IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 194
EMPC 68/2018

IN THE MATTER OF	an application for judicial review
BETWEEN	ROLAND SAMUELS Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	CAROLYN LANG Second Respondent
AND	GOURMET FOODS LIMITED Third Respondent

Hearing:	5 June 2020 (Heard at Auckland) And by written submissions filed on 8 and 22 September 2020
Appearances:	Applicant in person Appearance for respondents excused J Catran, counsel assisting the Court
Judgment:	13 November 2020

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Samuels represented Ms Lang in a case before the Employment Relations Authority. He has appeared in the Authority a number of times. Mr Samuels is not a

qualified lawyer. He appears as an advocate, as he is entitled to do under the Employment Relations Act 2000.[1]

[2] Ms Lang succeeded in her claim and a number of orders were made against her previous employer, Gourmet Foods Limited.[2] Issues arose from Mr Samuels' perspective when the Authority came to determine costs. He was concerned that the Authority Member had made several errors.

[3] While Ms Lang could have pursued a challenge to the costs determination, Mr Samuels (who was not a party) could not.[3] Ms Lang chose not to take any further steps in the matter. Mr Samuels applied for judicial review, which I subsequently held he was entitled to do. Neither Ms Lang nor the Authority has taken part in these proceedings. Ms Catran was appointed as amicus, essentially appearing as contradictor. I have been greatly assisted by her submissions.

Background context

[4] The alleged errors now before the Court arise against the following backdrop.

[5] Mr Samuels was instructed to act for Ms Lang. He acted for her on a contingency fee basis, the details of which were set out in a contract. During the course of the investigation meeting, Mr Samuels was sitting with his client, along with the Authority Member, around a table. A copy of the contract was in full view. The Authority Member asked Ms Lang if she could have a look at the document and Ms Lang passed it to her. The Authority Member noted its contents.

[6] At the conclusion of the investigation meeting the Authority Member issued an oral determination. The determination addressed the substantive claim and costs. Mr Samuels accepts that he had an opportunity to make submissions to the Authority Member, including in respect of costs. He says that the opportunity was inadequate for reasons I will come to.

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1 Employment Relations Act 2000, sch 3 cl 2.
2 *Lang v Gourmet Foods Ltd* [2018] NZERA Auckland 37 (Member Campbell).
3 *Samuels v Employment Relations Authority* [2018] NZEmpC 138, [2018] ERNZ 406.

[7] It is not unusual for the Authority to approach the issue of costs on the basis of a daily rate. In this case the Authority Member referred to the daily rate and then departed from it. A review of the determination suggests that two factors prompted the departure: the contingency arrangement reflected in the contract which Ms Lang had provided to the Authority Member and the fact that Mr Samuels was an advocate rather than a lawyer. The following paragraphs of the determination set out the approach:

> [41] At the date of the investigation meeting Ms Lang had not incurred any costs associated with the matter. She has entered into an arrangement with her representative that she would pay a $250 base fee plus 24% of any monetary awards made in her favour.
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> [42] The monetary awards made in this determination amount to $9,989. If Ms Lang is required to pay 24% plus $250 her total costs will amount to $2,647.36. This investigation was undertaken without the requirement of the parties to provide written witness statements or formal submissions. This means the extent of the work required by Ms Lang's representative has been limited to lodging the statement of problem, attending a case management call and attendance at the investigation meeting.
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> [43] The investigation meeting took less than half a day. The reasonableness of the costs incurred must be proportionate to Ms Lang's success. The usual practice of the Authority is to order a contribution to costs on a daily [tariff] basis. In this case that [tariff] would amount to $2,250.
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> [44] The [tariff] has been set to recognise that a variety of representatives appear in the Authority, including qualified, registered professionals who are required to adhere to a professional code of conduct and unregulated advocates who have no such obligations. Ms Lang's representative is an unregulated advocate and as such does not have the expenses and obligations of his qualified and registered counterparts.
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> [45] Taking all of the circumstances into account I consider a reasonable contribution to Ms Lang's costs is $1,000.
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> [46] Gourmet Foods Limited is ordered to pay costs of $1,000 to Ms Lang within 28 days of the date of this determination.

[8] At the centre of Mr Samuels' concerns are the observations at [44], which he says are pejorative and based on assumptions about his (supposedly lesser) status as an advocate, which were not put to him for comment and which have caused damage to his reputation.

[9] The claim as originally drafted has been substantially whittled down, and three questions are now in focus:

(a) Did the Authority have jurisdiction to request the contract between Mr Samuels and his client and to take it into account when determining an appropriate award of costs to Ms Lang?

