Employment Court of New Zealand

Hynds Pipe Systems Limited v Forsyth [2017] NZEmpC 89 (20 July 2017)

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IN THE EMPLOYMENT COURT AUCKLAND

[2017] NZEmpC 89

EMPC 44/2017

IN THE MATTER OF	an interlocutory application relating to contempt of court
BETWEEN	HYNDS PIPE SYSTEMS LIMITED Applicant
AND	DANIEL FORSYTH Respondent

Hearing:	1 May 2017 (Heard at Auckland)
Court:	Chief Judge Christina Inglis Judge M E Perkins Judge B A Corkill
Appearances:	P Skelton QC, counsel for applicant P Kiely and S Worthy, counsel for respondent
Judgment:	20 July 2017

INTERLOCUTORY JUDGMENT OF FULL COURT

Introduction

[1] This case relates to the narrow, but important, issue of the Court's powers to punish for contempt. It arises against the following backdrop.

[2] Mr Forsyth worked with Hynds Pipe Systems Ltd (Hynds) for a number of years. He resigned and went to work for another company. Hynds was concerned that Mr Forsyth may have removed a number of devices and confidential information in breach of his obligations to it. These concerns have not been tested,

are denied by Mr Forsyth and are not currently in issue.

HYNDS PIPE SYSTEMS LIMITED v DANIEL FORSYTH NZEmpC AUCKLAND [2017] NZEmpC 89 [20

July 2017]

[3] Hynds obtained search orders on a without notice basis. These orders were made because of serious concerns that, if made on notice, steps might be taken to destroy or otherwise interfere with the material and devices at issue.

[4] When the company sought to execute the search orders at Mr Forsyth's home he declined to co-operate. Mr Forsyth subsequently obtained legal advice. He allowed the search order to be executed the following day. Some of the material and devices named in the search order have not been able to be recovered. Mr Skelton QC candidly acknowledged that the applicant will never be able to establish what, if anything, was done to them in the intervening period.

[5] Hynds contends that Mr Forsyth's initial response to the search order amounts to a contempt. While accepting that there is no express power to punish for contempt not committed in the face of the Court, it says that:

a) The Employment Court has exclusive jurisdiction to make without notice search orders in the context of employment disputes.

b) To achieve their purpose, such orders must be complied with immediately and in full.

c) Where a court is given express jurisdiction to make one type of order, it also has the power to make subsequent or ancillary orders that are necessary to ensure the effectiveness of the first order.

d) Accordingly, by necessary implication, where a court is imbued with a particular jurisdiction, including a statutory jurisdiction, it possesses all the powers that are necessary for the effective exercise of that jurisdiction.

e) A similar conclusion may be reached by reference to the inherent or implied procedural powers which are necessary to enable courts to give effect to their statutory substantive jurisdiction.

[6] For Mr Forsyth, it was submitted that:

a) The Employment Court is without jurisdiction to hear and determine the application, as it has no power to punish the alleged contempt. It is a creature of statute and has only those powers given to it by Parliament. The only court in New Zealand with an inherent contempt power is the High Court. Parliament chose not to provide this Court with a general contempt power.

b) Instead Parliament chose to put in place a statutory scheme for the enforcement of the Court's orders which include compliance orders under ss 139 and 140 of the Employment Relations Act 2000 (the Act); and the enforcement provisions contained in s 141 of the Act.

c) Contempt is not an ancillary power necessary for the Court's search order power. It is, in effect, a criminal sanction which punishes a person found to be in contempt. It would be extraordinary if the Court were to classify such a power, which includes the power to imprison, as ancillary or incidental.

d) It is not necessary for the Court to find it has an implied power of contempt. The statutory methods of enforcement referred to above, along with potential enforcement in the High Court, are sufficient. There is no gap.

Contempt

[5] We begin our analysis with the power to punish for contempt, and what it is directed at. In essence, proceedings for contempt are designed to protect the court's responsibility and authority to fulfil the judicial function of administering justice according to the law, to ensure that the court is left to decide matters without any other person or body usurping or interfering with this function and to preserve

effective access to justice.[1]

1 For a discussion of the applicable principles see, for example, *Solicitor-General v Smith* [2004]

2 NZLR 540 (HC) at [41]-[42].

[6] Deliberate breaches of court orders or rulings, binding on the parties unless and until they are set aside or discharged, are clear examples of contempt which undermine the integrity of the court system.

Jurisdictional sources

[7] The High Court exercises two types of jurisdiction – inherent and statutory. Inferior courts and superior appellate courts exercise statutory jurisdiction only. The Employment Court has variously been described in terms of where it sits in the court structure. While its status remains unsettled, what is clear is that it occupies a unique position. The Employment Court hears appeals (referred to as challenges) and also has originating jurisdiction to determine a number of matters before it. Appeals from

the Employment Court are heard, with leave, by the Court of Appeal.2 The

Employment Court exercises a "full and exclusive" judicial review function3 and applications for judicial review relating to the Court itself are dealt with by the Court of Appeal, rather than the High Court.4

[8] It is notable that the Employment Court's jurisdiction (now conferred exclusively under the Act) originally resided with the High Court. The predecessor to the Employment Court, the Arbitration Court, was established with "slightly less jurisdiction than, but something of the same status as, the [then] Supreme Court".5 It has been described by the Court of Appeal as "entirely independent and beyond the control of any other Tribunal, the [then] Supreme Court included …".6 In 1991, the full employment jurisdiction was transferred to the newly created Employment Court.

