Employment Court of New Zealand

Halse v Employment Relations Authority [2022] NZEmpC 167 (13 September 2022)

Last Updated: 16 September 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2022] NZEmpC 167
EMPC 394/2021

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER OF	an application to strike out proceeding
AND IN THE MATTER OF	an application for judgment by default
BETWEEN	ALLAN HALSE Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	RANGIURA TRUST BOARD Second Respondent
AND	CULTURESAFE NZ LIMITED (IN LIQUIDATION) Third Respondent

Hearing:	23 May 2022 (Heard at Christchurch via Virtual Meeting Room)
Appearances:	A Halse, applicant in person First respondent excused appearance S W Hood and S Newman, counsel for second respondent
Judgment:	13 September 2022

JUDGMENT OF JUDGE K G SMITH

(Applications to strike out proceeding and judgment by default)

[1] Mr Halse is an employment advocate. Through his company, CultureSafe NZ Ltd (in liq), he represented parties involved in employment relationship disputes.

Mr Halse is not a lawyer but he is able to take instructions in these disputes because of s 236 of the Employment Relations Act 2000 (the Act).1

[2] In this proceeding Mr Halse is seeking to judicially review decisions of the Employment Relations Authority which arose from steps taken after a settlement agreement was entered into on 5 March 2018.2

[3] In 2018 the names of the applicant, second and third respondents were permanently prohibited from publication.3 When the application to strike-out the proceeding was heard Mr Hood, counsel for the Rangiura Trust Board, stated that it

no longer sought the protection of a non-publication order and asked that it be revoked. Mr Halse has taken the position throughout that a non-publication order should not be made.

[4] In those circumstances the non-publication order is revoked.

The initial problem

[5] Mr Halse was instructed to act for an employee in an employment relationship problem with the Trust. The problem was resolved during mediation and a settlement agreement was completed by the Trust, its employee and Mr Halse.

[6] Under the settlement agreement the employee resigned from the Trust with immediate effect. The Trust agreed to pay the employee outstanding wages, holiday pay, pay in lieu of notice and compensation for humiliation, loss of dignity and injury to the employee's feelings pursuant to s 123(1)(c)(i) of the Act.

1. Employment Relations Act 2000, ss 236(1)–(2), and as exempted by the Lawyers and Conveyancers Act 2006, ss 21 and 27.
2. *R v A* [2018] NZERA Auckland 237 (first determination); *R v A* [2018] NZERA Auckland 250 (second determination); *R v Halse* [2018] NZERA Auckland 253 (third determination); *R v Halse* [2018] NZERA Auckland 275 (fourth determination); *RPW v H (No 5)* [2018] NZERA Auckland 338 (fifth determination); *RPW v H (No 6)* [2019] NZERA 121 (sixth determination); *RPW v H* [2019] NZERA 367 (seventh determination), an unsigned Authority direction, a minute and processing a proceeding lodged in the Authority.

3 *RPW v H* [2018] NZEmpC 120 at [28].

[7] The settlement agreement provided that the Trust would make a contribution to the employee's costs of representation of a stipulated amount on receiving a GST invoice from Mr Halse.4

[8] The settlement terms were conventional except in one way. A commonly used clause committing the Trust and its former employee to not disparage each other was extended to encompass Mr Halse. It read:5

8. Neither party, nor their representatives, shall make disparaging or negative remarks about the other. Allan Halse has agreed to sign the Record of Settlement to indicate his agreement at being bound to this term in the Record of Settlement.

[9] Mr Halse signed the settlement agreement. It was also signed by a mediator. Before a mediator signs an agreement he or she must be satisfied that the parties understand the consequences of doing so.6 Once signed by a mediator the agreement is final and binding and cannot be cancelled under the Contract and Commercial Law Act 2017.7

The subsequent dispute

[10] Shortly after the agreement was signed Mr Halse's compliance with the non- disparagement clause became the subject of extensive litigation in the Authority. The Trust became concerned about comments he made on social media platforms it considered breached the settlement agreement.

[11] The Trust lodged a claim in the Authority seeking to compel Mr Halse (and CultureSafe) to comply with the settlement agreement. Throughout the subsequent litigation Mr Halse acknowledged responsibility for the social media comments the Trust complained about but denied breaching the agreement. His response to the claim was that the Authority did not have jurisdiction to make compliance and non- publication orders preventing him from commenting publicly about the Trust as he had been doing.

