IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA405/2023
[2023] NZCA 611

BETWEEN	ALLAN GEOFFREY HALSE Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
	NEW PROGRESS ENTERPRISES CHARITBLE TRUST BOARD OPERATING AS PROGRESS TO HEALTH Second Respondent
	CULTURESAFE NEW ZEALAND LIMITED Third Respondent

Court:	Collins and Wylie JJ
Counsel:	Applicant in person A P Lawson for First Respondent K A McLuskie and F H G Hills for Second Respondent No appearance for Third Respondent
Judgment: (On the papers)	1 December 2023 at 10 am

JUDGMENT OF THE COURT

A The application for leave to appeal the decision of the Employment Court is declined.

B The applicant must pay costs to the second respondent for a standard application on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] The applicant, Allan Halse, seeks leave to bring an appeal on a question of law against a judgment delivered by the Employment Court on 21 June 2023.[1] Leave is required pursuant to s 214 of the Employment Relations Act 2000 (the Act).

[2] The first respondent, the Employment Relations Authority (the ERA), filed an appearance abiding the decision of the Court. The second respondent, New Progress Enterprises Charitable Trust Board operating as Progress to Health (Progress to Health), opposed the application. The third respondent, CultureSafe New Zealand Ltd (CultureSafe), is a company associated with Mr Halse. It took no steps in the proceeding and was not represented before us.

Background

[3] The background to this matter is summarised in the judgment sought to be challenged.[2] It is also discussed in an affidavit sworn by Mark Brown, the current chairperson of Progress to Health.

[4] Mr Halse is an employment advocate. At some stage in late 2019 he was retained to advise one of Progress to Health's employees (the first employee). The first employee had been involved in a dispute with another Progress to Health employee and had lodged various complaints about that employee.

[5] On 18 December 2019, Mr Halse allegedly posted an article on CultureSafe's Facebook page. The post made various allegations about Progress to Health and disclosed information about communications between the first employee, Mr Halse and the Waikato District Health Board. Progress to Health believed that the disclosed material was taken from a confidential report prepared by it.

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1 *Halse v Employment Relations Authority* [2023] NZEmpC 96, [2023] ERNZ 397 [decision under appeal].

2 At [2]–[11].

[6] On 21 January 2020, Mr Halse filed a statement of problem in the ERA on behalf of the first employee in respect of three personal grievances. Progress to Health filed a statement in reply on 11 February 2020. The statement of reply included a counterclaim, which alleged that the first employee had breached the confidentiality clause in her employment agreement by contacting the Waikato District Health Board and disclosing the confidential information to it. The counterclaim also alleged that Mr Halse and CultureSafe had aided, abetted, incited and instigated this breach, in breach of s 134(2) of the Act.

[7] After an issue was raised about the counterclaim by Mr Halse's then representatives on 4 February 2021, the ERA directed Progress to Health to file a statement of problem in respect of any claim it wished to pursue. Progress to Health did so on 1 March 2021. Mr Halse and CultureSafe filed a statement in reply on 24 March 2021 through their representative.

[8] On 22 April 2021, the ERA held a case management conference. The ERA issued a minute on 23 April 2021, noting that Mr Halse had chosen not to participate in the case management conference, but that, by agreement, the claim by the first employee against Progress to Health would be heard together with Progress to Health's claim. A timetable was fixed for the filing of witness statements and a date was put in place for an investigation meeting.

[9] A further case management conference was held on 1 October 2021. By this stage, Mr Halse was representing the first employee, as well as himself and CultureSafe. None of the timetabling directions made in the minute of 23 April had been complied with by Mr Halse, CultureSafe, or the first employee. A new timetable was put in place and a new investigation date was set. Mr Halse indicated that, as Progress to Health was continuing with its counterclaim, he would seek a judicial review.[3]

[10] Mr Halse filed his judicial review application with the Employment Court on 26 November 2021. He sought a review of the direction made by the ERA that required Progress to Health to file a statement of problem in respect of any

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3 Employment Relations Act 2000, s 194.

counterclaim it wished to pursue, claiming that the ERA had no jurisdiction "to issue proceedings" against him.

