are narrower questions of law which may have wider significance for religious or volunteer organisations, and which are capable of decision on the existing record without embarking on the wider inquiry sought by the applicants. They are:

(a) whether the respondents in this case worked for hire or reward; and

(b) if not, whether they were volunteers for purposes of s 6(1)(c).

[18] The first of these questions involves consideration of intangible benefits such as religious support and guidance, spiritual salvation and the entitlement to remain so long as the person works. The second concerns the impact in law of the evidence that the respondents' agency was compromised in their circumstances at Gloriavale.

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24 *Courage*, above n 5, at [29].
25 Judgment under appeal, above n 1, at [11], n 12.

[19] Before deciding whether to grant leave on these questions we invite submissions from counsel. Having regard to the impending vacation we direct that the Registrar liaise with counsel and set a timetable for the exchange of submissions (limited to 10 pages). The decision will be made on the papers.

Solicitors:
Duncan Cotterill, Christchurch for Applicants
Shanahans Law, Auckland for Respondents