IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA765/2023
[2024] NZCA 223

BETWEEN	KEVIN BREEN Applicant
AND	PRIME RESOURCES COMPANY LIMITED Respondent

Court: Courtney and Katz JJ

Counsel: S R Mitchell KC for Applicant
S C Langton an R L White for Respondent

Judgment: (On the papers) 12 June 2024 at 11.30 am

JUDGMENT OF THE COURT

The application for leave to appeal is granted on the following question of law:

> **Whether the Employment Court erred in its construction and application of s 103(3) of the Employment Relations Act 2000.**

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] Kevin Breen succeeded in part in the Employment Relations Authority in a personal grievance claim against his former employer, Prime Resources Company Ltd (Prime Resources).[1] Both parties challenged the Authority's determination. In the

[1] *Breen v Prime Resources Company Ltd* [2022] NZERA Auckland 285 [ERA determination].

Employment Court, Prime Resources argued that Mr Breen's complaint was not a personal grievance for the purposes of s 103 of the Employment Relations Act 2000 (ERA) because it derived solely from an issue over the interpretation of the employment agreement and the Authority therefore lacked the jurisdiction to determine it. The Employment Court accepted this argument.[2] It held that Mr Breen's remedy was to pursue the dispute process under s 129 of the ERA and set aside the Authority's award.[3] As a result of its conclusion on jurisdiction, the Employment Court found it unnecessary to consider Mr Breen's challenge to the Authority's determination.[4] However, the Judge did indicate for the purpose of costs that, had there been no jurisdictional bar, the Court would have found in favour of Mr Breen.[5]

[2] Mr Breen applies for leave to appeal the Employment Court's decision. The application is bought under s 214(1) of the ERA and s 56(1)(c) of the Senior Courts Act 2016. Section 214(3) of the ERA provides that this Court may grant leave if the question of law raised in the proposed 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. Appeals under s 214 are limited to "significant questions of law".[6] Whether the proposed appeal is seriously arguable is relevant to the assessment of whether the question of law should be determined by this Court.[7]

Background

The circumstances of the complaint

[3] In April 2021, Prime Resources, a property developer, employed Mr Breen as a sales manager to sell apartments off the plan. Clause 4.2 of the employment agreement provided that Mr Breen would not be paid for "the hour you are not working because of your personal matter or ACC etc". Clause 4.3 provided that

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2 *Breen v Prime Resources Company Limited* [2023] NZEmpC 199, (2023) 20 NZELR 161 [Employment Court decision].
3 At [29].
4 At [28].
5 At [30].
6 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [19].
7 *Kidd v Cowan* [2020] NZCA 681 at [32]; and *FGH v RST* [2023] NZCA 204, (2023) ERNZ 321 at [53].

Prime Resources were entitled to make a rateable deduction from Mr Breen's remuneration or hours not worked in accordance with cl 4.2.

[4] In August 2021, the country went into a COVID-19 lockdown. Mr Breen advised Prime Resources that he would work from home. But on 1 September 2021, the managing director of Prime Resources, Mr Chung, emailed Mr Breen to say that Prime Resources would not pay Mr Breen's full salary for August as Mr Chung did not consider Mr Breen was working full time during August. Prime Resources did not pay the full salary for either August or September. Mr Breen maintained that he had worked full time throughout and was entitled to his full salary. Following a mediation in September 2021, Prime Resources paid Mr Breen his outstanding pay for August and September in full, albeit late.

The personal grievance claim in the Employment Relations Authority

[5] In 2022, Mr Breen brought a personal grievance claim in the Employment Relations Authority claiming that he had been unjustifiably disadvantaged as a result of Prime Resources paying his salary late in August and September 2021. Prime Resources contended that Mr Breen did not work full time during that period and that, under the terms of Mr Breen's employment contract, it was not required to pay him for hours he did not work. The Authority found that:[8]

> [46] There is no evidence that establishes that Mr Breen was not working the full complement of hours during August 2021. …
>
> [47] There is also no evidence that Mr Breen had taken ACC or any personal time. …
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> [48] Whilst [Prime Resources] may have considered initially that the reference to "etc" covered the Covid lockdown situation I observe that differed from personal matters and ACC, because that was outside of Mr Breen's control. Moreover full payment of Mr Breen's salary was subsequently made by [Prime Resources] so that is not an issue before the Authority.

8 ERA determination, above n 1.

[6] The Authority upheld Mr Breen's claim in respect of the August payment and awarded him $2,000 in compensation for humiliation, loss of dignity and injury to feelings.[9]

The challenges in the Employment Court

[7] Mr Breen challenged the Authority's determination in relation to the quantum of the award. Prime Resources challenged the determination in relation to the finding of underpayment and of unjustified disadvantage arising from it. Chief Judge Inglis noted that Mr Breen's challenge was brought on a "non-de novo" basis and Prime Resources' challenge on a de novo basis.[10]

[8] Prime Resources asserted, for the first time, that the Authority had lacked the jurisdiction to consider Mr Breen's claim because the claim arose solely from the interpretation of the employment agreement. It relied on s 103(3) of the ERA which provides that, for the purposes of bringing a personal grievance claim:

> … unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.

