IN THE COURT OF APPEAL OF NEW ZEALAND

CA21/2010
[2010] NZCA 196

	BETWEEN	CORRECTIONS ASSOCIATION OF NEW ZEALAND INC Applicant
	AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing: 20 April 2010

Court: William Young P, O'Regan and Arnold JJ

Counsel: R E Harrison QC, J M Roberts and R J Warren for Applicant
P J Radich, J C Holden and K F Spackman for Respondent

Judgment: 17 May 2010 at 3 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B We make no award of costs.

REASONS OF THE COURT

(Given by O'Regan J)

Dispute about double bunking

[1] This is an application for leave to appeal against a decision of the Employment Court.[1] In that decision, Chief Judge Colgan dismissed four claims made by the applicant (the Union) involving allegations that the decision of the respondent (the Chief Executive) to increase the capacity of certain prison facilities by "double bunking" (installing a second bunk in a cell which has previously been used by only one prisoner) breached the Collective Employment Agreement between the parties.

This Court's jurisdiction

[2] The application requires us to consider the extent to which this Court has jurisdiction to hear appeals in circumstances where the questions raised by the intended appeal derive from alleged errors in the construction of a collective employment agreement.

[3] Section 214 of the Employment Relations Act 2000 provides for appeals to this Court from decisions of the Employment Court. The relevant parts of this section provide:

> **214 Appeals on questions 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 the Court of Appeal, appeal to the Court of Appeal against the decision; and section 66 of the Judicature Act 1908 applies to any such appeal.
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> ...
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> (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.

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[1] *Corrections Association of New Zealand Inc v The Chief Executive of the Department of Corrections* Employment Court Auckland AC 52/09, ARC 54/09, 18 December 2009.

Issue for determination

[4] We are satisfied that the points that the Union wishes to raise in support of the intended appeal are points of law and that given the general importance of the double bunking issue they are of sufficient general public importance to be submitted to this Court for decision. The issue in relation to the present application is, therefore, whether the Employment Court decision against which the Union wishes to appeal is "a decision on the construction of... a collective employment agreement", and thus not amenable to appeal under s 214(1).

Our approach

[5] In order to evaluate that issue we need to outline something of the background to the dispute and the way in which it was dealt with in the Employment Court, consider the application of s 214 in cases involving alleged misinterpretation of employment agreements, and evaluate the proposed points of appeal that the Union wish to pursue. We emphasise that our outlining of the background is to assist our analysis of the issue outlined above. We are not doing so for the purposes of evaluating the ultimate merits of the proposed appeal if leave were to be granted.

The Collective Employment Agreement

[6] The provision that was the focus of the Employment Court decision is the clause headed "Operational Capacity" (the Collective Employment Agreement does not have any numbering so we will refer to this as the operational capacity provision). It provides as follows:

> **Operational Capacity**
>
> The maximum capacity of each institution at the start of this agreement shall be recorded at the prison concerned, and a copy provided to CANZ.
>
> Where in any institution there are cells designated for "at risk" prisoners, such cells shall be used for "at risk" prisoners only unless otherwise agreed.

> The maximum capacity is not to be exceeded and every endeavour shall be made to reduce the number of prisoners when the agreed maximum capacity is reached.
>
> The maximum capacity shall only be varied when:
>
> - Extra prisoner accommodation and facilities are made available
> - Existing prisoner accommodation and/or facilities are made unavailable
>
> The variation shall be according to the capacity of the prisoner accommodation and facilities.
>
> All newly built accommodation shall be one prisoner per cell unless cells have been specifically designed for more than one prisoner.
>
> The maximum capacity shall only be varied after the Regional Manager and CANZ have consulted and negotiated on staffing arrangements and facilities in relation to the variation. The agreed Protocol for Managing Variations to Operating Capacity shall be used for this purpose. Written confirmation of any change to the maximum operating capacity in any institution shall be promptly forwarded to CANZ.

The Protocol

[7] The Protocol for Managing Variations to Operating Capacity to which reference is made in the operational capacity provision is not appended to the Collective Employment Agreement. The protocol was the product of an agreement by the Union and the Chief Executive in 2003 to standardise the process of consultation for variation as required under the Collective Employment Agreement. The introduction to the Protocol includes the following statement:

> This protocol does not add to or detract from the rights and obligations of the parties under the applicable employment agreement. It provides for a process to be followed for consultations when a variation to operating capacity is planned: the protocol itself defines such variations in broadly similar terms to the operational capacity provision of the collective employment agreement.

