IN THE COURT OF APPEAL OF NEW ZEALAND

CA175/2013
[2013] NZCA 435

BETWEEN	TERRANOVA HOMES AND CARE LIMITED Appellant
AND	VASIVASI FAITALA AND DALRENE GOFF Respondents

CA136/2013

AND BETWEEN	VASIVASI FAITALA AND DALRENE GOFF Appellants
AND	TERRANOVA HOMES AND CARE LIMITED Respondent

Hearing:	21 August 2013
Court:	Randerson, Harrison and Miller JJ
Counsel:	E Coats for Appellant in CA175/2013 and for Respondent in CA136/2013 P Cranney and T Oldfield for Appellants in CA136/2013 and for Respondents in CA175/2013
Judgment:	19 September 2013 at 3 pm

JUDGMENT OF THE COURT

A The appeal in CA175/2013 is dismissed.

B The appeal in CA136/2013 is dismissed.

C The appellant in CA175/2013 is to pay the respondents 75 per cent of costs for a standard appeal on a band A basis and usual disbursements.

D There is no order for costs in CA136/2013.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] The question arising on the principal appeal is whether, where parties are in an employment relationship and an employee is paid at the statutory minimum wage rate, the employer is entitled to deduct from that wage its compulsory employer contributions payable for that employee under the KiwiSaver scheme. A full bench of the Employment Court decided that question in the employees' favour.[1] The employer now appeals against that decision with leave on a question of law.[2] The employees appeal separately against a discrete part of the decision relating to construction of a provision in the employees' contracts.

[2] At issue in the principal appeal is the relationship between two significant statutory provisions: s 6 of the Minimum Wage Act 1983 (the MWA) and s 101B of the KiwiSaver Act 2006 (the KSA). The employees accept that our decision on that issue will determine the result of their separate appeal.

Facts

[3] The relevant facts are not in dispute and can be summarised shortly.

[4] Terranova Homes and Care Ltd (Terranova) employed Vasivasi Faitala and Dalrene Goff (the employees) as caregivers at a rest home in Wellington. The employment relationship between Terranova and each employee was governed by an

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1 *Faitala v Terranova Homes and Care Ltd* [2012] NZEmpC 199.
2 Employment Relations Act 2000, s 214.

individual employment agreement on materially identical terms. At the relevant times each employee was paid a gross wage of $13.50 per hour.[3]

[5] Both employees are members of a KiwiSaver scheme. The agreements contained a schedule entitled "Your Remuneration", which stated that:

> The employee's remuneration is inclusive of any KiwiSaver compulsory employer contributions.

[6] By reference to the minimum hourly wage, the employees' wages and KiwiSaver contributions were paid as follows:

Component of pay	Amount
Gross wage paid after payment of employer and employee contributions (before tax)	$12.98
Employer contribution to KiwiSaver (before tax)	$00.26
Employee contribution to KiwiSaver (before tax)	$00.26
Total remuneration (before tax/deductions)	$13.50

[7] The employees issued a proceeding against Terranova before the Employment Relations Authority. Both claimed arrears of wages under the MWA essentially represented by Terranova's deduction of its statutory contribution from their wages. By consent, the Authority removed the proceeding to the Employment Court for determination.[4]

Legislative framework

[8] Section 6 of the MWA provides:

> **6 Payment of minimum wages**
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> Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[9] The purpose of the KSA is set out in s 3 of the Act, namely:

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[3] Counsel advise that the gross wages of each employee have since been increased to between $13.75 gross per hour and $14.12 gross per hour, but that factor is irrelevant for present purposes.

[4] *Faitala v Terranova Homes and Care Ltd* [2012] NZERA Wellington 100.

> **3 Purpose**
>
> (1) The purpose of this Act is to encourage a long-term savings habit and asset accumulation by individuals who are not in a position to enjoy standards of living in retirement similar to those in pre-retirement. The Act aims to increase individuals' well-being and financial independence, particularly in retirement, and to provide retirement benefits.
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> (2) To that end, this Act enables the establishment of schemes (**KiwiSaver schemes**) to facilitate individuals' savings, principally through the workplace.

[10] Employee contributions to KiwiSaver are governed by subpt 1 of pt 3 of the KSA. Section 64 sets the contribution rate; and s 66 specifies the employer's obligation to make deductions of employee contributions from each payment of the employee's wages.

