Employment Court of New Zealand

Halse v Employment Relations Authority [2022] NZEmpC 165 (7 September 2022)

Last Updated: 12 September 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2022] NZEmpC 165
EMPC 25/2022

IN THE MATTER OF	an application for a judicial review
AND IN THE MATTER	of an application to strike out a proceeding
BETWEEN	ALLAN GEOFFREY HALSE Plaintiff
AND	EMPLOYMENT RELATIONS AUTHORITY First Defendant
AND	FIRST SECURITY GUARD SERVICES LIMITED Second Defendant
AND	SUSAN MARGARET KENNEDY Third Defendant

Hearing:	On the papers
Appearances:	A Halse, in person Appearance for first defendant excused by leave M Lawlor, C Sargison, counsel for second defendant No appearance for third defendant
Judgment:	7 September 2022

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

(Application for strike out of judicial review proceedings)

ALLAN GEOFFREY HALSE v EMPLOYMENT RELATIONS AUTHORITY [2022] NZEmpC 165 [7 September 2022]

Introduction

[1] First Security Guard Services Limited (First Security), seeks an order striking out an application for judicial review brought by Mr Halse; he is an advocate representing a First Security employee, Ms Susan Kennedy.

[2] The judicial review proceeding relates to a determination of the Employment Relations Authority, dated 26 January 2022, made shortly before the parties were to attend mediation on 27 January 2022.1 The proceeding was filed on 3 February 2022.

The Authority's determination

[3] Because the judicial review proceeding focuses on whether certain orders the Authority made were available in fact or

in law, it is necessary to describe the determination in some detail.

[4] The Authority stated that Ms Kennedy works as a national operations centre operator for First Security, and that she claims she has been subject to unjustified actions by her employer causing disadvantage, including bullying. First Security denies these assertions.2

[5] The Authority recorded that mediation was to take place imminently, and that First Security had lodged an application for urgent non-publication and related orders, along with a supporting affidavit.

[6] The Authority stated that there were several components to the orders sought: these related to the conduct of Mr Halse. First Security had asserted that Mr Halse had made several threats against it if it did not settle with Ms Kennedy, then that he would publish negative comments about the company and/or its management in the media and/or on his social media platforms. These threats were contained in emails sent by Mr Halse.3

1 *Kennedy v First Security Guard Services Ltd* [2022] NZERA 26 (Member Craig).

2 At [1].

3 At [8].

[7] The Authority went on to record comments that had been made, which continued after First Security's lawyers had sent a cease and desist letter to Mr Halse.4

[8] First Security had sought the making of takedown orders against Mr Halse and the company with which he was associated, CultureSafe New Zealand Ltd (CultureSafe). They also requested orders that Mr Halse and CultureSafe not contact the company and its management directly, and that communications on behalf of Ms Kennedy be sent to First Security's lawyers, Duncan Cotterill.

[9] First Security asserted it had exhausted all reasonable efforts requiring Ms Kennedy's representative to cease making the threats, and to cease contact with First Security directly. It sought the Authority's assistance. It regarded the threats of publication, and to contact it directly, as attempts to apply improper pressure on the company to settle.5

[10] Mr Halse strongly opposed the making of the orders sought, including on the ground that the Authority had no jurisdiction. He asserted that the Authority could not restrict free speech, and that orders should not be made against those who were not parties to the employment relationship, such as himself and CultureSafe. He did not accept that a right to a fair hearing would be prejudiced by the steps they had taken. The Authority noted there was no denial that the posts provided to the Authority by First Security were related to that company.6

[11] The Authority recorded that during a case management conference, Mr Halse commented that if a non-publication order was made, he would then post the names of the company and its manager; and that he would publish if the Authority issued a non-publication order. Mr Halse asserted that contact with First Security rather than its lawyers, was necessary due to issues that arose under the Health and Safety at Work Act 2015 (the HSWA).7

4 At [10]—[11].

5 At [15]—[16].

6 At [19].

7 At [20]—[21].

[12] In a passage of the determination dealing with the applicable jurisdiction, the Authority noted findings made by this Court in *Bay of Plenty District Health Board v CultureSafe*; 8 it stated that the Court in that case had concluded that threats made by Mr Halse in certain communications were an attempt to coerce the employer into settling the claim without it being heard by the Authority, thus amounting to improper threats of adverse publicity.9 The Authority considered that this judgment confirmed it had the ability to make the orders sought by First Security.

