

**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, RPW AND C
REMAINS IN FORCE.**

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA249/2022
[2022] NZCA 398**

BETWEEN	H Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
	RPW Second Respondent
	C Third Respondent

Court: Courtney and Katz JJ

Counsel: Applicant in person
A P Lawson for First Respondent
S W Hood for Second Respondent
No appearance for Third Respondent

Judgment: 25 August 2022 at 11:00 am
(On the papers)

JUDGMENT OF THE COURT

The application for leave to appeal is declined.

REASONS OF THE COURT

(Given by Katz J)

[1] H applies under s 214 of the Employment Relations Act 2000 (the Act) for leave to bring an appeal against an Employment Court decision of Judge K G Smith declining H's application to disqualify Norris Ward McKinnon from acting for RPW in judicial review proceedings in the Employment Court.¹ In the review proceedings, H challenges various determinations of the Employment Relations Authority that found in favour of RPW, and against H and his associated company, C (of which H is the sole shareholder and director).

[2] The right of appeal to this Court from a decision of the Employment Court is limited to appeals on questions of law and is subject to a leave requirement. The threshold for a grant of leave is a high one. Leave may be granted if, in the opinion of this Court, 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 for determination.²

Background

[3] H, through his company, C, operates a business representing parties involved in employment disputes.³ In March 2018 H represented an employee in a dispute against RPW, their employer. The parties went to mediation. This resulted in a settlement agreement under s 149 of the Act. The settlement agreement was signed by the employee, RPW, H and the mediator. The agreement included the following non-disparagement clause:⁴

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.

[4] H was subsequently found by the Authority to have breached the non-disparagement clause.⁵ The Authority made orders compelling H and C

¹ *H v Employment Relations Authority* [2022] NZEmpC 87 [Employment Court judgment].

² Employment Relations Act 2000, s 214(3).

³ H can act as such by virtue of s 236 of the Employment Relations Act.

⁴ Employment Court judgment, above n 1, at [7].

⁵ *RPW v H* [2018] NZERA Auckland 338 [ERA liability decision] at [145]–[146].

to comply, to pay penalties, and to pay costs to RPW.⁶ Norris Ward McKinnon (in particular Mr Hood, a partner of that firm) has acted for RPW throughout.

[5] H applied to the Employment Court to disqualify Norris Ward McKinnon from continuing to act for RPW in the review proceedings. The Judge dismissed that application and H now seeks leave to appeal that decision.⁷

Proposed grounds of appeal

[6] The documents filed by H (who is not a lawyer) are somewhat discursive. They focus to a significant extent on the merits of the substantive proceedings before the Authority and the Employment Court. While that may provide helpful background, the present focus must be on any alleged errors of law made by the Judge. The submissions H makes that are most relevant in that context are that:

- (a) Norris Ward McKinnon cannot properly discharge their obligations to their clients, or the Court, as the interests of Norris Ward McKinnon and RPW are in conflict.
- (b) The Judge erred in law (albeit no specific error of law is identified).
- (c) The judgment is in breach of the obligation of due process of justice.
- (d) The judgment damages the rule of law, and the perception that the rule of law obtains in New Zealand.
- (e) The underlying review proceedings raise a matter of public interest and importance because it will establish whether New Zealand is in breach of its international obligations in respect of anti-corruption and anti-money laundering measures, and whether it is a safe place to do business.

⁶ ERA liability decision, above n 5; *RPW v H* [2019] NZERA Auckland 121; and *RPW v H* [2019] NZERA Auckland 367.

⁷ Employment Court judgment, above n 1.

Does the proposed appeal raise a question of law that, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for determination?

[7] The general theme underlying H's submissions is that the various decisions of the Authority that he is seeking to review are "bogus" and that the proceeding against him relating to the non-disparagement clause was "manufactured baselessly" on the advice of Norris Ward McKinnon. He expresses the view that Norris Ward McKinnon are now "advising on ... their own advice" and that if NWM are permitted to continue to represent RPW they will continue to advise RPW that their previous advice was correct "and they will drag [RPW] further into potential disrepute". H believes that it is in the interests of justice that RPW has independent advice.

