**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 127/2014**
**[2014] NZSC 196**

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| BETWEEN | TERRANOVA HOMES AND CARE LIMITED<br>Applicant |
| AND | SERVICE AND FOODWORKERS UNION NGA RINGA TOTA INCORPORATED<br>First Respondent |
| | KRISTINE BARTLETT<br>Second Respondent |

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| Court: | McGrath, William Young and Glazebrook JJ |
| Counsel: | M T Scholtens QC and P A McBridge for the Applicant<br>P Cranney for the Respondents |
| Judgment: | 22 December 2014 |

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal is dismissed.**

**B There is no order for costs.**

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**REASONS**

## Introduction

**[1]** This is an application for leave to appeal against a judgment of the Court of Appeal[1] which upheld an Employment Court decision on preliminary questions in relation to two proceedings in that Court concerning the Equal Pay Act 1972.[2]

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1 *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516 [*Terranova* (CA)].

[2] The first proceeding is a claim by Ms Bartlett, a rest home caregiver. She claims both male and female caregivers are paid at a lower rate than would be the case if care giving of the elderly was not predominantly performed by women. The second is a claim by the union, on behalf of 15 caregivers employed by Terranova, asking for a statement, pursuant to s 9 of the Equal Pay Act, of the general principles to be observed for the implementation of equal pay.

[3] The Employment Court agreed to consider a number of preliminary questions on the grounds that the hearing of the proceedings was likely to be lengthy and complex and answers to those questions might reduce the evidential ambit of the case.[3]

[4] On appeal, the Court of Appeal held that the answers given by the Employment Court to the first and sixth questions (the only ones at issue on appeal)[4] were correct. These questions and answers were:

> [Question 1]
>
> In determining whether there is an element of differentiation in the rate of remuneration paid to a female employee for her work, based on her sex, do the criteria identified in s 3(1)(b) of the Equal Pay Act require the Court to:
>
> (h) Identify the rate of remuneration that would be paid if the work were not work exclusively or predominantly performed by females, by comparing the actual rate paid with a notional rate that would be paid were it not for that fact; or
>
> (i) Identify the rate that her employer would pay a male employee if it employed one to perform the work?
>
> *Answer:* Section 3(1)(b) requires that equal pay for women for work predominantly or exclusively performed by women, is to be determined by reference to what men would be paid to do the same work abstracting from skills, responsibility, conditions and degrees of effort as well as from any systemic undervaluation of the work derived from current or historical or structural gender discrimination.

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2 *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157, (2013) 10 NZELC 79–034 [*Terranova* (Employment Court)].

3 *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 51.

4 The parties had identified a question of law and leave to appeal to the Court of Appeal was granted on the basis of that question. After the hearing, the Court of Appeal reformulated the question. The new question asked whether the answers given by the Employment Court to the first and sixth questions were wrong in law. This amendment was agreed to by Terranova. The reformulated question was set out in a minute of the Court of Appeal on 5 March 2014.

…

[Question 6]

In considering the s 3(1)(b) issue of "…the rate of remuneration that would be paid to male employees with the same, or substantially similar, skills, responsibility, and service, performing the work under the same, or substantially similar, conditions and with the same or substantially similar, degrees of effort", is the Authority or Court entitled to have regard to what is paid to males in other industries?

*Answer:* They may be if those enquiries of other employees of the same employer or of other employers in the same or similar enterprise or industry or sector would be an inappropriate comparator group.

[5] Section 3(1)(b) of the Equal Pay Act provides:

3 Criteria to be applied

(1) Subject to the provisions of this section, in determining whether there exists an element of differentiation, based on the sex of the employees, in the rates of remuneration of male employees and female employees for any work or class of work payable under any instrument, and for the purpose of making the determinations specified in subsection (1) of section 4, the following criteria shall apply: …

(b) for work which is exclusively or predominantly performed by female employees, the rate of remuneration that would be paid to male employees with the same, or substantially similar, skills, responsibility, and service performing the work under the same, or substantially similar, conditions and with the same, or substantially similar, degrees of effort.

[6] In a memorandum filed on 26 November 2014, the respondents agreed that the matter is one of general public importance and commercial significance and indicated that they did not oppose the application for leave to appeal.

**Minute of the Court**

[7] On 10 December 2014 this Court sent a minute to the parties asking for submissions on the following questions:

(a) Is the proposed appeal in the nature of an appeal on interlocutory matters?

(b) Is it necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal before the proceeding is concluded?

