Employment Court of New Zealand

Employees v Attorney-General [2021] NZEmpC 141 (24 August 2021)

Last Updated: 27 August 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2021] NZEmpC 141
EMPC 280/2021

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER	of an application for strike out
AND IN THE MATTER	of an application for urgency
AND IN THE MATTER	of an application for opt-out orders
BETWEEN	"EMPLOYEES" Applicants
AND	ATTORNEY-GENERAL Respondent

Hearing:	On the papers
Appearances:	Ms A Fechney (advocate) and Ms S Grey, counsel for applicants Ms J Catran and Ms K B Bell, counsel for respondent
Judgment:	24 August 2021

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

[1] These proceedings relate to the alleged proposed termination of a number of employees if they fail to have their first vaccination by 26 August 2021, the date specified for certain workers under the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order). An injunction is sought prohibiting such action.

[2] A statement of claim, and associated applications for interim orders and for urgency, were filed by the applicant on the afternoon of 16 August 2021. The respondent is named as the Attorney-General (apparently on behalf of all

employers). A telephone conference was convened the next morning, on 17 August 2021. A number of issues were discussed, primarily focussed on potential jurisdictional difficulties for the claim in this forum as opposed to the High Court (to the extent that the validity of the Order was being challenged) and/or the Employment Relations Authority (to the extent that it challenged the justification of employer action and sought orders restraining such action from being taken).

[3] Following discussion it was agreed that the applicant's representatives would consider the issue of forum and confirm which route/s they wished to go down. Late on Friday 20 August 2021, a memorandum was filed advising that the applicant wished to pursue the proceedings in this Court and set out a number of reasons why that was considered to be an available option. In the circumstances, and given the proximity of events that the applicant is concerned about and the relief being sought, I directed that the Attorney-General was to file and serve a response no later than midday Monday 23 August 2021. A strike out application (which had been foreshadowed during the course of the telephone conference) followed, accompanied

by comprehensive submissions.

[4] It was agreed that the strike out application could appropriately be dealt with on the papers, and I have been assisted by the material the parties have put before the Court within such a condensed space of time.

[5] The statement of claim is focussed on the validity or otherwise of the Order and the lawfulness of a requirement, by an employer, to require a worker of the class specified in the Order to be vaccinated by the due date or face dismissal. The Order is made by the Minister of Health. The applicant says that it is arguable that there was a breach of procedural fairness in making the Order and that, even if a challenge to the Order must be resolved in the High Court, this Court has jurisdiction to issue an injunction (restraining employers generally from relying on the Order) pending an outcome in that forum.

[6] In relation to forum the applicant accepts that the application for judicial review could be brought in the High Court (and has now filed parallel proceedings there), but submits that it is not necessary to do so, as the Employment Court has

jurisdiction to deal with it under s 189 of the Employment Relations Act 2000. That provision states that, in all matters before it, the Employment Court has jurisdiction to "determine [such matters] in such manner and to make such decisions or orders, not inconsistent with the [Employment Relations Act 2000] or any other Act ..., as in equity and good conscience it thinks fit."

[7] I agree with counsel for the Attorney-General that the claim ought to be struck out. It is fundamentally flawed. There are two key reasons why. First, the validity of the Order is for the High Court to consider on an application for judicial review.1 This Court has a judicial review function but it is limited to certain matters.2 Inquiring into the validity of an Order made by a Minister pursuant to another Act is not one of them.3 Nor do I regard s 189 as otherwise broadening out the reach of those powers. Reading s 189 in the way submitted for by the applicant would mean that the Court could intervene by way of judicial review in an almost limitless manner provided there was some connection to an employment relationship. That is plainly not what Parliament intended; indeed s 194A specifically excludes claims for termination of an employment relationship by way of judicial review. Such claims are to be pursued by way of personal grievance or breach of contract (common law).4 Allowing the claim to proceed as currently formulated would cut across the statutory framework.

[8] The second point is related. The Act makes it clear that such claims are to be commenced in the Employment Relations Authority (not the Court).5 The Authority has the power to make interim orders where it considers it appropriate to do so, as well as compliance orders.6 The Act also makes provision for matters to be challenged to the Court, including where interim relief has been declined;7 or for matters to be

1. The creation of the Order was an exercise of statutory power. See Judicial Review Procedure Act 2016, s 5. See also Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [2.26.5.1].

