

**NOTE: EXTANT EMPLOYMENT COURT ORDER SUPPRESSING NAMES
OR IDENTIFYING PARTICULARS OF THE APPLICANT'S FORMER
LAWYERS: SEE [55] OF THE REASONS**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA780/2009
[2011] NZCA 564**

BETWEEN	JONATHON PARKER Applicant
AND	SILVER FERN FARMS LIMITED First Respondent
AND	EMPLOYMENT COURT Second Respondent

Hearing: 27 May 2011

Court: Chambers, Harrison and Stevens JJ

Counsel: B A Corkill QC for Applicant
T P Cleary for First Respondent

Judgment: 8 November 2011 at 11:00 AM

JUDGMENT OF THE COURT

- A The application for judicial review is dismissed.**
- B The question of whether the interim orders prohibiting publication of the names or identifying particulars of the applicant's former lawyers should be made permanent or discharged is remitted to the Employment Court. The orders remain in place in the meantime.**
- C No order as to costs.**
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REASONS OF THE COURT

(Given by Chambers J)

Application for review of Employment Court decision

[1] Jonathan Parker, the applicant, worked for Silver Fern Farms Ltd, the first respondent,¹ at its Oringi works. On 31 October 2007, a private investigator employed by Silver Fern found cannabis in Mr Parker's car. Mr Parker left the works before Silver Fern's enquiries could proceed. This was despite Silver Fern's request that he stay on site and the union representative's recommendation that he should do so. Mr Parker was then absent from work on medical advice for about five weeks. When he eventually sought to return to work, Silver Fern made it a condition of his return that he undergo a drug test. Mr Parker refused to do so, asserting that Silver Fern's drug and alcohol policy did not allow it to make that a condition of his returning to work. Silver Fern then dismissed him. He raised a personal grievance. The Employment Relations Authority, by a decision dated 7 November 2008, dismissed his claim for unjustified dismissal.²

[2] Mr Parker was dissatisfied with the Authority's determination. He wanted his case heard by the Employment Court. He had 28 days within which to challenge the Authority's determination.³ He contacted a lawyer, Mr C. Because he could not afford to pay Mr C, he had to apply for legal aid. The Legal Services Agency had not determined that application by the time the appeal period expired. Accordingly, no appeal was filed in time.

[3] On 6 January 2009, the Agency declined legal aid. Mr C told Mr Parker he could not carry out further work without proper funding. Mr Parker then tried to find another lawyer. Eventually, in April 2009, Mr A agreed to act provided legal aid was granted. Mr A drafted a statement of claim for the proposed challenge to the Authority's decision and submitted it to the Agency for the purposes of a reconsideration of a grant of aid.

¹ Formerly known as PPCS.

² *Parker v Silver Fern Farms Ltd* ERA Wellington WA148/08, 7 November 2008.

³ Employment Relations Act 2000, s 179(2).

[4] The Agency stuck to its guns, however. On 5 June 2009, the Agency advised that it declined the application for aid. Mr A assumed that was the end of the matter. Unbeknownst to him, however, Mr Parker appealed the Agency's decision to the Legal Aid Review Panel. On 2 September 2009, the Panel issued its decision, reversing the Agency's decision and granting legal aid.⁴

[5] Mr Parker immediately told Mr A the good news. Mr A told Silver Fern's lawyer of the intended challenge. Within a couple of days the proceedings had been filed in the Employment Court, along with an application to file the appeal out of time.

[6] Chief Judge Colgan heard the application to file an appeal out of time on 16 November 2009. On 18 November, he declined the application.⁵

[7] Mr Parker brought two applications in this Court following the Employment Court's decision. The first was an application for leave to appeal under s 214 of the Employment Relations Act 2000 (the ERA). This Court dismissed that application.⁶ The second proceeding was an application for judicial review, asserting that the Employment Court, in reaching its decision, had acted in excess of jurisdiction and breached natural justice. Applications for judicial review in respect of proceedings before the Employment Court are brought in the Court of Appeal.⁷ This Court's decision on such an application is final and conclusive.⁸ It is this application for review with which we are concerned.

