IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA502/2024
[2025] NZCA 42

BETWEEN	SIOUXSIE WILES Applicant
AND	VICE-CHANCELLOR OF THE UNIVERSITY OF AUCKLAND Respondent

Court: Cooke and Woolford JJ

Counsel: C W Stewart and D B Church for Applicant
R E Judge and T J Bremner for Respondent

Judgment: (On the papers) 5 March 2025 at 10.30 am

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 Cooke J)

[1] Associate Professor Siouxsie Wiles seeks leave to appeal from a decision of the Employment Court in which the Court upheld her claim against the Vice-Chancellor of the University of Auckland for breaching its health and safety, good faith and good employer obligations to her, leading to unjustifiable disadvantage

and breach of contract.[1] The Court ordered the Vice-Chancellor to pay general damages of $20,000.[2] Associate Professor Wiles now seeks leave to appeal on the grounds that both the findings of breach and the award of damages were inadequate.

[2] The general context of the proceedings arises from Associate Professor Wiles' role during the COVID-19 pandemic which involved her providing public commentary and advice on the pandemic, and the measures taken to address it. This role resulted in criticism from a sector of the community who were highly critical of the views of Associate Professor Wiles and other commentators. These critics engaged in conduct which the Employment Court described as "appalling behaviour, harassing the commentators through emails and social media" including some "in-person approaches". Female contributors such as Associate Professor Wiles were the subject of "particularly awful communications" including threats of rape and murder.[3]

[3] Associate Professor Wiles and Professor Shaun Hendy originally commenced a claim in the Employment Relations Authority which was removed to the Employment Court.[4] The Court then upheld the claim, concluding that the University had failed to deal appropriately with the health and safety issues arising from this criticism,[5] that it breached the University's obligations of good faith and to be a good employer, and that this had led to unjustified disadvantage and breach of contract.[6] In doing so, however, the Court found that the issue of academic freedom was only tangentially engaged,[7] and that Te Tiriti claims were not made out.[8] In addition, when awarding $20,000 general damages the Court found that the breaches were not deliberate, serious or sustained, or intended to undermine the employment relationship.[9]

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1 *Wiles v Vice-Chancellor of the University of Auckland* [2024] NZEmpC 123, (2024) 20 NZELR 584 [Employment Court judgment] at [180]–[182].
2 At [184]–[186].
3 At [3].
4 *Hendy v Vice-Chancellor of the University of Auckland* [2021] NZERA 586. Professor Hendy's aspect of the proceeding was later discontinued.
5 Employment Court judgment, above n 1, at [163]–[165].
6 At [180]–[182].
7 At [176]–[177].
8 At [178]–[179].
9 At [187]–[188].

[4] Associate Professor Wiles now seeks leave to appeal to this Court on the following questions of law:

(a) Did the Employment Court err in finding that the applicant's academic freedom, as enshrined in ss 267 and 268 of the Education and Training Act 2020, was not breached?

(b) Did the Employment Court err in finding that damages could not be awarded for breach of the statutory duty of good faith?

(c) Did the Employment Court err in its assessment and quantification of remedies?

[5] The application for leave is supported by affidavits from Associate Professor Wiles and Professor Jack Heinemann.

[6] The respondent opposes the grant of leave on the basis that the standard for the grant of leave is not met, and the proposed appeal involves challenges to the factual findings of the Court and not questions of law of general or public importance.

Assessment

[7] Under s 214 of the Employment Relations Act a party may appeal from the Employment Court to this Court on questions of law if this Court grants leave to appeal.[10] Leave can be granted if the proposed question of law is one that "by reason of its general or public importance or for any other reason, ought to be submitted" to this Court for determination.[11] Such questions of law must be seriously arguable.[12]

[8] We accept that the nature and scope of a university's obligation to preserve and enhance academic freedom, and the associated freedom of expression of employed academics, potentially involve questions of law that could be of general or public

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10 Employment Relations Act 2000, s 214(1).
11 Section 214(3).
12 *FGH v RST* [2023] NZCA 204, [2023] ERNZ 321 at [53].

importance. But we do not accept the applicant's argument that such questions of law arise in connection with the proposed appeal.

