NOTE: ORDER OF EMPLOYMENT COURT IN [2018] NZEMPC 120 PROHIBITING PUBLICATION OF THE NAMES AND ANY INFORMATION LIKELY TO LEAD TO THE IDENTIFICATION OF H, C AND RPW REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 135/2021
[2021] NZSC 188

BETWEEN	H (SC 135/2021) Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
	EMPLOYMENT COURT Second Respondent
	BAY OF PLENTY DISTRICT HEALTH BOARD Third Respondent
	TURUKI HEALTHCARE CHARITABLE SERVICES Fourth Respondent
	RPW Fifth Respondent

Court:	O'Regan and Ellen France JJ
Counsel:	Applicant in person M B Beech for Third Respondent A F Drake and R G Judd for Fourth Respondent S W Hood for Fifth Respondent
Judgment:	21 December 2021

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs to each of the third, fourth and fifth respondents of $1,500.

REASONS

[1] The applicant seeks leave to appeal against a decision of the Court of Appeal.[1] In that judgment, the Court of Appeal struck out the applicant's application for judicial review of 16 directions and orders of the Employment Relations Authority (the Authority) and seven decisions of the Employment Court. Those directions, orders and decisions were made in relation to three separate cases in which the company of which the applicant is sole director and shareholder (which we will call "C") represented employees in disputes with the third respondent, fourth respondent and fifth respondent respectively.

[2] The Court of Appeal described the factual background in these general terms:[2]

> [2] While factually different, the three separate employment disputes follow the same general theme: C representing an aggrieved employee, refusing to comply with directions of the Authority, particularly with regard to publication of matters relating to mediated settlements, and posting derogatory material on its Facebook page. As a consequence penalties were imposed on both C and H personally.

[3] In the dispute involving the third respondent, the applicant represented an employee in a claim for unjustified dismissal, which was unsuccessful in the Authority. The Authority made directions that the applicant was not to contact the third respondent and was also not to make any public comments about it or its staff on his Facebook page.[3] He was warned that a failure to comply could lead to the imposition of a penalty against him under s 134A of the Employment Relations Act 2000 (the Act). Subsequently, the third respondent made an application for penalties, contempt and take-down orders against the applicant and C. This was removed into the Employment Court for determination. The Court determined that the Authority had

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1 *H v Employment Relations Authority* [2021] NZCA 507 (French and Brown JJ) [CA judgment].
2 At [2].
3 *Shaw v Bay of Plenty District Health Board* NZERA Auckland 5593008, 23 May 2017; and *Shaw v Bay of Plenty District Health Board* NZERA Auckland 5993008, 23 March 2018.

jurisdiction to make the directions against a person representing a party to a dispute in the Authority.[4] That proceeding is currently stayed.

[4] In relation to the fourth respondent, C represented a party in a dispute which was settled after mediation. The settlement recorded an obligation on the parties and C not to make derogatory or disparaging comments about the other, and that C was not to make any reference to the dispute in any publication, including social media. After breaches of these obligations, the Authority ordered that C, the applicant and another person pay penalties under s 149(4) of the Act. The challenge to the Authority's decision in the Employment Court was partially successful, but the penalties stood.[5] In particular, the Court determined that the Authority had jurisdiction to make orders against C, the applicant and the other person despite none having an employment relationship with the fourth respondent.

[5] The dispute in relation to the fifth respondent was also resolved by mediation and, again, the settlement agreement provided that no party would make disparaging or negative remarks about the other. It recorded that the applicant had signed the record of settlement to indicate his agreement to being bound by that term. The applicant did then make disparaging comments about the fifth respondent on C's Facebook page. This led to seven determinations of the Authority which culminated in orders requiring the applicant and C to comply with the settlement terms and remove the disparaging comments from social media platforms.[6]

[6] The applicant did not initially challenge the Authority's rulings, but after penalties were imposed, he challenged the final two determinations, dealing with quantification of the penalties. The Employment Court refused applications for leave to extend time to file challenges against the first five determinations and dismissed the challenges against the last two determinations.[7] Accordingly, the penalties ordered by the Authority stood and costs were awarded to the fifth respondent.

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4 *Bay of Plenty District Health Board v [C]* [2020] NZEmpC 149, (2020) 17 NZELR 545.
5 *[C] v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 165, (2020) 17 NZELR 577.
6 *R v [H]* [2018] NZERA Auckland 253.
7 *[H] v RPW* [2020] NZEmpC 141.

[7] The application for judicial review in the Court of Appeal was brought under s 213 of the Act. That provides that applications for review in relation to proceedings before the Employment Court must be brought in the Court of Appeal. As the Court of Appeal pointed out, that provision does not allow for applications for judicial review of decisions of the Authority to be commenced in the Court of Appeal.[8] That meant it was inevitable the Court of Appeal had to strike out the claims in the application for judicial review relating to the sixteen directions and orders of the Authority, because it had no jurisdiction to deal with them.

[8] In relation to the seven decisions of the Employment Court, the Court of Appeal recorded that the applicant's counsel acknowledged that review under s 213 is available only on the ground of lack of jurisdiction.[9] As the claims relating to the seven decisions of the Employment Court in the application for review did not challenge the jurisdiction of the Employment Court to consider the matters dealt with in the decisions to which the application for review related, they were also struck out.

[9] In his application for leave, the applicant complains that the Court of Appeal did not address the substance of his concern, namely that the Authority and the Employment Court do not have jurisdiction over parties outside the employment relationship at issue in the proceeding. He describes the powers relating to non-parties as "additional conflicting and baseless powers". He argues that Parliament cannot have intended to give the Authority and the Employment Court power to enforce settlement contracts against "anyone in the world or anyone that knows about the settlement". He argues that the interests of justice require the grant of leave and the ordering of a stay.

[10] The decision of the Court of Appeal did not address the underlying point the applicant seeks to make because the procedural grounding for it to determine that issue did not exist. The Court could not review decisions of the Authority because it had no jurisdiction to do so. And although it had jurisdiction to consider an application for review of the decisions of the Court, the nature of the argument the applicant wanted

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8 Applications for judicial review of decisions of the Authority must be made to the Employment Court: Employment Relations Act 2000, s 194. See the CA judgment, above n 1, at [27].

9 At [30].

to raise was not appropriately dealt with in a review application. That is why the Court suggested that the appropriate course was to apply for leave to appeal against the decisions of the Employment Court, albeit that the applicant will now be well out of time to do so.

[11] We do not see any point of public importance or general commercial significance arising from the decision of the Court of Appeal which, as just mentioned, concerned the procedure under which the case came before that Court.[10] Nor do we see any appearance of a miscarriage of justice in the way the Court dealt with the issue before it.[11]

[12] The application for leave to appeal is therefore dismissed. It is therefore not necessary to consider further the applicant's application for stay of the orders made against him in the Authority and the Employment Court.

[13] The applicant must pay costs to each of the third, fourth and fifth respondents of $1,500.

Solicitors:
Holland Beckett Law, Tauranga for Third Respondent
Wynn Williams, Auckland for Fourth Respondent
Norris Ward McKinnon, Hamilton for Fifth Respondent

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10 Senior Courts Act 2016, s 74(2)(a) and (c).
11 Section 74(2)(b).