

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 186
EMPC 144/2024**

IN THE MATTER OF an application for judicial review

AND IN THE MATTER OF an application to strike out pleadings

BETWEEN ALADDIN AL-BUSTANJI
 First Applicant

AND GLEN JENNER
 Second Applicant

AND CORRECTIONS ASSOCIATION OF NEW
 ZEALAND INCORPORATED
 Respondent

Hearing: On the papers

Appearances: M O'Flaherty and A Little, counsel for applicants
 JM Roberts and K Kleingeld, counsel for respondent

Judgment: 27 September 2024

**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE KATHRYN BECK
(Application to strike out pleadings)**

Background

[1] The applicants in this proceeding have filed an application for judicial review in relation to actions which the respondent has either taken or had indicated it intends to take.

[2] In its statement of defence to that application, the respondent, the Corrections Association of New Zealand Inc (CANZ), has initiated a counterclaim against the

applicants. That counterclaim seeks, amongst other things, a declaration that the matters particularised “*may* constitute a breach”¹ of its rules and other declarations as to how those rules should be interpreted both in relation to the alleged breaches and more generally.

[3] This judgment resolves a strike-out application brought by the applicants in respect of that counterclaim.

[4] Both parties filed and served submissions. Subsequently, the Court sought further submissions on the issue of whether it has jurisdiction to hear the counterclaim. Those additional submissions have now been received.

Issue

[5] The applicants’ strike-out application raises a number of issues. However, there is an important preliminary issue for the Court to determine, which is whether it has jurisdiction to hear the counterclaim. If it does not have jurisdiction to hear the matter, it would not be appropriate for it to make any assessment of whether the substance of the claim is reasonably arguable or whether the remedies sought are available.

Strike-out principles

[6] The Court may strike out a proceeding by relying on r 15.1(1) of the High Court Rules 2016.² Under that rule, all or part of a pleading may be struck out if it discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading.

Analysis

[7] The applicants have brought a judicial review application. The respondent’s counterclaim is for declaratory remedies relating to possible breaches of CANZ’s

¹ (Emphasis added).

² Employment Court Regulations 2000, reg 6(2)(a)(ii); see also *New Zealand Fire Service Commission v New Zealand Professional Firefighters’ Union Inc* [2005] ERNZ 1053 (CA) at [13].

rules.³ The applicants say that the respondent's counterclaim is not appropriate to the nature of the proceeding.

[8] Where a counterclaim is filed, the Court is guided by the processes set out in rr 5.53–5.61 of the High Court Rules.⁴ Rule 5.53, which relates to a counterclaim which is filed against a plaintiff only, states:

A defendant who intends to raise a counterclaim against the plaintiff only must file a statement of counterclaim in the registry of the court in which the statement of defence must be filed.

[9] Notably, this provision does not require that the counterclaim be relevant to the original pleading. This can be compared with r 5.57, which relates to counterclaims filed against the plaintiff and another person. That provision requires the counterclaim to be related to or connected with the original subject matter of the proceeding.

[10] Accordingly, the High Court held in *Audio Essentials Ltd v Tripathi*:⁵

[35] Rule 5.53 places no restrictions upon the character of the counterclaim which may be brought against the plaintiff. This type of counterclaim may comprise any matters which could have been included in a proceeding separately issued. It may comprise multiple causes of action to the same extent as would be permissible in an independent proceeding brought by the defendant against the plaintiff.

[36] However, where a counterclaim is brought against a plaintiff and another person r 5.57 restricts the subject matter to claims for “any relief relating to or connected with the original subject matter of the proceeding”.

[11] In the present case, the counterclaim is filed against the applicants only. That means r 5.53 applies, rather than the heightened test in r 5.57. Therefore, if the claims for breaches of the rules could have been included in a proceeding issued separately in the Court, there is nothing preventing them from being included in this present claim.

[12] However, I do not consider that CANZ's claims could have been initiated separately in the Court. Section 187 of the Employment Relations Act 2000 outlines

³ See above at [2].

⁴ Employment Court Regulations 2000, reg 6(2)(a)(ii).