Implied statutory jurisdiction

[9] All courts (of whatever status) enjoy express statutory powers and two additional strings to their armoury – an implied statutory jurisdiction and inherent

2 For a discussion of the special features of the Employment Court and its genesis, see *NZ Railways Corp v New Zealand Seamens IUOW*

[1989] 2 NZILR 613 (LC). See too *Attorney- General v Reid* [2000] NZHC 1301; [2000] 2 ERNZ 258 (HC).

3 Employment Relations Act 2000, s 194(4).

4 See s 213(2)-(3).

5 (17 November 1977) 415 NZPD 4581-4582.

6 *Blackball Miners v Judge of Court of Arbitration* [1908] NZGazLawRp 95; (1908) 27 NZLR 905 at 913 (CA).

powers. The classic formulation is found in *McMenamin v Attorney-General*, where the Court of Appeal held that an inferior court has:7

... the right to do what is necessary to enable it to exercise the functions, powers and duties conferred on it by statute. That is implied as a matter of statutory construction. Such Court also has the duty to see that its process is used fairly. It is bound to prevent an abuse of that process.

[Emphasis added]

[10] Implied jurisdiction derives from statute. It follows that a statutory function must be identified onto which the implied jurisdiction can latch.8 Ultimately the existence or otherwise of an implied jurisdiction to do a particular thing, or to take particular action, is an exercise in statutory interpretation.

[11] The second point is that implied jurisdiction is borne of necessity. Necessity has been said to arise in three situations:9

- where a court has jurisdiction to make orders but no express jurisdiction to enforce them;
- where a court must preserve the status quo prior to the exercise of its jurisdiction;10 and
- where a superior appellate court is functus officio but must revisit its original decision to correct a fundamental error.

[12] It is the first of these three categories of implied statutory jurisdiction which has particular application in the present case.

7 *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA) at 276.

8. See the discussion in *Department of Social Welfare (Russell) v Stewart* [1988] NZHC 731; [1990] 1 NZLR 697, (1988) 3 CRNZ 648 (HC) at 653.

9 P A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters,

Wellington, 2014) at 21.6.4, by reference to "inferior" courts.

10 In the context of employment proceedings see *Board of Trustees of Timaru Girls High v Hobday*

[1993] 2 ERNZ 146 (CA) at 162 per Casey J.

Inherent powers

[13] The second string to the bow is the court's inherent powers. They derive from common law. As has been observed:11

The power of each Court over its own process is unlimited; it is a power incidental to all Courts inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice.

[14] In relation to the District Court it has been said that:12

As a statutory Court of limited jurisdiction the District Court does not have an inherent jurisdiction to make any order necessary to enable it to act effectively as does the High Court. It is well settled, however, that it has the powers necessary to enable it to act effectively within its jurisdiction. The most important of those inherent powers are the powers of a Court, subject to the rules of Court and to statute, to regulate its own procedure, to ensure fairness in investigative and trial procedures, and to prevent an abuse of its process.

[15] This echoes an earlier House of Lords discussion in *Connelly v Director of*

Public Prosecutions:13

There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. *A court must enjoy such powers in order to enforce its rules of practice and to defeat any attempted thwarting of its process*.

[Emphasis added]

[16] Various courts have had recourse to their inherent powers over time to do a range of things,14 including to prevent abuse of process, stay frivolous and vexatious proceedings, correct the court's record, award costs, grant bail, control solicitors, sit in camera, correct flawed judicial orders, extend time, dismiss or stay proceedings for undue delay or cause, stay proceedings for undue speed, summon witnesses,

issue orders to preserve evidence, order new trials to correct injustice, reinstate

11 *Cocker v Tempest* [1841] EngR 242; (1841) 7 M & W 502 at 503-504[1841] EngR 242; , 151 ER 864 (Exch) at 865.

12 *Attorney-General v Otahuhu District Court* [2001] NZCA 187; [2001] 3 NZLR 740 (CA) at [16]. See too

McMenamin v Attorney-General, above n 7 at 276.

13 *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401(HL) at 409, per Lord Morris of Borth-y-Gest, LJ. This passage was cited with approval by Somers J (who six years later delivered the judgment of the Court of Appeal in *McMenamin v Attorney-General*) in the Supreme Court in *Bosch v Ministry of Transport* [1979] 1 NZLR 502 at 509.

14 P A Joseph, above n 9 at 21.6.3.

appeals that have been abandoned, rescind orders following changed circumstances, order disclosure of source of information, prohibit publication of evidence prior to or at trial, prohibit publication of identity of witnesses or parties, and order parties to attempt mediation of their disputes.

[17] It is well accepted that while the general law may circumscribe the court's inherent common law powers, it must do so clearly if it is to be taken as displacing them. It follows that the mere fact that a particular matter has been dealt with by statute is not determinative of whether an inherent power has been displaced or remains available for exercise. Inherent powers and express statutory powers can,

and sometimes do, operate in tandem.15

The Court's contempt powers

[18] The scope of the Employment Court's power to punish for contempt is unsettled, and has been for some time.16 This state of uncertainty is reflected in judgments of this Court, and of the High Court (which has asserted an inherent jurisdiction to punish for contempt in the Employment Court).17 The unsettled state of the law of contempt in the courts generally is reflected in a recent report of the Law Commission on contempt.18 Although the Law Commission discusses the contempt powers of a range of courts it makes no mention of the Employment Court, and contains no analysis as to the scope of its express or implied statutory

jurisdiction in relation to contempt, or any inherent powers it might possess.

15 See, for example, *R v Moke and Lawrence* [1995] NZCA 766; [1996] 1 NZLR 263 (CA) at 268 (inherent powers should be developed and exercised in harmony with any applicable legislation); for a discussion of this point see P A Joseph, above n 9, at 21.6.3.