[8] We have referred to Mr Parker's former lawyers as Mr C and Mr A. Mr C appears to have been given at least de facto name suppression in the Employment Court decision.⁹ This was on the basis, the Chief Judge said, that Mr C had "not had an opportunity to give his account of what may be serious allegations of professional

⁴ *Re Parker* LARP296/2009, 2 September 2009.

⁵ *Parker v Silver Fern Farms Ltd* EmpC Wellington WC26/09, 18 November 2009 ["the EC decision"].

⁶ *Parker v Silver Fern Farms Limited* [2010] NZCA 218 ["the CA leave decision"].

⁷ Employment Relations Act, s 213(2).

⁸ Section 213(4).

⁹ At footnote 3.

negligence against him”. Mr A was accorded interim name suppression in a subsequent decision by the Chief Judge.¹⁰

Issues

[9] Mr Corkill QC, for Mr Parker, and Mr Cleary, for Silver Fern, submitted two issues arose. The first was whether the Chief Judge, in reaching his decision, breached natural justice. This was in fact the second cause of action but Mr Corkill put it first, as he submitted it was the stronger cause of action.

[10] The second issue concerned the first cause of action, which was labelled in the pleading “Excess of jurisdiction”. This was a misnomer, however. Obviously the Chief Judge had jurisdiction to determine whether or not Mr Parker should have leave to file an appeal out of time.¹¹ This cause of action, as argued, shaded into the natural justice cause of action but differed in emphasis. The key complaint was that the Chief Judge had fallen into legal error in the views he expressed on lawyers’ obligations to clients. For convenience, we shall refer to this cause of action as “the error of law cause of action”. The second issue was therefore whether the Chief Judge had made an error of law with respect to lawyers’ obligations.

[11] Following the hearing, however, we became aware of, in the course of preparing our judgment, s 193 of the ERA. This section had not been referred to us. It is a privative provision which, at least on its face, appeared to preclude an application for judicial review on the grounds relied on here. We issued a minute on 5 August 2011 seeking further submissions on this jurisdictional question. Perhaps unsurprisingly, Mr Corkill submitted there was jurisdiction while Mr Cleary contended to the contrary. We are grateful to counsel for their thoughtful additional submissions. In view of the dispute on this question as to jurisdiction, we must first deal with the issue of whether this application for review is outside our jurisdiction by virtue of s 193.

¹⁰ *Parker v Silver Fern Farms Ltd* EmpC Wellington WRC30/09, 4 December 2009 [“the name suppression decision”].

¹¹ Employment Relations Act, ss 179, 187 and 219.

Do we have jurisdiction?

[12] To place the jurisdictional argument in context, we need to set out briefly what Mr Corkill submitted on the two grounds of the application for judicial review. In essence, on the natural justice ground, he submitted as follows. The Chief Judge found that Mr Parker's challenge to the Authority's decision had "merit".¹² His Honour said:

[26] Mr Parker has a substantial arguable case that the employer's policy, incorporated as part of the collective agreement to which he was subject, did not permit the employer to demand lawfully that he undergo a drug test as a condition of returning to work. Further, Mr Parker's case is that there was a genuine dispute between the parties as to the interpretation and operation of the drug testing policy. This should not have been resolved unilaterally by the employer dismissing the employee summarily for asserting his rights to compliance by the employer with its policy. The collective agreement included a disputes procedure which ought to have been followed in these circumstances: *Sky Network Television Ltd v Duncan*.¹³

[13] The Chief Judge also found that there would not be significant prejudice to Silver Fern if Mr Parker were given an extension of time to bring his claim.¹⁴

[14] The Chief Judge further found that, if reinstatement had been sought and was "a viable remedy", it was likely he would have granted an extension of time.¹⁵ The reason reinstatement was not possible was that Silver Fern's Oringi plant closed in May 2008. As a consequence, Mr Parker was, if successful, entitled only to monetary relief.