4. I have assumed the agreement intended to reimburse the former employee rather than to charge the Trust directly. Since Mr Halse operated through his company, CultureSafe, it is likely that the invoice was provided by it rather than him but that is immaterial.

5 Settlement agreements are commonly referred to as records of settlement.

6 Employment Relations Act 2000, ss 148A, 149(1)–(3).

7 Employment Relations Act 2000, s 149(3).

[12] The Authority concluded it did have jurisdiction. Mr Halse and CultureSafe were ordered to comply with the settlement agreement and non-publication orders were made. Ultimately ongoing breaches resulted in the Authority imposing financial penalties on them and they were ordered to pay costs.

The application for judicial review

[13] Mr Halse applied to judicially review the Authority's administrative action in accepting the Trust's application when it was lodged, seven Authority determinations, an Authority direction about non-publication conveyed by email and a minute. In his statement of claim they were described as "acts of the Employment Relations Authority" and pleaded in a list:8

A. Issuing of proceedings of 2 July 2018
B. Unsigned direction of Employment Relations Authority of 20 July 2018
C. First determination of Member Larmer [2018] NZERA 237
D. Second determination of Member Larmer [2018] NZERA 250
E. Minute of Member Arthur of [23] August 2018
F. Third determination of Member Larmer [2018] NZERA 253
G. Fourth determination of Member Larmer [2018] NZERA 275
H. Fifth determination of Member Larmer [2018] NZERA 338
I. Sixth determination of Member Larmer [2019] NZERA 121
J. Seventh determination of Member Larmer [2019] NZERA 367

[14] For convenience this judgment will refer to that list as the decisions.

[15] The statement of claim referred to several grounds on which the proceeding relied. The primary claim was that the Authority's minute, and the seven determinations, were made "without original jurisdiction" and in breach of Mr Halse's "right to justice". Claims were made that the Authority had no power to deal with the proceeding filed by the Trust, because the dispute did not arise from an employment agreement or relationship, that the Authority had no power to make "non-identification" orders, or to enforce a contract between Mr Halse's former client and the Trust against him on the basis that it had no "general jurisdiction in contract".

8 And see above n 2. E was incorrectly pleaded as 27 August 2018.

[16] Other grounds called into question the Authority's enforcement of the settlement agreement by the imposition of penalties under s 149 of the Act. The pleading was that the "penalty" for breach of contract is compensatory damages and that there was no "power to impose fines without authority of Parliament", followed by a pleading that enforcing concealment of evidence of wrongdoing and fraud is an offence.

[17] In relation to the decisions the statement of claim posed the following questions for resolution:

Did Parliament intend to give the Employment Relations Authority jurisdiction:

(a) over third parties to the employment relationship;
(b) in relation to contracts other than employment agreements;
(c) to enforce void or illegal arrangements;
(d) to enforce contracts against third parties to those contracts;
(e) to make non-identification orders;
(f) to make awards to parties' lawyers personally;
(g) to override the fundamental right to justice;

(h) to suppress the fundamental right of freedom of expression?

[18] While question (e) refers to "non-identification orders" Mr Halse's submissions clarified that it was intended to refer to non-publication orders.

[19] Mr Halse's statement of claim pleaded:9

I rely on the Employment Relations Act 2000, the New Zealand Bill of Rights Act 1990, the constitutional position that statutory tribunals have only the powers granted to them by Parliament, the general law of contract and subpart5 of the Contract and Commercial Law Act 2017 (formerly the Illegal Contracts Act 1970), the Crimes Act 1961, the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, and the United Nations Convention Against Corruption. I also rely on the decision of Her Honour Chief Judge Inglis in *8i Corporation v Marino* [2017] NZEmpC 69.

[20] The relief sought was to quash the decisions and, although not pleaded in the list at paragraph [13], three earlier decisions of the Court.10

9. *8i Corp v Marino* is an analysis of s 149 of the Act in the context of a claim that the settlement agreement in that case contained an unlawful and unenforceable penalty.

10 *RPW v H* [2018] NZEmpC 103; *RPW v H*, above n 3; *H v RPW* [2020] NZEmpC 141.

Strike out principles

[21] The Trust applied to strike out Mr Halse's statement of claim.11 If that application was unsuccessful it sought an extension of time to file a statement of defence. Mr Halse opposed the strike out application and sought judgment by default because a statement of defence was not filed.

[22] The Court may strike out all or part of a pleading if it:12

(a) Discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading.
(b) Is likely to cause prejudice or delay.
(c) Is frivolous or vexatious.
(d) Is otherwise an abuse of the process of the Court.