16 See, for example, *Ryan Security & Consulting (Otago) Ltd v Bolton* [2008] ERNZ 428 (EmpC) a judgment of the full Court concluding that the Employment Relations Authority had no power to

punish for contempt not committed in its face and concluding (obiter) that the Court did not have such a power either.

17 In particular, *Attorney-General v Reid* [2000] NZHC 1301; [2000] 2 NZLR 377, [2000] 2 ERNZ 258 (HC).

18 Law Commission *Reforming the Law of Contempt of Court: A Modern Statute - Ko te*

Whakahou i te Ture mõ te Whawhati Tikanga ki te Kõti: He Ture Ao Hou (NZLC R140,

2017) at [1.20]. The report notes that "... the law of contempt of court in New Zealand is now a mix of court decisions based on the common law inherent jurisdiction and on legislation, including powers implied under that legislation."

[19] There is no doubt that the Employment Court may punish for contempt committed in the course of a hearing (contempt in the face of the court).19 Cases of alleged contempt have also previously been referred to the Solicitor-General for prosecution in the High Court.20

[20] The issue in this particular case is whether, having made a without notice search order against the respondent pursuant to s 190 of the Act, the Court may find the respondent in contempt of that order and, if so, make orders against him. The statutory scheme is pivotal to the analysis. That is because a jurisdiction to do something cannot be implied if it would result in a conflict with the statute. Similarly an inherent power that might otherwise exist may be displaced by statute.

The statutory scheme

[21] The jurisdiction of the Employment Court is provided for in s 187 of the Act (annexed to this judgment for ease of reference). As that section makes clear, the Court has exclusive jurisdiction in relation to the range of matters specified in s

187(1)(a)-(m). The provision culminates with reinforcement of the exclusive nature of the Court's jurisdiction, by stating:21

Except as provided in this Act, *no other court has jurisdiction in relation to any matter that*, under subsection (1), *is within the exclusive jurisdiction of the court*.

[Emphasis added]

[22] As has been observed, the Court has express statutory powers to punish for contempt committed in its face. In this regard s 196

provides that:

196 Contempt of court or Authority

(1) This section applies if any person—

(a) wilfully insults a member of the Authority, a Judge, an officer of the Authority, a Registrar of the court, any other officer of the court, or any witness during his or her sitting or attendance in the Authority or the court, or in going to or returning from the Authority or the court; or

19 Employment Relations Act 2000, s 196.

20. An example of such a referral is found in *Solicitor-General v Smith*, above n 1, a case arising in the context of Family Court proceedings.

21 Employment Relations Act 2000, s 187(3).

(b) wilfully interrupts the proceedings of the Authority or the court or otherwise misbehaves in an investigation meeting or a hearing of the Authority or the court; or

(c) wilfully and without lawful excuse disobeys any order or direction of the Authority or the court in the course of an investigation meeting or the hearing of any proceedings.

(2) If this section applies,—

(a) any constable or officer of the court, with or without the assistance of any other person, may, by order of the Authority or a Judge, take the person into custody and detain him or her until the rising of the Authority or the court; and

(b) the Judge may, if he or she thinks fit, sentence the person to—

(i) imprisonment for a period not exceeding 3 months;

or

(ii) a fine not exceeding $5,000 for each offence; and

(c) in default of payment of any such fine, the Judge may direct that the offender be imprisoned for any period not exceeding

3 months, unless the fine is sooner paid.

(3) Nothing in this section limits or affects any power or authority of the court to punish any person for contempt of court in any case to which this section does not apply.

[23] Two things immediately emerge from s 196 – it does not deal with contempt outside of court, nor does it go so far as expressly excluding any additional powers or jurisdiction. Indeed insofar as the latter point is concerned, it is notable that s

196(3) specifically *preserves* any residual ability of the Court to punish for contempt.

[24] The Court may make freezing and search orders. The only other court with such a power is the High Court.22 Section 190(3) provides that:

In addition to the powers described in subsection (1), the court has the same powers of the High Court to make a freezing order and a search order as provided for in the High Court Rules.

[25] Section 190 says nothing about what is to happen if an order made by the

Court under this provision is flouted.

[26] The Act confers an express statutory power on the Court to order compliance in circumstances where any person has not observed or complied with any order,

determination, direction, or requirement made or given under the Act by the Court (s

22 The District Court has limited powers to prevent a party removing assets from New Zealand.

139(1)). Section 139(2) provides that the Court may order the person in default to "do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement." Where a person fails to comply with a compliance order within the timeframe specified for doing so the Court may, amongst other things, order that person to be sentenced to imprisonment for a term

not exceeding three months.23

[27] It appears that the compliance powers contained within ss 139 and 140 can have no application in a situation such as the one currently before the Court, and the respondent did not seek to argue otherwise. That is because the alleged initial failure to comply with the Court's without notice search order has already occurred, the search order has now been executed, and there is nothing a

compliance order can attach to.

[28] The provisions of the Act can be compared with general ancillary provisions which appear in other statutes – such as, for example, s 84 of the District Courts Act

2016.24 The previous version of this provision (repealed s 41) was pivotal to a

conclusion in the High Court that the Family Court had the implied statutory power to punish for contempt in *P v F*.25 Section 84 provides that:

84 Remedies

Subject to section 109, in a proceeding a Judge may, in the same way as a Judge of the High Court in the same or a similar proceeding,—

(a) grant remedies, redress, or relief: (b) dispose of the proceeding:

(c) give effect to every ground of defence or counterclaim, whether legal or equitable.

