IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 131/2021
[2022] NZSC 15

BETWEEN	KEANU HEAD First Applicant
	JAMES LOGIE WRIGHT Second Applicant
	SAMUEL GREGORY Third Applicant
	REBECCA LANGFORD Fourth Applicant
	ASHLEIGH CRICHTON Fifth Applicant
	TAMARA JOAN EVANS Sixth Applicant
	DYLAN CROOK Seventh Applicant
	WENDY KAIN Eighth Applicant
AND	CHIEF EXECUTIVE OF THE INLAND REVENUE DEPARTMENT First Respondent
	MADISON RECRUITMENT LIMITED Second Respondent

Court:	William Young, Glazebrook and O'Regan JJ
Counsel:	S R Mitchell and P Cranney for Applicants S L Hornsby-Geluk and B J Locke for First Respondent A G Service and S J Howard-Brown for Second Respondent
Judgment:	2 March 2022

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

C The applicants must pay each respondent costs of $2,500.

REASONS

[1] This case concerns arrangements under which Madison Recruitment Ltd provided the Commissioner of Inland Revenue with the labour of its (that is, Madison's) employees. They worked predominantly in Inland Revenue Department call centres. The applicants claim that they were in fact employees of the Commissioner. This contention was rejected by the Employment Court[1] and an application for leave to appeal against that judgment was dismissed by the Court of Appeal.[2]

[2] The case fell to be decided under the legislative framework as it was before the enactment of the Employment Relations (Triangular Employment) Amendment Act 2019.

[3] As there is no right of appeal to this Court against a decision of the Court of Appeal refusing leave to appeal,[3] the applicants apply for leave to bring a leapfrog appeal against the Employment Court judgment. Any such appeal would be restricted to issues of law under s 214A(1) of the Employment Relations Act 2000. As well, by reason of s 75(b) of the Senior Courts Act 2016, we must not grant leave unless satisfied that there are "exceptional circumstances that justify taking the proposed appeal directly to" this Court.[4] This Court has been reluctant to take appeals

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1 *Head v Chief Executive of the Inland Revenue Department* [2021] NZEmpC 69, [2021] ERNZ 183 (Judges Corkill, Holden and Beck) [EmpC judgment] at [291].

2 *Head v Chief Executive of the Inland Revenue Department* [2021] NZCA 483 (Miller and Cooper JJ) [CA judgment] at [8].

3 Senior Courts Act 2016, s 68(b).

4 It must also be necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal: Senior Courts Act, ss 74 and 75(a).

direct from the Employment Court where the Court of Appeal has previously refused leave to appeal.[5]

[4] The primary legal issue raised by the applicants relates to the interpretation and application of s 41 of the State Sector Act 1988 (now replaced by the similarly worded cl 2 of sch 6 of the Public Service Act 2020). This permitted the delegation by public service chief executives of functions and powers to, amongst others, "an individual working in the Public Service as a contractor".[6] The Commissioner did delegate some of her powers to the applicants; this on the basis that an employee of a contractor is a "contractor" for these purposes. The applicants' position is that this premise is wrong. On the applicants' argument, the delegations could only be valid if the applicants were employees of the Commissioner. The Employment Court concluded that if s 41 did not authorise the delegations to the applicants as employees of Madison, the consequence is simply that those delegations were not valid.[7] On this basis, success for the applicants in relation to the scope of s 41 would not require or justify treating the applicants as employees of the Commissioner (and, in this way, reconstructing the triangular arrangement) so as to validate the delegations.[8]

[5] The applicants' contention as to the limited effect of s 41 may be arguable. But, if the applicants were to succeed on this point, they would still face difficulty, at least, in persuading the Court that a misinterpretation of s 41 by the Commissioner and Madison (assuming there was one) would itself justify a conclusion that the applicants were employees of the Commissioner. For this reason, the s 41 argument may lead nowhere in terms of resolving the proposed appeal.

[6] We regard the other arguments proposed by the applicants as being in substance challenges to the conclusion of the Employment Court that treating the applicants as employees of Madison, rather than the Commissioner, accorded with the reality of the arrangements.[9] Although there may be some legal aspects to this conclusion, which in theory might be challenged on appeal, the conclusion is sufficiently factual as to

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5 See *White v Auckland District Health Board* [2007] NZSC 64, (2007) 18 PRNZ 698 at [6], referring to "extremely compelling circumstances".
6 State Sector Act 1988, s 41(1A)(c).
7 EmpC judgment, above n 1, at [178] and [181]. See also CA judgment, above n 2, at [4].
8 EmpC judgment, above n 1, at [181].
9 At [291]–[293].

leave little scope for the applicants to succeed on an appeal confined to questions of law.

[7] Against that background, we do not see the proposed appeal as raising issues of general or public importance so as to warrant granting leave.[10] As well, we see no appearance of a miscarriage of justice.[11] The exceptional circumstances test for a leapfrog appeal is also not met.

[8] The application for an extension of time to apply for leave to appeal is granted but the application for leave to appeal is dismissed. The applicants must pay each respondent costs of $2,500.

Solicitors:
Oakley Moran, Wellington for Applicants
Dundas Street Employment Lawyers, Wellington for First Respondent
MinterEllisonRuddWatts, Auckland for Second Respondent

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10 Senior Courts Act, s 74(2)(a).
11 Section 74(2)(b).