IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 147
EMPC 106/2022

IN THE MATTER OF	an application for judicial review
BETWEEN	MICHAEL REDDY Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	HAMILTON CITY COUNCIL Second Respondent

Hearing:	5 May 2023 (Heard at Hamilton)
Appearances:	A Halse, advocate for applicant Appearance excused for first respondent K McLuskie and J Nyika, counsel for second respondent
Judgment:	6 September 2023

JUDGMENT OF JUDGE J C HOLDEN

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[1] By minute dated 11 March 2022, the Employment Relations Authority (the Authority) addressed a request from Mr Halse, as representative for Mr Reddy, that the Authority issue summons for 42 witnesses on Mr Reddy's behalf (the Minute). In the case of four of the witnesses named, the Hamilton City Council (HCC) confirmed that they would be providing written witness statements and attending the investigation meeting. The Authority therefore determined that no summons was required for them.

[2] In relation to the other proposed witnesses, the Authority determined that four of the people named would be of assistance to the Authority's investigation and that summonses would be issued in respect of those four people. It otherwise declined Mr Reddy's request and provided reasons for doing so.

[3] Mr Reddy has applied for judicial review of the decision of the Authority Member contained within the Minute. He seeks an order quashing the Minute and endorsing his right to call all the witnesses he considers appropriate.

[4] Mr Reddy filed an affidavit in support of his application. That affidavit largely traverses his substantive personal grievance, but it concludes with Mr Reddy's belief that he is "entitled to have all those contractors and HCC employees who made frivolous complaints against [him] cross-examined and to ask them why they 'volunteered' to do so". He further says that he would "like to see all the HCC managers and HR personnel who enabled/condoned the soliciting of those frivolous and false complaints against [him] to be scrutinised".

[5] The Authority, being the first respondent, notified the Employment Court that it would abide the decision of the Court in these proceedings while reserving its rights in relation to costs, the addition of other parties and steps against its interests. Its appearance was excused.

[6] The HCC filed a statement of defence in respect of the claim. Initially it had filed an appearance and advised that it would abide the Court's decision, but at a directions conference in May 2022 it agreed that it would participate in the proceeding to enable the Court to have the full scope of argument in relation to the matter before it.

The submissions of Mr Reddy

[7] Mr Reddy's principal submissions were:

(a) The Authority was required to file a statement of defence pursuant to s 10 of the Judicial Review Procedure Act 2016 and the HCC cannot defend the Authority or act as a "contradictor" on the Authority's

behalf. He says that, as the Authority has not filed a statement of defence and has clearly expressed it did not wish to defend the judicial review, he is entitled to judgment by default.

(b) The Authority's decision not to allow Mr Reddy to call all the witnesses he sought was in breach of his right to natural justice and in breach of the Authority's obligation to comply with the principles of natural justice.[1]

(c) The witnesses were important. When he filed his submissions, Mr Reddy reduced his list from 42 to 23 witnesses in this category. At the hearing, Mr Halse identified that there were by then only three witnesses that Mr Reddy thought were important for his case who the Authority had not agreed to issue with summonses.

(d) In his application, Mr Reddy also refers to the Health and Safety at Work Act 2015.[2]

The Hamilton City Council submissions

[8] The HCC points to the narrow grounds upon which decisions of Authority can be the subject of an application for judicial review, pointing to s 184 of the Employment Relations Act 2000 (the Act). It submits that the Authority did not suffer from a lack of jurisdiction, as required by s 184(1) and (2) of the Act. The HCC accordingly submits that Mr Reddy's application must fail.

[9] The HCC, however, also submits that the Authority complied with the principles of natural justice by seeking and receiving the views of both parties before deciding on witnesses. It notes that the Authority provided detailed reasons for its decision.

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1 Citing the New Zealand Bill of Rights Act 1990, s 27; and the Employment Relations Act 2000, ss 157(2)(b) and 173(1)(a).

2 Mr Halse also referred to it in the submissions in reply.

[10] The HCC points to the Authority's broad jurisdiction to resolve employment relationship problems and that, in doing so, it directs its own processes. It says that extends to enabling the Authority to act effectively on matters before it, to prevent abuses of its process, and to uphold the administration of justice within its jurisdiction.[3]

[11] The HCC notes that the Court and the Authority do not have jurisdiction to determine matters under the Health and Safety at Work Act and any arguments under that Act must therefore fail. Finally, the HCC addresses Mr Reddy's argument regarding s 10 of the Judicial Review Procedure Act, saying this also must fail.

