IN THE COURT OF APPEAL OF NEW ZEALAND

CA657/2012
[2013] NZCA 135

BETWEEN	WANZHI HUANG Applicant
AND	FEI LI First Respondent
AND	THE EMPLOYMENT COURT Second Respondent

Court:	Arnold, Randerson and Wild JJ
Counsel:	Applicant in Person J J Cleary appearing with leave as advocate for First Respondent No appearance for Second Respondent (abiding the decision of the Court)
Judgment (On the Papers):	7 May 2013 at 10:00am

JUDGMENT OF THE COURT

A The application for judicial review is dismissed.

B The applicant must pay costs to the first respondent as if it were a standard application for leave to appeal on a Band A basis with usual disbursements (excluding any costs related to a hearing).

REASONS

(Given by Randerson J)

Introduction

[1] The applicant, Mr Huang, applies under s 213 of the Employment Relations Act 2000 (the ERA) for judicial review of a decision of the Employment Court.

Mr Huang alleged that he was in an employment relationship with Mr Li commencing on 1 June 2011 and that he was unjustifiably dismissed from employment on 5 December 2011. Mr Huang brought personal grievance proceedings under the ERA and was successful before the Employment Relations Authority.[1] However, Mr Li then brought a challenge in the Employment Court to the decision of the Authority. After a de novo hearing, Judge Ford found that there was no employment relationship between the parties and that Mr Huang's claim had to be dismissed accordingly.[2]

[2] By agreement, Mr Huang's application is to be decided on the papers. Despite a direction made by Wild J, no affidavits have been filed. The materials before the Court include Mr Huang's application for review, the decisions of the Employment Relations Authority and the Employment Court, limited extracts from the evidence and documents adduced in the Employment Court, and detailed written submissions by each of the parties.

[3] By minute of 30 January 2013, Wild J permitted Messrs Ogilvie and Cleary to appear as employment advocates on behalf of Mr Li. He also directed that the application would proceed solely on the basis of the Employment Court's decision. Nonetheless, we have taken into account the other materials produced by Mr Huang.

[4] Mr Li has submitted that this Court has no jurisdiction to consider the application, relying on the decision of this Court in *Parker v Silver Fern Farms Ltd*.[3] Mr Huang has submitted that this decision was wrong and should be revisited. It is clear to us that the issue of jurisdiction is central to the disposal of this application. We will refer to this issue in more detail after outlining the background facts, the essence of Judge Ford's decision and the grounds for Mr Huang's application.

Background facts

[5] Mr Li and his wife owned and operated an internet cafe in Wellington. Mr Huang arrived in New Zealand from China in September 2010. In November

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1 *Huang v Li* [2012] NZERA Wellington 35.
2 *Li v Huang* [2012] NZEmpC 166.
3 *Parker v Silver Fern Farms Ltd* [2011] NZCA 564, [2012] 1 NZLR 256.

2010 he obtained full time employment as a community support worker with a Wellington-based charitable trust. He continued to work full time for the Trust, at least up until the time of the hearing before the Employment Court in September 2012. Judge Ford found that Mr Huang did not tell Mr and Mrs Li about his employment with the Trust nor did he inform Immigration New Zealand.

[6] In April or May 2011 Mr and Mrs Li decided to employ someone in the cafe. Mr Huang was a frequent visitor to the cafe and became friendly with Mr and Mrs Li who decided to offer him work. An employment agreement was signed between the parties on 16 May 2011 with a commencement date of 1 June 2011. The Judge accepted Mr and Mrs Li's evidence that the employment relationship was not to commence until Mr Huang produced a valid work permit and a clearance from the Chinese police. Both Mrs Li and Mr Huang had a good grasp of English and gave much of the oral evidence in the Employment Court. Their credibility was very much in issue. Judge Ford had no hesitation in preferring the evidence of Mrs Li wherever it conflicted with that of Mr Huang.

[7] As matters transpired, Mr Huang had obtained a work permit for a two year period from 27 May 2011 but the Judge accepted that Mr and Mrs Li did not become aware of this until a discussion on 25 November 2011 with an officer at Immigration New Zealand.

[8] Mr and Mrs Li became concerned that Mr Huang had not been telling them the truth. Apart from the work permit issue and his failure to disclose to them his full time employment with the Trust, Mr Huang did not tell Mr and Mrs Li that he was applying for permanent residence. To the extent there was a conflict of evidence on this point, the Judge again preferred the evidence of Mr and Mrs Li.