[23] There is no dispute about the criteria to apply:13

(a) The pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.
(b) To strike out a proceeding the cause of action or defence must be clearly untenable. It is inappropriate to strike out a claim unless the Court can be certain that it cannot succeed.

11 The application also signalled a future intention to seek security for costs but that subject is not yet before the Court.

12 High Court Rules 2016, r 15.1 applied by Employment Court Regulations 2000, reg 6.

13 *Attorney-General v Prince* [1997] NZCA 349; [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [31]- [33]. The same criteria apply where an application is made to strike out a judicial review proceeding. *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1992] NZCA 510; [1993] 2 NZLR 53 (CA) at 62-63; *Moodie v Employment Court* [2012] NZCA 508, [2012] ERNZ 201 at [23].

(c) The jurisdiction is to be exercised sparingly, and only in clear cases, reflecting the Court's reluctance to terminate a claim or defence short of trial.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law requiring extensive argument.

(e) The Court should be slow to strike out a claim in a developing area of the law.

[24] The threshold to reach before an application to strike-out can succeed is obviously a high one.

The Trust's case

[25] The grounds of the Trust's application were that Mr Halse's claim was misconceived, frivolous, vexatious and otherwise an abuse of process of the Court.

[26] Mr Hood made four broad submissions supporting the Trust's application. The first one was that s 184(2) of the Act precludes the use of judicial review proceedings to determine questions of law. The second submission was that Mr Halse's claims attempted to relitigate matters previously dealt with in the "RPW line of cases". The third submission was that this Court has already recognised the Authority's jurisdiction over Mr Halse and/or issued decisions that exercised the same authority over him that he is now trying to oust. The fourth submission was that even if the proceeding is amenable to judicial review it should be struck out as frivolous or vexatious.

Mr Halse's response

[27] Mr Halse's lengthy, sometimes discursive, notice of opposition responded to the application and made submissions critical of the decisions. His grounds of opposition included assertions that the Trust's application was misconceived, the process was abused by the Trust, the Authority had no jurisdiction to consider the Trust's application to it or to make orders against him, and that cl 10 of sch 2 to the Act did not provide for the making of "non-identification" orders.

[28] The notice of opposition contained submissions that the underlying settlement agreement was illegal, and took issue with the contention that the claim gave rise to questions of law as distinct from reviewable decisions.

[29] Mr Halse's general response was that the Trust's application missed the point because the Authority's jurisdiction is a statutory one and the only source of its power is the Act. Mr Hood's submissions were said to have failed to grapple with the central point, which was whether the Authority exceeded its jurisdiction.

[30] As to s 184(2), Mr Halse acknowledged that it restricts the scope of judicial review. However, he considered that it was not a barrier in this case because all legally baseless acts of a public body can be reviewed.

[31] Mr Halse rejected the Trust's assertion that the Authority's jurisdiction over him had already been recognised and did not accept that his claim was frivolous.

The decisions

[32] It is necessary to provide context to the litigation by briefly describing the decisions Mr Halse seeks to quash.

[33] The Trust lodged its claim against Mr Halse in the Authority on 2 July 2018. It was received and processed, which was the first action called into question in the statement of claim.

[34] On 20 July 2018, the Authority issued a direction by email informing the parties that a non-publication order had been made and would remain in force until a telephone conference could be held. This is the second decision called into question in the statement of claim.

[35] The first determination was dated 27 July 2018.14 It continued the non- publication order made on 20 July 2018 until the substantive determination was concluded.15 A comment was made in the determination that the non-publication order

14 First determination, above n 2.

15 At [51].

may require Mr Halse to amend some of the social media posts.16 He was recorded as denying breaching the settlement agreement while admitting making or permitting the posts that gave rise to the litigation.17

[36] The second determination was dated 13 August 2018.18 The non-publication order made on 27 July 2018 was reviewed and remained in place.19

[37] The third determination was dated 16 August 2018 and dealt with the Trust's application for a compliance order.20 The Authority was satisfied that Mr Halse was bound by the settlement agreement and an order could be made that he comply with it.21 The Authority was also satisfied that some of the social media posts breached the agreement.22 It rejected Mr Halse's response in which he claimed the Trust's application attempted to restrict his ability to represent other clients, and that his conduct was allowed by the Health and Safety at Work Act 2015 or the New Zealand Bill of Rights Act 1990 (NZBORA). An order was made but time to comply was allowed before it took effect.23

[38] The fourth determination was dated 27 August 2018.24 A second compliance order was sought requiring Mr Halse to comply with the Authority's non-publication order. He did not file evidence or make submissions.25 A compliance order was made with immediate effect.26

[39] The fifth determination was dated 1 November 2018.27 Findings were made that the settlement agreement was breached 26 times and the non-publication order 24

16 At [52].

17 At [18].

18 Second determination, above n 2.

19. A variation was made to allow Mr Halse and CultureSafe to be named but that decision was subsequently revisited and non-publication order re-imposed.

