IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA714/2020
[2021] NZCA 434

BETWEEN	NEW ZEALAND FUSION INTERNATIONAL LIMITED First Applicant
	SHENSHEN GUAN Second Applicant
AND	THE EMPLOYMENT COURT OF NEW ZEALAND First Respondent
	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Second Respondent

Court:	Miller and Cooper JJ
Counsel:	First Applicant by its director M Lyttelton (without leave) Second Applicant in person No appearance for First Respondent HTN Fong and R A Denmead for Second Respondent
Judgment: (On the papers)	3 September 2021 at 3.00 pm

JUDGMENT OF THE COURT

A Mr Lyttelton's application for leave to represent the first applicant is dismissed.

B The second respondent's application to strike out the application for judicial review is granted.

C The applicants must pay the second respondent costs for a standard application on a band A basis.

REASONS OF THE COURT

(Given by Miller J)

[1] This proceeding is an application for judicial review which has been filed in this Court under s 213 of the Employment Relations Act 2000. The second respondent has moved to strike it out[1] on the grounds that it is barred by s 193 of the Act, which provides that:

> **193 Proceedings not to be questioned**
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> (1) Except on the ground of lack of jurisdiction or as provided in sections 213, 214, 217, and 218, no decision, order, or proceedings of the court are removable to any court by certiorari or otherwise, or are liable to be challenged, appealed against, reviewed, quashed, or called in question in any court.
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> (2) For the purposes of subsection (1), the court suffers from lack of jurisdiction only where,—
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> (a) in the narrow and original sense of the term jurisdiction, it has no entitlement to enter upon the inquiry in question; or
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> (b) the decision or order is outside the classes of decisions or orders which the court is authorised to make; or
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> (c) the court acts in bad faith.

[2] The strikeout application arises out of an Employment Court proceeding in which the employers, the first and second applicants, were found to have exploited migrant workers over substantial periods of time at a holiday park in Reporoa. The workers were three Chinese nationals who worked at the holiday park during 2016 to 2018, without pay or other minimum entitlements. The Labour Inspector pursued an action on their behalf. Chief Judge Inglis had no difficulty finding that the second applicant, through her company the first applicant, deliberately secured the services of

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[1] Though this Court lacks an explicit power to strike out an applicant for judicial review in the Court of Appeal (Civil) Rules 2005, it may be dealt with as if r 15.1 of the High Court Rules 2016 apply for the purposes of s 213(3) and r 5.4 of the Court of Appeal (Civil) Rules: *Moodie v Employment Court* [2012] NZCA 508, [2012] ERNZ 201 at [25].

workers who were vulnerable to exploitation because of their desire to improve their lives through a move to New Zealand. Ms Guan had them undertake work without pay, while holding bond payments over their heads. The applicants were ordered to pay significant damages, with costs.[2] None of these sums have been paid. The first respondent is now in voluntary administration.

[3] The applicants filed an appeal in this Court on 7 January 2020, one day after filing an application for a rehearing and stay in the Employment Court. They abandoned the appeal on 18 February 2020, electing to pursue the rehearing. Judge Perkins dismissed the rehearing application in a judgement dated 13 November 2020.[3] It is that judgment which is the subject of the application for judicial review. In substance, though, it is a challenge to the judgement of Chief Judge Inglis.

[4] Mr Lyttleton, who is the director of the first applicant, has sought permission to represent it. We decline that application. It is not in the interests of justice that the company should be represented by someone lacking the independent judgement which counsel can be expected to bring to bear. We have nonetheless considered what Mr Lyttleton has had to say when deciding the strikeout application.

[5] It has long been settled that the jurisdiction of this Court to judicially review decisions of the Employment Court is limited to lack of jurisdiction under s 193(2),[4] including bad faith under s 193(2)(c). Other grounds of judicial review must be pursued in an appeal.[5]

[6] It appears that Mr Lyttleton became the director of the first applicant after the application for rehearing was filed. He has been prepared to argue that the Employment Court acted in bad faith. There is no foundation for that submission in the record before us. It should not have been made. There was a substantial record which amply justified the findings of fact on which the decision of Chief Judge Inglis

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2 *Labour Inspector v NewZealand Fusion International Ltd* [2019] NZEmpC 181, [2019] ERNZ 525.

3 *NewZealand Fusion International Ltd v Labour Inspector* [2020] NZEmpC 195.

4 *Moodie v Employment Court*, above n 1, at [15]; *Parker v Silver Fern Farms Ltd* [2011] NZCA 564, [2012] 1 NZLR 256 at [47]; and *Huang v Li* [2013] NZCA 135, (2013) 10 NZELR 514 at [21].

5 *Parker v Silver Fern Farms Ltd*, above n 4, at [47].

rested, and her criticisms of Ms Guan's behaviour were measured and also open to her on those facts. The judgment of Judge Perkins is orthodox and on its face amply justified. It was not bias to describe as illogical a submission that it is lawful to employ migrant workers without pay because immigration law prohibits them from working in the first place.[6]

[7] The criteria on which review is sought concern the allegation that Ms Guan would have laid herself open to breaches of immigration law had she paid the workers, that the court took into account inadmissible evidence and that the Labour Inspector withheld relevant evidence from the Court regarding grace periods granted to other accommodation operators who offer travellers food and accommodation in exchange for unpaid labour. We accept the submission of the Labour Inspector that the first two of these grounds allege errors of fact and law, neither of which is susceptible to review under s 193 and both of which are more appropriately dealt with by way of appeal. The third ground appears to allege breach of natural justice, which is not an available ground of review under s 193.[7]

[8] These grounds could have been advanced on an appeal, but the appeal was abandoned more than a year ago to pursue the rehearing. We accept the submission of the Labour Inspector that to revive it in the form of judicial review is an abuse of process.

Result

[9] The proceeding is accordingly struck out on the grounds that this Court lacks jurisdiction to entertain it and it is an abuse of process.

[10] The applicants must pay the Labour Inspector costs for a standard application on a band A basis.

Solicitors:
Crown Law Office, Wellington for Second Respondent

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6 *NewZealand Fusion International Ltd v Labour Inspector*, above n 3, at [20].
7 *Parker v Silver Fern Farms Ltd*, above n 4, at [47].