[13] The Authority recorded that Mr Halse told it he had challenged the Employment Court's decision and was also judicially reviewing it. The Authority noted, however, that the judgment could be relied upon until such time as it was overturned.10

[14] The Authority then analysed the nature of the comments which had been made, stating that although there did not appear to have been any deliberate public specification of the employer's name, there had been strong adverse comments against First Security, its employees, and its lawyer, along with the use of what could be described as aggressive and threatening language.11 It went well beyond what could be described as fair and temperate. There were thus grounds to restrict the publication of that material.12

[15] With regard to the application brought by First Security for an order preventing contact with the company and/or its management directly, the Authority noted that attempts over months by the law firm acting for the second defendant to direct Mr Halse to correspondence with it, had not prevented such contact.13 Mr Halse was entitled to raise concerns under

the HSWA, and further grievances on Ms Kennedy's behalf, but had not explained why these could not be raised with First Security's authorised lawyers.14

8. *Bay of Plenty District Health Board v CultureSafe New Zealand Ltd* [2020] NZEmpC 149, [2020] ERNZ 367 [*Bay of Plenty DHB*].

9 At [25]—[26].

10 At [27].

11 At [30].

12 At [31].

13 At [34].

14 At [35].

[16] The Authority concluded that, on the evidence before it, there had been improper pressure and an attempt to interfere with First Security's right to representation.15

[17] However, the Authority was not satisfied that orders should be made against Ms Kennedy, since it had received no evidence of her making any public statements about the matter, let alone those to which First Security had objected.16

[18] Then the Authority considered whether Ms Kennedy should be required to produce a particular audio recording of a disciplinary meeting in which she had been involved. The Authority considered this would be appropriate, so the issues could be properly discussed at mediation.17

[19] In the result, the Authority made interim orders requiring Mr Halse and CultureSafe not to make, or threaten to make, any public comment about First Security and its management, or the Authority's investigation; to take down any public postings made on their website and social media platforms touching on the employment relationship between the parties or the Authority's investigation; and to cease and desist from contacting First Security and its management directly regarding Ms Kennedy, with communications regarding her to be sent only to its lawyers. Such communications were not to be copied to First Security or its management.

[20] Finally, Ms Kennedy was directed to provide First Security's lawyers with a copy of the audio of the disciplinary meeting.

The proceedings before the Court

[21] As noted, Mr Halse brought judicial review proceedings soon after the determination had been issued. In summary, it asserted that there was no legal basis for the granting of the orders or directions; and that they were also a beach of rights of freedom of speech and to justice, under the New Zealand Bill of Rights Act 1990

15 At [36].

16 At [40].

17 At [47].

(BORA). The Authority had no jurisdiction to override Parliament. Mr Halse asserted that the orders were void and an abuse of process.

[22] The judicial review application is supported by an affidavit from Mr Halse describing his view that the Authority was providing itself with new powers and was not performing the role Parliament had set up for it. He said that he would refuse to stand by whilst people were being bullied, and he believed it was his moral duty, as well as his legal right, to protest when this occurred. He said the Authority was acting in breach of democratic principles and international obligations.

[23] In his affidavit, Mr Halse asserted his right to speak publicly and concluded that there was no proper basis for the Authority to make the orders it did. He was critical of First Security for not having tried to resolve the case by way of negotiation. He also said workplace bullying is a serious problem in New Zealand, and that this meant he was justified in taking the steps he did.

[24] First Security then brought the application for an order striking out the judicial review proceeding. It is asserted that Mr Halse's application does not disclose a reasonable cause of action, since the sole ground relied on is that the Authority had no jurisdiction to make the interim orders. It submits that this issue was considered and decided in *Bay of Plenty DHB*. First Security says the Authority correctly relied on that decision and Mr Halse's arguments were entirely misconceived.

[25] The application was supported by an affidavit from Jaya de Zoete, and employee relations specialist employed by First Security. That affidavit traversed the factual context which led to the Authority making the interim orders which are the subject of the judicial review proceeding.

[26] Mr Halse filed a notice of opposition to the application for strike out. He repeated assertions made in the judicial review application, to the effect that the Authority was constrained by the powers granted to it under the Employment Relations Act 2000 (the Act), and these did not include powers to make the orders for which judicial review was sought.

[27] He said that the *Bay of Plenty DHB* decision was currently subject to appeal and review. Moreover, the judgment was erroneous because it reached conclusions that were without legal foundation. It could not provide a precedent for the circumstances of this case.

[28] Submissions have been filed by both parties.