20 Third determination, above n 2.

21 At [38] and [41]; it held that CultureSafe was bound as well.

22 At [63]–[70].

23 At [198]-[212]; compliance was required by 6 pm on the date of the determination was released, that is on 16 August 2018. The Authority exempted from the order information that Mr Halse and CultureSafe might provide to a number of agencies and courts.

24 Fourth determination, above n 2.

25 At [12] and [17].

26 At [105]–[109]; Mr Halse and CultureSafe were ordered to comply with the non-publication order made on 13 August 2018 although it was again subject to the exemptions which previously applied.

27 Fifth determination, above n 2.

times.28 The Authority held that eighteen breaches of the settlement agreement occurred after a compliance order was made on 16 August 2018.29 Mr Halse and CultureSafe were held jointly and severally responsible for the breaches.

[40] This determination recorded Mr Halse's statement that he intended to ignore the non-publication order made on 20 July 2018.30 He did not respond to a request for submissions on possible penalties beyond informing the Authority that he would "never pay a cent in penalties".31 Nevertheless he was given what the Authority referred to as a fifth and final opportunity to provide any evidence or submissions.32

[41] The sixth determination was dated 5 March 2019.33 It involved an extensive review of Mr Halse's and CultureSafe's actions. The Authority held that they gained from their behaviour by getting a financial benefit from the settlement agreement while simultaneously undermined the benefit the Trust derived from it.34 The response by Mr Halse and CultureSafe to the Trust's application was described as a false and self-serving narrative that they were victims while avoiding the real issue.35 The outcome was the imposition of penalties on them totalling $52,800.36

[42] The seventh and final determination was dated 21 June 2019.37 Mr Halse and CultureSafe were ordered to pay the Trust costs of $30,000.38

[43] Mr Halse also sought to review an Authority minute of 23 August 2018. The minute was written by a different Authority member from the one handling the Trust's application and associated litigation. Among other matters the minute discussed the Authority's jurisdiction contained in ss 137(1)(a)(iii) and 149(4) of the Act.

28 At [145] and [165].

29 At [147].

30 At [155].

31 At [310].

32 A time was directed for them to be filed. At [312]–[313].

33 Sixth determination, above n 2.

34 At [145].

35 At [148].

36 At [327]; they were each ordered to pay $26,400.

37 Seventh determination, above n 2.

38. At [137]–[141]; the amount was divided equally between them and they were required to reimburse the Trust's lodgement fee.

Further sanctions and challenge to some determinations

[44] Where an Authority compliance order has not been complied with the Court may impose sanctions under s 140(6) of the Act. The Trust successfully applied to the Court for a fine to be imposed on Mr Halse.39

[45] Mr Halse and CultureSafe unsuccessfully challenged the last two determinations, where penalties and costs were ordered. At the same time they unsuccessfully applied for extensions of time to challenge the remaining five determinations.40

[46] To complete this picture, Mr Halse unsuccessfully sought to judicially review the Authority determinations, and decisions of this Court, in the Court of Appeal.41 A subsequent application for leave to appeal to the Supreme Court was unsuccessful.42

Judicial Review

[47] A discussion of the Court's jurisdiction to consider applications for judicial review is necessary before considering the parties' submissions. The jurisdiction comes from s 194 of the Act:

> (1) If any person wishes to apply for review under the Judicial Review Procedure Act 2016, or bring proceedings seeking a writ or order of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or injunction, in relation to the exercise, refusal to exercise, or proposed or purported exercise by—

(a) the Authority; or
(b) an officer of the Authority or the court; or
(c) an employer, or that employer's representative; or
(d) a union, or that union's representative; or
(e) the Registrar of Unions; or
(f) the Minister; or
(g) the chief executive; or
(h) any other person—

39 *RPW v H* [2018] NZEmpC 131; he was fined $2,000.

40 *H v RPW*, above n 10.

