IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 134
EMPC 369/2021

IN THE MATTER OF	an application for judicial review
BETWEEN	CULTURESAFE NZ LIMITED Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	MANUKA HEALTH NEW ZEALAND LIMITED Second Respondent

Hearing:	5 May 2022 (Heard at Auckland, via VMR)
Appearances:	A Fechney, advocate for applicant No appearance for first respondent, by leave G Bevan, counsel for second respondent
Judgment:	1 August 2022

JUDGMENT OF JUDGE J C HOLDEN

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[1] The applicant, CultureSafe NZ Limited (CultureSafe), filed proceedings in the Employment Relations Authority (the Authority) for Mr Kalic and Mr Kostic (the grievants), who had previously been employed by the second respondent, Manuka Health New Zealand Limited (Manuka Health). In a preliminary determination the Authority found CultureSafe had not established its authority to act for the grievants.[1]

[1] *Kalic v Manuka Health New Zealand Ltd* [2021] NZERA 26 (Member Urlich).

[2] Ultimately, after neither the grievants nor CultureSafe provided further material sought by the Authority, the Authority administratively closed the file and said that when the grievants were ready for the matter to be investigated, they should advise the Authority.

[3] CultureSafe has filed an application for judicial review of the Authority's actions. In its statement of claim it seeks:

(a) a declaration that the Authority was acting ultra vires; and

(b) a declaration that the Authority cannot inquire into s 236 representation: it says this is an inquiry into a statutory power, conferred by the Employment Relations Act 2000 (the Act).

[4] CultureSafe also invited the Court to consider its jurisdiction to require the Authority to provide template authority to act forms (ATA forms) for representatives, to assist with access to justice.

The Authority considered the authorities to act

[5] Mr Halse is the sole director of CultureSafe. During 2019 and 2020 he acted for three of Manuka Health's Northland–based employees, including the grievants. In late 2019, the grievants resigned, and a few months later they lodged claims against Manuka Health with the Authority.

[6] The ATA form signed by Mr Kalic on 22 March 2019 included the sentence "I understand CultureSafe NZ will make the final decision on the most appropriate action to take in respect of this matter". The ATA form signed by Mr Kostic on 21 September 2019 included a slightly different sentence: "I understand CultureSafe NZ will in consultation with me decide on the most appropriate action to take in respect of this matter" (the authorisations).

[7] In a letter dated 15 October 2020 to the Authority, sent in advance of a telephone conference, Mr Bevan, Manuka Health's solicitor, noted the ATA forms and raised a concern that, by including the authorisations, the ATA forms did not meet the requirements of s 236 of the Act. He said the concern was that the sentences in

question gave CultureSafe the power to make decisions for the grievants. He said this is not what s 236 contemplates or permits. Manuka Health expected the matter to be resolved quickly (as it apparently had been in respect of the other Northland–based employee).

[8] On 15 October 2020, the concern about the ATA forms was discussed at a case management conference before Member Urlich, the Authority Member dealing with the grievants' matters. The Minute that was issued following that case management conference records:

> [15] During the telephone conference Mr Halse provided comment on these issues which included:
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> a) he had only just received the letter [from Mr Bevan] and had not had much time to consider it;
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> b) the issue is not relevant to the matter before the Authority;
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> c) the ATA is a matter between CultureSafe NZ and its clients; and
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> d) referred the Authority to the judgment of the Employment Court in *Dollar King Ltd v Hyowon Jun*.[2]

[9] The Authority said that it would consider further how to deal with the issue raised by Manuka Health about the ATA forms.

[10] Although a complaint on behalf of Mr Halse and CultureSafe was made to the Chief of the Authority in respect of Member Urlich, nothing was filed at that stage for and on behalf of the grievants.

[11] The Authority issued a further Minute dated 3 November 2020 saying that the issue of whether Mr Halse and/or CultureSafe had sufficiently established authority under s 236 of the Act to represent the grievants in their proceedings was a matter that was best resolved before the investigation of their employment relationship problems. The Authority set out a timetable for the filing of submissions and affidavit evidence in relation to that issue.

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2 *Dollar King Ltd v Jun* [2020] NZEmpC 91, [2020] ERNZ 246.

[12] There then followed some more email communications with the Authority from CultureSafe and from Mr Bevan. CultureSafe complained about the Minute of 3 November 2020 and said that the Authority Member had allowed Manuka Health's lawyers to detract from the grievants' personal grievances. Mr Bevan agreed that the ATA issue was distracting from resolution of the grievances, which was not in the interests of the grievants or indeed of Manuka Health. He noted that Mr Halse had the ability to remedy the situation simply by providing updated ATA forms that did not give him the power to make decisions about his clients' cases.

