

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA599/2019
[2020] NZCA 237**

BETWEEN	CAROLINE ANN SAWYER Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
	EMPLOYMENT COURT Second Respondent
	VICE-CHANCELLOR OF VICTORIA UNIVERSITY OF WELLINGTON Third Respondent

Court: Kós P and Gilbert J

Counsel: Applicant in person
M T Scholtens QC for Third Respondent

Judgment: 15 June 2020 at 2 pm
(On the papers)

JUDGMENT OF THE COURT

- A The application for judicial review dated 13 November 2019 is struck out.**
- B The application to debar the third respondent’s solicitor and counsel from continuing to act in the proceeding is accordingly declined.**
- C The applicant is to pay costs to the third respondent on both applications on a standard band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Gilbert J)

[1] There are two interlocutory applications before us for determination on the papers. The first is an application by the third respondent to strike out this proceeding — an omnibus application for judicial review of 10 determinations of the Employment Relations Authority and two decisions of the Employment Court. These decisions all stemmed from an employment dispute that was fully and finally settled at a mediation in 2014. The second interlocutory application, brought by the applicant, Caroline Sawyer, is for an order preventing the Vice-Chancellor’s solicitor and counsel from continuing to act in this proceeding. Strictly speaking, this application need only be dealt with if the proceeding is not struck out.

[2] Dr Sawyer was employed by Victoria University of Wellington as a law lecturer from January 2010 until February 2015. In 2014, she made a complaint about the conduct of two senior staff members in her faculty. Following investigation, a mediation was held on 24 July 2014 at which the parties were legally represented. The parties reached agreement and signed a record of settlement agreement (the settlement agreement) pursuant to s 149 of the Employment Relations Act 2000 (the Act). The terms of the settlement agreement are confidential and are the subject of a permanent non-publication order made by the Employment Court.¹

[3] On 8 August 2016, Dr Sawyer filed a claim in the Employment Relations Authority for constructive dismissal. She submitted that the settlement agreement was not an obstacle to her claim because she alleged it had been procured by fraud, duress or improper pressure. The Employment Relations Authority rejected this claim, finding that the settlement agreement was final and binding.² Dr Sawyer appealed to the Employment Court against this determination, but her appeal was dismissed.³ She then applied for leave to appeal to this Court pursuant to s 214 of the Act. This Court declined leave for the proposed appeal in a judgment delivered on 29 November 2018.⁴ That should have been the end of the dispute.

¹ *Sawyer v Vice-Chancellor of Victoria University of Wellington* [2018] NZEmpC 71 at [4]–[5].

² *Sawyer v Vice-Chancellor of Victoria University of Wellington* [2016] NZERA Wellington 158.

³ *Sawyer v Vice-Chancellor of Victoria University of Wellington*, above n 1.

⁴ *Sawyer v Vice-Chancellor of Victoria University of Wellington* [2018] NZCA 533, [2018] ERNZ

[4] However, undeterred, Dr Sawyer pursued proceedings in the High Court against the Vice-Chancellor, his lawyer and several other parties. Dr Sawyer claimed, amongst other things, that the settlement agreement should be set aside as being the product of blackmail, fraudulent misrepresentation and deceit. All claims against the Vice-Chancellor and his lawyer were struck out in a judgment delivered by Grice J on 29 August 2019.⁵ The Judge found that the validity of the settlement agreement had been finally determined and could not be challenged.⁶ The claims therefore constituted an abuse of process of the Court.⁷

[5] In the meantime, the Employment Relations Authority made various other orders which Dr Sawyer also seeks to review in the present proceeding. These include compliance orders, costs orders and penalties imposed for breaches of the settlement agreement.

[6] Dr Sawyer's substantive application in this proceeding seeks judicial review by this Court pursuant to s 213 of the Act of the following 12 decisions:

- (a) The substantive determination of the Employment Relations Authority dated 21 December 2016 finding that the settlement agreement is valid, final and binding ([2016] NZERA Wellington 158).
- (b) A further determination of the Employment Relations Authority referred to by Dr Sawyer as [2016] NZERA 590. However, there is no such decision.
- (c) A costs determination (consequent on (a) above) dated 1 February 2017 ([2017] NZERA 5).
- (d) A consent determination dated 3 March 2017 that Dr Sawyer had breached the settlement agreement and ordering her to comply with it ([2017] NZERA Wellington 14).

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⁵ *Sawyer v Vice-Chancellor of Victoria University of Wellington* [2019] NZHC 2149.