23 Section 140(6).

24 Note that while reg 6 of the Employment Court Regulations 2000 draws in the High Court

Rules, it deals with matters of procedure rather than substantive matters relating to relief.

25 *P v F* [2009] NZFLR 833, (2009) 27 FRNZ 603 (HC) at [39].

[29] A comparable UK provision, s 38 of the County Courts Act 1984 (now repealed) was discussed in a line of English cases and referred to in *P v F*. It provided that:

Generally ancillary jurisdiction

Every [Court], as regards any cause of action for the time being within its

jurisdiction, shall ... in any proceedings before it –

(a) grant such relief, redress, or remedy, or combination of remedies, either absolute or conditional; and

...

as ought to be granted or given in the like case by the [High Court] and in as full and as ample a manner.

[30] In *Rose v Laskington* the Court noted that the County Court, being a creature of statute, only had the powers conferred on it by statute.26 It went on to note that while some powers were specifically conferred, others derived from the general provisions of s 38. The Court observed that the County Court's power to grant injunctions and commit for contempt of court for failing to obey an order of the court fell within the scope of s 38.27

[31] As the Court held in *Laskington*:28

In my judgment this decision establishes that if a sanction in the High Court is a necessary or essential part of the relief, redress, or remedy which the County Court has jurisdiction to grant as regards the plaintiff's cause of action, then it is within the power of the Court under section 38 of the Act to impose that sanction.

[32] The scope of s 38 came before the English Court of Appeal in *Re M (a minor) (Contempt: Committal of Court's Motion)*.29 The case involved a mother who had refused to allow access to a father in breach of access orders made by the court. The Court of Appeal held that the County Court, while having no inherent jurisdiction, did have the power to punish the mother for contempt, the power being sourced from

s 38.30 Lord Justice Ward observed that the language of the provision ("in any

26 *Rose v Laskington* [1989] 3 All ER 306 (QB) at 309.

27 The power being regulated by Rules of Court. Reference was also made (at 310) to *Jennison v*

Baker [1972] 1 All ER 997, [1972] 2 QB 52 (CA Civ) as authority for the proposition that the power of committal derived from s 38 (and did not extend to matters unconnected with the relief, redress, or remedy granted in respect of the plaintiff 's cause of action).

28 *Rose v Laskington*, above n 26 at 312.

29. *Re M (a minor) (Contempt: Committal of Court's Motion)*; also cited as *Re M (minors) (breach of contact order: committal)* [1999] 2 All ER 56 (CA Civ), [1999] 2 WLR 810.

30 At [32]-[33].

proceedings in a County Court the Court may make any order which could be made by the High Court if the proceedings were in the High Court") effectively equated the powers of the inferior (County) Court and superior (High) Court judges. This meant that the County

Court could resort to the powers of the High Court held as part of its inherent jurisdiction (described by I H Jacob in his seminal article *The Inherent Jurisdiction of the Court* as "the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in

a regular, orderly and effective manner").31

[33] There is no provision in the Act which replicates s 38, or s 84 of the District Courts Act. Conversely the District Court, unlike this Court, has no power to make freezing and search orders.

[34] Section 189 of the Act, which Mr Skelton primarily relied upon (together with s 221) provides that:

In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act ... as in equity and good conscience it thinks fit.

[35] As is evident, there are two limbs to s 189 – the way in which matters coming before the Court are to be substantively determined ("the court ... has jurisdiction to determine [matters coming before it]") and the decisions and orders the Court may consequentially make ("and to make such decisions or orders...as in equity and good conscience it thinks fit"). The thrust of Mr Skelton's argument was that the Court has the express power to make a search order (limb one) and may then (as a matter of implied statutory jurisdiction) make consequential orders arising out of that power, consistently with equity and good conscience, but not inconsistently with the Act (or any other Act). We agree.

[36] Under the Act parties to employment relationships are obliged to act in good faith to each other. Part of that obligation, such as the obligation of confidentiality,

survives termination of the employment relationship. It can readily be said that a

31. I H Jacob "The Inherent Jurisdiction of the Court" (1970) 23 CLP 23 at 28; cited in *Re M (a minor),* above n 29 at [22].

necessary corollary of the Court's express statutory power to grant a without notice search order on the basis of serious concerns about the destruction or concealment of an employer's confidential information must be the existence of an effective mechanism for dealing with a refusal to comply. As we have already pointed out, the express provisions contained within s 196 have no application in such a situation. Nor are the Court's compliance powers of any utility.

[37] Counsel for the respondent submitted that the fact that the statute confers express powers to punish for contempt is a clear statutory indicator that Parliament did not intend to confer any broader powers on the Court, and that it would be inconsistent with the statute to read such powers in. *Attorney-General v Reid* supports such an interpretation.32 There the High Court concluded that the Employment Court's contempt jurisdiction was limited to that which is provided for in the Act, and accordingly did not extend to contempt which takes place outside the court.

[38] It is, however, far from certain that the presence of specific statutory provisions enabling a court other than the High Court to deal with contempt leads inexorably to the conclusion that there is an absence of any broader ability to do so. So, while the Court of Appeal in *Capital Coast Health Ltd v New Zealand Medical Laboratory Workers Union Inc* referred to the Employment Court's express powers to punish for contempt (committed in its face) the Court went on to note the Court's "inherent" powers as a court of record (under s 103 of the Employment Contracts Act) and observed that these powers included the power to issue a declaration that a

party is in contempt.33

[39] Relevantly, Professor Joseph makes the point that something other than the mere existence of a statutory power is necessary to oust a power that might otherwise be implied. In relation to the interrelationship between inherent common law powers and seemingly inconsistent statutory provisions or rules of court, he

observes that:34

32 *Attorney-General v Reid*, above n 2 at 332.

