NOTE: ORDER OF EMPLOYMENT COURT IN [2018] NZEMPC 120 PROHIBITING PUBLICATION OF THE NAMES AND ANY INFORMATION LIKELY TO LEAD TO THE IDENTIFICATION OF H, C AND RPW REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA482/2020
[2021] NZCA 507

BETWEEN	H Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
	EMPLOYMENT COURT Second Respondent
	BAY OF PLENTY DISTRICT HEALTH BOARD Third Respondent
	TURUKI HEALTHCARE CHARITABLE SERVICES Fourth Respondent
	RPW Fifth Respondent
	C Sixth Respondent
	ANA PAULA DE JESUS E CRUZ COSTA SHAW Seventh Respondent
	TRACEY SIMPSON Eighth Respondent

Court: French and Brown JJ

Counsel: M W O'Brien for Applicant
No appearance for First and Second Respondent
M B Beech for Third Respondent
A F Drake for Fourth Respondent

S W Hood for Fifth Respondent
No appearance for Sixth, Seventh and Eighth Respondents

Judgment: 4 October 2021 at 11.00 am
(On the papers)

JUDGMENT OF THE COURT

A The application for judicial review is struck out.

B The applicant must pay each of the third, fourth and fifth respondents costs for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] H is the sole director and shareholder of the sixth respondent, C. He filed in this Court an application for judicial review of 16 directions and orders of the Employment Relations Authority (the Authority) and seven decisions of the Employment Court. These directions and decisions were made in the context of three separate employment disputes involving the third respondent, the Bay of Plenty District Health Board (the Board), the fourth respondent, Turuki Healthcare Charitable Services (Turuki) and the fifth respondent, RPW.

[2] While factually different, the three separate employment disputes follow the same general theme: C representing an aggrieved employee, refusing to comply with directions of the Authority, particularly with regard to publication of matters relating to mediated settlements, and posting derogatory material on its Facebook page. As a consequence penalties were imposed on both C and H personally.

[3] In his third amended statement of claim H identifies the following question for this Court on review:

> Did Parliament intend to give the Employment Relations Authority and Employment Court jurisdiction:
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> (a) over third parties to the employment relationship;
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> (b) in relation to contracts other than employment agreements;
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> (c) to enforce void or illegal arrangements;
>
> (d) to enforce contracts against third parties to those contracts; [and]
>
> (e) to suppress the fundamental right of freedom of expression?

[4] H also seeks interim orders prohibiting the Board, Turuki or RPW taking any further action that is or would be consequential on the exercise of the statutory powers of the Authority and the Employment Court to make the determinations, decisions, directions and orders challenged in the review proceeding. He also seeks interim orders staying particular proceedings and a direction that no proceeding should be instituted or continued on the basis of the challenged decisions.

[5] The Board, Turuki and RPW jointly apply for orders that the judicial review proceeding be struck out on the grounds that it falls outside the limited scope of this Court's review jurisdiction in s 213 of the Employment Relations Act 2000 (the Act) and that it is an abuse of process and frivolous or vexatious.

[6] This judgment addresses the application to strike out the judicial review proceeding. Because of our conclusions on that application, it has not been necessary for us to address H's application for interim orders.

Factual background

[7] Although the Board, Turuki and RPW are unrelated parties to separate employment relationship dispute proceedings, the common thread lies in the fact that H, through C, acted as advocate for employees of those three parties.

The Board's employment dispute

[8] In 2015 the seventh respondent, Ms Shaw, was dismissed by the Board. Her claim for unjustified dismissal in the Authority was unsuccessful.[1] The Authority made a series of directions which included:

(a) H was not to make contact with the Board directly whilst the Board was represented by counsel;[2] and

(b) H was directed to comply with the Authority's first direction and he was directed not to make any public comment regarding the Board and its staff on his Facebook page while the Authority's investigation was ongoing.[3]

H was warned that if he failed to comply with the Authority's directions in relation to its investigation the Authority might consider imposing a penalty against him pursuant to s 134A of the Act.