[9] The Employment Court found that the terms of Associate Professor Wiles' employment contemplated her participating in public engagement activities where her views would be publicly expressed.[13] The Court also found that the University's duties as a good employer, of good faith and to protect the health and safety of Associate Professor Wiles were engaged when she participated in such activities.[14] It was through this framework that the duty to enhance and preserve academic freedom was manifested. These findings are not now challenged by the University. Given these findings we do not consider that the duty to preserve and enhance academic freedom is genuinely in dispute in the proposed appeal. It is not common for an employee's functions to include active participation in the media in relation to issues of public concern, or for an employer's duties to include protecting the employee from third-party criticisms arising as a consequence, but that is what the Employment Court found in relation to this employment relationship. We do not consider it seriously arguable that the Court failed to recognise academic freedom and the associated freedom of expression as a matter of law.

[10] We also accept the University's submission that it mischaracterises the judgment of the Employment Court to contend that the Court found the duty to preserve and enhance academic freedom did not arise in relation to mainstream opinions, but only controversial or unpopular opinions. We do not consider that this is what the Court found at [176] to [177] of the judgment, or elsewhere. On the contrary, the Court described the duty as important, and one of the reasons why it concluded that the University had breached its obligations was because of its advice to Associate Professor Wiles that she should keep public commentary to a minimum, which the Court found was not reasonable.[15] The findings at [176] to [177] simply record the submission being responded to, and followed the wording of the relevant legislation.[16]

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13 Employment Court judgment, above n 1, at [91]–[97] and [166]–[170].
14 At [102]–[109], [116]–[119], [163]–[170] and [173].
15 At [80]–[90] and [152]–[154].
16 Education and Training Act 2020, ss 267–268.

[11] Given these findings we also do not consider it seriously arguable to contend that the Court erred in law by describing such duties as only arising tangentially.[17] Whatever term is used to describe it, the right was held to be manifested in terms of the employment contract, and was then reflected in the findings that the associated duties of the University as an employer applied when such academic freedoms were being exercised, and then in the findings of breach. The duty to enhance and protect academic freedom was not advanced as a stand-alone claim, but as a matter underpinning the claims advanced. That is also how the Court addressed the right. The use of the word "tangential" should not be understood as a finding that the duty was unimportant. In any event, no appeal arises from the particular verbal formulation of the Court's reasons, but only from a result.[18] We agree with the University's submission that the applicant's proposed argument involves a challenge to the factual assessments made by the Court in relation to an aspect of Associate Professor Wiles' employment that was accepted by the Court as a matter of law, rather than to a genuine dispute about that law.

[12] We reach a similar conclusion with the remaining questions of law proposed. Whether the Employment Court can award damages for a breach of the duty of good faith potentially raises an issue of wider importance.[19] But an award of general damages was made in the present case in addition to the grant of declarations, and the University does not challenge this award on appeal. The argument that the damages award should have been more generous, or that it should have been awarded separately for different breaches of particular statutory duties concerns the evaluation made by the Court on the facts and circumstances of the particular case. Given that the University does not challenge the ability to make such an award for its breaches the proposed appeal does not raise a question of law of general or public importance.

[13] The short point is that Associate Professor Wiles succeeded with her claims, including because the University did not respond appropriately in protecting her right of academic freedom, and the associated freedom of expression. The exercise of those

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17 Employment Court judgment, above n 1, at [176]–[177].

18 *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13 at [25]; and *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2013] NZSC 35, [2013] 2 NZLR 397 at [3]–[4].

19 See *Kazemi v RightWay Ltd* [2018] NZEmpC 3 at [13]–[14].

rights was held to be part of her functions as an academic employed by the University. Arguments that the Court should have gone further in its reasoning, or been more generous in its award, do not raise questions of law of general or public importance. They are limited to the assessment of the facts and circumstances of the particular case. The findings on those facts and circumstances are obviously important for Associate Professor Wiles, and she was plainly the subject of highly objectionable behaviour by a section of the community. But her claims were upheld and this Court does not exercise a general appeal function. Leave to appeal to this Court can only be granted if the appeal raises questions of law or general or public importance. The proposed appeal does not genuinely raise such questions. Nor is there any other reason why such leave should be granted.

Result

[14] The application for leave to appeal is declined.

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

Solicitors:
Simpson Grierson, Auckland for Respondent