[29] Mr Lawlor, counsel for First Security, repeated the contention that the Authority had been justified in proceeding as it did. The Authority had not lacked jurisdiction which is a necessary prerequisite for judicial review under s 184(2) of the Act.

[30] In his submissions, Mr Halse reiterated his view that although the Authority has a role with regard to personal grievances such as that brought by Ms Kennedy, it should strive to resolve that problem in light of s 157 of the Act. He said there was nothing in the Act which entitled the Authority to make him a party to the proceeding, to make any orders against him restricting his freedom of speech, or to make a takedown order.

[31] Mr Halse also submitted that judicial review was available under s 184 of the Act, since what was asserted was a lack of jurisdiction which fell within the statutory definition of that term in s 184(2). On the facts he had alluded to, the Authority exceeded its powers.

[32] Mr Lawlor filed submissions in response, essentially repeating the primary submission made for First Security to the effect that the orders made by the Authority were in fact mandated by the Act.

Analysis

Strike out principles

[33] The principles as to the striking out of pleadings are well settled. The Court has power to strike out all, or part of, a pleading:

(a) If it discloses no reasonably arguable cause of action, is frivolous or vexatious, or is otherwise an abuse of the processes of the Court.18

(b) For a cause of action to be struck out, it must be so untenable that it cannot possibly succeed.19 Pleaded facts, whether or not admitted, are assumed to be true.20 The jurisdiction is exercised sparingly and only in clear cases.21

The orders made against Mr Halse and CultureSafe

[34] There is a central issue between the parties as to whether or not the judicial review proceeding brought by Mr Halse can properly be described as one where the Authority suffered from a lack of jurisdiction in the narrow and original sense of the term, so that it had no entitlement to enter upon the inquiry in question: s 184(2)(a) of the Act.

[35] Mr Lawlor submits that the Authority correctly cited this Court's judgment in *Bay of Plenty DHB* in support of the proposition that jurisdiction indeed existed for just such an occasion as the present. Mr Halse submitted that the judgment of this Court was incorrect, and that its conclusions were being challenged.

[36] It is necessary to refer to several subsequent judgments where the *Bay of Plenty DHB* decision has been considered.

[37] First, the Court of Appeal declined to make judicial review orders in respect of the *Bay of Plenty DHB* judgment, and a number of other judgments of this Court and determinations of the Authority.22 Subsequently, the Supreme Court declined leave to allow an appeal to that Court from the Court of Appeal's judgment.23

18 Employment Court Regulations 2000, reg 6(2)(a)(ii); High Court Rules 2016, r 15.1.

19 *Leigh v Attorney*-General [2010] NZCA 624, [2011] 2 NZLR 148 at [17].

20 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

21. *Watts & Hughes Construction Ltd v Buyzer* [2019] NZEmpC 18 at [28] citing *Attorney-General v Prince* [1997] NZCA 349; [1998] 1 NZLR 262 (CA).

22 *H v Employment Relations Authority* [2021] NZCA 507, [2021] ERNZ 858.

23 *H v Employment Relations Authority* [2021] NZSC 188.

[38] Then, an application for extension of time to file an application for leave to appeal the *Bay of Plenty DHB* judgment was brought in the Court of Appeal. That application was declined.24

[39] An application for judicial review of the Authority's determinations which were considered in the *Bay of Plenty DHB* judgment was recently the subject of an application for strike out. The judicial review proceeding was dismissed.25

[40] The result is that none of these steps have resulted in a reconsideration of the conclusions reached by this Court in the *Bay of Plenty DHB* judgment.

[41] The Authority was correct to say that the judgment has not been "overturned".26

[42] That, however, is not a final answer at this preliminary stage where an interlocutory application for strike out is under consideration.

[43] It is clear from the *Bay of Plenty DHB* judgment that the Authority had jurisdiction to make orders of the kind it did if the facts justified such a course. The Court concluded, for example:

> (a) The Authority has a broad jurisdiction to issue directions for the purposes of ensuring a fair conduct of proceedings before it; and such directions may be issued against any person representing a party.27
> (b) The right to freedom of expression may be subject to such reasonable limits as are prescribed by the right to natural justice. That right is affirmed in the BORA itself, and in the Act. This is a fair trial issue which is demonstrably justified in a free and democratic society.28

24 *H v Bay of Plenty District Health Board* [2022] NZCA 260.

25 *Halse v Employment Relations Authority* [2022] NZEmpC 149.

26 *Kennedy v First Security Guard Services Ltd*, above 1, at [27].