[8] The process for consultation is set out as a series of eight steps, beginning with the assessment of the need for a variation by the manager of the relevant prison, and including preconditions for varying operational capacity, formal advice to unions, and a formal process of meetings with records being kept. The eighth and final step is expressed as follows:

8 Confirming the Variation

Note that while it is highly desirable to reach a consensus, it is not necessary to reach an agreement.

Also note there is no need to enter into a formal variation of the collective agreement, but the maximum operating capacity recorded on site shall be amended accordingly.

If agreement is reached, record the fact in the consultation document. Then follow up with a letter to each Union advising of the details of the variation.

If agreement is not reached then, provided the consultation process has addressed all the relevant issues, advise the decision of PPS [the Public Prisons Service of the Department of Corrections] and confirm in writing.

A copy of the variation must be forwarded to National Office and the CANZ National Secretary.

The Employment Court decision

[9] Chief Judge Colgan summarised the effect of the operational capacity provision as follows:

> [58] The agreement therefore provides that the inmate maximum capacity of each institution (as recorded at the start of the collective agreement) is not to be exceeded. There is provision for variation of a maximum capacity (without the need to vary the collective agreement as a whole) and in the case of a proposed increase to this, only when extra prisoner accommodation and facilities are made available. Even then, a variation must be according to the capacity of prisoner and accommodation facilities including those extra facilities that are required to be made available.
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> [59] The intent of this provision is that the Chief Executive is not able to add minimally or nominally to prisoner facilities and then vary upwards, and disproportionately, the maximum capacity of the institution. The collective agreement contemplates a proportionality of increased inmates to facilities.

[10] Having considered the provisions in some detail, he set out two possible interpretations of the operating capacity clause as follows:

> [77] The first interpretation of the "*Operating Capacity*" clause is, in the context of this case, that an institution's maximum capacity can be increased when extra prisoner accommodation and extra prisoner facilities are made available but only according to the capacity of that additional prisoner accommodation and additional prisoner facilities. If additional prisoner accommodation is "newly built", it shall be one prisoner per cell unless cells have been specifically designed for more than one prisoner.

> [78] In this first possible interpretation of the "*Operating Capacity*" clause, reference to the agreed Protocol (including its requirement for negotiation as well as consultation) is for the purpose of addressing "*staffing arrangements and facilities in relation to the variation*" and requires consultation and negotiation only about staffing arrangements and facilities. The Protocol and its contents would not deal with the requirement for extra prisoner accommodation and extra prisoner facilities that must be made available, and consultation and negotiation about these.
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> [79] To achieve compliance with the collective agreement, the defendant must make available extra prisoner accommodation and extra prisoner facilities and the muster increase must equate with the capacity of these extra prisoner accommodations and extra prisoner facilities. If the defendant complies with the foregoing requirements, then no consultation or negotiation with the union is required on that issue. Consultation and negotiation deal only with staffing arrangements and facilities in relation to the variation under the Protocol.
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> [80] The alternative interpretation of the "*Operating Capacity´*clause is that the Protocol (and therefore a requirement for consultation and negotiation) extends to consultation and negotiation on extra prisoner accommodation and extra prisoner facilities as well as to a requirement to consult and negotiate on staffing arrangements and facilities. That interpretation, although not in apparent accordance with the wording of the main collective agreement, does make sense of the Protocol's reference to "*inmate accommodation*" and "*inmate facilities*" in that document's definitions. These would be arguably meaningless if the first interpretation of the collective agreement (set out above) were to be accepted.

[11] He chose between those two alternatives as follows:

> [83] After much hesitation, because both interpretations are tenable, I find the second interpretation to be that which the parties must have intended. That is for the following reasons. First, the Protocol existed in its current form at the time the collective agreement was settled. So, despite using the words they did in the "*Operating Capacity*" clause, the parties were aware of the broader scope of the Protocol and its numerous references to consultation about, and negotiation over, inmate accommodation and inmate facilities. The parties clearly intended the Protocol to be incorporated in the collective agreement's process of increasing prison operating capacities. The Protocol and its predecessors had been applied in the past in respect of such exercises.