[15] The Chief Judge considered, however, that an extension of time should not be granted because Mr Parker could be "compensated adequately" from those responsible for the delays, namely Messrs C and A.¹⁶ His Honour concluded his judgment as follows:

[33] Finally, although it is not for this Court to determine issues of ethical professional responsibility between lawyers and clients, I am concerned about one of the submissions made to me by Mr A. That was that, in the

¹² The EC decision at [25].

¹³ *Sky Network Television Ltd v Duncan* [1998] 3 ERNZ 917 (CA).

¹⁴ The EC decision at [24].

¹⁵ At [29].

¹⁶ At [29].

absence of an assurance of payment, Mr Parker’s lawyers were under no obligation to protect his position in litigation, even to the extent of notifying the company of his intention to challenge, and/or filing the pro forma statement of claim that had been drawn up, or making a pro forma application for leave to extend the time for challenging. That was especially so when the client had, and had tendered, the Court filing fee. Without deprecating the importance of fees for services, it is one of the hallmarks of a profession that its members are driven not by remuneration considerations but by an ethic of service to client. A lawyer having accepted a retainer to act for a legally-aided client and aware of the time limits should in my view act to protect the client’s rights of appeal even if this means the payment of the modest cost of doing so is delayed.

[16] Mr Corkill submitted the Chief Judge breached the rules of natural justice as Silver Fern had never relied on any wrongdoing on Mr A’s part as a ground for opposing the application to extend time.

[17] On the error of law cause of action, Mr Corkill submitted that the Chief Judge made findings “which did not arise from the pleadings or from material which was properly before the Court”. Mr Corkill also submitted that findings related to alleged negligence on the part of Mr Parker’s lawyers were also outside the scope of the application before the Court and that the Court had “no inherent supervisory jurisdiction over the professional conduct of solicitors, other than conduct in the face of the Court”. Further, the Judge misstated the lawyers’ legal and ethical obligations.

[18] With that background we now turn to the jurisdictional argument. Section 193 of the ERA¹⁷ reads as follows:

193 Proceedings not to be questioned

- (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.
- (2) For the purposes of subsection (1), the court suffers from lack of jurisdiction only where, —
 - (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 decision or order is outside the classes of decisions or orders which the court is authorised to make; or

¹⁷ We refer to this provision and its predecessors as “the privative provision”.

(c) the court acts in bad faith.

[19] We note immediately that the exceptions provided in ss 214, 217 and 218 are irrelevant for current purposes.¹⁸ On its face, s 193 would appear to limit judicial review to the ground of “lack of jurisdiction” as defined in subsection (2). It would seem to rule out judicial review on the grounds relied on here.

[20] Mr Corkill submitted otherwise. His argument was essentially this. This Court in *New Zealand Rail Ltd v Employment Court*¹⁹ had interpreted the predecessor section in the Employment Contracts Act 1991 liberally so as to permit judicial review challenges of the kinds made here. Parliament must therefore be taken to have intended to endorse such liberal interpretation.

[21] We are unable to accept Mr Corkill’s submission, essentially for the reasons advanced by Mr Cleary in his supplementary submissions. We consider the legislative history of these privative provisions does not permit the conclusion Mr Corkill urges on us.

[22] A suitable starting point for this analysis is the Industrial Conciliation and Arbitration Act 1954. It established the Court of Arbitration.²⁰ Section 47(1) of the Act provided as follows:

Proceedings in the Court [of Arbitration] shall not be impeached or held bad for want of form, nor shall they be removable to any Court by certiorari or otherwise; and no award, order, or proceeding of the Court shall be liable to be challenged, appealed against, reviewed, quashed, or called in question by any Court on any account whatsoever.