33 *Capital Coast Health Ltd v New Zealand Medical Laboratory Workers Union Inc* [1995] 2

ERNZ 305 at 321[1995] NZCA 364; , [1996] 1 NZLR 7 (CA).

34 P A Joseph, above n 9, at 21.6.3 (footnotes omitted).

... a statute or rule must manifest a clear intention [to circumscribe inherent common law powers]. *The courts may exercise their inherent powers "even in respect of matters ... regulated by statute or by rules of Court, providing, of course, that the exercise of power does not contravene any statutory provision*." A statutory power or rule of court that overlaps the court's inherent power – if it does not expressly override or restrict it – may leave untouched the inherent power.

[Emphasis added]

[40] The same point was made by the Court of Appeal (in respect of its powers as a court with no inherent jurisdiction) in *R v Moke and Lawrence*,35 and is emphasised in the Law Commission Report on contempt where it makes clear that "The general constitutional

principles that apply mean that courts will not allow 'by implication drafting' in a statute to restrict their jurisdiction."36

[41] We have already referred to s 196(3). That subsection was recently inserted, expressly preserving any other powers (outside of s 196) to punish for contempt.37

That provision must be taken to mean something, otherwise its enactment would have served no useful purpose and it would be redundant. As has been observed:38

It is axiomatic that Parliament is to be taken to have an intention in everything it enacts; and that the function of the court is to find out and declare that intention.

[42] The most obvious meaning is that s 193(3) reflects a statutory recognition, and preservation, of broader powers to punish for contempt not committed in the face of the Court. Its enactment reinforces the view we have reached as to the scope of the Court's implied statutory jurisdiction.

[43] We note too that s 139(2) (power of the Court to order compliance) expressly provides that where this section applies the Court may, "*in addition to any other power it may exercise*", order a person to do a specified thing or activity to prevent non compliance. Again, the non-exclusive formulation of this provision tells against

the interpretation advanced on behalf of the respondent.

35 *R v Moke and Lawrence*, above n 15.

36 NZLC R140, 2017, above n 18 at [7.20].

37 Employment Relations Act 2000, s 196(3), replaced on 1 March 2017 by the Employment

Relations Amendment Act (No 2) 2016, s 6.

38 O Jones (ed) *Bennion on Statutory Interpretation: A Code* (6th ed. LexisNexis, London, 2013) at

441.

[44] The approach adopted by the Court of Appeal in *Hobday v Timaru Girls High Trustees*, a case involving the implication of the Employment Court's power to make interim orders of reinstatement absent express statutory power to do so, underscores the point.39 There Casey J said:

... It would be an extraordinary situation if something so fundamental as the preservation of the position of an employee complaining of unjustified dismissal could not be preserved pending resolution of his or her personal grievance, when the Act provides for reinstatement as a remedy. Because it is virtually impossible to have immediate adjudication by Courts or tribunals, protection of the status quo is generally available in other areas of litigation or dispute resolution. It cannot have been the intention of the Legislature to deny this remedy to employees involved with the new procedures under the Employment Contracts Act; to do so would be quite inconsistent with its emphasis on mediation and settlement.

[45] We conclude that the fact that the statute makes specific provision for the punishment for contempt in some circumstances (contempt in the face of the court), and the power to make compliance orders and punish for breach of court orders (under s 139), is not determinative. Nor should it be taken as an indicator that Parliament intended the Employment Court's jurisdiction to be limited in the way contended for by the respondent.

Reasonably necessary?

[46] A power need not be essential but something more than mere inconvenience is required before it will be implied as part of the court's statutory jurisdiction.40

There are a number of factors reinforcing the reasonable necessity of the power to punish for contempt to enable the Employment Court to act effectively.

[47] The Court operates in a unique environment. Its expertise in the area of employment law and industrial relations is specifically acknowledged in the Act, and the Court of Appeal must (in exercising its appellate jurisdiction) have regard to that expertise.41 The Employment Court is obliged, when exercising its powers, to have

regard to the desirability of supporting successful employment relationships, the

39 *Board of Trustees of Timaru Girls High v Hobday* [1993] 2 ERNZ 146 (CA) at 162-163, per

Casey J.

40 See, for example, *Police v District Court at Wanganui* [2009] NZAR 97 (HC) at [26].

41 Employment Relations Act, s 216.

inherent imbalance of power between employer and employee, and the broader objectives of the legislation.

[48] As was observed by Kirby J in *DJL v Central Authority* in considering the

nature and extent of the Family Court's powers:42

[107] Care must be taken in treating the appellate courts of the Commonwealth, the Territories and the States below this court as a uniform class. The history, functions and express powers of each are different. The differences are important in considering the outer limits of their respective "inherent" or "implied" powers, as the case may be. ...

[108] It is for this reason that it is essential to approach the central problem in this appeal by considering the Act in the context of the Constitution and the respective functions of this court and the Family Court in relation to each other. ... in my view, in deriving the implied powers of the Family Court, this court will not overlook the functions and powers of the Family Court, its character as an Australian superior court of justice and its duties which require it to make orders affecting the status of persons and the rights of children and others who may not be parties. ...

[49] As we have already noted, the Employment Court's jurisdiction can be sourced back to the High Court; and it is the Court of Appeal, not the High Court, which exercises a judicial review and appellate role in relation to it. The Employment Court's jurisdiction is wide, and exclusive. It would be odd if Parliament had conferred a jurisdiction of this sort while reserving to another (generalist) court the ability to deal with a flagrant breach of Employment Court orders. While, as counsel for the respondent point out, the Act does provide for a compliance order regime, an application of it in the circumstances of the present case would appear to be futile. That is because there is nothing for a compliance order to attach to, the alleged breach having already taken place; compliance having already been made subsequent to the alleged breach (the respondent having allowed the search order to be executed the following day); but the 24-hour intervening period of non-compliance giving rise to the possibility that certain material and devices were destroyed.