(b) Did Mr Samuels have the right to natural justice on the question of costs payable to Ms Lang?

(c) If Mr Samuels did have the right to natural justice, what is the content of that right and did the Authority breach it?

[10] I deal with each question in turn.

Analysis

Power to request document

[11] The Authority's powers are derived from statute. As the Employment Relations Act 2000 makes clear, the Authority has a discretion whether to order costs and, if so, in what amount.[4] More generally, Parliament has conferred on the Authority a broad suite of powers to manage matters coming before it and to undertake its functions without regard to technicalities. Relevantly, s 160(1) provides that, in investigating a matter, the Authority may "call for evidence and information from the parties or from any other person." Section 160(2) provides that the Authority may "take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not."

[12] Mr Samuels accepts that the Authority Member requested the contract and that his client gave it to her. There is no doubt that the Authority Member took it into account in setting costs – the determination specifically refers to the contingency fee arrangement and the amounts payable to Mr Samuels under the arrangement.

[13] I understood Mr Samuels' concerns about the first issue to fall away during the course of the hearing. For completeness, I record that I can see no difficulty with the

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4 Employment Relations Act 2000, sch 2 cl 15.

Authority Member requesting, and having regard to, the contract. It falls squarely within the statutory power conferred by s 160(1) and (2). The contract was relevant to the issue of costs; it was requested; it was given without objection; and it was within the Authority's broad cost-setting powers to take it into account. The request for the contract and taking the contract into account do not amount to a reviewable error.

Did Mr Samuels have a right to natural justice on the question of costs?

[14] While there is authority for the proposition that a party to a matter before the Authority may have a right to natural justice in relation to costs,[5] there does not appear to have been any judicial consideration of whether a representative has a right to natural justice in Authority proceedings.

[15] Natural justice rights have been a feature of the common law for many years. While the principles that have been developed in that context usefully inform the nature and extent of any right which might exist in the present case, the source of the right in this case emerges from the statute itself. In this regard, s 157(2)(a) provides that "the Authority *must*, in carrying out its investigative role,– … comply with the principles of natural justice". The point is reinforced by s 173(1)(a) (Procedure) which provides that in exercising its powers and performing its functions the Authority "*must*– … comply with the principles of natural justice".

[16] The wording of ss 157(2)(a) and 173(1) (the natural justice provisions) is broad, and notably focussed on the exercise of the Authority's powers and functions, rather than the identity of the person on whom a right to natural justice is conferred. That is perhaps unsurprising given the sweep of the inquisitorial powers the Authority may exercise and their potential impact. The wording of the relevant statutory provisions can be contrasted with, for example, s 50 of the Coroners Act 2006 (which specifically identifies the people who have a right to request the return of body parts and samples) and s 14 of the Inquiries Act 2013, which specifies the category of people who are entitled to natural justice (namely those against whom an adverse finding is going to be made).

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5 See *Eden v Rutherford & Bond Toyota Ltd* [2010] NZCA 399 at [15].

[17] While Parliament has expressly conferred on the Authority a broad range of powers to deal with matters coming before it without regard to technicality, the point is that a general provision of this sort does not override the specific requirement to comply with the principles of natural justice. Nor, in any event, is 'technicality' an apt descriptor for the fundamental principles of natural justice. The plain wording of s 173 requires the Authority to comply with the principles of natural justice in exercising its powers, including the power to determine costs and, where it has failed to do so, it acts outside its jurisdiction.

[18] The principles of natural justice are broad and flexible and are used to inform the procedure necessary to achieve justice in the specific context, including the statutory context in which a decision is made. As the cases reflect, surprise and prejudice are two key concerns the principles are designed to address.

[19] It is well accepted that natural justice rights arise when a person is the subject of a decision, the effect of which impacts on that person's livelihood and/or reputation.[6] There have also been cases involving claims of breach of natural justice rights by non-parties. In *O'Regan v Lousich: Proprietors of Mawhera v Maori Land Court*, adverse comments by a Judge about the deponent of an affidavit who did not attend the hearing to give evidence were held to be reviewable; the Judge ought to have given them an opportunity to comment prior to making adverse statements about them in a judgment.[7]

[20] There is no doubt, as Ms Catran submitted, that a representative would have a right to natural justice in circumstances where consideration was being given to the imposition of a penalty for obstructing or delaying the Authority's investigation (s 134A),[8] or where consideration was being given to imposing a costs order against the representative.[9] She went on to submit that neither the scheme of the Act nor the case law supported a conclusion that Mr Samuels had a right to natural justice in relation

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6 See, for example, *Murdoch v New Zealand Milk Board* [1982] 2 NZLR 108 (HC); *Stininato v Auckland Boxing Association Inc* [1978] 1 NZLR 1 (CA); *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA); *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC).