(c) Is it in the interests of justice for the Court to hear the appeal "in the abstract" divorced from:

(i) the setting of principles under s 9; and/or

(ii) from consideration of Ms Bartlett's case (and thus in a factual vacuum)?

**The parties' submissions**

*The applicant's submissions*

[8] The applicant submits that the proposed appeal is not in substance an appeal with regard to interlocutory matters. In its submission, the proposed question on appeal would settle the interpretation of s 3 of the Equal Pay Act. Further, the proposed appeal is not against an "interlocutory application" as defined in s 4 of the Supreme Court Act 2003. It is not in relation to a matter of procedure. Nor does it relate to relief ancillary to the relief claimed.

[9] Finally, it is submitted that the application of principles under s 9 to the interpretation of s 3 in accordance with the judgment of the Court of Appeal would necessarily require some form of complex social and historical analysis at significant cost and time to the parties and courts. The applicant submits that it is not apparent how the existence of such analysis could assist this Court in interpreting the Act. If this proposed application for leave appeal is successful, no such analysis would be necessary.

[10] In the applicant's submission, justice would not be served if the parties were required to go through a lengthy and complex process if, on ultimate appeal to this Court, the question of the scope of the enquiry under s 3 of the Equal Pay Act is not so broad as to encompass pay equity. In addition, this is a test case.

*The respondents' submissions*

[11] The respondents submit that the proposed appeal is in the nature of an appeal on interlocutory matters and that it is not necessary in the interests of justice to hear and determine it before the proceedings are concluded. Although "interlocutory application" is defined in s 4, it is submitted that the principle underlying s 13(4) can also be applied to situations that do not fit "strictly" within the definition.[5]

[12] The respondents submit that difficulties will arise with the limited nature of the proposed appeal. In answering questions seven and eight, the Employment Court concluded equal pay does not exist if the female rate is affected by gender discrimination, even if it is the same rate the employer pays, or would pay, to male employees.[6] In answering question four, the Employment Court concluded that the employer did not have a complete defence to an equal pay claim by proving it pays the four males the same pay rates as the 106 females and would pay additional or replacement males those same rates.[7]

[13] The answers to these questions were not challenged in the Court of Appeal. The respondents submit therefore that a conclusion in favour of the employer on questions one and six is unlikely to bring the litigation to an end, in light of the unchallenged answers to questions four, seven and eight.

[14] Further, in the respondents' submission, there may be injustice in this Court seeking to deal definitively or finally with the issues at this stage. The full ramifications of the relatively abstract legal principles thus far determined will only become fully clear upon application to particular facts. That process will inevitably serve to more fully elucidate the nature and parameters of the principles themselves.

[15] The respondents accept that the applicant may be assisted if there is a decision of this Court which determines that "potential social and historical factors" cannot properly be referred to by the Employment Court in equal pay cases (contrary

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5 As this Court has previously stated, "[t]he policy of the Supreme Court Act does not favour appeals to this Court on preliminary points that can be raised at the conclusion of the process": *Orlov v New Zealand Law Society* [2013] NZSC 94.

6 *Terranova* (Employment Court), above n 2, at [118].

7 At [118].

to the view of the Court of Appeal). However, the potential injustice of a determination of that issue in a vacuum heavily outweighs any "injustice" relied upon by the applicant.

**Discussion**

[16] While not strictly an appeal from an interlocutory application, as defined in the Supreme Court Act 2003, the proposed appeal nevertheless is an appeal on preliminary questions. There remains a residual discretion for this Court to refuse an application for leave to appeal under s 13(1), even if one of the criteria in s 13(2) is met.[8]

[17] The Court of Appeal has indicated its view that the next stage of the proceedings should be the setting of principles under s 9 of the Equal Pay Act.[9] At least until that has been done[10] and considered by the Court of Appeal in any appeal, we consider the application for leave to be premature.[11]

[18] We therefore consider that the application for leave to appeal should be dismissed. However, this is without prejudice to the applicant's ability to challenge any of the findings of the Court of Appeal on the preliminary questions it dealt with in any subsequent appeal before this Court.

**Result**

[19] The application for leave to appeal is dismissed.

[20] Given that the application is dismissed, despite being a matter of general or public importance, only because it is premature, there is no order for costs.

Solicitors:
McBride Davenport James, Wellington for the Applicant
Oakley Moran, Wellington for the Respondents

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8 *LFDB v SM* [2014] NZSC 197 at [20].
9 *Terranova* (CA), above n 1, at [239].
10 Assuming the Employment Court agrees that this is the next logical step.
11 We make no comment at this stage on whether the application should wait until Ms Bartlett's case has also been dealt with.