[50] We make the obvious point that such a result would defeat the very purpose of a without notice order, namely to prevent the destruction or hiding of evidence or

another person's property. This broader concern of not undermining, and rendering

42 *DJL v Central Authority* [2000] HCA 17; (2000) 170 ALR 659 (HCA).

futile, express powers to make orders which must (by their very nature) be immediately complied with, was emphasised by Salmon LJ in *Jennison v Baker*:43

We should be doing less than our duty, because not only does she richly deserve the punishment which has been meted out to her, but there are many other unscrupulous landlords who might be tempted to follow her example and many other humble decent tenants who might be subjected to the same beastly methods of terrorisation and persecution were we to allow the defendant to go free. *To my mind it would be a real encouragement to landlords such as her to act as she did and it would be exposing the tenants to a real danger should the law ... sit limply by*.

[Emphasis added]

[51] The position was succinctly summarised by Edmund Davies LJ in the same case:44

If ever a case gave rise to what may be described as a cold question of law, totally devoid of all merits, this is that case. The narrative of events related by Salmon LJ fortunately relieves me of the necessity of describing in any detail the odious behaviour of the defendant [a landlord who evicted a number of tenants in defiance of an injunction restraining such action by the County Court]. ... A more gross contempt is not easily conjured up. If the orders of the court can deliberately be set at nought by a litigant employing for her own personal advantage such means as were here resorted to, and if indeed it be the case that she has to go unpunished for her contumacy, justice vanishes over the horizon and the law is brought into disrepute.

[52] The same concern applies with particular force in the alleged circumstances of the present case.

[53] As the Act acknowledges, employment relationship issues are best dealt with expeditiously, as close to the problem as possible and by a specialist body. Commencing proceedings in this Court, obtaining a without notice order, but then having to go to another court to obtain an order that the original order has not been complied with and that ancillary contempt orders are appropriate, slows the whole process down – contrary to the evident underlying Parliamentary intent. Further, it throws the weight (and expense) of the problem on to the opposing party, including those who not uncommonly lack financial capacity. A referral to the Solicitor- General might be made but it is not at all clear that a particular problem such as the

present, with no broader impact, would excite immediate attention from that quarter.

43 *Jennison v Baker*, above n 27 at 1011 per Salmon LJ (emphasis added).

44 At 1005-1006.

[54] Recognising an ability within the Employment Court itself to deal with such matters is consistent with the underlying statutory imperative of resolving issues arising in the employment sphere expeditiously, consistently with equity and good conscience and having regard to the imbalance of power between employer and employee.45 It may also be seen as consistent with facilitating an effective, efficient response to deal with a contempt.

[55] We approach the issue on the following basis. A power that can be said to be sufficiently connected with the discharge of this Court's functions, powers and duties conferred on it under the Act, and which is not otherwise excluded, may be implied as a matter of statutory jurisdiction.

[56] It is convenient to deal with the respondent's submission that the High Court's contempt powers effectively oust the need to recognise a parallel power residing in the Employment Court at this point.

Does the High Court's ability to punish for contempt oust any power that might otherwise reside with the Employment Court?

[57] It is well established that the High Court has the power to "protect" an inferior court from abuse, by punishing for contempt committed against the lower court. This is an acknowledged exercise of the High Court's inherent jurisdiction.46

We put aside for present purposes any question as to the correct characterisation of the Employment Court given its unique nature, as the case was not argued before us on this basis.

[58] The fact that recourse may be had to a superior court to address a contempt committed against an inferior court may suggest (as counsel for the respondent does) that such a power is unavailable within the inferior court itself. This is the

conclusion reached by one commentator in *Inherent Jurisdiction and Inherent*

45 Although the latter factor has no application in the present case.

46 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA);

Solicitor-General v Smith, above n 1.

*Powers in New Zealand.*47 Rosara Joseph, citing *Attorney-General v Butler*48,

Quality Pizzas and *Attorney-General v Blundell*49 in support, states that:50

The High Court ... possesses inherent jurisdiction to protect inferior courts from contempt committed out of court over which the inferior courts have no jurisdiction. Some contempts are dealt with by statute. Contempts of court which are not the subject of specific statutory provisions can only be dealt with by exercise of the High Court's inherent jurisdiction.

[59] We are not drawn to this analysis. In *Quality Pizzas* the Court was dealing with an argument that the High Court had no jurisdiction to punish for contempt committed in the Arbitration Court. The first point is that the Arbitration Court's powers were significantly more confined than the powers now conferred on the Employment Court.51 Newly enacted s 222C is one recent example of the trend towards enhanced powers over time. Not only does it provide that a judge may make an order restricting commencement or continuation of civil proceedings in the Court for a period of up to five years, but it also expressly provides that "Nothing in

this section limits the court's inherent power to control its own proceedings."

[60] Nor does it appear that there was any attempt in *Quality Pizzas* to argue that the Arbitration Court's alleged contempt powers arose by necessary implication in the manner considered by the Court of Appeal in *McMenamin v Attorney-General* two years later,52 or that, even if they did, their existence excluded the High Court's own contempt powers.

[61] The Court in *Quality Pizzas* did disapprove an indication in *Butler v Wellington Publishing Co Ltd* that the Arbitration Court, as a court of record, probably had an inherent jurisdiction to punish for contempt.53 That may, however, be taken as nothing more than a statement of settled legal principle – namely, that a

court of record does not possess any inherent jurisdiction.