7 *O'Regan v Lousich: Proprietors of Mawhera v Maori Land Court* [1995] 2 NZLR 620 (HC).

8 See, for example, *Ward v Concrete Structures (NZ) Ltd* [2019] NZERA 67.

9 See, by way of analogy, *Harley v McDonald* [2002] 1 NZLR 1 (PC).

to the Authority's decision to award costs to Ms Lang. That is because, it is said, he was not a party to the proceeding; he was not a witness; and he was not a person against whom an adverse finding was made. She also submitted that the Authority's findings were open to it, as they reflected well-known facts.

[21] It is true that the costs award was not made against Mr Samuels personally, and no direct liability arose from it insofar as he was concerned. However, the Authority Member clearly had regard to the fact that Mr Samuels was an advocate, rather than a lawyer with a practicing certificate, in arriving at the costs award. The Authority Member's statements reflect an assumption that Mr Samuels' status meant that he was "unregulated"; he accordingly did not have the expenses (and obligations) lawyers appearing before the Authority do; and that this was relevant to an assessment of costs (despite also observing that the daily rate was set having regard to the broad range of representatives who appear in the Authority).

[22] Mr Samuels was concerned that the Authority Member's observations suggested two classes of representatives – lawyers and advocates, and that a lesser service was to be expected from the latter; hence lower costs. It is possible to read the statements in a more benign way, as simply making an observation about the particular professional obligations applying to practising lawyers as compared to non-practising lawyers. I accept, however, that the inference Mr Samuels has drawn from the Authority's statements reasonably arises, and it appears that it is not just Mr Samuels who has read the statements in this way. In this regard Mr Samuels says that the Authority Member's observations have negatively impacted on his business. This includes because clients and opposing counsel are aware of the determination and the statements made within it and have used them as a means of querying the level of costs charged by Mr Samuels and sought on behalf of his clients. Effectively, clients and opposing counsel are arguing that some sort of discount from the daily rate ought to apply because he is an advocate rather than a lawyer (the inference being that he, and other advocates, are less competent, their services less valuable, and their overheads lower). This, in turn, has impacted negatively on his reputation and he feels particularly aggrieved.

[23] The issue of whether natural justice rights apply to a non-party to a matter in the Authority has not previously been determined, and (as Ms Catran pointed out) differing approaches to the issue have been adopted in cases coming before the High Court.

[24] The line of High Court cases begins with *O'Regan v Lousich*, which I have already referred to. In allowing judicial review, Tipping J stated:[10]

> … The public are entitled to take the view, and do take the view, that if a Judge criticises someone in a judgment the Judge has carefully weighed the evidence after giving the person criticised an opportunity to be heard. Thus comments such as that which the Judge made in the present case carry considerable weight. The greater the apparent authority of the person making the finding the greater is the harm likely to ensue to the person criticised; the greater therefore is the responsibility of the person making the comment or finding not to do so without observing the rules of procedural fairness. In my judgment those rules were not followed in the present case and Sir Stephen has reason to feel aggrieved. *The present point is not whether the Judge's comments are correct. Sir Stephen, of course, says they are not. The point is that he has never had the opportunity which should have been afforded to him to put his position. In my judgment the Judge's finding was made in breach of the rules of natural justice*.

[25] In *Quantum Laboratory Ltd v Dunedin District Court*[11] Panckhurst J considered *O'Regan* but concluded that it could not be reconciled with case law in other jurisdictions, including, for example, *Hurd v Hewitt*.[12] The judgment drew a clear distinction between adversarial proceedings on the one hand and investigative proceedings on the other. It was ultimately considered that procedural fairness is not required for non-parties in the former (adversarial) category of case.[13] As explained by the Privy Council in *Re Erebus Royal Commission*, a Judge in adversarial proceedings has no ability to search for their own evidence but must simply rely on what the parties provide.[14] The nature of that process accordingly precludes the ability for a Judge to guarantee procedural fairness for any non-party.[15]

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10 *O'Regan v Lousich*, above n 7, at 631-632 (emphasis added).
11 *Quantum Laboratory Ltd v Dunedin District Court* [2008] 2 NZLR 541 (HC).
12 *Hurd v Hewitt* (1994) 120 DLR (4th) 105 (ONCA).
13 *Quantum*, above n 11, at [64].
14 *Re Erebus Royal Commission*, above n 6, at 666.
15 *Quantum*, above n 11, at [56].

