IN THE COURT OF APPEAL OF NEW ZEALAND

CA430/2016
[2017] NZCA 123

BETWEEN	AFFCO NEW ZEALAND LIMITED Applicant
AND	EMPLOYMENT COURT First Respondent
	NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INCORPORATED Second Respondent

Hearing:	22 March 2017
Court:	Randerson, French and Asher JJ
Counsel:	P R Jagose and G P Malone for Applicant K G Stone and V McCall for First Respondent (appearance excused) P Cranney and S R Mitchell for Second Respondent
Judgment:	12 April 2017 at 2.30 pm

JUDGMENT OF THE COURT

A The application for judicial review is dismissed.

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

REASONS OF THE COURT

(Given by French J)

Introduction

[1] What is the scope of this Court's jurisdiction to judicially review decisions of the Employment Court? That is the key issue for determination in this strike-out application.

[2] The New Zealand Meat Workers and Related Trades Union Inc (the Union) applies to strike out proceedings filed in this Court by AFFCO New Zealand Ltd (Affco). The proceedings seek judicial review of a decision of the Employment Court on the grounds of breach of natural justice.[1]

[3] The Union contends that breach of natural justice is not an error amenable to review under this Court's very limited judicial review jurisdiction and therefore the proceeding should be struck out for want of jurisdiction. That contention is supported by previous decisions of this Court.[2] Affco accepts that but responds that those decisions require re-consideration in light of the New Zealand Bill of Rights Act 1990 (Bill of Rights).

[4] Although the main ground of the strike-out application is want of jurisdiction, the Union also contends in the alternative that even if there is jurisdiction the proceeding should be struck out as an abuse of process.

Background

[5] Affco and the Union have been embroiled in a dispute arising out of certain actions taken by Affco when reopening its plants for the 2015/2016 killing season.[3] The company invited workers (including union members) who had worked for it during the previous season to attend presentations for a new intended individual employment agreement. The individual employment agreement contained terms that differed in some significant respects from those contained in previous collective

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1 *New Zealand Meat Workers and Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204, (2015) 10 NZELC 79-057 [EC judgment].

2 *Parker v Silver Fern Farms Ltd* [2011] NZCA 564, [2012] 1 NZLR 256; *Moodie v Employment Court* [2012] NZCA 508, [2012] ERNZ 201; and *Huang v Li* [2013] NZCA 135; (2013) 10 NZELR 514.

3 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 482; (2016) 10 NZELC 79-067 [CA judgment] at [14]–[17].

agreements. The most recent collective agreement had expired, but the Union had initiated bargaining for a new collective agreement.

[6] The Union issued proceedings against Affco in the Employment Court. The Employment Court directed it would hear two of the claims made by the Union:

(a) whether Affco's actions breached s 32 of the Employment Relations Act 2000 (the Act), which imposes a duty of good faith in collective bargaining; and

(b) whether Affco's actions amounted to a lockout under s 82 of the Act.

[7] A hearing duly took place. In its subsequent decision, the Employment Court held that Affco's actions amounted to an unlawful lockout of union members and that the company had breached its duty of good faith.[4]

[8] Dissatisfied with that outcome, Affco sought leave to appeal to this Court under s 214 of the Act on four questions of law. Section 214 confers a right to appeal from decisions of the Employment Court on questions of law that are of general or public importance or which for any other reason ought to be submitted to this Court for determination.

[9] This Court granted Affco leave to appeal on three of its four questions.[5] As it transpired, the third question was subsequently abandoned by consent and need not trouble us further.[6] The other two questions can be paraphrased as follows.

(a) Did the Employment Court err in finding the seasonal workers were engaged by Affco on employment agreements of indefinite duration with the result that employment was not terminated when they were laid off at the end of the season?

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4 EC judgment, above n 1, at [194]–[210].

5 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 121 [Leave judgment].

6 See CA judgment, above n 3, at [6].

(b) Even if there was no employment relationship between Affco and the workers during the off season, did the Employment Court err in finding the workers were unlawfully locked out as "employees" within the meaning of the Act's lockout provisions?

[10] Significantly for present purposes, the fourth question, on which leave to appeal was declined, was whether the Employment Court acted in breach of natural justice by reaching a conclusion that Affco had breached an obligation to act in good faith without sufficient evidence and without Affco being afforded the opportunity to be heard.[7]

[11] This Court issued its substantive decision on 6 October 2016.[8] It found the Employment Court had erred in finding that Affco engaged the seasonal meat workers on employment agreements of indefinite duration. However, it upheld the Court's finding that the workers came within the definition of "employees" under the lock-out provision notwithstanding the absence of any employment relationship during the off-season. The Court therefore dismissed Affco's appeal.[9]

[12] Both parties then sought and obtained leave to appeal to the Supreme Court.[10] We were advised by counsel that the appeal hearing is to take place in June this year.

