IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 96
EMPC 425/2021

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER OF	an application to strike out proceedings
BETWEEN	ALLAN GEOFFREY HALSE Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	NEW PROGRESS ENTERPRISES CHARITABLE TRUST BOARD OPERATING AS PROGRESS TO HEALTH Second Respondent
AND	CULTURESAFE NEW ZEALAND LIMITED Third Respondent

Hearing:	13 April 2022 (Heard at Auckland)
Appearances:	Applicant in person No appearance for first respondent K McLuskie and C Wi, counsel for second respondent No appearance for third respondent
Judgment:	21 June 2023

JUDGMENT OF JUDGE KATHRYN BECK
(Application to strike out proceedings)

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[1] This decision considers a strike-out application brought by the second respondent, New Progress Enterprises Charitable Trust Board operating as Progress to Health (Progress to Health). Progress to Health seeks to strike out judicial review proceedings which have been brought by Mr Halse in respect of proceedings which are presently before the Employment Relations Authority.

Background

[2] On 18 December 2019, Mr Halse allegedly made a post on the CultureSafe NZ Ltd Facebook page where various allegations were made about Progress to Health which it says were derived from a confidential report prepared by it.

[3] Mr Halse filed a statement of problem (dated 21 January 2020) in the Authority on behalf of Julie Nicholson in respect of three personal grievances. Progress to Health was named as respondent.

[4] Progress to Health filed a statement in reply (dated 11 February 2020), which included a counterclaim. The counterclaim alleged that Ms Nicholson had breached the confidentiality clause in her employment agreement and sought penalties against Mr Halse and CultureSafe for aiding, abetting, inciting or instigating that breach pursuant to s 134(2) of the Employment Relations Act 2000 (the Act).

[5] On 4 February 2021, after an issue was raised about the counterclaim by Mr Halse's then representative, the Authority directed Progress to Health to file a separate statement of problem regarding its claims against Mr Halse and CultureSafe. Progress to Health filed its statement of problem (dated 1 March 2021). Mr Halse and CultureSafe filed a statement in reply on 24 March 2021.

[6] An investigation meeting to investigate Ms Nicholson's claim against Progress to Health, Progress to Health's counterclaim against Ms Nicholson, and its separate claim of aiding, abetting, inciting and instigating the breach against Mr Halse and CultureSafe was initially set down for 27 and 28 October 2021

[7] At a directions conference on 1 October 2021, the investigation meeting was rescheduled for 21 and 22 March 2022 because timetabling had not been complied with.

[8] On 25 November 2021, Mr Halse filed judicial review proceedings in which he sought review of the Authority's decision to allow proceedings to be brought against him.

[9] Progress to Health then applied for Mr Halse's judicial review proceedings to be struck out.

[10] All the claims in the Authority, including Ms Nicholson's, have been adjourned pending the outcome of these proceedings.

[11] After this matter was heard, Mr Halse applied to stay the determination of these proceedings. The application for a stay was declined, and this proceeding can now be dealt with.[1]

Submissions

[12] In his application for judicial review, Mr Halse stated three grounds of review. His subsequent oral submissions indicated that he was also pursuing three further grounds of review.

[13] First, he submitted that the Authority only had jurisdiction to consider disputes between parties to an employment relationship and that he is not a party to any relevant employment relationship.

[14] Second, he argued that the Authority did not have jurisdiction to consider actions in tort and the counterclaim of Progress to Health was an action in tort.

[15] Third, he said that the Authority had no jurisdiction to issue a claim against him. He clarified this third ground of review in oral argument and submitted that the

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1 *Halse v Employment Relations Authority* [2023] NZEmpC 53.

Authority should never have accepted the claim for filing and did not have jurisdiction to allow malicious claims to be filed. He submitted that the counter-claim of Progress to Health was malicious as it was a SLAPP – a strategic lawsuit against public participation. Additionally, he submitted that the Authority acted in bad faith when it proceeded with the claim.

[16] In oral argument, he also submitted that the Authority does not have jurisdiction to make orders suspending his right to freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990. Finally, in related proceedings,[2] he submitted that the Authority should have filed a statement of defence pursuant to s 10(2) of the Judicial Review Procedure Act 2016. While this submission was not made in the strike-out proceedings, as a matter of equity and good conscience, I have taken it into account.

[17] Ms McLuskie, counsel for Progress to Health, submits that Mr Halse's application for judicial review should be struck out because it discloses no reasonably arguable cause of action and because it is frivolous and vexatious.

[18] Further, she argued that the Authority had clear jurisdiction under ss 134(2) and 161 of the Act to order penalties against any person who "incites, instigates, aids, or abets any breach of any employment agreement", which she submitted meant that Progress to Health could make a claim against Mr Halse. She also submitted that there was no evidence that the Authority had acted in bad faith in relation to any action it had taken in these proceedings.