[26] In *Hampton v District Court at Christchurch*, Whata J considered both *Quantum* and *O'Regan*. He found that, in some cases, judicial review would be available for non-parties even in adversarial proceedings.[16] It was considered that this question should be guided by the Evidence Act 2006 and the circumstances of each particular case. It was ultimately determined that a finding of a breach of natural justice would be rare, with the importance of preserving the integrity of the adversarial process still being a foremost consideration.[17]

[27] Both *Hampton* and *Quantum* related to the impact on witnesses of statements made by a District Court Judge and the scope of the common law rights to natural justice in the context of adversarial hearings in that forum. Notable too is Pankhurst J's observation in *Quantum* that, in investigative proceedings, no controversy exists regarding the availability of judicial review for non-witnesses.[18] Investigations in the Authority are inquisitorial, not adversarial, and there is a statutory, rather than common law, right to natural justice.

[28] It is well established that:[19]

> The requirements of natural justice must depend upon the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

[29] While preparing the judgment I became aware of a line of High Court cases involving judicial review of decisions of the Disputes Tribunal (the Tribunal) and invited further submissions on the (restrictive) approach to reviewability taken in those cases. I did this because there are some notable similarities between the functions and powers of the Tribunal and the Authority.[20] In this regard the Tribunal has a wide statutory function to determine disputes according to the substantial merits and justice

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16 *Hampton v District Court at Christchurch* (2014) 22 PRNZ 312 (HC).

17 At [28]–[30].

18 At [40]-[42]. See also *Suckling v Bradley* HC Timaru CP 6/87, 13 September 1989.

19 *Russell v Duke of Norfolk* [1949] 1 All ER 109 (CA) at 118. See also Philip Joseph Constitutional and Administrative Law in New Zealand (4th ed, Thomson Reuters, Wellington, 2014) at [2.25.1].

20 There are, however, some material differences between the Tribunal and the Authority. The Tribunal is not required to give effect to strict legal rights, obligations, forms or technicalities. The right to appeal a decision of the Tribunal is limited to the grounds that the manner in which the proceeding was carried out was unfair to the appellant and prejudicially affected the result of the proceedings.

of the case, and to chart its own procedures.[21] The Authority has investigatory powers; a broad discretion to determine its own procedure; is designed to provide speedy, cost-effective and non-technical disposition of employment relationship problems;[22] and is specifically tasked with supporting the objectives of the Act, including reducing the need for judicial intervention.[23]

[30] In *Evans v Disputes Tribunal*, the High Court held that judicial review of Tribunal proceedings is not to be encouraged or lightly entertained. That is because widely opening the reviewability door would undermine the primary purpose of the Tribunal, namely to determine cases quickly, cheaply, informally and finally.[24] Judicial review introduces technicalities, legal formalism, and additional cost and delay.

[31] The overarching point, Ms Catran suggests, applies with equal force in relation to judicial review of Authority determinations for breach of natural justice. The Authority should have latitude when it is determining how to comply with the principles of natural justice consistently with its inquisitorial nature, the statutory bar on procedural challenges contained within s 179 and the principle that natural justice is flexible and circumstance-specific.[25] Applications for judicial review for breach of natural justice in the Authority should, it was submitted, only rarely give rise to relief and only in cases of plain injustice.

[32] While I agree that the nature and scope of the powers conferred on the Authority are relevant to an assessment of when and how judicial review might bite, it is relevant too that Parliament has expressly conferred an obligation on the Authority to comply with the principles of natural justice when undertaking its investigative functions. I doubt that Parliament intended that a breach of natural justice conferred by it for the benefit of those involved in Authority investigations would be significantly hollowed out by the Court, reserved for rare or exceptional cases. Mr

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21 Disputes Tribunals Act 1988, s 18(6).
22 Employment Relations Act 2000, s 157.
23 Section 3(a)(vi).
24 *Evans v Disputes Tribunal at New Plymouth* (2000) 14 PRNZ 183 (HC) at [1], cited in *Patterson v District Court, Hutt Valley* [2020] NZHC 259.
25 See *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [67]; *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [120].

Samuels made the point that mere inconvenience for the Authority should not be enough to avoid liability for a breach of natural justice. I agree.