[11] On 22 December 2021, Progress to Health filed a statement of defence to Mr Halse's application for judicial review, and then, on 18 February 2022, it applied to strike out Mr Halse's application for review. Mr Halse filed a notice of opposition to this application and both parties subsequently filed submissions in support of their respective positions.

[12] On 13 April 2022, the Employment Court heard Progress to Health's strike-out application. Both parties made oral submissions.

[13] On 13 October 2022, Mr Halse applied to the Employment Court for a stay in respect of the strike-out application. In a judgment issued on 4 April 2023, the Employment Court denied the stay application.[4] On 4 May 2023, Mr Halse applied to the Employment Court for leave to file further submissions in respect of the strike-out application. Progress to Health filed a notice of opposition. Both parties filed submissions in support of their respective positions and the Employment Court released a judgment denying Mr Halse leave to file further submissions on 20 June 2023.[5] The following day, on 21 June 2023, the Employment Court released its judgment in relation to the strike-out application.[6] It granted Progress to Health's application and struck out Mr Halse's application for judicial review.[7]

[14] On 12 July 2023, Progress to Health filed a memorandum with the Employment Court, seeking costs on a 2B basis against Mr Halse in the sum of $17,088.50. On 19 July 2023, Mr Halse filed an amended application in this Court seeking leave to appeal the Employment Court's decision on the strike-out application. On 25 July 2023, Mr Halse filed an application in the Employment Court seeking a stay of the proceedings in the Employment Court and an extension of time to file any opposition to the costs application. There is nothing in the materials before us that discloses what has happened thereafter.

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4 *Halse v Employment Relations Authority (No 2)* [2023] NZEmpC 53.
5 *Halse v Employment Relations Authority (No 3)* [2023] NZEmpC 93.
6 Decision under appeal, above n 1.
7 At [58].

The Employment Court's decision

[15] After summarising the factual background, Judge Beck noted that, in his application for judicial review, Mr Halse relied on three grounds:[8]

a) first, that the ERA only had jurisdiction to consider disputes between parties to an employment relationship and that he was not in any relevant employment relationship;

b) second, that the ERA did not have jurisdiction to consider actions in tort and that the claim brought by Progress to Health was an action in tort; and

c) third, that the ERA had no jurisdiction to issue a claim against him. He asserted that the claim was malicious and should not have been accepted it for filing.

[16] The Judge noted an additional oral argument advanced by Mr Halse, namely that the ERA did not have jurisdiction to make orders suspending his right to freedom of expression affirmed in s 14 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).[9]

[17] The Judge then noted that Ms McLuskie, counsel for Progress to Health, had submitted that Mr Halse's application for judicial review should be struck out because it disclosed no reasonably arguable cause of action and because it was frivolous and vexatious.[10] She had argued that the ERA had jurisdiction under ss 134(2) and 161 of the Act to order penalties against any person who incites, investigates, aids or abets any breach of an employment agreement, which, she argued, meant that Progress to Health could make its claim against Mr Halse and CultureSafe.[11]

[18] The Judge considered that there were a number of issues that needed to be determined — what was Mr Halse seeking to judicially review; was any review that was available to Mr Halse under s 194 of the Act restricted by s 184(1A); did Mr Halse's application for judicial review disclose a reasonably arguable claim or

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8 At [12]–[15].
9 At [16].
10 At [17].
11 At [18].

cause of action; and was the application for review frivolous, vexatious or otherwise an abuse of process.[12]

[19] After considering and summarising the relevant law, the Judge noted that s 194 of the Act permits judicial review proceedings to be brought against any exercise of a statutory power by the ERA, but that s 184 places limits on this power of review.[13] She noted that s 184(1A) states that review proceedings may not be brought in relation to any matter before the ERA unless the ERA has issued a determination on all matters related to the subject matter of the review application, that determination has been challenged in the Employment Court and that Court has made a decision on the challenge.[14]