[13] After the hearing of the substantive appeal in this Court, but before this Court had issued its decision, Affco filed the current judicial review proceedings. Initially those proceedings named only the Employment Court as respondent but following concerns raised by Wild J, the Union was added as a second respondent.[11] In accordance with usual practice the Employment Court has been excused from appearing and abides the decision of this Court.[12]

[14] The gravamen of Affco's complaint in its judicial review proceeding is that it was not given fair notice of the matters considered by the Employment Court and was therefore denied an opportunity to respond. It says in particular that the

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7 Leave judgment, above n 5, at [2].
8 CA judgment, above n 3.
9 At [72]–[73].
10 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 30.
11 *AFFCO New Zealand Ltd v Employment Court* CA430/2016, 26 August 2016 (Minute No 1) at [4]–[5].
12 *AFFCO New Zealand Ltd v Employment Court* CA430/2016, 28 November 2016 (Minute No 4).

Employment Court strayed beyond an agreed statement of facts and made a finding on a cause of action (breach of s 4 of the Act) that was not properly before it.

Strike-out principles

[15] It was common ground that, following this Court's decision in *Moodie v Employment Court* (*Moodie*), the Union's strike-out application should be governed by the same principles as are applied under the High Court Rules.[13] The Rules set out four criteria permitting the High Court to strike out a proceeding:

> **15.1 Dismissing or staying all or part of proceeding**
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> (1) The court may strike out all or part of a pleading if it—
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> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
>
> …

[16] In relation to the first of these criteria — "no reasonably arguable cause of action" — the Supreme Court has held it is inappropriate to strike out a claim unless the court can be certain it cannot succeed, or that the case is so certainly or clearly bad that it should be precluded from going forward.[14] While particular care is required in areas where the law is confused or developing, the courts are well equipped to strike out a claim that cannot possibly succeed due to contrary judicial authorities and clear parliamentary intent. Indeed, in light of its function to resolve disputes efficiently, a court would be remiss not to strike out all or part of such a pleading.

[17] We now turn to consider the two grounds advanced by the Union as warranting strike-out.

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13 *Moodie v Employment Court*, above n 2, at [25].

14 *Couch v Attorney-General (on appeal from Hobson v Attorney-General)* [2008] NZSC 45, [2008] 3 NZLR 725 at [33]. It is well settled that the same principles apply in the case of an application for judicial review: *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA) at 63.

Does this Court have jurisdiction to entertain Affco's claims?

The key provisions under the Employment Relations Act

[18] The jurisdiction that Affco seeks to invoke is derived from the Act. The key provisions are ss 193 and 213. It is convenient at this juncture to set both out in full.

> **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 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.

[19] As will be seen, s 193(1) purports to prohibit challenges to Employment Court decisions except on the ground of lack of jurisdiction and except as provided in ss 213, 214, 217 and 218. It is what is commonly described as an ouster or privative clause.

[20] Of the four listed provisions, only one — s 213 — deals with judicial review:[15]

> **213 Review of proceedings before court**
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> (1) If, in relation to any proceedings before the court, any person wishes to apply for a review under Part 1 of the Judicature Amendment Act 1972 [since 1 March 2017 replaced by 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.

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[15] Contrast the other provisions listed in s 193(1) of the Employment Relations Act 2000: s 214 confers a right of appeal to this Court on a question of law; s 217 provides for appeals against convictions or orders or sentences in respect of contempt of court; and s 218 provides for appeals in respect of orders made by the Employment Court on applications for review before it.

(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.

(3) The Court of Appeal or a Judge of that court may at any time and after hearing such persons, if any, as it or the Judge thinks fit, give such directions prescribing the procedure to be followed in any particular case under this section as it or the Judge considers expedient having regard to the exigencies of the case and the interests of justice and the object of this Act.

(4) The decision of the Court of Appeal on any such matter is final and conclusive, and there is no right of review of or appeal against the court's decision.

Previous decisions regarding the relationship between ss 193 and 123 of the Act

[21] The leading authority is the 2011 decision of *Parker v Silver Fern Farms*.[16]

[22] In *Parker,* the Court traced the legislative history of s193 and its predecessors dating back to a privative provision in the Industrial Conciliation and Arbitration Act 1908.[17] The Court concluded that the clear intent of the section was to limit judicial review to the ground of lack of jurisdiction as defined by subs (2). That is to say, the Court held that under s 193 this Court's jurisdiction on judicial review is limited to three categories of decisions:

(a) A decision made in circumstances where the Employment Court did not have jurisdiction, in the narrow sense of the Court not having been entitled to enter on the inquiry in question.