[33] It is however important that the Authority's ability to do its work in the way it thinks fit is not unduly constrained by the spectre of judicial review. And, as Ms Catran observed, the Act provides for de novo challenges which can, in a practical sense, address many perceived breaches by allowing the aggrieved party to seek a fresh decision. That avenue was not open to Mr Samuels in this case and nor is it likely to be a particularly effective avenue when damage to reputation has occurred.

[34] A balance must be struck having regard to the particular facts of each case. The facts of this case are unusual. Mr Samuels was appearing in the Authority as a representative of one of the parties. He applied for costs on behalf of his client, who had been successful in her claim. As I have already concluded, in determining costs, the Authority Member made what can reasonably be read was pejorative statements about Mr Samuels' status as an advocate. In this regard the unqualified reference to Mr Samuels being "unregulated" contrasts with the Authority's reference to the other group of representatives appearing in the Authority referred to, namely "qualified, registered professionals who are required to adhere to a professional code of conduct". The Authority's statements contained untested assumptions, including as to the absence of regulation and as to the quantum of expenses and overheads Mr Samuels, as an advocate, might have; and why if, as was said, the daily rate was set having regard to the fact that a broad range of representatives appeared it was nevertheless appropriate to have regard to Mr Samuels' status in departing from it.

[35] Mr Samuels was not on notice of the fact that the Authority was intending to take such matters into account and he had no opportunity to provide comment or further information to the Authority before the statements about him and his practice were made. I accept that the statements had the potential to adversely impact on his reputation and business interests.

[36] I conclude that the Authority was required to comply with the principles of natural justice in determining costs and that extended beyond the particular parties to Mr Samuels.

What was the content of the right to natural justice and did the Authority breach it?

[37] Mr Samuels had a right to be heard prior to the Authority making the statements at issue. He was not put on notice that the Authority Member considered his status as an advocate, and the assumed costs and regulatory restrictions applying to that status, as potentially relevant to the costs calculus and that it might impact on the Authority's approach to the daily rate. That meant that Mr Samuels did not have an adequate opportunity to respond to the Authority Member's assumptions. It may be, as Ms Catran says, that aspects of the Authority's observations were factually correct, but this is largely beside the point for the reasons touched on by Tipping J in *Lousich*.

[38] The Authority breached the statutory requirement to comply with natural justice when exercising its functions and powers, in this case to determine costs.

Remedies

[39] The granting of relief in judicial review proceedings is a matter of discretion.[26] There is a presumption that wrongs should be righted, particularly where substantial prejudice has been suffered.[27] The nature and extent of any relief ordered will depend on what is appropriate in the circumstances.[28]

[40] Mr Samuels says that his reputation has been damaged as a result of the Authority's breach, and he seeks a substantial sum by way of damages. He says that damages will reinforce the significance of the Authority's breach and serve as a deterrent. Mr Samuels also referred, during the course of submissions, to the desirability of an order being made requiring the Authority to record investigation meetings. While recording investigation meetings may be considered desirable for a range of reasons (including to support disposition of non de novo challenges and applications for judicial review), this Court has no power to make any such order.[29]

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26 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 136.
27 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [1].
28 *Hunt v A* [2007] NZCA 332, [2008] 1 NZLR 368 at [92].
29 Employment Relations Act 2000, s 188(4).

[41] Damages are not generally available as a remedy for judicial review.[30] Factors such as the gravity of the error and the degree of prejudice suffered are relevant to an assessment of any relief ordered. Neither factor supports an award of damages in this case. It is not a case which sits in the same league as *Taunoa v Attorney-General*,[31] a judgment referred to by Mr Samuels. That case involved severe mistreatment of prisoners in conditions in breach of, in at least one instance, the human rights protection against disproportionately cruel and degrading treatment.[32]

[42] While I do not consider this to be an appropriate case in which to make an award of damages, I can discern no good reason why a declaration of breach should not be made in Mr Samuels' favour. The Authority erred in the exercise of its powers; a declaration of breach will act to vindicate Mr Samuels' rights; and a declaration will promote good decision-making. A declaration that the Authority breached Mr Samuels' right to natural justice is accordingly made.

Conclusion

[43] The Authority breached Mr Samuels' right to natural justice. I decline to award damages in his favour.

[44] I do not understand any issue of costs to arise, but if it does I will receive memoranda.

Christina Inglis
Chief Judge

Judgment signed at 12pm on 13 November 2020

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30 *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC).
31 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.
32 New Zealand Bill of Rights Act 1990, s 9.