IN THE COURT OF APPEAL OF NEW ZEALAND

CA215/2013
[2013] NZCA 400

BETWEEN	ALAN JOHN MAYNE Applicant
AND	NUPLEX SPECIALTIES NZ LIMITED Respondent

Hearing:	12 August 2013
Court:	Ellen France, White and Asher JJ
Counsel:	C T Patterson and A M Halloran for Applicant J G H Hannan for Respondent
Judgment:	27 August 2013 at 3.00 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by White J)

[1] Mr Mayne seeks leave to appeal against a decision of Judge Inglis in the Employment Court that his employment agreement did not include a legally binding term that he and his wife would be provided with employer-paid health insurance until death.[1]

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[1] *Mayne v Polychem Marketing Ltd* [2013] NZEmpC 33.

[2] Mr Mayne, who commenced employment with Polychem New Zealand Ltd (PNZ, subsequently sold to Polychem Marketing Ltd, now Nuplex Specialties NZ Ltd) in 1965, was the sole director and shareholder of the company by 1981. He claims that while in this position he initiated a medical insurance scheme for employees and their families which provided cover until death. Mr Mayne remained a director of Polychem until his retirement in 1990 and continued to receive medical insurance cover until the policy was terminated by Nuplex in 2009.

[3] In his Employment Court proceeding Mr Mayne challenged the termination of his insurance cover by Nuplex. He claimed that Nuplex was legally obliged to continue with the payments until both he and his wife died. Judge Inglis found that Mr Mayne had not been able to establish the existence of a legal obligation on Nuplex to continue with the provision of medical insurance cover for him and his wife until their deaths. The factors relevant to her decision were: none of the minutes of company meetings from the relevant time referred to any discussion of post-retirement medical insurance; there was no evidence suggesting the staff were informed of the scheme; the evidence of another director was that he was not aware of such a scheme; and there was no evidence that paying for a healthcare scheme following retirement was a general or notorious custom or practice within the company.

[4] Mr Mayne's application for leave to appeal to this Court is made under s 214(3) of the Employment Relations Act 2000. Under that provision this Court may grant leave to appeal if satisfied that there is a question of law involved that, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for decision.

[5] As the Supreme Court held in *Bryson v Three Foot Six Ltd*,[2] determining the terms of a contract of employment will normally be a question of fact. At the same time, as the Supreme Court recognised,[3] appealable questions of law may nevertheless arise from the reasoning of the Court on the way to its ultimate conclusion if the Court has overlooked a relevant matter or taken account of some

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2 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [20].
3 At [24]–[28].

matter which is irrelevant to the proper application of the law or reached an ultimate conclusion that is unsupportable – so clearly untenable – as to amount to an error of law. An appellant seeking to assert that there was no evidence to support a finding of the Employment Court or that the true and only reasonable conclusion contradicts the determination faces "a very high hurdle".[4]

[6] As the Supreme Court concluded:

> [28] It should also be understood that an error concerning a particular fact which is only one element in an overall factual finding, where there is support for that overall finding in other portions of the evidence, cannot be said to give rise to a finding on "no evidence." It could nonetheless lead or contribute to an outcome which is insupportable.

[7] The important question of law identified by Mr Patterson in his written submissions for Mr Mayne in support of his application for leave in this case was:

> What factors are to be taken into account in determining whether an unwritten contractual obligation exists in an employment context?

[8] Recognising that an answer to this abstract question would not determine Mr Mayne's case, Mr Patterson, in the course of his oral submissions, made a number of attempts to reformulate the question, submitting ultimately that it should be:

> Whether the Employment Court erred in its judgment by reaching factual findings that were mistaken and unsustainable on the evidence.

[9] Mr Patterson submitted that there were so many factual errors in the judgment that there was an appealable question of law. The "high hurdle" threshold under *Bryson* was met.

[10] We have considered all the alleged errors identified by Mr Patterson in his written and oral submissions. The problem is that they all relate to factual matters which were resolved by Judge Inglis who saw and heard all the witnesses give their evidence during the Employment Court hearing and reached her decision largely on the basis of that evidence.[5] She found that Mr Mayne's recollection of events was

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4 At [27].

5 *Mayne v Polychem Marketing Ltd*, above n 1, at [41].

"patchy",[6] and she preferred the evidence of others witnesses.[7] The Judge's findings cannot be described as unsustainable.

[11] The underlying difficulty for Mr Mayne is that his own evidence in chief did not provide support for the contention that his employment agreement included the legal obligation he sought to establish. His evidence was simply that in his capacity as sole director he had "decided that PNZ's Healthcare Scheme would continue for all its employees who retired from their employment with PNZ" and that he considered that he was "entitled to receive the same as a former employee who had retired from PML". Contrary to Mr Patterson's submission, we agree with Mr Hannan that as this evidence did not establish the legal obligation it was unnecessary for Mr Mayne to be cross-examined on it. Bearing in mind, as Mr Patterson acknowledged, that the onus of proving the obligation rested on Mr Mayne, the Judge's decision was really inevitable and cannot be described as clearly unsupportable on the facts.

[12] In these circumstances we do not consider that this is a case where the "very high hurdle" referred to in *Bryson* is surmounted.

[13] In this case the only relevant question is whether there was sufficient evidence to support the Judge's factual finding that Mr Mayne's employment agreement did not include a term that he and his wife would be provided with employer-paid health insurance until death. When the question is formulated in this way, it is clear that it is not a question of law. It is, in any event, not a question of general or public importance as it relates specifically to the particular circumstances of Mr Mayne's case, and there is no other sufficient reason for it to be submitted to this Court for decision.

[14] We do not accept Mr Patterson's submission that Judge Inglis erred in relying on the decisions of the Supreme Court in *Gibbons Holdings Ltd v Wholesale Distribution Ltd*[8] and *Vector Gas Ltd v Bay of Plenty Energy Ltd*[9] and that therefore a

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6 At [30].
7 At [34] and [37].
8 *Gibbons Holdings Ltd v Wholesale Distribution Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.
9 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

question of law arose. The principles in those decisions are well settled and apply to oral contracts and employment agreements.[10] They were applied by Judge Inglis in a straightforward manner to the facts of this case and their application by the Judge does not give rise to a question of law.

[15] Nor do we accept Mr Patterson's submission that Judge Inglis erred in considering whether there was a well-established custom or practice that supported Mr Mayne's claim.[11] While this point may not have been raised for Mr Mayne, if the Judge had been satisfied that there was such a custom or practice, it would have supported his claim. For Judge Inglis to consider this possibility did not constitute an error of law giving rise to a question of law for appeal.

[16] The application for leave to appeal is therefore declined.

[17] Mr Mayne is to pay the costs of Nuplex Specialities NZ Ltd for a standard application on a band A basis and usual disbursements.

Solicitors:
Jones Young, Auckland for Applicant
DLA Phillips Fox, Auckland for Respondent

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10 *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317, [2010] ERNZ 317; *New Zealand Airline Pilots' Assoc Inc v Air New Zealand Ltd* [2012] NZEmpC 88, (2012) 10 NZELR 292 at [48].

11 *Mayne v Polychem Marketing Ltd*, above n 1, at [39]–[40].