[9] On 25 February 2019 the Board's application for penalties, contempt and take down orders in respect of the conduct of H and C was removed to the Employment Court for determination.[4] On 6 September 2019 Judge Corkill granted leave to C, H and Ms Shaw to file a statement of defence out of time.[5]

[10] C, H and Ms Shaw opposed the orders sought by the Board principally on the ground that the Authority did not have jurisdiction to make the orders it had. The parties agreed that the Employment Court should determine these jurisdictional issues as "preliminary questions".

[11] In a judgment dated 22 September 2020 Judge Corkill held that the Authority had jurisdiction to make the relevant directions.[6] In the course of his judgment the

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1 The determination of the Authority was the subject of a de novo challenge in the Employment Court. The Employment Court's decision remains pending as at the date of this judgment.
2 *Shaw v Bay of Plenty District Health Board* NZERA Auckland 5593008, 23 May 2017.
3 *Shaw v Bay of Plenty District Health Board* NZERA Auckland 5593008, 23 March 2018.
4 *Bay of Plenty District Health Board v [C]* [2019] NZERA 101.
5 *Bay of Plenty District Health Board v [C]* [2019] NZEmpC 122.
6 *Bay of Plenty District Health Board v [C]* [2020] NZEmpC 149.

Judge addressed the issue of whether directions could be issued to bind a representative as well as a party. After a comprehensive discussion of the roles of representatives under the Act the Judge concluded:

> [81] Where the conduct of a representative is relevant to the Authority's obligation to the fair discharge of its statutory responsibilities, I am satisfied a direction may be issued in respect of that person.
>
> …
>
> [86] In short, I am satisfied the Authority has the broad jurisdiction to issue directions for the purposes of ensuring the fair conduct of proceedings before it; and that such directions can be issued against any person representing a party.

[12] The applications for contempt findings and penalties against C, H and Ms Shaw are presently stayed pending the outcome of the application for review in this Court.[7]

Turuki's employment dispute

[13] In 2017 C on behalf of a former employee of Turuki, which is a healthcare provider in South Auckland, brought a personal grievance against Turuki. The parties attended mediation which resulted in a record of settlement being drawn up. The settlement relevantly recorded:

> 1. These terms of settlement and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties and to the representatives of [C].
>
> …
>
> 11. Neither party, including [C], shall make derogatory remarks or disparaging comments about the other. Further, [C] shall not make any reference whatsoever to this employment relationship problem in any publication, including social media.

The record of settlement was not signed by H.

[14] In response to actions of H and C, in March 2018 Turuki obtained ex parte interim orders in the Authority that H, C and the eighth respondent, Ms Simpson (a former contractor for C), comply with the terms of the settlement, not make any

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7 *Bay of Plenty District Health Board v [C]* [2021] NZEmpC 131.

further breaches of confidentiality, and not publish Turuki's name or the names of its employees or representatives.[8]

[15] In a determination dated 1 May 2018 the Authority ordered that the interim orders be made permanent, made orders relating to suppression and ordered that C, H and Ms Simpson pay a penalty under s 149(4) of the Act to Turuki.[9]

[16] C, H and Ms Simpson challenged the Authority's 1 May 2018 determination in the Employment Court on the ground that the Authority lacked jurisdiction to make the orders against them. In a judgment dated 14 October 2020 their challenge was largely dismissed.[10] The Judge noted that although C, H and Ms Simpson did not have a contractual or employment relationship with Turuki, that did not mean that the Authority lacked jurisdiction to make the challenged orders, noting that the use of the word "person" in s 149(4) of the Act (which provides for penalties in response to breaches in an agreed term of settlement) was wider than the word "party" used elsewhere in ss 137 and 149.[11] Relying on *Musa v Whanganui District Health Board*,[12] the Judge ruled that:[13]

> A person who knows of the fact of the settlement having been achieved, and of the relevant terms of the settlement, and who then breaches an agreed term of the settlement, can be liable for a penalty for breach of s 149.