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

42 *H (SC 135/2021) v Employment Relations Authority* [2021] NZSC 188.

of a statutory power or statutory power of decision (as defined by [section 4 of the Judicial Review Procedure Act 2016]) conferred by or under this Act or any of the provisions of sections 17 to 21, subpart 4 of Part 3, Part 4, and clauses 1 to 5 and 7 to 11 of Schedule 8 of the Public Service Act 2020 or subpart 4 of Part 6 of the Education and Training Act 2020, the provisions of subsections (2) to (4) of this section apply.

...

[48] Under s 194(2) the Court has full and exclusive jurisdiction to hear and determine any application or proceeding for judicial review of the sort referred to in s 194(1).

[49] Section 194(3) deals with situations where the party seeking to review a decision has a right of appeal.43 An application for judicial review may not be made unless any appeal has been decided. There are other restrictions on the ability to seek judicial review contained in s 184 of the Act. Under s 184(1), except on the grounds of lack of jurisdiction, no determination is removable to the Court by way of certiorari or otherwise, or is liable to be challenged, appealed against, reviewed, quashed or called into question in any Court.

[50] Section 184(1A) prohibits a review proceeding in relation to any matter before the Authority unless a determination has been issued on all matters relating to the subject of the review and, if the determination has been challenged, the Court has made a decision.44

[51] Finally, under s 184(2) the only situations in which judicial review may be pursued are where the Authority lacked jurisdiction, the decision was outside the Authority's power to make, or it acted in bad faith. The section reads:

(2) For the purposes of subsection (1), the Authority suffers from lack of jurisdiction only where,—
(a) in the narrow and original sense of the term jurisdiction, it has no entitlement to enter upon the inquiry in question; or
(b) the determination or order is outside the classes of determinations or orders which the Authority is authorised to make; or
(c) the Authority acts in bad faith.

43 Including an election under s 179 to challenge a determination.

44 Under ss 174A(2), 174B(2), 174C(3), 174D(2), 179 and 183.

[52] Section 184(2) sits behind Mr Hood's submission that Mr Halse's proceeding is an attempt to pursue questions of law that are not matters susceptible to judicial review.

[53] Mr Halse has not pleaded, and does not allege, that the Authority acted in bad faith or in breach of natural justice. His case was put forward on the basis that the Authority lacked jurisdiction to make orders against him and, presumably, in making them interfered with his rights such as those protected by NZBORA.

The issues

[54] The issues relevant to this application are:

(a) Did the Authority have the jurisdiction to make the decisions that it made?
(b) Are the questions in the pleading about the Authority's jurisdiction or something else?
(c) Should the proceeding be struck out or, if it is not, should the Trust be granted time to file a statement of defence or should judgment be entered for Mr Halse?

[55] It is convenient to consider the Authority's jurisdiction first. The Authority's jurisdiction was analysed recently by the Supreme Court in *FMV v TZB*.45 In that case the Court held the Act is comprehensive having evolved from prior employment regimes and contained a mix of both continuity and change.46 Section 161, conferring jurisdiction on the Authority, must be read in light of that context.

45. *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, [2021] ERNZ 740; comments are drawn from the judgment of the majority in that Court.

46 At [44].

[56] The Court held that the language of s 161 reflects the relational framework of the Act and drives the fact-based, problem solving, approach of the Authority.47 It conferred exclusive jurisdiction on the Authority to make determinations about problems generally. The only requirement is that the problem must be an "employment relationship" one. That is, it must relate to or arise from the employment relationship in its entire sense. What constitutes a problem was described by the Court as just meaning a difficulty or controversy to be resolved.48 Problems are not, however, legal categories but factual phenomena.

[57] The Supreme Court held that the Authority has exclusive jurisdiction over compliance orders made under s 137. The broad scope of s 161 demonstrated that issues of compliance with settlement agreements generally are employment relationship problems.49

[58] Under s 137(1)(a)(iii) the Authority has power to order compliance where any person has not observed or complied with a term of a settlement or decision that s 151 provides may be enforced by such an order.50 Relevantly, s 151 reads:

> (1) This section applies to—
> (a) any agreed terms of settlement that are enforceable by the parties under section 149(3): ...

[59] There is a common feature in the language of ss 137(1)(a)(iii), 149(3) and 151. Those sections refer to the terms of settlement being enforced by the parties. Further, s 149(1) refers to the mediator, whose signature makes the agreement final and binding, being asked to sign it "at the request of the parties to the problem".