[23] Despite the apparent breadth of that privative provision, it had to be read subject to the restriction placed on it by the Full Court of the Supreme Court in *New Zealand Waterside Workers’ Federation Industrial Association of Workers v Frazer*,²¹ which had considered the equivalent provision in the previous employment Act, the Industrial Conciliation and Arbitration Act 1908. In that case, the Court had held that the award, order or proceeding protected from examination by the privative

¹⁸ We return later to s 213.

¹⁹ *New Zealand Rail Ltd v Employment Court* [1995] 1 ERNZ 603 (CA).

²⁰ Industrial Conciliation and Arbitration Act 1954, s 13.

²¹ *New Zealand Waterside Workers’ Federation Industrial Association of Workers v Frazer* [1924] NZLR 689 (SC).

provision was an award, order or proceeding “within the jurisdiction of the Arbitration Court”,²² certiorari would go to bring into the Supreme Court an industrial award in respect of an excess of jurisdiction.

[24] The Court of Appeal’s jurisdiction with respect to matters covered by the 1954 Act was limited to the situation where the Judge of the Court of Arbitration stated a case “for the Court of Appeal on any question of law arising in the matter, excluding any question as to the construction of any award or collective agreement”.²³ Parliament did not provide for any appeals from the Court of Arbitration, whether to the Court of Appeal or any other Court.

[25] For Parliament to set up a powerful specialist court which was subject to oversight from the general courts in such limited circumstances may seem unusual to lawyers in the 21st century. But this represented the prevailing ethos in industrial law for most of the 20th century. Lawyers were not on the whole involved in the resolution of industrial disputes.²⁴ In general, bargaining was carried out and disputes were sorted out by large unions and employers’ organisations, usually working at a national level. When disputes could not be resolved by conciliation, they were brought to the Court of Arbitration, a court consisting of a judge, a representative of labour and a representative of employers. The Court was empowered to decide all matters before it in accordance with “equity and good conscience”, as it thought fit.²⁵

[26] The Industrial Relations Act 1973 replaced the 1954 Act. It established the Industrial Court.²⁶ Section 47(6) was the equivalent of s 47 of the 1954 Act. It provided as follows:

Except on the ground of lack of jurisdiction, no decision, order, or proceeding of the Court shall be removable to any Court by certiorari or otherwise or be liable to be challenged, appealed against, reviewed, quashed, or called in question in any court.

²² At 703.

²³ Industrial Conciliation and Arbitration Act, s 38.

²⁴ For example, under the 1954 Act, lawyers were expressly prohibited from appearing where industrial disputes were referred to conciliation (s 125) and could appear on the arbitration of a dispute only with “the consent of all the parties” (s 139).

²⁵ Section 36.

²⁶ Section 32.

[27] The opening words “Except on the ground of lack of jurisdiction” were new. They merely reflected, however, the interpretation the Full Court in *Frazer* had placed on the equivalent privative provision in 1908. The legislature’s addition of those words can be seen as confirmation of the Full Court’s decision.

[28] The Court of Appeal’s jurisdiction under the 1973 Act remained extremely limited. Once again, as with the 1954 Act, this Court’s jurisdiction was limited to cases stated on questions of law.²⁷

[29] Section 47 of the 1954 Act came before the Court of Appeal in 1975 in *New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration*.²⁸ This Court held that s 47 did not prevent a superior court from quashing a decision of the Court of Arbitration on the ground that that Court had acted without or in excess of its jurisdiction.²⁹ The Court followed *Frazer*. It held that s 47 prevented the superior court from examining proceedings in respect of errors appearing on the face of the record (unless such errors amounted to jurisdictional errors). Richmond J, with whom McCarthy P agreed, referred to the difficulty which frequently arose in attempting “to draw a clear line between jurisdictional errors and errors within the jurisdiction”.³⁰

[30] The Court of Appeal’s decision appears to have provoked a legislative response. In 1977, the Government introduced into the House the Industrial Law Reform Bill, which in due course was passed as the Industrial Relations Amendment Act 1977. That Act reconstituted the Industrial Court as the Arbitration Court. For the first time, Parliament provided for a right of appeal from the specialist employment court (by whatever name) on questions of law. The right of appeal was conferred on “any party ... dissatisfied with any decision of the Court (other than a decision on the construction of any award or collective agreement)”.³¹ The

²⁷ Section 51.