[13] In the meantime, Manuka Health filed submissions in accordance with the timetable set out in the Minute dated 3 November 2020, but no submissions or applications to vary the timetable were received from or for the grievants. Accordingly, the Authority considered the matter and issued its preliminary determination on 22 January 2021.[3]

[14] The Authority found that, by including the authorisations, the ATA forms did not meet the requirements of s 236 of the Act.[4] Therefore, the Authority held CultureSafe had not established its authority to represent the grievants.

[15] Nothing further came in from the grievants. This led to the Authority's Minute of 12 March 2021 in which the Authority ordered CultureSafe to file ATA forms that established that it was authorised to represent the grievants under s 236 of the Act, or alternatively provide the Authority with the last known contact details (physical and email address and telephone numbers) of the grievants, which would enable the Authority to contact them to inquire as to their intentions. This was to occur within 10 working days of the date of the Minute.

[16] On 6 April 2021, after the required information was not filed, the Authority issued the fourth Minute, administratively closing the file until the grievants advised the Authority that they were ready to proceed.

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3 *Kalic,* above n 1.
4 At [2] and [21].

[17] As far as the Authority is concerned, that remains where things stand. In the course of the hearing, the Court was provided with copies of newer ATA forms that replace the sentences in issue with the following:

> I understand CultureSafe NZ Limited will consult with me, in circumstances other than those shown above where they have my express permission, to decide on the most appropriate action to take in respect of my employment/health and safety matters. I also understand that if I seek and/or obtain alternative advice and/or representation this may compromise the ability of CultureSafe NZ Limited to represent me. I accept that in these circumstances, CultureSafe NZ Limited may decide not to represent me further in this matter.

[18] These were signed by the grievants in January 2021. There was nothing before the Court that indicated that these ATA forms have been provided to the Authority.

Employment advocates are not regulated

[19] In her introduction to the Court, Ms Fechney, advocate for CultureSafe, referred to recent media coverage of lay advocates in the employment jurisdiction where the view was expressed that they ought to be regulated.

[20] At present, the Act expressly allows an employee or an employer to be represented in matters under employment legislation by "any other person".[5] The Act does not impose any standards on such representatives; they are not required by the Act to be competent or ethical; there is no body that oversees their activities. The Court has recognised that the issue of whether lay advocates should be regulated is a matter for Parliament if it so chooses, not the Court. There is a limit to the extent to which the Court can appropriately address professional standards issues which arise in respect of the conduct of some (but certainly not all) advocates and which impact on often vulnerable litigants, the opposing party, and more generally in terms of the efficient and effective administration of justice.[6]

[21] Here, CultureSafe has not looked after the grievants. The Authority records that they are visa-dependent workers for whom English is a second language and that one of them is currently offshore. As the Authority notes, their personal circumstances

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5 Employment Relations Act 2000, s 236.

6 *Ward v Concrete Structures (NZ) Ltd* [2019] NZEmpC 111 at [12].

may put them in a category of employees who are inherently vulnerable.[7] Their interests ought to have been paramount in CultureSafe's engagement with Manuka Health and with the Authority. They were entitled to expect that CultureSafe would progress their claims expeditiously. Unfortunately, CultureSafe has failed to do so, leaving the grievants in limbo. Their interests, and those of Manuka Health and its current and former employees who would be witnesses in these proceedings, have been subsumed in the present argument.

[22] This is unsatisfactory. While the grievants could, of course, find another representative, they are unlikely to be knowledgeable about the intricacies of employment law and procedure, and are looking to CultureSafe for advice. They should reasonably expect CultureSafe to act in their best interests, including by providing the Authority with the material sought.

The issues for this Court

[23] Prior to the hearing, Manuka Health identified two key issues for this proceeding, relating to natural justice:

(a) whether the Court has jurisdiction to hear a review based on an alleged failure to afford natural justice; and

(b) if it does, whether the Authority failed to afford CultureSafe natural justice.

[24] Manuka Health also included as an issue whether any other permitted ground of review is made out. Remedies were said to be in issue.

[25] Manuka Health accepts that CultureSafe had standing.

[26] In submissions, Ms Fechney acknowledged that CultureSafe itself was given a significant opportunity to comment. The real issue, she said, was that the grievants did not get that opportunity. The grievants are not parties. In any event, by giving

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7 *Kalic*, above n 1, at [18].

their representative the opportunity to comment, it is hard to see how the Authority could be criticised.

[27] In short then, there is no basis for a claim by CultureSafe for alleged failure by the Authority to afford it natural justice. The issue can be put to one side. It is not necessary in this case for the Court to consider whether it has jurisdiction to hear a claim based on a breach of natural justice.

[28] Ms Fechney also said that the order was reviewable for being unreasonable. She submitted:

> … the Authority suffers a lack of jurisdiction where it fails to comply with the principles of natural justice, and/or act in a manner that is reasonable, having regard to its investigative role.