Issues

[19] The issues that must be determined under this application are:

(a) What is Mr Halse seeking to judicially review?

(b) Is the review under s 194 restricted by s 184(1A) of the Act?

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2 At [9].

(c) Does the applicant's application for judicial review disclose a reasonably arguable claim or cause of action?

(d) Is the judicial review application frivolous, vexatious or otherwise an abuse of process?

Law

[20] The Court may strike out an application if it:[3]

(a) discloses no reasonably arguable causes of action, defence, or case appropriate to the nature of the pleading;

(b) is likely to cause prejudice or delay;

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of process of the Court.

[21] When considering a strike-out application, pleaded facts, whether or not admitted, are assumed to be true.[4]

[22] The criteria for striking out for no reasonably arguable cause of action under r 15.1(1)(a) was summarised by the Court of Appeal in *Attorney-General v Prince*:[5]

> ... It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed ... the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material ... but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction ...

[23] The Supreme Court stated similarly in *Couch v Attorney-General*:[6]

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3 Rule 15.1 of the High Court Rules 2016 as applied by reg 6 of the Employment Court Regulations 2000; see generally *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc* [2005] ERNZ 1053 (CA) at [13]; and *Malcolm v Chief Executive of the Department of Corrections* [2022] NZEmpC 39 at [64].

4 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.

5 At 267.

6 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

> [33] It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing.

[24] Section 194 of the Act permits judicial review proceedings to be brought against any exercise of a statutory power by the Authority. However, s 184 places limitations on that power of review.[7] First, it states that review proceedings may not be brought in relation to any matter before the Authority unless the Authority has issued a determination, that determination has been challenged, and the Court has made a decision on that challenge.[8] Second, it states that the Authority may only be judicially reviewed on the ground of lack of jurisdiction.[9] The Authority lacks jurisdiction where:[10]

(a) in the narrow and original sense of the term jurisdiction, it has no entitlement to enter upon the inquiry in question; or

(b) the determination or order is outside the classes of determinations or orders which the Authority is authorised to make; or

(c) the Authority acts in bad faith.

Analysis

What is Mr Halse seeking to judicially review?

[25] In his application for judicial review, Mr Halse stated:

> I seek judicial review of the decision of the Employment Relations Authority ... to issue proceedings against me by Progress to Health by way of counterclaim in proceedings in [the] Authority.

[26] In this statement, Mr Halse appears to be saying that the Authority issued proceedings against him. However, this is qualified by the statement that the Authority issued proceedings by Progress to Health. In Mr Halse's oral submissions, he

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7 Employment Relations Act 2000, s 194(2).
8 Section 184(1A).
9 Section 184(1).
10 Section 184(2).

submitted that the Authority should never have accepted the claim for filing and should not have proceeded with it once it was filed. That submission helpfully encapsulates Mr Halse's complaint.

[27] Mr Halse is seeking to judicially review the Authority's decision to allow Progress to Health to commence proceedings against him.

[28] I now turn to consider whether the Court has jurisdiction to review these decisions of the Authority.

Is the review under s 194 restricted by s 184(1A) of the Act?

[29] As noted above, s 184(1A) states that review proceedings may not be brought in relation to any matter before the Authority unless the Authority has issued a determination on that matter, the determination has been challenged, and the Court has made a decision on that challenge. The Court of Appeal in *Employment Relations Authority v Rawlings* held that the purpose of s 184(1A) is to prevent review processes from disrupting unfinished investigations in the Authority.[11]

[30] As the Authority has not yet made a determination in relation to the matters underlying this review hearing, the Court's jurisdiction to review is restricted by s 184(1A). Such proceedings may not be initiated.

[31] Accordingly, Mr Halse's review proceedings cannot proceed and must be struck out.

Does the application for review disclose a reasonably arguable cause of action?

[32] For completeness, I also consider whether Mr Halse's application for review discloses a reasonably arguable claim or cause of action.

[33] Mr Halse argued that the Authority did not have jurisdiction for a number of reasons.

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[11] *Employment Relations Authority v Rawlings* [2008] NZCA 15, [2008] ERNZ 26 at [26]; see also *Straayer v Employment Relations Authority* [2022] NZEmpC 184 at [55]–[68].

Mr Halse is not a party to the employment relationship

[34] Mr Halse's first ground of review was that the Authority only has jurisdiction to consider matters between the parties to an employment relationship. He says he is not a party and therefore it has no jurisdiction to consider a claim against him.