27 *Bay of Plenty District Health Board*, above n 8, at [86].

28 At [105].

(c) The Authority may issue directions that are necessary to maintain the integrity of its process, and to ensure a fair investigation is able to be conducted.29

(d) It is open to the Authority to consider whether non-compliance with a direction could, without sufficient cause, lead to obstruction or delay of its investigation.30

(e) The making of a *sub judice* direction constrained the free speech rights possessed by the defendants, but the Authority was permitted to balance those rights against fair trial considerations.31

(f) The power under s 160(1)(f) of the Act can extend to enable the Authority to act effectively on matters before it, to prevent abuses of its processes, and to uphold the administration of justice within its jurisdiction. For those purposes, the subsection can be utilised to make a takedown order.32

[44] It is clear from that judgment, however, that whilst the Court considered that the Authority could exercise jurisdiction in those instances, the jurisdiction had limits. The Court was satisfied that the threshold for making the various directions was cleared in the particular circumstances. But in this judicial review proceeding, the separate issue of whether the Authority suffered from a lack of jurisdiction in the narrow and original sense of the term arises under s 184(2) of the Act.

[45] I infer from the statement of claim in this case, and from Mr Halse's affidavit and submissions, he contends that not only was there no jurisdiction in this instance as a matter of law, but there was no factual basis for exercising the jurisdiction even in the narrow and original sense of the term.

29 At [114].

30 At [120].

31 At [135].

32 At [157].

[46] On the face of it, then, because of the limitations which exist when considering whether a case should be struck out, I cannot conclude that the judicial review cause of action is clearly untenable. That is because the Court is unable to fully evaluate the arguments in any depth at the interlocutory stage.

[47] That is not to say that the judicial review claims will succeed. All that can be concluded is that the case for strike out is not so clear-cut on the facts that the claim should be terminated now.33

[48] I also note that this is not a case which might be regarded as an attempt to relitigate the conclusions reached in *Bay of Plenty DHB*, from which it could be concluded there is an abuse of process justifying strike out.

[49] There are examples where further litigation between parties over the same facts has been commenced after a final determination, albeit "in a different garb".34 Generally, the question is whether there is an issue estoppel. But that is not the position in this particular instance. The parties and subject matter are somewhat different.

[50] It is for that reason that I distinguish the result reached in *Halse v Employment Relations Authority*,35 where it appears there was an attempt to relitigate the conclusions reached by this Court in *Bay of Plenty DHB*; this led to the judicial review proceeding being struck out.

[51] In short, the judicial review proceeding should not be struck out, but should proceed to a substantive fixture.

The order made against Ms Kennedy

[52] The foregoing reasoning does not apply, however, to the order directing Ms Kennedy to produce a copy of the audio recording of a meeting in issue.

33. Full argument should be heard on the effect s 184(2) Employment Relations Act 2000 at the substantive hearing.
34. *Collier v Butterworths of New Zealand Ltd* (1997) 11 PRNZ 581 (HC) at 586; *Hunter v Chief Constable of the West Midlands Police* [1981] UKHL 13; [1982] AC 529 (HL) at 541.

35 *Halse v Employment Relations Authority,* above n 25.

[53] It is patently clear from previous decisions of this Court that the Authority has the power, and would be acting within its jurisdiction, when calling for relevant evidence under s 160(1)(a) of the Act. Numerous examples can be cited. I mention two only. In *UXK v Talent Propeller Ltd*, the Court held the Authority has jurisdiction to require the production of documents, so long as adequate protections were in place.36 In *Johnstone v Kinetic Employment Ltd*, the Court held the Authority could issue a witness summons requiring a witness to bring a computer system to the Authority and to disclose his password so it could be read by a computer forensic expert.37

[54] I conclude that there is no reasonable basis for arguing that the Authority did not have jurisdiction, in the sense in which the term is used under s 184(2) of the Act, to require production of the audio. Accordingly, the application for judicial review of that direction is struck out.

Result

[55] Except for the pleaded judicial review application concerning production of an audio tape by Ms Kennedy, which is struck out, the application for strike out of all other orders of the Authority in its determination is dismissed.

[56] The balance of the judicial review proceeding should now proceed to a substantive hearing.

[57] Costs are reserved.

Judgment signed at 12.45 pm on 7 September 2022

B A Corkill Judge

36 *UXK v Talent Propeller Ltd* [2021] NZEmpC 167, [2021] ERNZ 868.

37 *Johnstone v Kinetic Employment Ltd* [2019] NZEmpC 91.

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