⁵ *Audio Essential Ltd v Tripathi* [2018] NZHC 3425 (citations omitted).

the extent of the Court’s jurisdiction. That jurisdiction is narrow and typically arises out of proceedings first filed in the Authority. It can hear judicial review claims in relation to actions of a union, or that union’s representative.⁶ However, the Court does not have originating jurisdiction to hear and determine actions relating to alleged breaches of a union’s rules by its members.

[13] Section 161(1)(r) of the Employment Relations Act states that the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including any action arising from or related to the employment relationship, unless the action is directly within the jurisdiction of the Court. Matters which are within the Authority’s exclusive jurisdiction are not within the Court’s jurisdiction.⁷

[14] The High Court (then Supreme Court) has previously indicated that the mere fact that a matter has been filed as a counterclaim cannot lead to a court acquiring jurisdiction over that matter if it would not otherwise have had jurisdiction.⁸ That principle applies here. The Court does not have jurisdiction to hear the matter, and jurisdiction cannot be created by a counterclaim.

[15] For completeness, I observe that neither the counterclaim pleadings nor the submissions from the respondent explicitly indicate that the counterclaim is a claim for judicial review. It is described more narrowly as a claim for “declaratory remedies”. Similarly, the respondent does not suggest that the counterclaim could have been filed separately as a judicial review proceeding.

[16] If the counterclaim was a judicial review claim, it could theoretically fall within s 194 of the Employment Relations Act. However, if that were the case, the respondent would have essentially been filing judicial review proceedings in respect of its own prospective actions. But that is not possible. Section 9 of the Judicial Review Procedure Act 2016 indicates that “the person whose act or omission is the subject of the application” must be named as the respondent. Thus, if the counterclaim

⁶ Employment Relations Act 2000, ss 187(1)(j) and 194.

⁷ Section 161(3).

⁸ *McConnochie v Ewing* (1895) 13 NZLR 719 (SC) at 722.

was filed as a separate proceeding, the respondent would have been both applicant and respondent. Even if such an application was technically lawful, it would be a breach of process and would have to be struck out.

[17] The relevance of the Declaratory Judgments Act 1908 was another related issue which the parties addressed. The respondent indicated that it was seeking “declarations as remedies, which are akin to the declarations described in the Declaratory Judgments Act”. It submitted that there is no doubt that the Employment Court and Authority can issue such declarations. On the other hand, the applicants suggested that only the High Court, and not the Employment Court, has jurisdiction to issue such remedies.

[18] For the purposes of this proceeding, it is only necessary to determine that the Court does not have originating jurisdiction to issue such declarations. That much is clear in that the jurisdiction to hear judicial review proceedings in s 194 of the Employment Relations Act does not extend to making declarations under the Declaratory Judgments Act. Nor is there any reference in s 187 of the Employment Relations Act to the Declaratory Judgments Act.

[19] The Authority may have jurisdiction to make the orders sought, even if not pursuant to the Declaratory Judgments Act.⁹ However, as already noted above, the originating jurisdiction of the Court is narrower than that of the Authority, and the Court can only obtain jurisdiction where a matter of this nature has been first filed and dealt with, either by removal or determination, in the Authority.

[20] Finally, the fact that the Employment Relations Act gives the Authority and Court exclusive originating jurisdiction over employment relationship problems does not necessarily oust the jurisdiction of the High Court under the Declaratory Judgments Act. Section 11 of that Act states:

The jurisdiction hereby conferred upon the High Court to give or make any declaratory judgment or order shall not be excluded by the fact that the said Court has no power to give relief in the matter to which the judgment or order

⁹ *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2007] ERNZ 405 (EmpC) at [7]–[13].

relates, or that such matter would, independently of this Act, be within the exclusive jurisdiction of any other Court.

[21] However, that is not an issue that needs to be determined here.

Conclusion

[22] The Court does not have jurisdiction over the matters arising in the counterclaim. The counterclaim is incapable of giving the Court jurisdiction. Therefore, I dismiss the counterclaim. As a result, it is not necessary for the applicants to file any statement of defence to the counterclaim.

[23] If the respondent wishes to pursue its proposed claim, it may wish to consider whether proceedings ought to be filed in the Authority. If it wishes to have the matter heard in the Court, it will need to file an application for removal after filing an application in the Authority.

[24] Costs are reserved.

Kathryn Beck
Judge

Judgment signed at 4.15 pm on 27 September 2024