IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA163/2024
[2024] NZCA 386

BETWEEN	NEW ZEALAND STEEL LIMITED Applicant
AND	E TŪ INCORPORATED Respondent

Court:	Mallon and Palmer JJ
Counsel:	C B Pearce for Applicant P Cranney and E Griffin for Respondent
Judgment: (On the papers)	16 August 2024 at 10 am

JUDGMENT OF THE COURT

A The application for leave to appeal is granted.

B The approved question is whether the Employment Court erred in law by interpreting the collective agreement in light of past practice which was disputed and a proposed amendment that was not agreed.

C We make no order for costs.

REASONS OF THE COURT

(Given by Palmer J)

[1] On 26 February 2024, Judge Holden in the Employment Court issued a judgment in proceedings between the parties.[1] New Zealand Steel Ltd (NZ Steel) the applicant, applies for leave to appeal, which E Tū Inc, the respondent, opposes.

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1 *E Tū Inc v New Zealand Steel Ltd* [2024] NZEmpC 29, (2024) 20 NZELR 369 [Employment Court decision].

What happened?

[2] The Employment Court judgment deals with a challenge to two Employment Relations Authority determinations on the interpretation of cl 80.6.1 of the collective agreement between NZ Steel and E Tū (the Agreement), which reads:[2]

> 80.6.1 Where an employee is requested to work outside his/her established ordinary hours of work and as a result is unable to complete his/her ordinary hours of work, he/she shall be paid make-up pay for those lost ordinary hours, paid at expected weekly/hourly earnings as defined above.

[3] While the Glenbrook Steel Mill is shut down for maintenance, NZ Steel employees work a 24/7 "Critical Path" roster and are paid at special rates. The parties disputed whether, under the Agreement, employees should get "make-up pay" in the weeks where they transition onto or off the Critical Path roster.

[4] E Tū submitted an employee's "ordinary hours", which are set out in cl 11 of the Agreement, referred to their rostered hours so if they missed any rostered hours because they were asked to work different hours, they would still receive make-up pay for the original rostered hours. NZ Steel submitted "ordinary hours" referred to the number of hours an employee ordinarily works so they would only receive make-up pay if they were unable to complete the full number of hours they ordinarily work as a result of a request to work different hours.

[5] The Court held that make-up pay is payable where, at the request of NZ Steel, an employee works outside their ordinary hours of work and, as a result, cannot complete their ordinary hours.[3]

[6] NZ Steel applies for leave to appeal on the following questions:

> (a) Did the Employment Court err in law by failing to give the phrase "ordinary hours" in cl 80.6.1 its natural and ordinary meaning in the context of the contract as a whole? (**Question 1**)
>
> (b) Did the Employment Court err in law by failing to give effect to the words "unable to complete" in cl 80.6.1? (**Question 2**)

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2 *E Tū Inc v New Zealand Steel Ltd* [2022] NZERA 166; and *E Tū Inc v New Zealand Steel Ltd* [2022] NZERA 677.

3 Employment Court decision, above n 1, at [51].

(c) Did the Employment Court err in law by failing to consider the relevant background in interpreting cl 80.6.1? (**Question 3**)

(d) Did the Employment Court err in law by taking into account an amendment proposed (but abandoned) in 2018 when interpreting cl 80.6.1? (**Question 4**)

(e) Did the Employment Court err in law by failing to apply the *contra proferentem* rule? (**Question 5**)

Submissions

[7] Mr Pearce, for NZ Steel, submits it is seriously arguable that the Employment Court made operative errors of interpretative principle that warrant appellate intervention. The issues are of general and wider public importance because they affect a large number of current and future employees of New Zealand's largest single-site employer and the Agreement is renewed on a triennial basis. In particular, and among other things, he submits the Court's interpretation:

(a) fails to consider the long-standing difference of views between the parties over how make-up pay should apply, known to the parties when the Agreement was negotiated in 2011; and

(b) wrongly considers, as relevant background, the subjective content of a NZ Steel proposal for amendment to the Agreement in 2018, that was abandoned, and draws the wrong conclusion from it.

[8] Mr Cranney and Ms Griffin, for E Tū, submit that the proposed appeal raises no question of general or public importance and there are no questions of principle going beyond the construction of this particular agreement. In particular, and among other things, they submit the Court resolved sharp factual disputes between the parties about past practice and the 2018 attempt to alter the clause in E Tū's favour, are questions of fact, not questions of law.

Should leave be granted?

[9] Under s 214 of the Employment Relations Act 2000, a party can appeal an Employment Court decision on a question of law, with leave of this Court. Appeal of decisions on the construction of a collective employment agreement are barred except

in relation to "questions of principle going beyond the construction of the particular contract".[4] Under s 214(3) we may grant leave if, in our opinion, the question of law involved in the 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". The question of law must be seriously arguable.[5]

[10] We consider it is seriously arguable whether the Employment Court should have adopted an approach of interpreting the Agreement by relying on a practice that was disputed by one of the parties and on a proposed amendment to the Agreement in 2018 that was not agreed. Those are questions of interpretive principle which go beyond the construction of the Agreement. They are of general importance and ought to be submitted to the Court of Appeal for decision.

Result

[11] The application for leave to appeal is granted.

[12] The approved question is whether the Employment Court erred in law by interpreting the collective agreement in light of past practice which was disputed and a proposed amendment that was not agreed.

[13] No costs are sought so none are awarded.

Solicitors:
Russell McVeagh, Auckland for Applicant
Oakley Moran, Wellington for Respondent

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4 Employment Relations Act 2000, s 214(1); and *New Zealand Airline Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 at [30].

5 *FGH v RST* [2023] NZCA 204, [2023] ERNZ 321 at [53].