[60] This common feature was picked out by Mr Halse as confining enforceability to "the parties" which, he considered, did not include him. His submission was two- fold. First, the word "parties" refers to those involved in the employment relationship problem meaning the employer and employee.51

47 At [60].

48 At [61].

49 At [100]. Employment Relations Act 2000, s 161(1)(a).

50 Employment Relations Act 2000, s 137(1)(a)(iii).

51 But see the extended definition in ss 4(2) and 5.

[61] The second part of Mr Halse's argument was that, because he was not in an employment relationship with the Trust, any arrangement they made was not susceptible to enforcement in the Authority. On this analysis, the Authority was unable to exercise any powers in relation to him.

[62] I do not accept Mr Halse's submissions. They overlook the Authority's exclusive and extensive jurisdiction as discussed in *FMV* and the broad language used in s 137. The introduction to s 137(1) is very clear; it says the section applies where "any person" has not complied. That is consistent with s 149(4), which provides that "a person" who breaches an agreed term of settlement under s 149(3) may be liable to a penalty.

[63] There is no difficulty or tension in or between ss 137, 149, and 151 by distinguishing between a party to a settlement agreement and any other person. There will be persons who have knowledge of the settlement agreement but who will not be parties to the problem or the agreement that resolved it. A distinction was therefore necessary so that the Authority's enforcement powers were robust enough to ensure settlement agreements are adhered to, if necessary, by appropriate orders.

[64] In *Musa v Whanganui District Health Board* Chief Judge Colgan held that the object of s 149 would be defeated if an argument such as that proposed by Mr Halse succeeded.52 The confidentiality of settlements would not be preserved because only the parties to the employment relationship problem would be bound.

[65] To illustrate the point *Musa* used as an example a journalist who was not a party to the problem being able to publish

with impunity otherwise confidential terms. The conclusion reached was that such an outcome could not have been intended by Parliament.53 The same conclusion was reached by Judge Perkins in *H v RPW* by applying *Musa*.54

[66] In *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust*, Judge Holden held that the absence of an employment relationship did not preclude the

52 *Musa v Whanganui District Health Board* [2010] NZEmpC 120, [2010] ERNZ 236.

53 At [55].

54 *H v RPW*, above n 10, at [32]-[33].

Authority from having jurisdiction.55 In addition to endorsing the example given in *Musa*, Judge Holden mentioned other attendees at mediation such as partners of the parties, support people and representatives, likewise being able to act in a way contrary to the settlement agreement, without sanction, if the Authority had no jurisdiction over them. Judge Holden held that Parliament cannot have intended to have reached such a conclusion.

[67] I agree with the conclusions in *Musa, H v RPW* and *Turuki*. In *Turuki* a non- disparagement clause was a feature of the settlement, as it is in this case, but it was not signed by the employee's representative. The Authority, and the Court, accepted nonetheless that the representative was bound. The position is stronger in this case because Mr Halse was included in the settlement agreement and obtained a financial benefit from it.

[68] The Authority had jurisdiction to consider the Trust's application and to make orders requiring Mr Halse to comply with the settlement agreement.

[69] Although not dealt with by Mr Halse in his submissions, the Authority also has power to issue compliance orders to force any person to comply with any order or direction given by the Authority or by an officer of the Authority.56

[70] The next issue is whether the Authority had jurisdiction to make non- publication orders. During the hearing Mr Halse was referred to cl 10 of sch 2 in the Act and he was asked to make submissions as to whether it contained the Authority's jurisdiction to make non-publication orders. The clause reads:

10 Power to prohibit publication

(1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

(2) Where a matter is resolved by the Authority making a consent order as to the terms of settlement, the Authority may make an order prohibiting the publication of all or part of the contents of that settlement, subject to such conditions as the Authority thinks fit.

55. *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 165, [2020] ERNZ 398 at [49]- [59].

56 Employment Relations Act 2000, s 137(1)(b).

[71] Mr Halse did not explain why the clause failed to apply where the Authority considered grounds existed to order non-publication. Clause 10 is clear and needs no further explanation.

Are the questions in the pleading about the Authority's jurisdiction?