2 See Employment Relations Act 2000, s 194.

3 See also *Fleming v Attorney-General* [2021] NZEmpC 77 at [45]- [59].

4 Subject to s 113(1).

5. For a recent discussion in relation to the jurisdiction of the Authority and the first instance and appellate jurisdiction of the Court see *FMV v TZB* [2021] NZSC 102, in particular from [60].

6 Employment Relations Act 2000, s 161.

7 Employment Relations Act 2000, s 179.

removed to this Court for hearing.8 Where removal is declined, a party may apply to the Court for special leave to remove.9

[9] In summary, while the Court has some first instance jurisdiction, the path in this case is clearly delineated by the statute. The path does not allow the applicant, however pressing the matter might be, to effectively bunny-hop over the Authority to the Court without passing through the first gate. The statutory path does however enable the applicant to file in the Authority in respect of employment matters; seek urgent interim orders; apply for removal on an urgent basis; and, if removal is declined, apply for special leave to remove.

[10] The applicant submits that this Court has first instance jurisdiction to grant injunctive relief – here what is being sought is an injunction prohibiting all employers from terminating employment on the basis of the Order. It is further submitted that the High Court is prevented from injuncting the Crown under s 15(3) of the Judicial Review Procedure Act 2016.

[11] As Ms Fechney points out, s 194 of the Employment Relations Act refers to a number of matters that can be brought to the Employment Court and the relief that may be sought – an injunction is one of them. However, the scope of the jurisdiction conferred by s 194 is limited, both as to the legislative instruments referred to (which an application must be attached to) and the requirement that the matter complained about relates to the exercise, refusal to exercise, or proposed exercise of a statutory power or statutory power of decision. The Order is not one of the statutory instruments referred to in

s 194. And while certain of the employees named in Appendix A to a memorandum filed on behalf of the applicant are public servants, that does not mean that any employment action taken against them, including dismissal, is sourced in statute.

[12] I also note that, if any of the employees are employed by private sector employers, the proper respondent will need to be named, have notice of the claim, and

8 Employment Relations Act 2000, s 178.

9 Employment Relations Act 2000, s 178(3).

be given an opportunity to respond. The same can be said for public sector employers (such as AVSEC) that are not represented by counsel for the Attorney-General.

[13] I note one final point. The applicant's representative raised a concern about what was said to be the likelihood of delay in the Authority if proceedings were commenced in that forum. It was said that the Authority would almost certainly direct the parties to mediation, even given the urgency, and that it was highly unlikely they would get before the Authority itself until well after the date on which termination has been signalled. It was further said that a related case is still awaiting determination in the Authority, which has prompted an application for special leave to remove. The applicant submits that the timeline for disposition in the related case reinforces the strength of the application in the present case.

[14] Neither the Authority nor the Court is required to direct parties to mediation and there are circumstances in which a direction is not appropriate.10 Parties are entitled to seek urgency and to have consideration given to whether urgency ought to be granted, and, if so, on what terms.11 Parties are also entitled to seek leave to remove matters to the Court for hearing, including where the proceedings raise important legal issues or are of such urgency that it is in the public interest that they be removed immediately to the Court.

[15] It may be helpful to record that this Court is able to deal with matters urgently where that is appropriate, as recent judgments of the Court reflect.12 Whether the applicant chooses to file in the Authority is a matter for the applicant; what orders are made by the Authority is a matter for it. What is clear is that there is no aspect of the matter which is properly before this Court at this stage.

[16] The statement of claim is accordingly struck out. In light of the conclusions I have reached, it is unnecessary to deal with the application for opt-out orders.

10 Employment Relations Act 2000, ss 159 and 188(2).

11 Employment Relations Act 2000, sch 2 cl 17 and sch 3 cl 21.

12. See for example *The 20 District Health Boards v New Zealand Nurses Organisation* [2021] NZEmpC 123.

[17] If there is any issue of costs, I will receive memoranda.

Christina Inglis Chief Judge

Judgment signed at 12.45 pm on 24 August 2021