IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA479/2020
[2022] NZCA 12

BETWEEN	SUSAN MARGARET KENNEDY Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
	THE CHIEF EXECUTIVE OF ORANGA TAMARIKI — MINISTRY FOR CHILDREN Second Respondent
	EMPLOYMENT COURT Third Respondent

Hearing:	30 November 2021
Court:	French, Gilbert and Collins JJ
Counsel:	Applicant in person S M Bisley and L Robertson for Second Respondent No appearance for First or Third Respondents
Judgment:	10 February 2022 at 3 pm

JUDGMENT OF THE COURT

A The application for judicial review is dismissed.

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

REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] Ms Kennedy was employed by Oranga Tamariki as a senior social worker for approximately eight years until she resigned in February 2018. She commenced personal grievance proceedings in the Employment Relations Authority (the ERA) claiming she was bullied by various individuals in the course of her employment, treated unfairly, and otherwise disadvantaged. She claims she was constructively dismissed. She links the alleged conduct to her suffering two strokes, experiencing suicidal thoughts and attempting suicide.

[2] Ms Kennedy's claims are contested and have not yet been determined.

[3] After Ms Kennedy published her claims in various media, Oranga Tamariki obtained an interim order from the ERA prohibiting publication of the pleadings, evidence and the names of witnesses, employees or former employees (the subject of her complaints) (the ERA decision).[1] The ERA accepted that the "nature of the allegations, which are currently untested, is such that the named employees are highly likely to suffer distress and reputational damage if the orders are not granted".[2] The interim non-publication order was made in the exercise, or purported exercise, of the powers conferred on the ERA under cl 10(1), sch 2 of the Employment Relations Act 2000 (the Act):

> **10 Power to prohibit publication**
>
> (1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[4] Ms Kennedy applied pursuant to s 179 of the Act to have the matter heard by the Employment Court and sought a hearing de novo. She challenged the ERA's power

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1 *Kennedy v Chief Executive of Oranga Tamariki — Ministry for Children* ERA Auckland 3024458, 28 August 2019 [ERA decision].

2 At [9].

to make the order, contending it breached her right to freedom of expression assured under s 14 of the New Zealand Bill of Rights Act 1990. She argued that the ERA's powers are confined to employment relationship problems and do not extend "to making general directions restricting persons' rights in their general lives". She noted that details of her case had already been made public, on television and in newspaper reports, and she therefore contended the interim non-publication order was futile. Finally, she argued it was:

> unjust and unfair that the victim of bullying has her reputation and judgement questioned in public while the bullies and the organisation that condoned this behaviour are effectively protected by the [ERA].

[5] The Employment Court dismissed Ms Kennedy's challenge in a decision given on 5 May 2020 (the Employment Court decision).[3] Judge Holden considered the interim non-publication order was a determination about procedure and therefore could not be challenged because of s 179(5)(a) of the Act.[4] Because of its central importance to the decision, it is helpful to set out s 179 in full at this stage:

> **179 Challenges to determinations of Authority**
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> (1) A party to a matter before the Authority who is dissatisfied with a written determination of the Authority under section 174A(2), 174B(2), 174C(3), or 174D(2) (or any part of that determination) may elect to have the matter heard by the court.
>
> (2) An election under subsection (1) must be made in the prescribed manner and within 28 days after the date of the determination.
>
> (3) The election must—
>
> (a) specify the determination, or the part of the determination, to which the election relates; and
>
> (b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as a **hearing de novo**).
>
> (4) If the party making the election is not seeking a hearing *de novo*, the election must specify, in addition to the matters specified in subsection (3),—
>
> (a) any error of law or fact alleged by that party; and

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3 *Kennedy v Chief Executive of Oranga Tamariki — Ministry for Children* [2020] NZEmpC 58 [Employment Court decision].

4 At [16].

(b) any question of law or fact to be resolved; and

(c) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the court and the other parties of the issues involved; and

(d) the relief sought.

(5) Subsection (1) does not apply—

(aa) to an oral determination or an oral indication of preliminary findings given by the Authority under section 174(a) or (b); and

(a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; and

(b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

Application for review

[6] Ms Kennedy now applies for judicial review of the ERA decision and the Employment Court decision. She seeks a declaration that neither the ERA nor the Employment Court had jurisdiction to make the interim non-publication order. She also seeks an order quashing those decisions.

ERA decision

[7] The application for review of the ERA decision must be dismissed for the simple reason that this Court has no jurisdiction to review it pursuant to s 194 of the Act. The Employment Court has exclusive jurisdiction to determine any application for judicial review of the exercise, or purported exercise, of any statutory power of decision by the ERA, as the interim non-publication order undoubtedly was:

194 Application for review

(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; …

…

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 Parts 5, 6, 7, or 7A of the State Sector Act 1988, 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.

(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.

…

[8] Ms Kennedy did not apply to the Employment Court for judicial review of the ERA decision. Instead, she sought to challenge it by way of a de novo hearing in the Employment Court pursuant to s 179 of the Act.

Employment Court decision

[9] This Court has exclusive power to review a decision of the Employment Court in terms of s 213(2) of the Act. However, the review power is limited to the ground of lack of jurisdiction:[5]

193 Proceedings not to be questioned

(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.

(2) For the purposes of subsection (1), the court suffers from lack of jurisdiction only where,—

(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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5 *Parker v Silver Fern Farms Ltd* [2011] NZCA 564, [2012] 1 NZLR 256 at [19]; and *Moodie v Employment Court* [2012] NZCA 508, [2012] ERNZ 201 at [15].

(b) the decision or order is outside the classes of decisions or orders which the court is authorised to make; or

(c) the court acts in bad faith.

[10] Ms Kennedy's application for review is not grounded on a lack of jurisdiction in this narrow sense. She does not contend that the Employment Court had no jurisdiction to deal with her application for review of the ERA decision; she herself invoked its jurisdiction to do so. The Employment Court plainly had jurisdiction to entertain Ms Kennedy's application. Its decision dismissing that application was within the class of decisions it was authorised to make. Ms Kennedy does not suggest the Employment Court acted in bad faith. It follows that the application for review of the Employment Court's decision falls outside the scope of this Court's very narrow jurisdiction on review. This aspect of the application must also be dismissed.

[11] For completeness, we accept it is arguable that an interim non-publication order is not a determination about the procedure the ERA has followed, is following or is intending to follow. If it was not a procedural order, s 179(5) of the Act did not apply. If this is the correct legal position, the Employment Court erred in law in dismissing Ms Kennedy's challenge on that basis. However, any such error could only be addressed by way of appeal to this Court on a question of law under s 214. The time for any appeal under that section has long since passed (the time limit is 28 days from the date of issue of the decision).[6] Importantly, whether or not the Employment Court did err in law is irrelevant for the purposes of the present application. It does not mean the Employment Court lacked jurisdiction in the narrow sense applicable such that its decision is amenable to judicial review by this Court.

Result

[12] The application for judicial review is dismissed.

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

Solicitors: Buddle Findlay, Wellington for Second Respondent

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6 Employment Relations Act 2000, s 214(2).