[72] Mr Hood's first submission, that the questions asked are not amenable to judicial review, arose because the Court of Appeal has previously considered five of Mr Halse's questions listed in para [17] above. The questions asked by Mr Halse in this Court as (a)–(d) and (h) referred to in paragraph [17] were the same as the questions asked by him in the Court of Appeal when he sought to judicially review the Authority and the Court in *H v Employment Relations Authority*.57

[73] The Court of Appeal held Mr Halse's questions were more suitable for an appeal on a question of law than to an application for review.58 I agree with Mr Hood that, since the same questions were previously held not to be suitable for judicial review, the same conclusion must be reached about them now. It is not material that the Court of Appeal was considering s 193(2). The restrictions placed on judicial review in the Court of Appeal are essentially indistinguishable from those placed on this Court under s 184(2).59

[74] That analysis is sufficient to dispose of questions (a)–(d) and (h). Questions (a), (b) and (d) are also answered by the extent of the Authority's jurisdiction discussed earlier. They are therefore precluded from consideration by s 184(2).

[75] Mr Hood submitted the questions (e), (f) and (g) listed in paragraph [17], are not amenable to judicial review and/or should be struck out because they either deal with matters already decided or are vexatious and an abuse of process. The questions are whether the Authority has jurisdiction to make non-publication orders, whether Parliament intended to give the Authority jurisdiction to make awards to parties' lawyers personally, and to "override" the fundamental right to justice.

57 *H v Employment Relations Authority*, above n 41, at [3].

58 At [37]–[38].

59 See the discussion in *Fechney v Employment Relations Authority* [2022] NZEmpC 52.

[76] As discussed already, the Act confers jurisdiction to make non-publication orders so that question (e) is not in any sense justiciable.60

[77] Question (f), about an award to a party's lawyers personally, is not a live issue. It relates to the Authority imposing a penalty and directing part of it to be paid to the Trust's lawyer, Mr Hood. Judge Perkins set aside that order.61 Instead the amount was redirected and became payable to the Crown and that decision was not challenged. Having been resolved there is nothing left to litigate and attempting to revisit the subject is an abuse of process.

[78] I also accept Mr Hood's submission that question (g), about overriding the fundamental right to justice, is vexatious and an abuse of process. It is, in every sense, a loaded question because it assumes something was wrong with the Authority's consideration of its jurisdiction when that was not the case. Plainly that contention cannot succeed.

[79] Question (h), about alleged suppression of Mr Halse's freedom of expression, has already been dealt with. A further comment is required, however, to address Mr Hood's submission that it is a vexatious question and Mr Halse's reliance on the NZBORA.

[80] Mr Halse's response was that the Authority acted in a way contrary to his rights under NZBORA and that should be corrected. The argument was that the Authority could not restrict his activities because his rights to freedom of expression are protected by s 14 which reads:

14 Freedom of expression

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[81] There is no merit in this submission. It is well established that s 14 must be interpreted broadly.62 The right to express ideas, including those that might be

60 Employment Relations Act 2000, sch 2 cl 10.

61 *H v RPW*, above n 10, at [52].

62. *Bay of Plenty District Health Board v Culturesafe New Zealand Ltd* [2020] NZEmpC 149, [2020] ERNZ 367 at [92]; *Morse v The Police* [2011] NZSC 45, [2012] 2 NZLR 1.

unpopular, is a basic democratic right.63 The right, however, is not an absolute one.64 It has to be considered in light of the balance of NZBORA. Section 5 of NZBORA provides that rights and freedoms may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.65

[82] Mr Halse's submission assumed the Authority's orders adversely impacted on his rights to freedom of expression but missed the point. He voluntarily entered into an agreement not to make disparaging or negative remarks about the Trust and did not explain how his decision to restrict what he might say breached s 14.

[83] The Court has previously accepted that a confidentiality clause in a settlement agreement, signed by a mediator, can be a justified limitation on rights protected by s 14.66 That reasoning applies to the settlement agreement's non-disparagement clause especially in light of the financial benefit obtained by Mr Halse.

[84] The Authority did no more than hold Mr Halse to the agreement he made and that decision was entirely within its jurisdiction. I agree with Mr Hood that question

(h) discloses no reasonably arguable cause of action.

[85] Mr Halse made other submissions responding to the Trust's application asserting the proceeding should be struck out because it attempted to relitigate matters already determined by the Court.67 His response was to question the Court's

decisions. By relying on those decisions the Trust's argument was said to assert or imply that they were valid when the Court had acted:

(a) in contempt of Parliament;
(b) in breach of obligations New Zealand has under the United Nations Convention against corruption;

63 *Bay of Plenty District Health Board*, above n 62, at [92].

64 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [156].

65 This section is subject to s 4 which provides that other enactments are not affected by the passage of NZBORA and, in particular, no provision of another enactment is to be regarded as impliedly repealed, revoked, to be rendered invalid, or ineffective and the Court is not to decline to apply any provisions of the other enactment only because it may be inconsistent with NZBORA.