47 Rosara Joseph "Inherent Jurisdiction and Inherent powers in New Zealand" (2005) 11 Canta LR

220. See also the discussion in M R Ferrere "The Inherent Jurisdiction and its Limits" (2013) 13

Otago LR 107.

48 *Attorney-General v Butler* [1953] NZLR 944 (SC).

49 *Attorney-General v Blundell* [1942] NZGazLawRp 27; [1942] NZLR 287 (SC).

50 Rosara Joseph, above n 47 at 228.

51 A point made by Chief Judge Goddard in the *NZ Seamens IUOW* case, above n 2, at 621.

52 *McMenamin*, above n 7.

53 *Quality Pizzas*, above n 46 at 617.

[62] Notably the main thrust of the argument in *Quality Pizzas*, which was the focus of the resulting judgment, was that the High Court's *inherent jurisdiction* was ousted by the Arbitration Court's implied contempt powers. That was an argument which was lost.

[63] Similarly in *Attorney-General v Blundell* the then Supreme Court was dealing with an argument that that court had no jurisdiction to punish for a contempt of the Arbitration Court because provisions of the Industrial Conciliation and Arbitration Act 1925, (ICA Act) (which empowered the Arbitration Court to punish for contempt committed in the face of the court) and the Crimes Act 1908 (prosecution for seditious libel) provided a code which effectively ousted the Supreme Court's inherent jurisdiction. The Supreme Court rejected this argument, holding that its inherent jurisdiction could only be taken away by express language or necessary

implication.54 The relevant statutes left unaffected the inherent jurisdiction of the

Supreme Court to punish for contempt of the Arbitration Court committed out of court.

[64] The Supreme Court went on to hold that s 115 of the ICA Act conferred on the Arbitration Court:55

... exclusive jurisdiction to punish for contempt in respect of the printing or publishing of anything calculated to obstruct or interfere with or to prejudicially affect any matter before the Court, but beyond that it does not extend, and we can entertain no doubt that it leaves untouched the inherent jurisdiction of this Court to protect the Arbitration Court from a contempt...

[65] And that:

There can be no doubt of the general power of this Court to protect inferior Courts from contempt committed out of Court which the inferior Court has no jurisdiction over: ...

[66] While *Quality Pizzas*, *Blundell* and *Butler* are routinely cited as authority for the proposition that inferior courts have no inherent and/or implied statutory power

to punish for contempt, all were focussed on an argument relating to the scope of the

54 *Attorney-General v Blundell,* above n 49, at 290.

55 At 290.

High Court's inherent jurisdiction and each of them pre-dated the Court of Appeal's

analysis of implied as opposed to inherent jurisdiction in *McMenamin*.

[67] As emerges from the House of Lords approach in *Connelly v Director of Public Prosecutions*, the central focus is not on whether an abuse can be corrected by some other means within the judicial hierarchy, but rather on recognising that the court itself must enjoy such implied powers as are necessary in order to defeat any attempted thwarting of *its* processes.56 This is reinforced by the fact that the underlying rationale for recognising an inherent jurisdiction to punish for contempt in the High Court is to prevent abuse of the court's process (see *Quality Pizzas*), which is wholly consistent with the accepted rationale for implying powers in

inferior courts. As Alderson B observed in *Cocker v Tempest*, the court is not

"obliged to see its own processes abused for the purpose of injustice."57

[68] In *Bryant v Collector of Customs* the Court of Appeal noted that *any* court of justice has the inherent power to prevent an abuse of its processes.58 Relevantly the Court also made the point that it was a judge's duty to exercise this power. There was no suggestion in that case that a parallel power in the High Court to deal with an abuse would mean that a comparable power could not reside elsewhere.

[69] The respondent raised concerns about the absence of a statutory mechanism to impose a punishment for contempt, noting that there is no express power to imprison or fine except in circumstances where the contempt has been committed in the face of the court or where, for example, there has been an established breach of a compliance order. We do not regard the point as determinative; nor was it regarded in this way by the High Court in its analysis of the Family Court's powers to deal with contempt of court orders in *P v F*. We note too that the High Court, in exercising its jurisdiction to punish for contempt, has no express powers to draw on

and rather has developed jurisprudence to guide the exercise of its powers in such

56 *Connelly v Director of Public Prosecutions*, above n 13 at 409 per Lord Morris of Borth-y-Gest.

57 *Cocker v Tempest*, above n 11 at 865.

58 *Bryant v Collector of Customs* [1984] 1 NZLR 280 (CA) at 284.

circumstances.59 We emphasise that at this stage no finding has been made as to whether or not Mr Forsyth has committed a contempt and, if so, what the appropriate response might be. A further hearing will be required to consider these matters, and to hear further from counsel.

[70] We conclude that the fact that the High Court may retain a parallel power, under its inherent jurisdiction, to punish for contempt of the Employment Court does not determine the issue as to whether the Employment Court itself enjoys such a power.

Inherent power?

[71] While we have concluded that the Court has an implied statutory jurisdiction to punish for contempt for breach of a search order made by it, we consider that the alternative argument raised on behalf of the applicant in relation to inherent powers also carries weight.

[72] It is plain that contempt powers are an important component of a court's armoury for not only ensuring that it can properly carry out its statutory powers and duties, but that its processes are used fairly and not abused. A contempt committed against the court, including outside the court while a matter is before the court, has the effect of undermining the integrity of the court, its functions, powers and duties

and the judicial system more generally. As was pointed out in *Jennison v Baker*:60

The power [to commit for contempt] exists to ensure that justice shall be done. And solely to this end it prohibits acts and words tending to obstruct the administration of justice. The public at large, no less than the individual litigant, have an interest, and a very real interest, in justice being effectively administered. Unless it is so administered, the rights, and indeed the liberty, of the individual will perish.

