

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 36/2024
[2024] NZSC 83

BETWEEN NZTSOS INCORPORATED
Applicant

AND MINISTER FOR COVID-19 RESPONSE
First Respondent

AND DIRECTOR-GENERAL OF HEALTH
Second Respondent

AND ATTORNEY-GENERAL
Third Respondent

Court: Glazebrook, Ellen France and Miller JJ

Counsel: M I Hague for Applicant
D Jones and O Kiel for Respondents

Judgment: 30 July 2024

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay the respondents one set of costs of \$2,500.**
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REASONS

[1] The applicant represents education sector workers who challenge the lawfulness of the COVID-19 Public Health Response (Vaccinations) Order 2021. The Order extended the vaccine mandate to certain education sector workers on 25 October 2021.¹ That mandate was later revoked, insofar as it applied to the

¹ As amended by COVID-19 Public Health Response (Vaccinations) Amendment Order (No 3) 2021, cl 14.

education sector, on 4 April 2022.² The applicant contended that it was ultra vires the empowering legislation,³ that it was unjustified, and that criteria for exemptions were too strict.

[2] The applicant failed in the High Court and Court of Appeal.⁴ Both Courts were satisfied that the mandate was lawful and justified and the exemption criteria were not too strict.⁵ The applicant now seeks leave to appeal to this Court.

[3] The applicant wishes to argue that:

- (a) it is not clear on the New Zealand authorities how an “overly broad and unquantifiable” objective could justify a limitation on a right protected under the New Zealand Bill of Rights Act 1990 (NZBORA);
- (b) it is not clear on the New Zealand authorities to what degree the state must satisfy a court that a less rights-limiting alternative is not reasonably available; and
- (c) it is not clear on the New Zealand authorities how the “precautionary principle” should be applied to a s 5 NZBORA analysis.

[4] In addition, the applicant says there was a substantial miscarriage of justice because the Crown failed to disclose facts that the applicant says were material, and an expert witness for the Crown failed to disclose a report that the applicant says was relevant and contradicted the witness’s conclusions.

[5] We are not persuaded that the application for leave to appeal raises a question of general or public importance.⁶ Rather, we consider that the proposed appeal is in substance a challenge to the correctness of the judgments below, without raising any

² As amended by COVID-19 Public Health Response (Protection Framework and Vaccinations) Amendment Order 2022, cl 26.

³ COVID-19 Public Health Response Act 2020.

⁴ *NZDSOS Inc v Minister for COVID-19 Response* [2022] NZHC 716, (2022) 18 NZELR 833 (Cooke J) [HC judgment]; and *NZTSOS Inc v Minister for COVID-19 Response* [2024] NZCA 74 (Gilbert, Collins and Goddard JJ) [CA judgment].

⁵ HC judgment, above n 4, at [138], [144] and [154]; and CA judgment, above n 4, at [30], [80], [84] and [93].

⁶ Senior Courts Act 2016, s 74(2)(a).

point of significant principle divorced from the particular facts. We add that whether there is a question of general or public importance must be assessed against the fact that it is now over two years since the mandate was removed.

[6] Nor are we persuaded that there may have been a miscarriage of justice.⁷ The issue about disclosure and the expert evidence appears to turn on contested views about the relevance and meaning of some studies into the risk of COVID-19 spreading in and from schools, and information about the number of people given exemptions in the health sector. We observe that these points appear not to have been raised in the Court of Appeal, though they could have been. If leave were to be granted, it might be necessary to allow the Crown to file evidence explaining why the non-disclosed information was not material. This is generally not appropriate on a second appeal.

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

[8] The applicant must pay the respondents one set of costs of \$2,500.

Solicitors:

Frontline Law, Wellington for Applicant

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondents

⁷ Section 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].