66 *Turuki*, above n 55, at [65]; relying on *ITE v ALA* [2016] NZEmpC 42, (2016) 15 NZELR 16 at [56].

67 *RPW v H*, above n 10; *RPW v H*, above n 3; *H v RPW*, above n 10.

(c) by usurping the power of Parliament to specify the scope and limits of a statutory jurisdiction;

(d) by giving itself powers and sanctioning the Trust to "pervert the course of justice by suppressing offenses";

(e) in suppressing by order the reporting of the identity of offenders contrary to fundamental rights in NZBORA; and

(f) by ordering and permitting the transfer of money as a reward for assisting in such wrongdoing.

[86] These points were directed at the Court's decisions in which Mr Halse was fined, his challenge to penalties and costs was dismissed and his application for an extension of time to challenge other determinations failed.68 It goes without saying that if the Court's decisions are to be challenged the appropriate avenue is to seek leave to appeal to the Court of Appeal. The submissions about those decisions mischaracterise them and what they did, are misconceived and irrelevant to considering the Authority's jurisdiction to make orders affecting Mr Halse.

[87] The last point that needs to be dealt with is Mr Halse's claim that the settlement agreement was void or illegal (effectively his question (c) at paragraph [17] and possibly an aspect of the submission of alleged wrongdoing). His point was, presumably, that if the agreement had no legal effect the Authority would lack jurisdiction to deal with his subsequent conduct.

[88] The settlement agreement was a reasonably conventional one. It resolved an employment relationship problem with commonly used terms of settlement; payment of outstanding financial entitlements and compensation for the potential distress arising from the loss of employment. An agreement was created that was binding on the parties and plainly was not void.

[89] To bolster the claim of alleged illegality Mr Halse submitted that the purpose of the agreement was in some way to prevent the disclosure of unspecified dishonesty.

68 *RPW v H*, above n 10; *RPW v H*, above n 3; *H v RPW*, above n 10.

That was a very serious allegation with far reaching consequences for the parties to the settlement agreement, and others, but it was not supported by any evidence at all. The submission should not have been made.

Should the proceeding be struck out or judgment entered by default?

[90] None of the questions asked in the statement of claim can be pursued in a judicial review proceeding. As discussed, some are not amenable to review because they pose questions more suited to appeals on a question of law. Others purport to dispute the Authority's clear jurisdiction and the remainder are an abuse of process.

[91] Each of the Authority's seven determinations dealt in one way or another with breaches by Mr Halse of the settlement agreement, non-publication and compliance orders. The Authority had jurisdiction to make those decisions. If Mr Halse was dissatisfied with them his avenue to seek to overturn them was to file a challenge.69

[92] That leaves for consideration the pleading questioning the Authority's action in accepting the Trust's claim and processing it, the direction provided by email, the minute and the Court's decisions.70

[93] The claim about processing the Trust's application is misconceived and not a matter subject to judicial review; it involved no more than receiving a claim and did not involve the exercise or purported exercise of a statutory power of decision.71

[94] The power to order compliance with the direction sent by email comes from s 137(1)(b) and was within the Authority's

jurisdiction. As to the minute, it was the conclusion of another Authority member about jurisdiction which was both correct but contained no decision about the Trust's application against Mr Halse or the orders made in relation to him. They disclose no reasonably arguable cause of action and seeking to pursue them is an abuse of process.

69. Employment Relations Act 2000, s 179(1). Such challenges were unsuccessful in *H v RPW*, above n 10.

70 *RPW v H*, above n 10; *RPW v H*, above n 3; *H v RPW*, above n 10.

71 Judicial Review Procedure Act 2016, s 4.

[95] Finally, this Court does not have jurisdiction to review its earlier decisions.72

[96] I have considered whether it might be possible for Mr Halse to amend his pleading to bring some of the claims within the proper scope of an application for judicial review. There is, however, no amendment that could cure the identified deficiencies.

Outcome

[97] The application seeking to strike out Mr Halse's statement of claim is successful and it is struck out accordingly. It follows that Mr Halse's application for judgment by default is unsuccessful and is dismissed.

[98] The Trust is entitled to costs. It may file submissions within 20 working days. Mr Halse may respond within a further 20 working days and the Trust can reply within a further five working days.

K G Smith Judge

Judgment signed at 3.45 pm on 13 September 2022

72 *RPW v H*, above n 10; *RPW v H*, above n 3; *H v RPW*, above n 10.