²⁸ *New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration* [1976] 2 NZLR 283 (CA) [“*Engineers Union*”].

²⁹ At 285 per McCarthy P, 295 per Richmond J and 301 per Cooke J.

³⁰ At 295.

³¹ Industrial Relations Act, s 62A, as substituted by s 3 of the Industrial Relations Amendment Act 1977.

conferring of a right of appeal was coupled with a restriction on the right of judicial review. Parliament passed the following two subsections in place of s 47(6):

48 Jurisdiction of Court —

...

- (6) Except on the ground of lack of jurisdiction or as provided in section 62A of this Act, no decision, order, award, or proceeding of the Court shall be removable to any Court by certiorari or otherwise or be liable to be challenged, appealed against, reviewed, quashed or called in question in any Court.
- (7) For the purposes of subsection (6) of this section, the Court suffers from lack of jurisdiction only where —
- (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 decision, order, or award is outside the classes of decisions, orders, or awards which the Court is authorised to make; or
 - (c) The Court acts in bad faith.

[31] The new exception in subs (6), s 62A, was, of course, a reference to the new appeal right. The point of subs (7) was to clarify the meaning of the expression “the ground of lack of jurisdiction”. This had been a source of debate by this Court in *Engineers Union*, particularly in light of the House of Lords’ then recent decision on the topic of jurisdictional error. That decision, which was one of the groundbreaking administrative law decisions of the twentieth century, was *Anisminic Ltd v Foreign Compensation Commission*.³² Lord Reid famously said in that case:³³

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word “jurisdiction” has been used in a very wide sense, and I have come to the conclusion that **it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question.** But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. **It may have given its decision in bad faith. It may have made a decision which it had no power to make.** *It may have failed in the course of the inquiry to comply with the requirements of natural justice.* It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some

³² *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

³³ At 171. Emphasis added.

question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

[32] That Lord Reid's terminology in the above passage should find such a close echo in the new subs (7) is surely not coincidental. It is clear Parliament intended to permit judicial review only in three of the circumstances Lord Reid had listed. First, and this is reflected in para (a), judicial review was permitted if the Court suffered from a lack of jurisdiction in, to use Lord Reid's words in the first bolded sentence, "the narrow and original sense of the tribunal [not] being entitled to enter on the inquiry in question". A second ground of permitted review, set out in para (b), picks up Lord Reid's category of "a decision which [the tribunal] had no power to make", the third bolded sentence above. The third permitted category, reflected in para (c), picks up the second bolded sentence in Lord Reid's speech. The drafter has used the technique of calling these three grounds of review "lack of jurisdiction" for the purposes of subs (6).

[33] What is also noteworthy is what Parliament (and the drafter) did *not* pick up from Lord Reid's speech. Parliament did not provide for judicial review on the ground of a failure "in the course of the inquiry to comply with the requirements of natural justice": see the italicised sentence in Lord Reid's speech. We have no doubt that was deliberate. We have no doubt Parliament envisaged that breaches of natural justice, were they to occur, could be picked up by the new appeal right conferred by s 62A, in the same way that breaches of natural justice in the High Court are picked up by the general appeal right conferred by s 66 of the Judicature Act 1908. The insertion of an appeal right, confirmed in all subsequent legislation, lessens the need for the normally strict construction of privative provisions.