Employment Relations Authority not required to file statement of defence

[12] The argument made in respect of the Judicial Review Procedure Act is on all fours with the argument made by Mr Halse in other proceedings. No additional points are raised, and the argument fails here as it did with previous cases.[4] In short, in dealing with the Judicial Review Procedure Act, the Authority is a tribunal for the purposes of s 10.[5] Its filing of a statement of defence is governed by s 10(2) of the Judicial Review Procedure Act, whereby the Authority has the discretion (but not the obligation) to file a statement of defence. This is consistent with the longstanding and well-recognised principle that when the decisions of courts and tribunals are judicially reviewed, the appropriate position is for the relevant court or tribunal to abide the decision and not become protagonists in challenges of their own decisions. It is inappropriate for a court or tribunal to enter the fray and essentially have a second opportunity to justify their decision. The decision must speak for itself.[6]

[13] The approach taken by the Authority here was appropriate and its attendance was excused.

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3 Citing the Employment Relations Act 2000, s 160; and *Halse v Employment Relations Authority* [2022] NZEmpC 165 at [43].

4 *Halse v Employment Relations Authority* [2023] NZEmpC 69 at [26]–[29]; and *Halse v Employment Relations Authority* [2023] NZEmpC 96 at [53].

5 *Claydon v Attorney-General* [2002] 1 ERNZ 218, [2004] NZAR 16 (CA) at [61]–[71] and [112].

6 *Goodman Fielder Ltd v Commerce Commission* [1987] 2 NZLR 10 (CA) at 13; *Secretary for Internal Affairs v Pub Charity* [2013] NZCA 627, [2014] NZAR 177 at [27]; and *Fraser v Central Hawke's Bay District Council* [2021] NZHC 2981 at [16].

Judicial review not available here

[14] Section 194 of the Act recognises that a person may apply for judicial review of various bodies and persons, including the Authority. With respect to the Authority, however, there are express restrictions on the right to judicially review, which are set out in s 184 of the Act. That section relevantly provides:

> **184 Restriction on review**
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> (1) Except on the ground of lack of jurisdiction or as provided in section 179, no determination, order, or proceedings of the Authority are removable to any court by way of certiorari or otherwise, or are liable to be challenged, appealed against, reviewed, quashed, or called in question in any court.
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> …
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> (2) For the purposes of subsection (1), the Authority suffers from lack of 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
> (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.

[15] The Authority has exclusive jurisdiction to make determinations about employment relationships generally.[7] Here, it is investigating an employment relationship problem; it is entitled to enter upon the inquiry in question. Section 184(2)(a) is not engaged.

[16] The Authority drives the investigation process and, in so doing, may call for, and take into account, such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.[8] It is, therefore, for the Authority to determine what witnesses it needs to hear from in order for it to investigate the employment relationship problem in front of it. The Authority is entitled to make directions that are necessary or expedient in the circumstances of the case.[9]

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7 Employment Relations Act 2000, s 161.
8 Employment Relations Act 2000, s 160.
9 Employment Relations Authority Regulations 2000, reg 4(2); see also *Bay of Plenty District Health Board v CultureSafe New Zealand Ltd* [2020] NZEmpC 149, [2020] ERNZ 367 at [64]–[68].

Accordingly, the directions in the Minute are within the classes of orders that the Authority is authorised to make. Section 184(2)(b) is not engaged.

[17] In his reply submissions, Mr Reddy argued that the Authority acted in bad faith by deliberately breaching mandatory statutory provisions, namely those relating to the principles of natural justice.[10] Apart from there being no evidence of deliberate non-compliance by the Authority, I note that natural justice does not require the Authority to hear from any witness suggested by a party. Here, before it reached a decision on witnesses, the Authority asked for and received the views of both parties. It considered those views and provided its reasons for the decision it made. It acted in accordance with the principles of natural justice. There is nothing else before the Court that would suggest that the Authority has acted in bad faith. Section 184(2)(c) is not engaged.

[18] For these reasons, Mr Reddy's application for judicial review fails. The matter remains with the Authority for it to proceed with its investigation.

[19] Although that resolves the matter before the Court, I also note that the Health and Safety at Work Act has no relevance to this application. Neither the Court nor the Authority has any jurisdiction under that Act; it is not clear why it was referred to by Mr Reddy or how it might require the Authority to summons the witnesses.

Costs

[20] The HCC is entitled to costs on this matter. If those cannot be agreed between the parties, the HCC may file and serve a memorandum seeking costs within 21 days of the date of this judgment. Mr Reddy then has 14 days within which to file and serve a memorandum in response. Any memorandum in reply from the HCC may be filed within a further seven days. The matter will then be determined on the papers.

J C Holden
Judge

Judgment signed at 10.30 am on 6 September 2023

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[10] See above at [7(b)].