[9] Prime Resources contended that Mr Breen's claim was not a personal grievance but, rather, a dispute to be determined under s 129(1) of the ERA.

[10] Mr Breen did not accept that the interpretation of the employment agreement was the sole issue between the parties. The Judge recorded the position as follows:

> [10] Counsel for Mr Breen submitted that while the parties were at odds over the application and/or interpretation of cl 4, that was not the sole focus of the difficulties between them. Rather, broader issues were engaged, including about the way in which Mr Chung had dealt with Mr Breen and the failure to pay remuneration on time. All of this, it was said, gave rise to a disadvantage which was actionable.

[11] The Employment Court upheld Prime Resources' challenge on the jurisdictional point. The Judge reviewed a case from this Court, *Auckland College of*

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9 At [60]–[62].
10 Employment Court decision, above n 2, at [5].

Education v Hagg, which concerned the application of the predecessor section to s 103(3).[11] She held that the way a litigant frames their claim is not the central issue, nor does it impact the jurisdictional bar imposed by s 103(3). Rather the central issue is "what the claim derives from".[12] The Judge then considered cases concerned with what an action derives from,[13] before concluding that:[14]

> [24] It may be said that at its heart, every unjustified disadvantage claim engages issues about the interpretation, application and operation of an employment agreement, and what was referred to in [*Clarkson v Child Youth & Family*] as a "technical" approach may lead to practical difficulties in particular cases, including the case currently before the Court. However, an interpretation which recognises, without blurring or undermining, the distinctions drawn by the Act between disputes and personal grievances, along with the processes Parliament had in mind for their resolution, is to be preferred. …

[12] The Judge then went on to find that, despite Mr Breen having made complaints that were unrelated to the interpretation of the employment agreement, his claim was properly viewed as deriving solely from a disputed interpretation of the employment agreement and, as a result, no personal grievance arose:

> [25] … The actions complained of (reduction in pay and late payment) were allegedly contrary to the provisions of the employment agreement and were unjustified. However, the company's actions were based on a genuine interpretation of cl 4 of the employment agreement. The company's interpretation may well have been wrong (a point I do not need to decide), but the claim was an action deriving solely from a disputed interpretation of an employment agreement. Therefore, the dispute procedure applied, and no grievance based on disadvantage arose.

Should leave be granted?

[13] The following question is proposed:

> Was the Employment Court wrong to find that section 103(3) is a jurisdictional bar to the Appellant's personal grievance, due to a dispute as to the interpretation of the Employment Agreement?

[14] In submissions in opposition to the leave application, counsel for Prime Resources says that Mr Breen has attempted to reframe the circumstances of

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11 At [16], citing *Auckland College of Education v Hagg* [1996] 2 NZLR 402 (CA).
12 Employment Court decision, above n 2, at [17].
13 At [18]–[22].
14 Footnote omitted.

how the dispute arose to suggest an error of law warranting the grant of leave when, in fact, the proposed appeal is essentially a challenge to the Employment Court's findings of facts. Counsel points out that the issue of whether Mr Breen had worked the requisite number of hours was canvassed in evidence and that the Employment Court also had before it emails between the parties on the issue.

[15] The issue of Mr Breen's hours was certainly considered in the Authority and resolved in Mr Breen's favour, as we have already noted. There is no indication in the Employment Court decision that the Judge intended to interfere with the finding of the Authority on this point. The only finding of fact evident from the decision is that Mr Chung's view of how the employment agreement should be interpreted was genuinely held.

[16] The broad criticisms underlying the proposed question are that the Judge (1) failed to take an objective approach to the question whether Mr Breen's claim derived solely from a dispute over interpretation and instead relied on Mr Chung's personal view of how the agreement should be interpreted and (2) failed to take into account that Mr Breen's complaint was directed at whether the provisions in the employment agreement applied at all.

[17] Counsel maintain that the law is settled, there is no ambiguity in the cases and differences in the outcome of the cases cited by the Judge are attributable to their different facts. However, the criticisms made of the decision in this case, in our view, raise significant questions of law that are seriously arguable. It does appear that there is a need for clarification of the approach to the proper construction and application of s 103(3).

Result

[18] The application for leave to appeal is granted. The question for consideration on appeal is whether the Employment Court erred in its construction and application of s 103(3) of the ERA.

Solicitors:
Hesketh Henry, Auckland for Applicant
LangtonHudson Lawyers, Auckland for Respondent