[34] The Industrial Relations Act 1973 was repealed by the Labour Relations Act 1987. The specialist employment court changed its name again: this time from Arbitration Court to Labour Court. Parliament re-enacted s 48(7) of the earlier

legislation³⁴ in effectively identical language in s 279(7). There was a subtle change, however, to s 48(6) of the earlier Act. Its equivalent in the 1987 Act read as follows:

279 Jurisdiction of Labour Court —

...

- (6) Except on the ground of lack of jurisdiction or as provided in section 309 or section 310 or section 311 or section 312 of this Act, no decision, order, or proceedings of the Labour Court shall be removable to any Court by certiorari or otherwise or be liable to be challenged, appealed against, reviewed, quashed, or called in question in any Court.

[35] Instead of there being reference, by way of exception, to one other section of the Act (as in the earlier subsection), there were now four sections excepted. That arose from the fact that new rights of appeal to the Court of Appeal were conferred. Previously, there was only one right of appeal, that conferred by s 62A. The equivalent of that section in the 1987 Act was s 312. New appeal rights were conferred by s 309 (appeals in respect of proceedings founded on tort), s 310 (appeals against orders or sentences in respect of contempt of Court), and s 311 (appeals in respect of orders on applications for review conducted in the Labour Court). (In respect of that last appeal right, we should explain that s 280 conferred on the Labour Court for the first time a judicial review jurisdiction in a number of labour-related areas.) These additional appeal rights did not in any way, however, affect existing statute law as to the circumstances in which the Labour Court could itself be judicially reviewed. The sole ground of judicial review remained “lack of jurisdiction”, as previously defined in s 48(6) and as now defined in s 279(7).

[36] There was, however, one other change of note effected by the 1987 Act. Section 308 of the 1987 Act provided that if judicial review proceedings “in relation to any proceedings before the Labour Court” were brought, such proceedings were to be filed and determined in the Court of Appeal, not the High Court as previously.³⁵ Section 308 did not, of course, enlarge the judicial review jurisdiction, which

³⁴ See at [30] above.

³⁵ One may speculate as to why that change was made. One suspects it may have been driven by considerations of status, as there has always been a certain tension between the High Court and the specialist employment court, the latter for some purposes being effectively treated as on a par with the High Court. It may for this reason have been seen as inappropriate that a High Court Judge was pronouncing on the legality or otherwise of the specialist court’s jurisdiction.

remained limited as set out in s 279(6) and (7). Its concern was *the forum* for such judicial review and the procedure which the Court of Appeal, in this instance acting as a trial court, should follow.³⁶

[37] The Labour Relations Act 1987 was replaced by the Employment Contracts Act 1991. The specialist employment court changed its name again! It now became the Employment Court. The new Act made no material change to the provisions with which we have been concerned. The four rights of appeal to the Court of Appeal were now conferred by ss 132-135. Sections 104(5) and 104(6) were identical to ss 279(6) and 279(7) of the 1987 Act, although with the numbers updated to reflect the new statute. The equivalent of s 308 of the 1987 Act was s 131. It continued to provide that any judicial review proceedings must be determined in the Court of Appeal.

[38] A judicial review proceeding was brought in this Court in 1994: *New Zealand Rail Ltd v Employment Court*.³⁷ The Court noted, as we have, the obvious link between the new s 48(6) and (7), first introduced by the Industrial Relations Amendment Act 1977, and what Lord Reid had said in *Anisminic*. This Court said:³⁸

Patently the statutory change [in 1977] was intended to protect the then Arbitration Court's decisions from challenge by review except on narrow jurisdictional grounds. Some of the wider grounds of jurisdictional challenge of which Lord Reid spoke in the part of the passage quoted above beginning with "But there are many cases ..." were obviously meant to be ruled out. These would include misinterpretations of the kind held to have occurred in *Anisminic* itself, which resulted in a conclusion that the Tribunal had failed to consider the right question and had rejected a claim on a ground which they were not entitled to take into account.