[11] Employer contributions are governed by subpt 3A of pt 3 of the Act. Section 101B of the KSA relevantly provides:

> **101B Compulsory contributions must be paid on top of gross salary or wages except to extent that parties otherwise agree after 13 December 2007**
>
> (1) The purpose of this section is to ensure that, for contractual arrangements of parties to an employment relationship (as defined in section 4(2) of the Employment Relations Act 2000), compulsory contributions are paid in addition to an employee's gross salary or wages described in section 101D(3).
>
> (2) The contractual arrangements of parties to an employment relationship must not have the effect of defeating the purpose of this section described in subsection (1).
>
> (3) A contractual term or condition has no effect to the extent to which it is contrary to the purpose of this section described in subsection (1).
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> (4) However, on and after 13 December 2007, parties to an employment relationship are free to agree contractual terms and conditions that disregard the purpose of this section described in subsection (1), and, to the extent of such agreement, subsections (1) to (3) do not apply, unless, in respect of the employer and employee,—
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> (a) section 60(1)(a), (b) or (c) first applies on or after the day of assent for the Taxation (Urgent Measures and Annual Rates) Act 2008; and

(b) the contractual terms and conditions do not account for the amount of compulsory contributions the employer is required to pay.

(4A) In the circumstances described in subsection (4)(a) and (b), despite subsection (4),—

(a) compulsory contributions must be paid in addition to an employee's gross salary or wages described in section 101D(3), in accordance with the purpose of this section described in subsection (1); and

(b) subsections (2) and (3) apply. …

[12] Section 101D sets out the formula applicable in calculating the amount of the employer contribution. Each payment is made by the employer to the Commissioner of Inland Revenue. The Commissioner pays the contribution into a holding account and then on to the relevant provider of the employee's KiwiSaver scheme.[5]

Employment Court Decision

[13] In summary the Employment Court found for the employees on the grounds that:

(a) The purpose of the MWA was to ensure that workers received a base wage for their work to enable them to meet their daily living expenses for themselves and their family.[6] There was nothing to suggest that it built in a component of saving for retirement. Deductions which might be made from an employee's pay, such as liable parent contributions and PAYE, represented obligations that might be owed by an employee personally.

(b) The payment of a compulsory employer contribution under the KSA was of a different character.[7] It was the employer's, not the employee's, contribution. The employer contribution was not paid directly to the employee but to a KiwiSaver provider via the Inland Revenue KiwiSaver Holding Account. A deferred payment to an

5 KiwiSaver Act 2006, ss 93 and 96.
6 At [15] and [19].
7 At [20]–[29].

employee of a compulsory statutory employer contribution did not constitute payment by an employer for work performed by an employee for the purposes of the MWA.

(c) When s 6 of the MWA and s 101B of the KSA were read together, and in light of their respective purposes, the latter was subject to the former.[8] So, for an employee on the minimum wage, an employer was obliged to pay the two per cent contribution in addition to the minimum wage or (if the parties agreed) the gross wage must amount to the minimum wage plus two per cent. However s 101B(4) did not apply unless the parties' contractual terms and conditions accounted for the amount of compulsory contributions the employer was required to pay.[9] The reference in the remuneration schedule sufficiently accounted for the amount of the compulsory contributions the employer was obliged to pay.

[14] Accordingly, Terranova was in breach of s 6 of the MWA. The employees were being paid for their work at a rate that was less than the statutorily prescribed minimum wage.

Terranova's appeal

[15] Terranova appeals against the Employment Court's decision on three broad grounds. One is that the Court erred in concluding that compulsory employer contributions are not wages received by employees for their work within the meaning of s 6 of the MWA. The second is that the Court erred in rejecting Terranova's argument that s 6 cannot limit Parliament's authority to enact later contrary legislation. The third is that the relevant provisions of the MWA and KSA when read together entitled Terranova to make the deductions. We shall address Terranova's submissions in the same order.

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8 At [41].
9 At [47]–[48].

(a) Does the employer's contribution to KiwiSaver amount to the receipt by the worker of payment for work in terms of s 6 of the MWA?

[16] First, Ms Coats submits, it is artificial to construe strictly the word "receive" where it is used in s 6 of the MWA ("shall be entitled to receive from his employer payment for his work ..."). She points out that employees on the minimum wage do not in fact receive that amount. All wages are subject to PAYE and other deductions, imposed by law or according to the parties' contractual arrangements. Applicable taxes and deductions therefore comprise part of the minimum wage for the purpose of the MWA and thus are part of the employee's wage. By analogy, an employee who chooses to participate in KiwiSaver has accepted that part of his or her wage will also be deducted as an employee contribution to KiwiSaver.

[17] We do not accept Ms Coats' submission. It is true that an employee on a minimum wage whose income is subject to statutory or other legal deductions does not receive payment of the prescribed minimum. However, that is because the law recognises that he or she has certain personal obligations to third parties such as the state which must take priority over his or her right of access to the cash represented by the wage. That is a function of the employee's legal liability for which he or she is solely responsible. Deductions of this kind are external to the employment relationship. By contrast, the deductions relevant to this appeal derive their justification from the employment contract.