[29] She then submitted:

> The Authority has an investigative function. If there were any doubt as to the applicant's representation, the *reasonable* resolution would have been to ask Mr Kalic and Mr Kostic whether they had chosen the applicant to represent them.

[30] Apart from any other difficulty, the argument fails on the facts; the Authority expressly asked CultureSafe for the contact details of the grievants so the Authority could contact them to inquire as to their intentions.

[31] The principal issue in the case is a narrow one: whether the Authority had jurisdiction to consider the basis on which CultureSafe was engaged.

The Authority has jurisdiction to consider s 236

[32] CultureSafe says that the Authority is not entitled to enter into an inquiry as to what it says is the exercise or purported exercise of the statutory power conferred under s 236. CultureSafe seeks a declaration that the Authority is not authorised to make a determination or order that limits a person's right to choose a person to represent them in accordance with s 236. CultureSafe says that if Manuka Health remains concerned about CultureSafe's right to represent the grievants, it would be

able to bring a judicial review against CultureSafe pursuant to s 194 of the Act with respect to CultureSafe's purported actions under s 236.

[33] Manuka Health submitted that sch 2, cl 1 of the Act gave the Authority the express jurisdiction to consider s 236 of the Act. That clause relevantly provides:

> (1) The Authority may, in performing its role, deal with any question related to the employment relationship, including –
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> …
>
> (b) any question connected with the construction of this Act … being a question that arises in the course of any investigation by the Authority.

[34] It submits that this gives the Authority jurisdiction to consider whether s 236 has been complied with in the context of the investigation before it.

[35] Although sch 2, cl 1 initially refers to "the employment relationship", which may be seen as a narrow focus, the inclusions of cl 1(b) confirms that the scope of the clause extends to "any question" connected with the construction of the Act that "arises in the course of any investigation".

[36] In the course of the investigation into the grievants' employment relationship problems, a question arose as to whether CultureSafe had established its authority to represent the grievants. It falls squarely within sch 2, cl 1.

[37] A further point can be made about s 236 which relevantly provides:

> **236 Representation**
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> (1) Where any Act to which this section applies confers on any employee the right to do anything or take any action –
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> …
>
> (b) in the Authority or the court, –
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> that employee may choose any other person to represent the employee for that purpose.
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> …
>
> (3) Any person purporting to represent any employee … must establish that person's authority for that representation.

[38] As can be seen, s 236(3) does not define to whom the purported representative must establish their authority.

[39] The clear inference is that it must be to the entity to whom they are making claims on behalf of a person. If an issue arises as to whether a person appearing in the Authority has proper authority to represent a party, the Authority must be able to consider that issue. Any other outcome would be absurd.

[40] The Authority had jurisdiction to consider the question of whether the ATA forms established CultureSafe's authority to represent the grievants.

[41] Given the arguments made in this Court, two other comments are made. First, the Authority was not limiting the grievants' right to choose who they wish to represent them; it was simply seeking to ensure that they had indeed authorised CultureSafe to do so. Second, no statutory power is conferred on purported representatives under s 236; rather, the section gives parties a right to choose who will represent them for matters under the Act. CultureSafe relies on s 194 of the Act. Section 194 only relates to situations where a person has exercised a "statutory power or statutory power of decision". Those terms are defined in ss 4 and 5 of the Judicial Review Procedure Act 2016 and would not include a grievant choosing their representative, let alone someone purporting to represent a grievant.

No jurisdiction to require the Authority to provide templates

[42] As noted, CultureSafe invited the Court to consider its jurisdiction to require the Authority to provide template ATA forms. It did not point to any particular provision that might establish such jurisdiction.

[43] Matters of process are for the Authority.[8] The Court has no jurisdiction to require the Authority to provide forms.

[44] In any event, prior to a representative filing a statement of problem in the Authority, the parties will have been expected to try and resolve matters between them

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[8] Employment Relations Act 2000, ss 179(5), 184(1), 188(4).

and usually will have been to mediation. The representative would need authority to take those steps. For this reason, while there may be value in template ATA forms, providing such templates would not seem to be a function that might be expected of the Authority.

Conclusion and costs

[45] In conclusion, the application for judicial review fails. If the grievants wish to pursue their claims, updated ATA forms should be filed with the Authority and/or they should contact the Authority.

[46] Manuka Health is entitled to costs on this application. Those ought to be able to be agreed. If that does not prove possible, Manuka Health may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. CultureSafe is to respond by memorandum filed and served within 14 days thereafter, with any reply from Manuka Health filed and served within a further seven days. Costs would then be determined on the papers.

J C Holden
Judge

Judgment signed at 11 am on 1 August 2022