[35] It is clear from s 161 of the Act that the Authority's jurisdiction is broad. In particular, s 161(1)(b) states that the Authority has exclusive jurisdiction to consider "matters related to a breach of an employment agreement".

[36] The claim brought against Mr Halse is a matter which is related to an alleged breach of an employment agreement brought under s 134. That provision states:

> **134 Penalties for breach of employment agreement**
> (1) Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.
> (2) Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[37] Even though Mr Halse is not a party to any relevant employment agreement for the purposes of s 134(1), he is still capable of being a "person" for the purposes of s 134(2). The purpose of the sub-section is clear in that it creates a form of secondary liability for people who are not parties to an employment agreement but who have been involved in breaching an employment agreement.

[38] For completeness, I observe that Mr Halse also submitted that the Authority should not permit proceedings to be brought against a representative. However, there is nothing in the Act which supports that submission. While the Act states at s 236 that an employee may choose "any other person" to represent that employee, it does not provide any form of legal immunity to such a representative. Even though non-lawyer advocates are not regulated, they are still subject to the law. To find otherwise would be inconsistent with the most fundamental principle of the rule of law, which is that no-one is above the law.

[39] The Authority has express jurisdiction to consider claims against any person when it is alleged that the person has incited, instigated, aided, or abetted a breach of

an employment agreement. There is no legal principle or provision in the Act that would preclude a representative from being considered "a person". Any such claim is subject to the normal requirements of pleading and ultimately proof, but the Authority clearly has jurisdiction to consider such a claim.

[40] This ground of review is clearly untenable to the extent that it cannot succeed.

Tort

[41] The second ground of review raised by Mr Halse was that the counterclaim brought by Progress to Health is a claim in tort and that the Authority does not have jurisdiction to consider tort claims. However, the Authority's minute of 1 October 2021 states that the issue for investigation was whether Mr Halse's client had breached the confidentiality clause of her employment agreement and whether Mr Halse or CultureSafe had aided or abetted her breach if proved.[12] The claim is made under a provision of the Act, not tort. Mr Halse may have confused the statutory action with the economic tort relating to inducement of breach of contract. If so, his submission is mistaken. There is a clear statutory provision that the claim is based upon.[13] That provision is within the jurisdiction of the Authority.

[42] This ground is clearly untenable and cannot succeed.

Malicious claim

[43] The third ground of review raised by Mr Halse, which was clarified in oral argument, was that the Authority should never have accepted the claim for filing and did not have jurisdiction to allow malicious claims to be filed in these circumstances.

[44] Mr Halse did not point to any statutory grounds for his claim that the Authority could and/or should refuse to accept a claim for filing.

[45] Regulation 5 of the Employment Relations Authority Regulations 2000 states that any person may commence proceedings in the Authority to resolve any

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12 *Nicholson v Progress to Health* ERA Auckland 3088713, 1 October 2021 at [8].
13 Employment Relations Act 2000, s 134(2).

employment relationship problem or any other matter in respect of which the Authority has jurisdiction. Further, s 157(1) of the Act states that the Authority has "the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities".[14] When these two provisions are read together, it is clear that once a person has commenced proceedings in the Authority, the role of the Authority is to resolve those proceedings. Therefore, the Authority did not err when it permitted the claim to be filed.

[46] On the other hand, the Authority does have the power to dismiss frivolous or vexatious proceedings.[15] Mr Halse has submitted that the proceedings brought against him are a SLAPP. The term SLAPP is an acronym for strategic lawsuit against public participation. SLAPPs are a form of abusive litigation where powerful plaintiffs bring claims against individuals or smaller organisations in retaliation for them speaking out about some matter of public interest.[16] The concept of a SLAPP has received little attention in New Zealand; however, it is possible that claims of this nature could be struck out as being vexatious or an abuse of process.[17]

[47] However, even though the Authority has the power to dismiss vexatious claims, it is not required to do so. There is no evidence that Mr Halse sought to have the claim against him dismissed. On the contrary, his representative at the time requested that it be filed separately.[18] A statement in reply was then filed as normal. The Act only states that such claims "may" be dismissed. Turning to consider the grounds of review as set out in s 184(2) once again, even if the Authority did explicitly decide not to dismiss the claim of Progress to Health against Mr Halse,[19] such a decision would

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14 The phrase "employment relationship problem" is broadly defined in s 5 as including: "a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship". As discussed above, the claim of Progress to Health arises from an employment relationship as it is a claim of secondary liability against Mr Halse in relation to the alleged breach of an employment agreement by his client.

15 Employment Relations Act, sch 2 cl 12A.

16 George W Pring "SLAPPS: Strategic Lawsuits Against Public Participation" (1989) 7 Pace Envtl L Rev 3.

17 Lucille Reece "The Rise of the SLAPP: A Gap in New Zealand Law?" (LLB (Hons) Dissertation, Victoria University of Wellington, 2021).

