IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 132/2023
[2024] NZSC 17

BETWEEN	TONI COLIN REIHANA Applicant
AND	GREGORY FORAN First Respondent
	AIR NEW ZEALAND LIMITED Second Respondent

Court:	Ellen France and Kós JJ
Counsel:	Applicant in person J Q Wilson and T M J Shiels for Respondents
Judgment:	22 February 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.

REASONS

Introduction

[1] The applicant, Toni Colin Reihana, has filed an application for leave to appeal from the decision of the Court of Appeal.[1] The Court of Appeal declined to grant an extension of time for Mr Reihana to apply for the allocation of a hearing date and to file his case on appeal in the Court of Appeal.

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1 *Reihana v Foran* [2023] NZCA 506 (Brown and Wylie JJ) [CA judgment].

Background

[2] The events giving rise to the present proceedings date back to March 2022. Mr Reihana was a resident in Australia. He wanted to travel from Australia to New Zealand. He was ultimately unable to travel on the ticket he had booked with Air New Zealand because he was not vaccinated against Covid-19. At that point in time, persons aged 18 or over flying on Air New Zealand's international network were required to be vaccinated against Covid-19. Mr Reihana's return to New Zealand was accordingly delayed.

[3] Mr Reihana sought judicial review of Air New Zealand's Covid-19 vaccination policy (the policy). He pleaded three causes of action. First, it was alleged that in making the policy decision in October 2021 to adopt a requirement for international travellers to be vaccinated, the respondents erred in a jurisdictional sense by not taking account of all relevant biomedical/immunological scientific considerations and, as a result, did not make a fully cognisant decision. Second, it was alleged the respondents breached the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, on the basis that the policy discriminated against Mr Reihana. Finally, there was a claim that the respondents breached a duty of care not to require Air New Zealand customers to undergo "potentially dangerous" vaccinations.

[4] Mr Reihana sought various forms of relief, including certiorari invalidating the policy decision and mandamus requiring the respondents to "diligently" apply the relevant biomedical and relatable scientific considerations to a reconsideration of the October 2021 policy decision. Various forms of relief by way of damages were also sought.

[5] On application of the respondents, the proceeding was struck out by the High Court as disclosing no reasonable cause of action.[2] Amongst other matters, the High Court doubted that the requirement imposed by the airline for vaccination as a condition of carriage was an exercise of a statutory power or right as defined in s 5(1) of the Judicial Review Procedure Act 2016. Even assuming there was a basis for judicial review, the High Court considered any such review would be "constrained or

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2 *Reihana v Foran* [2022] NZHC 2425 (Venning J).

limited".[3] The Judge considered there were difficulties with the argument about the reasonableness of Air New Zealand's actions, given the position taken by the New Zealand Government at the time. The Judge also referred in this regard to several High Court judgments which had considered the scientific reasonableness of the decision to require aeroplane passengers to be vaccinated.

[6] Mr Reihana filed an application for leave to appeal from the High Court to the Court of Appeal. Several extensions of time for filing the case on appeal and to apply for the allocation of a hearing date were granted to him by the registrar. When the registrar declined to grant a further extension, Mr Reihana applied formally for an extension of time from the Court. As noted earlier, that application was declined.

Proposed appeal

[7] In support of the application for leave to appeal, by reference to the factors discussed in this Court's judgment in *Almond v Read*,[4] Mr Reihana argues that the Court of Appeal was wrong to not grant an extension. Mr Reihana explains that the delay was justified due to the difficulties caused by absence of access to the internet and cell phone coverage at various points in time, and that, in any event, the delay was not extensive. He argues the Court's decision was wrong because the Court did not take into account the final extension granted by the registrar. Further, Mr Reihana says that his claim is a significant one.[5] In this respect, Mr Reihana contends that the respondents mandated a medical procedure "without qualified knowledge or the seeking of the same, when there was a raft of research data available to the respondents". Essentially, he argues that the point he wishes to have litigated is an important one, and thus case management delays are something of a trivial distraction.

Our assessment

[8] Mr Reihana would have this Court review the arguments made and addressed in the Court of Appeal. The Court of Appeal took the view that the delay was significant. The Court referred to the fact that the notice of appeal had been filed on

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3 At [34].
4 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].
5 See at [38(e)].

14 October 2022 and the original deadline under r 43(1) of the Court of Appeal (Civil) Rules 2005 for filing the case on appeal and seeking a hearing date was 7 February 2023. The Court said that time had been extended on three occasions but still nothing had been filed, with the Court of Appeal's judgment ultimately being issued on 20 October 2023. Further, the Court noted that security for costs was outstanding and there was nothing to indicate any steps had been taken in that respect.

[9] The Court did not consider that any good reason had been put forward to explain the delay. Despite the extensions granted there was no urgency in the applicant's response. The Court considered the respondents were entitled to have the matter addressed.

[10] In addition, the Court noted the issues were essentially moot given that Air New Zealand had since withdrawn the policy and there was no suggestion of a replacement. In various contexts, including consideration of Mr Reihana's challenge to the imposition of security for costs, both the High Court and Court of Appeal had considered there was no merit in the underlying claim. The Court of Appeal accepted the assessment of the High Court that the proposed appeal was hopeless.

[11] There is no challenge to the applicable principles as set out in *Almond v Read*. Rather, the proposed appeal would involve a re-evaluation of the way in which the Court applied those principles to this case. Accordingly, the proposed appeal does not raise any question of general or public importance or of general commercial significance.[6] Nor do we see any appearance of a miscarriage of justice.[7] There is force in the respondents' submission that there is no good explanation as to why, even when matters could have been dealt with, the appeal was still not advanced. It is also relevant in this context that there has been no payment of security for costs, nor any explanation as to steps taken in relation to that matter.

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6 Senior Courts Act 2016, s 74(2)(a) and (c).
7 Section 74(2)(b).

Result

[12] The application for leave to appeal is dismissed. The applicant must pay the respondents one set of costs of $2,500.

Solicitors:
Bell Gully, Auckland for Respondents