[18] As the Employment Court found, s 6 does not envisage that an employer will be entitled separately to deduct from the minimum wage an amount equal to its statutory liability relating to that worker. The phrase "... shall be entitled to receive from his employer payment [of a wage] for his work at not less than [the] minimum rate" has a temporal and physical quality, suggesting an employee's right to receive a fixed amount periodically payable for actual performance of his or her services. The payment to a third party of a compulsory statutory obligation imposed on an employer does not fit easily within this concept.

[19] Second, Ms Coats submits that a compulsory employer contribution is in law a payment which in terms of s 6 of the MWA the employee "receive[d] from his [or her] employer". While the contribution is initially paid to the Crown through its

agent the Commissioner of Inland Revenue, it is then paid to the employee's KiwiSaver account. By this means the employee does "receive from his or her employer" payment at the minimum wage, even if it is in two different accounts.

[20] We do not accept this analysis. In terms of s 6, the employer's payment of a contribution is not "payment for his [or her] work". It is payment of the employer's contribution as required by law. It is true that the obligation arises as a consequence or by virtue of the employee's "work". However, the source of the obligation is not to be confused with the nature of the obligation itself.

[21] Moreover, as Mr Cranney submitted, the money paid to a KiwiSaver scheme does not belong to the employee but to the scheme. The employee's rights will ultimately depend upon the terms and conditions of the governing instrument. But it cannot be said that an employee who contributes to a KiwiSaver scheme is necessarily entitled to receive the money at a future date.

[22] Third, Ms Coats submits that the employer's contribution to KiwiSaver is part of the employee's payment for his or her work as it is calculated based on the amount of the employee's salary or wages. An employer is only required to make this payment if (a) the employee belongs to KiwiSaver and is not on a contributions holiday; and (b) the employee performs work in return for which he or she receives a wage. Given that the amount of the employer contribution will depend on the number of hours during which the employee performed work for the employer, there is more than just a nexus (as the Employment Court found[10]) between the employer's contributions to KiwiSaver and the employee's work. The contribution is only payable for hours for which the employee is paid for work.

[23] We do not accept this argument, largely for the reasons already given. The relationship between hours worked by an employee and the amount of an employer's contribution does not convert the latter into part of an employee's "payment for his [or her] work". It is no more than a means of quantifying the employer's obligation, and does not satisfy the separate statutory concept of payment for work.

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[10] *Faitala v Terranova Homes and Care Ltd*, above n 1, at [28].

[24] It follows that we reject Ms Coats' submission that the Employment Court erred in concluding that compulsory employer contributions are not wages received by employees for their work within the meaning of s 6 of the MWA.

(b) Does s 6 of the MWA limit subsequent enactments?

[25] Ms Coats submits that the phrase "notwithstanding anything to the contrary in any enactment ..." where used in s 6 should be construed to mean that s 6 only overrides or takes priority above anything to the contrary in any earlier statute or legislative instrument but does not affect later enactments.[11] Ms Coats submits that any other approach would infringe the principle that Parliament cannot control its successors and that legislation – in this case, the KSA – impliedly repeals earlier legislation which is inconsistent with it. The phrase cannot therefore be construed so as to prevent Parliament from enacting something to the contrary in the future.

[26] We do not accept Ms Coats' submission. Its essence is that no statute can on its own terms exclude implied repeal by a later legislative instrument. The authorities which she cites stand for that proposition. Our starting point is that all statutory enactments must be read and applied together insofar as they are not inconsistent.[12] The Court must strive to find a construction which reconciles any apparent inconsistency and allows two statutory provisions to stand together.

[27] In interpreting s 6 of the MWA and s 101B of the KSA, it is unnecessary to go so far as to say that when enacting s 6 Parliament was intending to bind its successors. Similarly, we do not construe the language of s 101B as impliedly repealing s 6. The introductory language of the latter ("notwithstanding anything to the contrary in any enactment ...") is broad and emphatic. A narrow or confined construction is unnecessary.

[28] We agree with the Employment Court that the MWA was "designed to impose a floor below which employers and employees cannot go" and that it is "directed at preventing the exploitation of workers, [being] a statutory recognition of

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[11] Citing *Paterson's Freehold Gold Dredging Co (Ltd) v Harvey* (1909) 28 NZLR 1088 (SC) at 1012; and *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 (CA) at 597.

[12] JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 441–442.

the diminished bargaining power of those in low paid employment".[13] Given its importance, we are satisfied that if Parliament had intended to repeal, override or limit the effect of s 6 when enacting s 101B it would have done so expressly.