18 As opposed to being included in the counterclaim against the employee.

19 There is no evidence that it was asked to do so.

have been within its jurisdiction and within the class of determinations which the Authority is authorised to make.

[48] Therefore, this claim is clearly untenable.

Bad faith

[49] In his oral submissions,[20] Mr Halse suggested that the Authority Member was not impartial and that she had not acted in good faith because she had the opportunity not to proceed but still chose to allow Progress to Health's claim to proceed.

[50] For Progress to Health, Ms McLuskie submitted that there is no evidence that the Authority acted in bad faith. I agree.

[51] Mr Halse has not pleaded any fact which, if proved, would be capable of constituting bad faith on the part of the Authority. The fact that the Authority chose not to dismiss the claim is not capable of constituting bad faith.

Freedom of expression

[52] Mr Halse also submitted that the Authority does not have jurisdiction to suspend his right to freedom of expression. However, I observe that the Authority's decision to hear the claim of Progress to Health against Mr Halse has not limited and certainly has not suspended his right to freedom of expression. The Authority has not had the opportunity to hear the claim yet. There is no evidence that Mr Halse's right to defend and respond to the claim against him is going to be restricted in any way.

Failure to file a statement of defence

[53] Finally, in respect of his submission that the Authority should have filed a statement of defence to his application for judicial review, I observe that s 10(2) of the Judicial Review Procedure Act states that where a "court or tribunal" is named as a

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[20] Bad faith was not explicitly a ground for review in Mr Halse's application. The Authority acts outside its jurisdiction when it acts in bad faith. Mr Halse stated in his application for judicial review that the Authority did not have jurisdiction to issue the counterclaim against him. Therefore, even though he did not mention bad faith in his claim, I have considered it under his broad statement that the Authority had no jurisdiction.

respondent, a statement of defence may be filed.[21] Glazebrook J held in *Claydon v Attorney-General* that the Authority is a tribunal.[22] Accordingly, the Authority was permitted to file a statement of defence but was not required to file one.[23] It chose to abide the decision of the Court.

[54] Progress to Health is a separately named party to these proceedings.[24] It has made this application to strike out on its own behalf. It is entitled to do so and to have the application determined.

[55] The decision of the Authority to abide is not relevant to the strike-out application other than that it will have to accept whatever the outcome might be.

Summary

[56] In summary, none of the grounds of review proposed by Mr Halse are capable of succeeding. They are clearly untenable. Accordingly, his application for review does not disclose a reasonably arguable cause of action and must be struck out.

Is the review application frivolous, vexatious or otherwise an abuse of process?

[57] In light of the conclusions above, it is unnecessary to consider this issue.

Conclusion

[58] There are restrictions on review under the Act.[25] Mr Halse's application for judicial review is struck out on the basis that, having not been the subject of a challenge, the Court does not have jurisdiction to consider it,[26] and also on the basis that it does not disclose a reasonably arguable cause of action.

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21 A submission made in related proceedings. See [16] above.
22 *Claydon v Attorney-General* [2002] 1 ERNZ 281 (CA) at [112].
23 See also *Halse v Employment Relations Authority*, above n 1, at [9]–[15]; and *Secretary for Internal Affairs v Pub Charity* [2013] NZCA 627, [2014] NZAR 177 at [27].
24 It is the second respondent.
25 Employment Relations Act 2000, s 184.
26 Section 184(1A).

[59] Mr Halse's energies would be better placed responding to the claim and making his substantive arguments in relation to freedom of speech, and its intersection with his role as an advocate, in the Authority. This would enable the substantial merits to be determined, and the parties would then be able to take steps to challenge that determination if they choose to do so.

[60] Further, these are separate, albeit related, proceedings to those involving Ms Nicholson. It is not clear to me why Mr Halse has not sought to have Ms Nicholson's proceedings heard independently from the claims against him. Her right to have her matters heard and determined should not be delayed while Mr Halse works through his matters. I note that if the Authority was to find that Ms Nicholson did not breach her employment agreement, any claim against Mr Halse must fail in any case.

Costs

[61] The parties agreed that this matter is appropriately allocated category 2B for costs purposes under the Practice Directions Guideline Scale.[27] Those costs ought to be able to be agreed. If that does not prove possible, the respondents may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. The applicant is to respond by memorandum filed and served within 14 days thereafter with any reply from the respondents filed and served within a further seven days. Costs will then be determined on the papers.

Kathryn Beck
Judge

Judgment signed at 4.30 pm on 21 June 2023

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[27] "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.