[73] An ability of the Employment Court itself to act, to protect and uphold its own orders and authority, is also important. This underlying policy imperative was

59 These were summarised recently by Palmer J in *Zhang v King David Investments Ltd (in liq)* [2016] NZHC 3018 at [39]- [42]. See too the discussion of the common law approach to penalties in *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 229; *Siemer v Solicitor-General* [2010] NZSC 54; [2010] 3 NZLR 767 (SC) at [17] per McGrath J; at [67] per the majority.

60 *Jennison v Baker*, above n 27 at 1001 per Salmon LJ; cited in *Re B [contempt of Court]* (1999)

18 FRNZ 530 at 534.

acknowledged by the Court of Appeal in *Quality Pizzas* in noting that the High Court had the power to punish for contempt of its processes "in order to enable it to act effectively as a Court."61 The same description has been applied in identifying the rationale for powers impliedly held by other courts – namely that those powers are "necessary" to enable the inferior court to operate effectively and to prevent injustice and abuse.

[74] Further, it is clear that a court enjoys inherent powers in respect of matters occurring *outside* the court if necessary to prevent abuse of its process. So, for example, in *Sutherland v Sutherland* the High Court, in considering whether the judge below had erred by ruling that there was a conflict of interest between a solicitor and his client and therefore that the solicitor was not entitled to act for his client, noted that the Family Court had inherent powers to regulate the proceedings

of the court so as to prevent an abuse of process.62 The High Court put the question

this way:

[30] The issue ultimately becomes one which was not, on the face of it, clearly before the Family Court Judge. There is no dispute that he had a power to control any abuse of process in his Court. *That would be so even if the abuse of process related to something connected with the proceedings outside the courtroom.* The question is rather whether the wife's wishes in respect of any settlement of her claim which was being pursued outside the Court could give rise to an abuse of process in respect of the proceedings before the Court.

[Emphasis added]

[75] As the Court of Appeal observed in *R v Smith*,63 a court has necessary powers to suppress abuses of its process and to control its own practice; and the inherent power to do what is necessary in order to maintain its character as a court of justice. Such powers may be exercised even where an alternative remedy (in *Smith* a right of appeal) exists.

[76] While, as we have said, there are alternative mechanisms for dealing with a failure to comply immediately with a without notice search order issued by this

61 *Quality Pizzas*, above n 46 at 616.

62 *Sutherland v Sutherland* (2001) 21 FRNZ 529 (HC) at [17]. See too *Brown v Attorney-General*

[2004] NZHC 1810; [2004] 17 PRNZ 257 (HC) at [22]; *P v New Zealand Police* [2008] NZAR 581 (HC) at [22].

63 *R v Smith* [2002] NZCA 335; [2003] 3 NZLR 617 (CA) at [35].

Court, they are problematic. This factor reinforces the need for the Employment Court itself to be able to act in such cases to avoid a significant injustice, to suppress abuses and to protect and reinforce its character as a court whose orders must be complied with.

Conclusion

[77] We conclude that the Employment Court has the power to punish for contempt for breach of a search order made by it. The power to do so necessarily arises as a corollary of the Court's express statutory power to make such orders. The position is reinforced by the nature and scope of the Court's statutorily conferred jurisdiction, including s 189. If we are wrong about that, we would have held that the power to punish for contempt is an inherent power enabling the Court to effectively manage and dispose of matters before it and to control abuses. We see the statutory scheme as supporting, rather than as undermining, that conclusion.

[78] Costs are reserved, at the parties' request.

[79] A telephone conference should now be convened with a judge to enable further timetabling orders to be made in these proceedings.

Christina Inglis

Chief Judge

For Full Court

Judgment signed at 3 pm on 20 July 2017

Annexure A

187 Jurisdiction of court

(1) The court has exclusive jurisdiction—

(a) to hear and determine elections under section 179 for a hearing of a matter previously determined by the Authority, whether under this Act or any other Act conferring jurisdiction on the Authority:

(b) to hear and determine actions for the recovery of penalties under this Act for a breach of any provision of this Act (being a provision that provides for the penalty to be recovered in the court):

(c) to hear and determine questions of law referred to it by the Authority under section 177:

(d) to hear and determine applications for leave to have matters before the Authority removed into the court under section 178(3):

(e) to hear and determine matters removed into the court under section

178:

(f) to hear and determine, under section 6(5), any question whether any person is to be declared to be—

(i) an employee within the meaning of this Act; or

(ii) a worker or employee within the meaning of any of the Acts referred to in section 223(1):

(g) to order compliance under section 139:

(ga) to hear and determine proceedings for a declaration of breach, pecuniary penalty order, compensation order, or banning order under Part 9A:

(h) to hear and determine proceedings founded on tort and resulting from or related to a strike or lockout:

(i) to hear and determine any application for an injunction of a type

specified in section 100:

(j) to hear and determine any application for review of the type referred to in section 194:

(k) to issue warrants under section 231:

(ka) to hear and determine any application for review of the type referred to in section 237D:

(l) to exercise its powers in respect of any offence against this Act:

(m) to exercise such other functions and powers as are conferred on it by this or any other Act.

(2) The court does not have jurisdiction to entertain an application for summary judgment.

(3) Except as provided in this Act, no other court has jurisdiction in relation to

any matter that, under subsection (1), is within the exclusive jurisdiction of the court.