[8] These (or similar) arguments were advanced before the Judge, who rejected them for the following reasons:⁸

- (a) Disqualification on the grounds that counsel will be litigating their own advice is insufficient, and speculative given the advice is unknown.⁹ The advice is also unlikely to be relevant to the review proceedings.¹⁰
- (b) There is no evidence of a conflict of interest between counsel and RPW, such that counsel will be unable to discharge their duties to RPW in the review proceedings.¹¹
- (c) There is no basis for asserting that counsel would be called to give evidence in the review proceedings. The application for judicial review relies on information in H's affidavit and there does not appear to be any gap which counsel's evidence might be relevant to fill.¹²
- (d) There is nothing to suggest counsel will be incapable of discharging their duty to the Court, or that they have acted in a way that falls short

⁸ At [64].

⁹ At [44].

¹⁰ At [45].

¹¹ At [48].

¹² At [49]–[56].

of the standards required by the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.¹³

[9] In our view the Judge's findings and reasoning do not disclose any arguable error of law. Further, the material before us does not provide any cogent evidential foundation for H's various submissions, including his core submission that there is a conflict of interest between RPW and its counsel.

[10] Underpinning many of H's arguments is the proposition that RPW's counsel has been pursuing, and is continuing to pursue, a baseless campaign against him. There is nothing in the material before us, or in the various decisions of the Authority or the Employment Court that we have reviewed, to support such a submission. On the contrary, RPW's substantive allegations against H were largely (possibly entirely) upheld by the Authority in its 2018 liability decision.¹⁴ H did not appeal that decision, although we note that the Authority's substantive findings, or its jurisdiction to make such findings, appear now to be under challenge in the review proceedings. For now, however, the Authority's liability findings stand.

[11] Nor is there any apparent substance to H's submission that Mr Hood should be disqualified from acting because, in a recent affidavit in a separate (but related) High Court proceeding, Mr Hood allegedly falsely claimed that the Authority had found that H had acted in contempt of the Authority.

[12] This allegation does not relate to any alleged error of law by the Judge. There is no suggestion that Mr Hood's affidavit was before him and it is not referred to in the judgment.

[13] In any event, H does not explain why he believes the statement to be false. We infer that it may be because a separate contempt proceeding was not brought against H. Rather, concerns about H's conduct were raised and addressed in the course of the liability and enforcement proceedings. If that is the essence of H's argument, there is nothing in the point. Although Mr Hood's statement may have been expressed

¹³ At [59] and [62].

¹⁴ ERA liability decision, above n 5.

in shorthand form, it is well supported by the Authority's findings in its liability decision. Those findings included that H:¹⁵

- (a) had demonstrated ongoing public contempt for the Authority's investigation process and of the Authority's directions and orders;
- (b) had engaged in contemptuous communications with the Authority;
- (c) had repeatedly told the Authority he would not participate in its investigation, would ignore its directions, and would not observe its orders;
- (d) had made it clear he did not respect the Authority's investigation process into RPW's claims against him and C;
- (e) had breached the Authority's non-publication orders 24 times;
- (f) had breached the two compliance orders the Authority issued a total of 23 separate times; and
- (g) had publicised his multiple deliberate breaches of the Authority's orders (drawing as much attention as he could to the contemptuous acts).

[14] In conclusion, taking the various matters we have outlined into account, it is our view that the application does not identify any error of law. However, even if one of the matters raised by H could be characterised as an error of law, it is clearly not one that by reason of its general or public importance or for any other reason, ought to be submitted to this Court for determination. H submitted that the underlying substantive review proceedings are of general or public importance. He did not, however, advance any argument that would support the conclusion that the subject matter of the proposed appeal (Norris Ward McKinnon's continued involvement as counsel for RPW) raises a matter of general or public importance. In our view it does not.

¹⁵ At [247]–[252].

Result

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

Solicitors:

Crown Law Office, Wellington for First Respondent

Norris Ward McKinnon, Hamilton for Second Respondent