RPWs employment dispute

[17] C represented an employee engaged in an employment dispute with RPW which is a registered charity in the Waikato region. The dispute was resolved culminating in a mediated settlement agreement on 5 March 2018. In addition to the mediator, RPW and the employee, H signed the agreement. Clause 8 of the agreement relevantly provided:

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8 *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 95.
9 *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 136.
10 *[C] v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 165. The challenge succeeded in relation to an order that C, H and Ms Simpson pay Turuki $3,000 as general damages on the basis that the Authority lacked jurisdiction to make an award of general damages: at [74]. The Court also reduced the quantum of penalties ordered by the Authority: at [92].
11 At [49]–[53].
12 *Musa v Whanganui District Health Board* [2010] NZEmpC 120, [2010] ERNZ 236 at [55]–[57].
13 *[C] v Turuki Healthcare Services Charitable Trust*, above n 10, at [53].

> Neither party, nor their representatives, shall make disparaging or negative remarks about the other. [H] has agreed to sign the Record of Settlement to indicate his agreement at being bound to this term in the Record of Settlement.

The agreement also recorded it was understood that once signed by the mediator it would become final, binding and enforceable, and that:

> … [section]149(4) of the Employment Relations Act 2000 provides that a person who breaches an agreed term of settlement to which subs (3) applies is liable to a penalty imposed by the Employment Relations Authority.

[18] Shortly after settlement H posted disparaging comments about RPW on C's Facebook page and RPW took steps to enforce the settlement. This resulted in seven determinations of the Authority, including a determination of 16 August 2018 dealing with issues of jurisdiction and granting RPW's application for compliance orders against H and C in which they were ordered to comply with the terms of settlement and to remove disparaging comments on social media platforms.[14]

[19] H challenged two of the Authority's determinations concerning the quantum of penalties and costs in the Employment Court. He also belatedly sought an extension of time to file challenges to the earlier determinations of the Authority. In a judgment dated 4 September 2020 Judge Perkins declined the application for an extension of time and dismissed the challenges to the quantum of penalties and costs.[15]

[20] In total, the review proceeding in this Court purports to challenge ten determinations of the Authority and three decisions of the Employment Court made in the context of the RPW employment dispute.

The judicial review application

[21] The third amended statement of claim dated 28 October 2020 is a discursive document. Mr O'Brien, counsel for H, responsibly acknowledges it requires improvement.

[22] After reciting the question referred to at [3] above, the pleading states:

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[14] *R v [H]* [2018] NZERA Auckland 253.
[15] *H v RPW* [2020] NZEmpC 141.

> The applicant seeks review of all the actions against him on the basis that the MBIE institutions' powers and functions under the [Act] and the jurisdiction of the Employment Court did not extend to him or his company. There was no jurisdiction for the respondents to file or the Authority to issue or entertain proceedings against him, or his company. The directions, orders, determinations and decisions sought and made against him were all without jurisdiction.

[23] It then proceeds to traverse the details of each of the directions, determinations, decisions and orders which are the subject of challenge. Orders are sought quashing all the directions, determinations, decisions and orders addressed in the application. Costs and damages are sought in an unquantified amount.

Judicial review under the Act

[24] The Authority and the Employment Court have exclusive statutory jurisdiction to determine employment relationship problems as defined in s 5 of the Act.[16] Although the Act recognises a power of review, the scope of such review is narrowly confined.

[25] With reference to review of the Employment Court, s 193 provides:[17]

> **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.

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16 Employment Relations Act 2000, ss 161 and 187.

17 The restriction on review of determinations, orders or proceedings of the Authority is contained in s 184.

[26] Review applications in respect of the Employment Court are made to this Court under s 213:

> **213 Review of proceedings before court**
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> (1) If, in relation to any proceedings before the court, any person wishes to apply for a review under the Judicial Review Procedure Act 2016 or bring proceedings seeking a writ or order of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or an injunction, the provisions of subsections (2) to (4) apply.
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> (2) Despite anything in any other Act or rule of law, the application or proceedings referred to in subsection (1) must be made to or brought in the Court of Appeal.
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> …

[27] However the review power in respect of the Authority is exercised by the Employment Court. Section 194 relevantly states:

> **194 Application for review**
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> (1) If any person wishes to apply for review under the Judicial Review Procedure Act 2016, or bring proceedings seeking a writ or order of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or injunction, in relation to the exercise, refusal to exercise, or proposed or purported exercise by—
>
> (a) the Authority; or
>
> …
>
> of a statutory power or statutory power of decision (as defined by section 4 of the Judicial Review Procedure Act 2016) conferred by or under this Act or any of the provisions of sections 17 to 21, subpart 4 of Part 3, Part 4, and clauses 1 to 5 and 7 to 11 of Schedule 8 of the Public Service Act 2020 or subpart 4 of Part 6 of the Education and Training Act 2020, the provisions of subsections (2) to (4) of this section apply.
>
> (2) Despite any other Act or rule of law, but subject to section 184(1A), the court has full and exclusive jurisdiction to hear and determine any application or proceedings of the type referred to in subsection (1) and all such applications or proceedings must be made to or brought in the court.
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> (3) Where a right of appeal (which includes, for the purposes of this subsection, the right to make an election under section 179) is conferred on any person under this Act or the Public Service Act 2020 or the Education and Training Act 2020 in respect of any matter, that person may not make an application under subsection (1) in respect of

> that matter unless any appeal brought by that person in the exercise of that right of appeal has first been determined.
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> …

Discussion

The parties' cases

[28] The submissions of counsel for the Board, Turuki and RPW advance a number of grounds in support of the application to strike out the review proceeding which can be encapsulated under three broad headings:

(a) The review proceeding discloses no reasonably arguable cause of action, is frivolous and vexatious or otherwise an abuse of the process of the Court.

(b) The contentions advanced in the review proceeding involve questions of law, not questions of jurisdiction in the narrow sense contemplated by s 213 of the Act.

(c) The challenges to the various determinations of the Authority are being pursued in the wrong forum, contrary to the statutory regime in respect of judicial review of the Authority's actions.

[29] Counsel emphasise the policy reasons for the limitation on rights of appeal in respect of employment disputes, citing observations of this Court in *AFFCO New Zealand Ltd v Employment Court*.[18] They contend that the scheme of the Act which is designed to limit access to this Court in light of the Authority and the Employment Court being specialised bodies should be respected.

[30] Mr O'Brien acknowledges that review under s 213 is only available on the ground of lack of jurisdiction in the narrow and original sense of the Employment Court not having been entitled to enter upon the inquiry in question, or where a power

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[18] *AFFCO New Zealand Ltd v Employment Court* [2017] NZCA 123, [2017] 3 NZLR 603 at[38]–[39].

is wrongly assumed. However he maintains that H's review application is of that nature, explaining:

> The factual setting for the review application is that the third and fourth respondents each entered into a mediated settlement with one of their employees. The applicant did not sign the settlement agreement (re the fourth respondent), nor was he a party to the agreements (contracts) (fourth and fifth respondents). Despite this, the Court (and the Authority) found it had jurisdiction to enforce the terms of settlement agreement against him as a non-party to that contract and impose penalties for the applicant having breached the settlement agreement.

[31] In particular he submits that the reference to "person" in s 149(4) of the Act should be given a narrower meaning than in *Musa*,[19] drawing support from a decision of the Human Rights Review Tribunal in *Director of Proceedings v O'Malley.*[20]

[32] With reference to the review application so far as it applies to the Board, Mr O'Brien further submits:

> The review application regarding matters with the third respondent raise[s] an arguable case as to whether the Authority acted outside its jurisdiction in directing the applicant not to contact the third respondent. It entails whether the Authority mistakenly applied s 160(1)(f) [of the Act] to give it powers outside the scope of an investigation (and the Employment Court reinforced that baseless assumption of power in the subsequent challenge Judgment).

[33] In summary Mr O'Brien contends that H has a strongly arguable case that the Employment Court exceeded its jurisdiction in the narrow and original sense and granted itself powers not conferred by the Act. While acknowledging that the pleading will require amendment, he notes that a court will generally allow an applicant the opportunity to amend pleadings instead of taking the draconian step of striking out a proceeding.[21]

The challenges to the Authority's orders

[34] Mr O'Brien does not squarely confront the objection taken that s 194(2) of the Act mandates that any application for review of actions of the Authority must be made or brought in the Employment Court. In stating in his submission that "the Court (and

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19 *Musa v Whanganui District Health Board*, above n 12, at [55].
20 *Director of Proceedings v O'Malley* [2008] NZHRRT 23.
21 Citing *Reay v Attorney General* [2016] NZCA 519, [2016] NZAR 1672; and *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 (HC).

by association the Authority) had no jurisdiction", Mr O'Brien appears to assume that a review application to this Court in respect of a decision of the Employment Court can extend to orders or determinations of the Authority made in the same employment dispute.