⁶ At [100(a)].

⁷ At [99].

- (e) A determination dated 1 November 2017 ordering Dr Sawyer to pay a penalty of \$8,500 for breaching the settlement agreement ([2017] NZERA Wellington 106).
- (f) A costs determination (consequent on (e) above) dated 7 December 2017 ([2017] NZERA Wellington 125).
- (g) Four other consequential orders of the Employment Relations Authority which Dr Sawyer describes in her application for review as decisions which “enforced the document of 24 July 2014 [the settlement agreement] against [the applicant]”. The references given by Dr Sawyer in her application are erroneously stated to be [2017] NZERA 2005, 2014, 2016 and 2125. There are no such decisions.
- (h) The judgment of the Employment Court dated 22 June 2018 confirming the substantive decision of the Employment Relations Authority (referred to at (a) above) that the settlement agreement is valid, binding and enforceable ([2018] NZEmpC 71).
- (i) A judgment of the Employment Court dated 22 June 2018 declining Dr Sawyers’ application for an extension of time to challenge the compliance order made by consent (referred to at (d) above) ([2018] NZEmpC 72).

[7] Dr Sawyer’s application for review to this Court is yet another attempt by her to challenge the enforceability of the settlement agreement. She poses the following questions for review:

- (a) The question for the review is whether Parliament intended to give parties jurisdiction to make illegal arrangements unquestionable and enforceable and if not then what is the remedy for an illegal arrangement that has become enforceable and unquestionable in the employment area.

- (b) The determinations and decisions concern the contents of a document dated 24 July 2014 [the settlement agreement] which purports to be a contract in relation to employment matters and which in the employment area has been determined and decided to be valid and has been enforced, but which is an arrangement that is void in law and illegal in law and equity in both its creation and its performance.

[8] We are satisfied that the proceeding must be struck out for two reasons. First, it is clearly an abuse of process of the Court in that it is a collateral attack on the final determination of the Employment Court that the settlement agreement is valid and binding. That issue was finally determined when this Court declined leave to appeal against the decision of the Employment Court on 29 November 2018.⁸ Dr Sawyer is no longer able to challenge the validity of the settlement agreement. Secondly, the proceeding is in any event misconceived because it falls outside the limited scope of this Court's jurisdiction under s 213 of the Act.

[9] Section 213 of the Act relevantly reads:

213 Review of proceedings before court

- (1) If, in relation to any proceedings before the court, any person wishes to apply for a 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 an injunction, the provisions of subsections (2) to (4) apply.
- (2) Despite anything in any other Act or rule of law, the application or proceedings referred to in subsection (1) must be made to or brought in the Court of Appeal.

[10] In *Moodie v Employment Court*, this Court confirmed that the Court of Appeal's jurisdiction on judicial review of an employment tribunal is limited to:⁹

- (a) a decision made in circumstances where the tribunal (here the Employment Relations Authority or the Employment Court) did not

⁸ *Sawyer v Vice-Chancellor of Victoria University of Wellington*, above n 4.

⁹ *Moodie v Employment Court* [2012] NZCA 508, [2012] ERNZ 201 at [15], applying *Parker v Silver Fern Farms Ltd* [2011] NZCA 564, [2012] 1 NZLR 256.

have jurisdiction in the narrow sense of not having been entitled to enter on the enquiry in question;

- (b) a decision that the tribunal had no power to make; or
- (c) a decision made in bad faith.

[11] None of these grounds are relied on here. Dr Sawyer does not suggest, nor could she, that the Employment Relations Authority and the Employment Court lacked jurisdiction to determine the validity of the settlement agreement and make the orders they did. Dr Sawyer, quite properly, invoked the jurisdiction herself. Moreover, none of the orders contemplated by s 213(1) — mandamus, prohibition, certiorari, et cetera — are sought. The review application is misconceived and discloses no reasonably arguable cause of action.

[12] Given that the proceeding must be struck out, it is not strictly necessary to consider Dr Sawyer's application for an order debarring the Vice-Chancellor's solicitor and counsel from continuing to act in the proceeding. However, for completeness, we formally decline that application. This is to avoid any doubt that this proceeding is now at an end.

Result

[13] The applicant's application for judicial review dated 13 November 2019 is struck out.

[14] The application to debar the third respondent's solicitor and counsel from continuing to act in the proceeding is accordingly declined.

[15] The applicant is to pay costs to the third respondent on both applications on a standard band A basis and usual disbursements.