[12] The Judge's adoption of that approach meant that he did not directly confront the issue as to whether the double bunking had increased the maximum capacity of the institutions in a manner which breached the operational capacity provision. At [107] of his judgment he stated that the installation of additional bunks in single cells to house increased muster numbers "is not and will not be compliant with the collective agreement". However, he then concluded at [112] that the consultation

and negotiation obligations had been met by the Chief Executive. That led him to conclude at [113] that the double bunking of the prisons, both actual and planned, was not in breach of the Collective Employment Agreement, essentially because the Protocol did not require the Union's agreement to double bunking.

Issues arising from the Employment Court judgment

[13] On the face of it, the consultation and negotiation required under the operational capacity provision (which engages the process outlined in the Protocol) relates only to "staffing arrangements and facilities in relation to the variation". While the Protocol envisages that consultation will also deal with the extent of the variation and the way in which the increased numbers of prisoners will be provided for, that appears to be simply because those details will be relevant to the impact on staff and therefore the required staffing arrangements and facilities. The operational capacity provision does not, itself, call for consultation on the variation of capacity or on the required adjustment to prisoner accommodation and facilities resulting from such variation. Rather it sets out a requirement about the maximum capacity of each institution and a prohibition on a variation in maximum capacity unless extra prisoner accommodation and facilities are made available.

[14] Chief Judge Colgan appeared to consider that this aspect of the operational capacity provision required an increase in facilities to accommodate the extra numbers which was broadly proportionate to the increase in inmate numbers. There are indications in his judgment that such a proportionate increase has not, in fact, occurred. For example he recorded at [30] that there had not been a proportionate increase in dining facilities in one prison. However, as already noted, the approach he took to the case meant that he did not need to make, and it appears he did not make, actual findings of fact on such issues.

[15] As indicated earlier, we would certainly be prepared to permit the union to argue that the interpretation adopted by the Judge was wrong, in that it appears to subsume the consultation obligation which relates only to staff arrangements and facilities into the provisions relating to inmate numbers and facilities which do not appear to be a required topic of consultation but rather a matter of absolutes. There

appears to be a strong argument to the effect that the provisions have either been complied with or they have not: the extent of consultation does not appear to have any impact on that.

Scope of s 214

[16] This Court cannot grant leave to appeal under s 214(1) unless it is satisfied that the decision being appealed is not a decision on the construction of an individual employment agreement or a collective employment agreement. This restriction on the Court's jurisdiction has been described as a relic of times when it was thought that the terms of industrial awards might be construed over-legalistically by the ordinary courts.[2] Nevertheless, the limitation has been repeated in a number of iterations of the legislation over the years.

[17] There are a large number of decisions about s 214. Some have drawn a distinction between questions of interpretation and questions of principle going beyond the particular terms of the contract, with the latter giving rise to jurisdiction.[3] Thus the Court in *Attorney-General v NZPPTA* found jurisdiction to consider whether the Employment Court erred in its approach in determining whether an alleged implied term was a term of the contract.[4] More recently, the Court allowed leave to decide whether the Employment Court erred by considering historical negotiations and contracts in construing the meaning of the contract.[5]

[18] We recognise that section 214 does not wholly preclude appeals against Employment Court cases involving the interpretation of a contract. Leave to appeal may be granted where the Employment Court has adopted irregular or unorthodox construction techniques.[6] Nevertheless, the Court in *Secretary for Education v Yates*

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2 *TISCO Ltd v Communication & Energy Workers Union* [1993] 2 ERNZ 779 (CA) at 781 per Cooke P.

3 See *Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558 (CA) at 566 per Richardson P; *Secretary for Education v Yates* [2004] 2 ERNZ 313 (CA) at [20] per McGrath J and at [82] per William Young J.

4 *Attorney-General v NZPPTA* [1992] 1 ERNZ 1163 (CA).

5 *Silver Ferns Farms Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2009] NZCA 394 at [8].

6 *Secretary for Education v Yates* [2004] 2 ERNZ 313 (CA).

warned against too readily concluding that there had been an error of principle.[7] Thus in *TLNZ Auckland Ltd v Neenee*, the Court refused leave to appeal despite its view that the Employment Court's construction of the contract was wrong.[8]

[19] In *Waitemata District Health Board v New Zealand Public Servants Association*, Chambers J commented:[9]

> What amounts to "construction" has been the subject of such subtle interpretation that no employment lawyer could be confident in advising a client dissatisfied with an Employment Court decision involving the interpretation of an employment agreement whether an appeal to this court was barred by the construction privative provision...
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> I think that, at some point in the near future, either this court or the Supreme Court will need to review the jurisprudence surrounding s 214... I would have to say that, in some of those cases, I think this court may have exceeded its jurisdiction. It could not resist the temptation to correct legal error when it perceived it. I confess to that temptation myself in the present case. Having seen what was in my view error in the Employment Court's approach, I did look to see whether I could categorise that error as an error other than one of construction. In the end, I could not, but I confess I tried.