[9] On 5 December 2011 Mrs Li spoke to Mr Huang and told him that she and her husband did not wish to support his application for permanent residence and did not want him to come to their cafe any more. Effectively, that was the end of their relationship. There is no dispute that no wages were ever paid to Mr Huang.

[10] Mr and Mrs Li explained that they wished to help Mr Huang. They did so by allowing him free access to the internet in their cafe and by giving him drinks and food vouchers. He carried out some tasks in the cafe but their evidence was that he never worked for them as an employee.

The findings in the Employment Court

[11] In finding that there was no employment relationship, Judge Ford referred to the relevant statutory provisions in the ERA including the definition of an "employment relationship" under s 4(2) and the meaning of the term "employee" in s 6 of the Act. The Judge also referred to the judgment of this Court in *Three Foot Six Ltd v Bryson*[4] and in particular, to the observations of McGrath J about the importance of assessing all matters relevant to the real nature of the arrangement including the intentions of the parties.[5]

[12] Judge Ford found:[6]

> Each case must depend on its own facts but a party ought not to be able to take advantage of a situation by claiming the existence of an employment relationship they never intended. I am satisfied that in the present case Mr Huang never had any intention to enter into an employment relationship with the plaintiff. I say that for several reasons not least of all because at no stage did he tell either Mr or Mrs Li that he had obtained a work visa. He never showed them his passport containing the visa which Immigration had sent to him under cover of the letter of 27 May 2011. Nor did he tell his prospective employer that he had another full-time job. These matters, of course, also go to the issue of good faith which is the requirement in s 4 of the Act underpinning all employment relationships.

[13] The Judge also took into account that Mr Huang had written a "resignation" letter to Mr Li. The letter was undated but the Judge found it was written at some time between 16 May 2011 and 1 June 2011. In the letter, Mr Huang thanked Mr Li for "offering me this position and I hope I may work for you some time in the future if possible". The Judge found that it was most likely Mr Huang wrote the letter after he received confirmation from Immigration New Zealand that he had been issued

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4 *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526 (CA).
5 At [21] and [22].
6 At [49] of the judgment.

with his work visa. However, the letter was not shown to Mr Li and did not come to light until later. On this point the Judge found:[7]

> … In the final sentence [of the letter] Mr Huang is thanking Mr Li, not for having worked for him, but for "offering" him the position. I consider it most likely that Mr Huang wrote the letter immediately after he received confirmation from Immigration that he had been issued with his work visa but he never submitted it to Mr Li because he worked out that it would be more advantageous to him not to disclose the fact that he had obtained a work visa. In that way he would be able to carry on in his full-time position with the MASH Trust. At the same time he could continue in colloquial terms, "to hang-out" at the Internet cafe as he pleased and provide assistance to Mr and Mrs Li in exchange for having free use of the Internet. That was a lifestyle scenario that suited him at the time. Later in the year he sought to take further advantage of his association with the Internet cafe by relying on his work visa in support of his residence application. But Mr and Mrs Li had no knowledge of those developments.

[14] Judge Ford also referred to certain documents that came to light in the November/December 2011 period, including an email and two further "employment agreements" of disputed authenticity. The Judge had "no doubt"[8] that the two further "employment agreements" were forwarded to Immigration New Zealand by Mr Huang and that it was he who had printed Mr Li's signature on each of them. The Judge also found that Mr Huang had falsely represented to Immigration New Zealand that the commencement of his employment had been deferred by agreement between the parties until 1 December 2011. Judge Ford was also "equally satisfied" that the other contentious emails and correspondence held on the Immigration New Zealand file were all produced and signed by Mr Huang. He rejected Mr Huang's proposition that Mr and Mrs Li had been guilty of deception, fraud and forgery, finding those allegations to be "completely fanciful".

Grounds for the application for review

[15] Mr Huang's application for judicial review pleads the following grounds:

(a) Irrationality in the *Wednesbury* sense.

(b) Failure to consider and take into account evidence said to be "decisive".

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7 At [51].
8 At [53].

(c) Failure to reasonably or fairly consider the "most decisive evidence" (a note in which Mr and Mrs Li told Mr Huang that he could take Saturdays off).

(d) Failure to reasonably or fairly consider further "decisive evidence" (in the form of a bank statement).

(e) The Judge misdirected himself as to the separate immigration matters that were said to be irrelevant.

(f) Unlawfully investigating the separate immigration matters without relying on original documents.

(g) Unlawfully investigating the separate immigration matters in breach of privacy legislation.

(h) Bias or predetermination including that Mrs Li was a credible witness.