[29] In our judgment there is no need to resort to the doctrine of implied repeal where provisions can be read consistently on the basis that, in this case, s 101B is to be interpreted as subject to the provisions of the MWA applicable to minimum waged workers.

(c) When read together, do the relevant statutory provisions entitle Terranova to make the deductions?

[30] Ms Coats third ground is that s 6 of the MWA and s 101B(4) of the KSA can be read consistently with one another to justify Terranova's approach. In particular, she submits, s 6 does not prevent the parties to an employment relationship from agreeing that s 101B(4) will apply where the employee receives the minimum wage; that is because the employer contribution forms part of the employee's wage. She says the effect of the Employment Court decision is that s 101B(4) can only apply where an employee's hourly wage is at least $14.16 gross, based on the current minimum wage of $13.75. In this respect she notes that the KSA does not refer to the minimum wage, was not apparently considered during the Parliamentary debates, and there is no indication within it that Parliament intended s 101B(4) should only apply to employees who received a particular level of wage.

[31] We reject this submission. The opening phrase used in s 6 of the MWA – "notwithstanding anything to the contrary" – is an unequivocal statement of legislative intent that the provision shall prevail over any enactment, award, collective agreement, determination or contract of service which purports to limit the worker's entitlement to the prescribed minimum wage. Relevantly here, the contracts of service purport to limit the statutory entitlement.

[32] We are satisfied that the introductory words of s 6 prohibit parties to an employment contract entering into an agreement which might affect its substance. As Mr Cranney submitted, and the Employment Court accepted, a strict construction

[13] At [39].

of the introductory phrase is consistent with New Zealand's international obligations to the effect that the purpose of minimum wage legislation is that minimum wages shall not be subject to abatement by individual agreement.[14] In accordance with this international purpose, s 6 is of central importance in setting a minimum statutory threshold.

[33] In any event, that prohibition against an agreement to receive payment of a wage less than the minimum level does not otherwise intrude upon or stand inconsistently with s 101B of the KSA. Parties remain free to negotiate and agree to contractual terms and conditions which disregard the purpose of s 101B(1) that compulsory contributions are paid in addition to an employee's gross salary or wages providing however – and this is where the s 6 takes effect – their agreement does not result in a payment of wages below the statutory minimum. And we agree with Mr Cranney that s 101B(4) is not intended to displace or qualify the effect of other legislative enactments. On analysis, it is more in the nature of an adjustment mechanism. As the Employment Court observed, s 101B(4) is expressed in permissive terms, whereas the requirements of s 6 are mandatory.[15]

[34] Significantly, also, the two statutes serve different purposes. The MWA is concerned with ensuring the sanctity of payment of a minimum wage: by contrast, the KSA is directed towards providing a future benefit in the form of savings for use in retirement. We endorse the Employment Court's statement that:[16]

> Reading ss 6 and 101B in the way contended for by the defendant would undermine two key purposes of the KiwiSaver legislation for those on the minimum wage, namely to encourage all workers to join the KiwiSaver Scheme to make provision for their retirement, and to make the Scheme affordable.

[35] Thus we reject Ms Coats' final submission that when s 6 of the MWA and s 101B of the KSA are read together they authorise Terranova's deductions from the employees' wages.

[36] It follows that Terranova's appeal must fail.

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[14] At [39]; Minimum Wage-Fixing Machinery Convention 39 UNTS 3 (opened for signature 16 June 1928, entered into force 14 June 1930) art 3(3).

[15] At [37].

[16] At [38].

Employees' appeal

[37] The employees appealed separately against a finding made by the Employment Court on a separate issue about whether a provision in the individual employment contracts complied with the terms of s 101B(4) of the KSA.

[38] Both parties filed written submissions on this issue. However, Mr Cranney accepted that the result of the employees' appeal would be academic if Terranova's primary appeal failed. As we have dismissed that appeal, it is unnecessary for us to determine the employees' appeal and it is dismissed also.

Result

[39] The appeal in CA175/2013 is dismissed.

[40] The appeal in CA136/2013 is dismissed.

[41] There would be no order for costs if we strictly applied the rule that costs follow the event. However, we are satisfied that Terranova's appeal required significantly more preparation and argument than the employees' appeal. We must nevertheless acknowledge that Terranova has been successful on the employees' appeal even if the issue raised was of a subsidiary nature. We are satisfied that the interests of justice will be served if Terranova is ordered to pay the employees 75 per cent of costs for a standard appeal on a band A basis and usual disbursements in CA176/2013 and no order for costs is made in CA136/2013.

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