(b) A decision that the Court had no power to make.

(c) A decision made in bad faith.

[23] As Affco accepted, a decision made in breach of the rules of natural justice does not come within any of those three categories.[18]

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16 *Parker v Silver Fern Farms Ltd*, above n 2.

17 In tracing that history, the Court considered change and continuity in New Zealand labour law effected by the Industrial Conciliation and Arbitration Act 1954, the Industrial Relations Act 1973, the Industrial Relations Amendment Act 1977, Labour Relations Act 1987 and the Employment Contracts Act 1991: see generally *Parker v Silver Fern Farms Ltd*, above n 2, at [21]–[42].

18 At [47] and [53].

[24] In *Parker*, the party seeking judicial review argued that while a breach of natural justice might be outside s 193(2)'s narrow definition of jurisdictional error, that was not the end of the story because of the reference to s 213 in s 193(1). Previous iterations of s 193 in earlier statutes had not contained a reference to the equivalent of s 213. Accordingly, it was submitted that by now expressly excepting s 213 from s 193, Parliament had widened the scope of judicial review so as to permit judicial review on all grounds.

[25] The Court however emphatically rejected that argument on the following grounds:[19]

(a) it made a nonsense of s 193(2);

(b) there was nothing in the legislative history of the Act to suggest that Parliament had intended any change to the privative provision or the permitted grounds of judicial review; and

(c) there was nothing to suggest s 213 was intended to have any different function from its predecessors in the Labour Relations Act 1987 and The Employment Contracts Act 1991, that function being to counter the normal role of the High Court as the judicial review court (as to which the Judicature Amendment Act 1972 set out the procedure) and instead to confer jurisdiction exclusively on the Court of Appeal for such judicial review as was permitted by the respective privative provisions in each of the three Acts.

[26] The Court went on to say there were three possible reasons for the inclusion of the s 213 exception in s 193(1), including drafting error. Each of the possible explanations involved a degree of speculation. The Court was satisfied however that whatever the explanation:[20]

> … the addition of s 213 to the excepted provisions to s 193 did not change at all the limited grounds on which judicial review can be brought in this court. The grounds remain as they have been since 1977. Those grounds do not include breach of natural justice or mere error of law. Errors of those kinds may be corrected in the Court of Appeal but only if the errors meet the standard appeal criteria.

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19 At [43]–[46].

20 *Parker v Silver Fern Farms Ltd*, above n 2, at [47].

[27] The Court's reference to "standard appeal criteria" is of course a reference to the requirements under s 214 that before leave to appeal will be granted, the question of law must be a question of general or public importance or there must be some other reason why the Court should hear the appeal. As the Court in *Parker* implies, the existence of those restrictions on access to this Court for the purposes of an appeal provide further support for its interpretation of ss 193 and 213. It would be a strange result if a party could circumvent the standard appeal criteria by the simple expedient of issuing judicial review proceedings.

[28] It is noteworthy that in this case for example the fourth question of law in respect of which leave was sought from this Court, but not granted was capable of encompassing all the judicial review points that Affco now seeks to raise in this proceeding. That this is so was conceded by Affco at the hearing before us.

[29] *Parker* has been followed in several decisions of this Court, including *Moodie* and *Huang v Li*.[21] We note too that since *Parker* was decided Parliament has amended some of the appeal provisions in the Act but has never amended s 193.[22] Under orthodox principles of statutory interpretation, Parliament is taken to be aware of this Court's settled interpretation. The fact Parliament has chosen not to amend s 193 is therefore significant.

The New Zealand Bill of Rights Act

[30] Affco acknowledges that if ss 193 and 213 of the Act stood alone, then the *Parker* analysis would be correct. However, it submits the analysis is wrong because this Court has failed in its earlier decisions to have regard to the provisions of the Bill of Rights, in particular s 27(2).

[31] Section 27 is headed "Right of Justice" and relevantly states:

> **27 Right to justice**
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> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

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21 *Moodie v Employment Court*, above n 2, at [15]–[17]; and *Huang v Li*, above n 2, at [16]–[21].

22 See the amendments to ss 214AA, 214A and 217 of the Employment Relations Act effected by the Employment Relations Amendment Act 2016.

> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
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> …

[32] Affco's counsel Mr Jagose confirmed he was not submitting that s 27 itself conferred a judicial review jurisdiction on the Court of Appeal in addition to that conferred by the Employment Relations Act. Rather, the submission was that s 27 should inform the interpretation of the judicial review provisions under the Employment Relations Act, having regard to s 6 of the Bill of Rights. Section 6 states that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other meaning. In short, the argument was that by reason of the combined effect of ss 27(2) and 6 of the Bill of Rights, s 213 of the Act should be interpreted as conferring a separate right of judicial review wider than that contained in s 193.