The jurisdiction issue

[16] In *Parker v Silver Fern Farms Ltd*, this Court considered at length the relationship between ss 193 and 213 of the ERA. Section 193 of the ERA provides:

> **193 Proceedings not to be questioned**
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> (1) Except on the ground of lack of jurisdiction or as provided in sections 213, 214, 217 and 218, no decision, order, or proceedings of the court are removable to any court by certiorari or otherwise, or are liable to be challenged, appealed against, reviewed, quashed, or called in question in any court.
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> (2) For the purposes of subsection (1), the court suffers from lack of jurisdiction only where, —
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> (a) in the narrow and original sense of the term jurisdiction, it has no entitlement to enter upon the inquiry in question; or
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> (b) the decision or order is outside the classes of decisions or orders which the court is authorised to make; or
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> (c) the court acts in bad faith.

[17] This Court determined in *Parker* that the scope of an application for judicial review under s 213 was limited to the ground of lack of jurisdiction as defined by s 193(2). Those grounds are derived from limited aspects of the well-known speech of Lord Reid in *Anisminic v Foreign Compensation Commission*.[9] The two issues

[9] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL) at 171.

which Mr Parker had sought to raise in this Court were an allegation of breach of natural justice in the Employment Court and an allegation of error of law by that Court with respect to the obligations of lawyers. This Court had no difficulty in deciding[10] that neither complaint could be pursued. It was obvious that an allegation of breach of natural justice did not fall within any of the three grounds for lack of jurisdiction in the limited form prescribed by s 193(2) and that the allegation of error of law was "not within striking distance" of the ground of lack of jurisdiction under s 193.

[18] The *Parker* decision has recently been followed by this Court in *Moodie v Employment Court*.[11] The Court accepted that the scope of judicial review applications under s 213 of the ERA was confined to the lack of jurisdiction ground as elaborated in s 193(2).

[19] The application for review in *Moodie* cited similar grounds to those raised in the present case: delay; mistakes and unreasonableness due to a failure to have sufficient regard to pleadings, evidence and documents; taking into account irrelevant matters and failing to take into account relevant matters; unfounded criticisms of the applicant; failing to have regard to inconsistencies in the second respondent's evidence; and generalised wording and lack of articulated grounds for findings. There was a further ground pleaded of "excess of jurisdiction" but this ground was found essentially to duplicate the other grounds.

[20] This Court found[12] that some of the grounds alleged would be orthodox grounds for seeking judicial review in the High Court where the jurisdiction of the Court is not limited by statutory restrictions such as those in s 193. However, none of the grounds met the criteria for judicial review under ss 193 and 213 of the ERA.

[21] Mr Huang submitted that the *Parker* decision was wrong and invited us to depart from it. We are not prepared to do so. It is a recent and fully argued decision of this Court and has been followed in *Moodie*. We are not persuaded that any substantial argument has been raised to warrant these decisions being revisited.

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10 At [53].
11 *Moodie v Employment Court* [2012] NZCA 508.
12 At [27].

Conclusions

[22] We have considered the lengthy and detailed submissions made by Mr Huang. Essentially, he invites us to reconsider the evidence and reach a view on the facts which differs from those of the Employment Court. We find we have no jurisdiction to do so. We reach the same conclusion with regard to alleged errors of law and alleged misdirection. Neither of those grounds could fall within the confines of s 193. Similarly, with the suggestions of bias, pre-determination, irrationality, and failing to consider relevant evidence.

[23] Quintessentially, this was a case which depended on the view taken by Judge Ford about the credibility of the parties. He decided this critical issue in favour of the evidence of Mr and Mrs Li. To the extent that there may have been conflicts with documentary evidence, the Judge accepted the explanations given by Mr and Mrs Li for such conflicts. We add there is no foundation for the allegations of bias, pre-determination and irrationality. The decision of the Employment Court was an orthodox approach to conflicting oral and documentary evidence. All the immigration issues were properly taken into account in establishing the factual context and in assessing issues of credibility.

[24] Mr Huang's real complaint is that the Employment Court did not reach the conclusion on the evidence that he wanted. The legislature has made it clear that applications to this Court for judicial review under s 213 of the ERA are confined to the issue of jurisdiction as narrowly defined by s 193(2). We have no doubt that none of the matters raised by Mr Huang falls within that provision.

Result

[25] The application for judicial review is dismissed. The applicant must pay costs to the first respondent as if it were a standard application for leave to appeal on a Band A basis with usual disbursements (excluding any costs related to a hearing).