[20] We agree that some fine distinctions have been made in judgments dealing with applications under s 214. However, we do not see this case as requiring a review of those earlier cases.

Evaluation of questions of law for appeal

[21] Against the above factual and legal background, we now turn to consider the questions of law that the Union wishes to raise on appeal.

[22] The first question is:

> Did the Employment Court err in law in treating and in particular interpreting the Protocol as prevailing over, or alternatively as having a status equal to, otherwise applicable provisions of the Collective Agreement?

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7 At [20], per McGrath J.

8 *TLNZ Auckland Ltd v Neenee* CA67/06, 22 August 2006; see also *Waitemata District Health Board v New Zealand Public Servants Association* [2006] ERNZ 1029 (CA).

9 At [30] and [44].

[23] The Union wishes to challenge the Judge's conclusion that the Protocol was incorporated into the Collective Employment Agreement because it was referred to in the operational capacity provision and that it therefore contained contractual rights and obligations between the parties. This, it argues, is not a decision on the construction of a collective employment agreement, and thus amenable to appeal under s 214.

[24] We consider that the requirement in the operational capacity provision that the Protocol be used for the consultation process envisaged by the provision is clear. The parties have contracted to engage in a process and have agreed what the process is. We do not think it is arguable that the stipulation as to the process to be adopted in the Protocol is other than contractual, and in any event we see this as being a question of interpretation of the operational capacity provision, and therefore a matter of construction of that agreement. This takes the issue outside the permitted bounds of s 214.

[25] The second question is:

> Did the Employment Court err in law by misdirecting itself as to the correct approach in principle to the interpretation of the Collective Agreements's operating capacity provision?

[26] As our earlier analysis indicates, we see any errors in the interpretation of the Employment Agreement as just that: errors of interpretation. We do not consider that there is any proper basis for argument that there has been a misdirection as to the proper approach to interpretation in this case.

[27] The third question is:

> Did the Employment Court err in law by ignoring or failing to apply, or alternatively failing to give reasons for not applying, previous decisions of the Employment Court which address the correct interpretation of the relevant provisions of the Collective Agreement and/or the Protocol?

[28] If any such error was made, the error would be an error of interpretation rather than error of law of any other character. Thus, it is not amenable to appeal under s 214.

[29] The fourth question is:

> Did the Employment Court err in law by misinterpreting the Protocol as having the effect set out in paras [80] – [98] of the Judgment thereby ignoring or failing to give or give effect to (inter alia) those clauses of the Protocol set out in paras [68] – [69] of the Judgment?

[30] Again, we see these alleged errors as errors of interpretation of a collective employment agreement and therefore not amenable to appeal. Dr Harrison QC for the Union submitted that the Protocol was not a collective employment agreement at all, and therefore any error of interpretation in that document did not fall outside the scope of s 214. He relied on the introductory statement to the Protocol that "this protocol does not add to or detract from any of the rights and obligations of the parties" as showing that the Protocol was intended to be independent from the Collective Employment Agreement. We are unable to accept that submission. It is clear that by adopting a protocol as the agreed basis for the consultation procedure required under the Collective Employment Agreement, the Union and the Chief Executive have agreed that this is part of the collective agreement between them.

[31] The fifth and final question is:

> Did the Employment Court err in law by concluding that the respondent's double bunking of the four penal institutions in question, both actual and planned, was not in breach of the collective agreement?

[32] That is quintessentially a question of interpretation of the agreement and clearly not amenable to appeal under s 214.

Conclusion

[33] We conclude that, while the Union's proposed appeal does appear to raise genuinely arguable questions of law, all of the questions are matters of interpretation of the collective employment agreement between the Union and the Chief Executive, and not therefore amenable to appeal to this Court. We therefore dismiss the application for leave to appeal.

Costs

[34] We are satisfied that, in the circumstances of this case, no award of costs should be made.

Solicitors:
Hesketh Henry, Auckland for Applicant
Minter Ellison Rudd Watts and Crown Law Office, Wellington for Respondent