[20] The Judge then turned to consider what Mr Halse was seeking to judicially review. She noted that he initially appeared to be saying that the ERA had no jurisdiction to issue proceedings against him but, that following his oral submissions, it became clear that he was submitting that the ERA should not have accepted Progress to Health's claim for filing and should not have proceeded with it once it was filed.[15] The Judge turned to consider s 184(1A) of the Act and noted that the ERA has not as yet made a determination in relation to the matters underlying Mr Halse's application for review. As a result, she considered that the Employment Court's jurisdiction was constrained by s 184(1A).[16] She found that Mr Halse's review proceeding could therefore not proceed and that it had to be struck out.[17]

[21] For completeness, the Judge went on to consider whether or not the application for review disclosed a reasonably arguable claim or cause of action.[18] She referred to s 161 of the Act, noting that the ERA's jurisdiction is broad and that the claim against Mr Halse related to an alleged breach of s 134.[19] She considered that even though Mr Halse was not a party to any relevant employment agreement, he was nevertheless

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12 At [19].
13 At [20]–[24].
14 At [24].
15 At [25]–[28].
16 At [30].
17 At [31].
18 At [32].
19 At [35]–[36].

capable of being a "person" for the purposes of s 134(2) and also that there was nothing in the Act which supported Mr Halse's argument that the ERA should not permit proceedings to be brought against the representative of an employee.[20] The Judge observed that the Act does not provide legal immunity to representatives and that even though non-lawyer advocates are unregulated, they are still subject to the law.[21] She noted that the ERA has express jurisdiction to consider the imposition of penalties against persons when it is alleged that they have incited, instigated, aided or abetted a breach of an employment agreement and that Mr Halse's claim to the contrary was untenable.[22]

[22] Similarly, the Judge concluded that the claims raised by Progress to Health were not claims in tort, but rather claims made pursuant to a specific provision contained in the Act. She considered that there were clear statutory provisions on which to base the claim and that Mr Halse's argument to the contrary was also untenable.[23]

[23] The Judge did not consider that Mr Halse's submission that Progress to Health had acted maliciously, meaning that the ERA had no jurisdiction to accept the claim for filing, was tenable. She noted that Mr Halse could not point to any statutory ground for his assertion that the ERA could and/or should have refused to accept the claim for filing.[24] There was no evidence that the ERA had acted in bad faith.[25] Nor was there any breach by the ERA of Mr Halse's right to freedom of expression under the Bill of Rights Act.[26] In summary, the Judge found that none of the grounds for review proposed by Mr Halse were capable of succeeding and that each was clearly untenable.[27]

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20 At [37]–[38].
21 At [38].
22 At [39]–[40].
23 At [41]–[42].
24 At [44]–[48].
25 At [50]–[51].
26 At [52].
27 At [56].

The application for leave

[24] The application for leave to appeal to this Court is brought pursuant to s 214 of the Act. Relevantly, it provides as follows:

> **214 Appeals on question of law**
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> (1) A party to a proceeding under this Act who is dissatisfied with a decision of the court (other than a decision on the construction of an individual employment agreement or a collective employment agreement) as being wrong in law may, with the leave of the Court of Appeal, appeal to the Court of Appeal against the decision; and section 56 of the Senior Courts Act 2016 applies to any such appeal.
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> …
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> (3) The Court of Appeal may grant leave accordingly if, in the opinion of that court, the question of law involved in that appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.
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> …

[25] Mr Halse submitted that leave should be granted, because the statutory provisions at issue are crucial to the way in which the judicial review jurisdiction of the Employment Court is exercised. He submitted that it is debatable whether the Judge properly applied and interpreted the law and that the correct approach to such applications raises a matter of both general and public importance.

[26] Ms McLuskie argued that no question of law arises and that Mr Halse does not meet the relevant criteria for leave, because there is no identified question of law, let alone one of general or public importance.

Analysis

[27] It is difficult to discern what question of law Mr Halse seeks leave to raise on appeal.

[28] In his amended application for leave to bring an appeal, Mr Halse asserted that the Employment Court erred in striking out his judicial review proceedings in circumstances where Progress to Health was "not privy to the contest between [Mr Halse] and the [ERA]", where Mr Halse had "a constitutional right" to judicially

review the ERA under s 27(2) of the Bill of Rights Act, and where Mr Halse "has a statutory protection from summary judgment applications under s 187(2) of the [Act]".