[35] We agree with the submission of the strike-out applicants that s 194(2) precludes the making of applications for review to this Court in respect of orders or determinations of the Authority. It follows that the third amended statement of claim must be struck out in respect of the challenges made to the 16 directions and orders of the Authority.

The challenges to the Employment Court's decisions

[36] We turn to consider the proceeding insofar as it challenges the seven decisions of the Employment Court. It is plain that H seeks to ventilate in this Court the issue of whether various orders should have been made against him personally. Mr O'Brien's submissions frame that issue as a matter of jurisdiction which can be brought before this Court by the pathway of s 213.

[37] However it is apparent from the statutory scheme that the Employment Court is the appropriate forum for challenges to orders and determinations of the Authority, whether by appeal or review. The Employment Court was considering within its jurisdiction challenges to determinations of the Authority. No issue of a want of jurisdiction thus arises justifying the exercise of this Court's s 213 power.

[38] We agree with the submission advanced for Turuki and RPW that in relation to the employment disputes involving those parties, H's challenge is more accurately viewed as an appeal on a question of law, challenging the Employment Court's finding (within its jurisdiction) that the power in s 149(4) extended to him. As Mr O'Brien submits:

> The applicant's position is that the correct approach is to read s 149(4) [of the Act] in light of the wording of s 149(3)(a) … , which sets out that the terms of a settlement agreement are binding on the parties, not non-parties.

[39] Similarly, in regard to the Board's employment dispute Judge Corkill held that under the provisions of the Act the Authority had jurisdiction to make the orders directing H not to contact the Board whilst it was represented by counsel.[22] We agree with the submission for the Board that the proper avenue to challenge the Employment Court's finding would be an appeal on a question of law.

[40] Consequently we accept the submission for the strike-out applicants that the appropriate pathway for bringing such challenges to the Employment Court's decisions before this Court was by an application for leave to appeal pursuant to s 214 of the Act. In order to do so of course, it is necessary to obtain leave by persuading this Court that the criteria for such an appeal are met.[23] For this reason the balance of the third amended statement of claim seeking review under s 213 of the seven decisions of the Employment Court is also struck out.

[41] As an order for strike-out is inevitable for the reasons above, we do not find it necessary to engage with the submissions that the review proceeding is otherwise an abuse of process and frivolous or vexatious. However we note two points. First there is merit in the submission made for the Board that H agreed to the course of action whereby preliminary jurisdictional matters were addressed by the Employment Court in the decision of 22 September 2020.[24] Secondly H's challenge to the Employment Court decision granting him an extension of time to file a statement of defence[25] is misconceived because that judgment favoured H. The fact that that decision is included in what counsel for Turuki describes, with some justification, as the "omnibus" application for review suggests that the selection of orders and decisions challenged in the proceeding was somewhat indiscriminate.

[42] As our conclusions on the strike out application are determinative of the judicial review proceeding, it is unnecessary to address H's application for interim orders.

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22 *Bay of Plenty District Health Board v [C]*, above n 6, at [110] and [122].
23 We note that such an application would now be out of time.
24 *Bay of Plenty District Health Board v [C]*, above n 6.
25 *Bay of Plenty District Health Board v [C]*, above n 5.

Result

[43] The application for judicial review is struck out.

[44] The applicant must pay to each of the third, fourth and fifth respondents costs for a standard application on a band A basis and usual disbursements.

Solicitors:
Just Lawyers (NZ) Ltd, Auckland for Applicant
Holland Beckett Law, Tauranga for Third Respondent
Wynn Williams, Auckland for Fourth Respondent
Norris Ward McKinnon, Hamilton for Fifth Respondent