[33] Unlike the party seeking judicial review in *Parker*, Affco did not argue that the scope of judicial review under the Act should be widened so as to permit judicial review on all grounds, only that it should extend to breaches of natural justice in addition to the three categories in s 193. If s 27(2) does however have the effect Affco says it does, then it is difficult to understand why it should only impact on breaches of natural justice. Mr Jagose attempted to overcome this difficulty by emphasising the fundamental nature of the right to natural justice. But the fact of the matter is that the s 27(2) right is not limited to judicial review on the grounds of breach of natural justice.

[34] This difficulty highlights the problematic nature of the submission generally.

[35] In our view, s 27(2) of the Bill of Rights does not assist Affco. The right to apply for judicial review under s 27(2) is expressed to be a right exercisable only "in accordance with law". The Court of Appeal is a creature of statute. Unlike the High Court, it has no inherent jurisdiction and unlike the High Court it does not have a general supervisory jurisdiction to review the decisions of public bodies. There is no general right of judicial review to the Court of Appeal. The only judicial review

jurisdiction conferred on this Court is that conferred by the Act and in our view, for the reasons identified in *Parker*, the relevant provisions of the Act permit only one meaning.

[36] It follows we consider there is no inconsistency between s 193 as interpreted by *Parker* and s 27(2). Section 6 of the Bill of Rights does not take matters any further.

[37] Further, even if we are wrong and there is an inconsistency between ss 193 and 27(2), we consider that the limit placed by s 193 on the right to judicial review is "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" for the purposes of s 5 of the Bill of Rights.

[38] The scheme of the Employment Relations Act is to limit access to the Court of Appeal. It is a deliberate and in our view rational policy choice by Parliament, reflecting as it does the fact that employment disputes involve dynamic relationships and should therefore be resolved speedily and informally without undue legalism and excessive judicial intervention. The objects provision of the Act expressly states that the object of the Act is "to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship", and that one way of achieving that object is "by reducing the need for judicial intervention".[23] As recorded in *Parker*, New Zealand's courts and tribunals for the resolution of employment matters have a long pedigree of minimal appellate intervention, especially in the context of collective bargaining.[24]

[39] Limiting access to this Court also reflects the fact that the two adjudicative entities primarily tasked with enforcing the Act — the Employment Relations Authority and the Employment Court — are specialist bodies. This Court is not. Further, many if not most of the decisions that parties seek to challenge in the Court of Appeal will already have had two hearings and both of which must be conducted in accordance with the rules of natural justice. We take Parliament to have

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23 Employment Relations Act, s 3(a)(vi).

24 *Parker v Silver Fern Farms Ltd*, above n 2, at [25].

confidence that the settled statutory pathways for appeal and review by this Court provide sufficient security of natural justice in the context of a complex area of public policy.

Conclusion on jurisdiction

[40] Counsel agreed that, although this is a strike-out application, we are in possession of all the factual material to be presented at the substantive hearing. It follows that we are in a position to make a definitive ruling on the issue of jurisdiction.

[41] For the reasons traversed, we are satisfied that the arguments raised by Affco in its bid to overturn *Parker* are not tenable. In our view, the analysis in *Parker* is unassailable and still holds good. We therefore find that this Court does not have jurisdiction to entertain Affco's judicial review proceeding, which should accordingly be struck out.

Abuse of process

[42] In light of our conclusion on jurisdiction, it is not strictly speaking necessary for us to address the Union's alternative ground. However, were it required, we would also strike out these judicial review proceedings for abuse of process.[25]

[43] We consider these proceedings to be an abuse of process for two main reasons:

(a) The fact these proceedings were not brought at the same time as the appeal under s 214, seek to raise the same issues on which leave was declined and were served on the Union after this Court had delivered its judgment, undermines the administration of justice and the principle of finality. It has also resulted in a separate proceeding running in tandem with a Supreme Court appeal addressing the same dispute.

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[25] High Court Rules, r 15.1(1)(d).

(b) If there were any breaches of natural justice in the Employment Court, they have been cured by the hearing of the s 214 appeal in this Court.

Result

[44] The application for judicial review is dismissed.

[45] Counsel agreed that costs should follow the event. We therefore order the applicant to pay the second respondent costs as for a standard application on a band A basis together with usual disbursements. Mr Cranney for the Union responsibly advised that he could not justify a certificate for two counsel.

Solicitors:
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Crown Law Office, Wellington for First Respondent
Oakley Moran, Wellington for Second Respondents