[29] No seriously arguable question of law can arise from the involvement of Progress to Health in the hearing before the Employment Court. It was a party to Mr Halse's judicial review application. It had sought to strike out that application. It was entitled to be heard.

[30] Similarly, there is no seriously arguable question of law arising out of the Bill of Rights Act. Section 27(2) of the Bill of Rights Act confirms that every person whose rights, obligations or interests are affected by a determination of any tribunal or other public authority has the right to apply for judicial review of that determination. But as the Judge found, the ERA has not as yet made a determination. Mr Halse was seeking to review a procedural direction of the ERA requiring Progress to Health to file a statement of problem against him if it wished to do so. That direction followed on from a request by Mr Halse's then representatives.

[31] Section 184(1A) of the Act provides that no review proceedings under s 194 may be initiated in relation to any matter before the ERA, unless inter alia the ERA has issued a determination under ss 174A(2), 174B(2), 174C(3) or 174D(2) on all matters relating to the subject of the review application between the parties to the matter. Section 174E(a) provides that a written determination provided by the ERA in accordance with any of those sections must: state relevant findings of fact, state and explain the ERA's findings on relevant issues of law, express the ERA's conclusions on the matters or issues it considers required determination in order to dispose of the matter, and specify what orders, if any, the ERA is making. Here, the procedural direction made by the ERA did not do any of those things. Rather, it was a case management direction, made at the request of Mr Halse's representatives.

[32] We do not understand Mr Halse's assertion in his amended notice of application that he has a statutory protection from summary judgment applications. Mr Halse refers to s 187(2) of the Act. It provides that the Employment Court does not have jurisdiction to entertain an application for summary judgment. The Employment Court has not purported to do so. There is a distinct difference between

a summary judgment and a strike-out. A strike-out is usually determined on the pleadings alone, whereas summary judgment requires evidence.[28] Summary judgment is a judgment between the parties to the dispute which operates as an issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a properly constituted claim.[29]

[33] None of the various issues raised in the amended application for leave to appeal raise a seriously arguable question of law, let alone a question of law of general or public importance, or a question which ought to come before this Court for some other reason.

[34] In his submissions filed in support of his application, Mr Halse sought to raise a host of additional issues. Those questions are said to include, but are not limited to, the following:

a) Is a judicial review proceeding the same as an appeal proceeding?

b) Can a collateral party to a judicial review proceeding, who is not the statutory decision maker, defend the processes followed by the public authority decision maker?

c) In the judicial review proceeding, is the public body decision maker required to defend the process it followed in reaching its decision by filing a statement of defence?

d) Is the ERA a tribunal?

e) Does s 10(2) of the Judicial Review Procedure Act 2016 exclude a tribunal or court from the mandatory provisions of s 10(1) in relation to the filing of a statement of defence?

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28 *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [60].
29 At [60].

f) Does r 15.1 of the High Court Rules 2016 override the provisions of the Bill of Rights Act, the Judicial Review Procedure Act, the Employment Relations Act and the Employment Court Regulations 2000?

g) Does r 15.1 apply to judicial review proceedings or does only pt 5 of the High Court Rules apply?

h) Is a strike-out of an entire judicial review proceeding, before a substantive hearing has been held, a summary judgment?

Mr Halse goes on to refer to a large number of statutory and regulatory provisions and then submits that judgments of the Employment Court demonstrate "conceptual confusion". No convincing account of the alleged conceptual confusion is given.

[35] We do not consider that any of these alleged errors is seriously arguable, or that any of them raises any question of general or public importance. The majority of the questions raised are the subject of settled authority. Others are academic or moot. Some are not raised by the Employment Court's judgment and are tendentious and argumentative. None of the questions is seriously arguable.

[36] Mr Halse's application for leave to appeal the decision of the Employment Court is declined.

Result

[37] The application for leave to appeal the decision of the Employment Court is declined.

[38] The applicant must pay costs to the second respondent for a standard application on a band A basis with usual disbursements.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for First Respondent
Tompkins Wake, Hamilton for Second Respondent