[39] The Court went on to say:³⁹

In the present case it is not contended that the claims made by the workers were not properly before Judge Castle or that his conclusions and declarations were outside the classes of decisions and orders which he was authorised to make. There is of course no suggestion of bad faith. Nor is there any suggestion of a breach of natural justice: as to that kind of issue it is unnecessary to say anything.

³⁶ For this reason, we shall refer to s 308 and its successor sections as "the forum section".

³⁷ *New Zealand Rail Ltd v Employment Court* [1995] 1 ERNZ 603 (CA).

³⁸ At 607.

³⁹ At 607.

[40] Mr Corkill puts emphasis on the last sentence. But, by its plain terms, it does not help at all. *New Zealand Rail* did not involve an alleged breach of natural justice. The comment, such as it is, is not even an obiter dictum: the Court refused to make any comment on the possibility.

[41] The Employment Contracts Act was in turn replaced by the ERA. We have already set out s 193.⁴⁰ At first blush, the section would appear to be a direct copy of s 104(5) and (6) of the 1991 Act, the sole change being to the numbers of the four sections excepted. There is, however, a curious twist. The new s 214 is the equivalent of the old s 135, providing for appeals on questions of law. The new s 217 is the equivalent of the old s 133, providing for appeals against convictions or orders or sentences in respect of contempt of court. The new s 218 is the equivalent of the old s 134, providing for appeals in respect of orders made by the Employment Court on applications for review before it. But the fourth excepted section, namely s 213, is not the equivalent of the fourth “appeal” section in the old Act, s 132, providing for appeals in respect of proceedings founded on tort.

[42] Oddly, despite the Employment Court continuing to have under the ERA a tort jurisdiction, there is now no specific provision permitting an appeal from a decision in that jurisdiction. Instead, the fourth excepted section in s 193(1) is s 213, which is the section providing that applications for judicial review, in relation to any proceedings before the Employment Court, are to be filed and determined in the Court of Appeal. In other words, s 213 is the current equivalent of s 131 of the 1991 Act and s 308 of the 1987 Act. Those sections were not excepted sections in their Act’s respective privative provisions. Their modern equivalent is, however, one of the excepted sections to the current privative provision, s 193. Why is that and what is its significance?

[43] Part of Mr Corkill’s argument is that, by now excepting s 213 from the privative provision, Parliament has widened the scope of judicial review so as to permit judicial review on all grounds. We cannot accept that submission.

[44] First, it makes a nonsense of s 193(2).

⁴⁰ At [18] above.

[45] Secondly, there is nothing in the legislative history of the ERA, which we have studied, to suggest that the then Government or Parliament intended any change to the privative provision or the permitted grounds of judicial review.

[46] Thirdly, there is nothing to suggest that s 213 was intended to have any different role from its predecessors in the 1987 and 1991 Acts. That is to say, its role was 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.

[47] We think there are three possible reasons for the inclusion of the s 213 exception in s 193(1). Two of them involve drafters’ error. Each of the possibilities involves a degree of speculation on our part. Whatever the explanation, we are quite satisfied that 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.

[48] The final part of Mr Corkill’s argument involved reliance on the Employment Court’s decision in *David v Employment Relations Authority*.⁴¹ In that case the Court was exercising its judicial review function under ss 187(1)(j) and 194 with respect to proceedings in the Authority. Just as judicial review proceedings with respect to the Employment Court must be heard in the Court of Appeal rather than the High Court, so too judicial review proceedings relating to statutory powers or statutory powers of decision conferred under the ERA, when exercised by the Authority and others, must be heard in the Employment Court rather than the High Court. Mr Corkill cited *David* as authority for the proposition that judicial review on the ground of breach of natural justice was possible, despite a privative provision (s 184) effectively on all fours with the privative provision with which we are concerned, s 193.

⁴¹ *David v Employment Relations Authority* [2001] ERNZ 354 (EmpC).

[49] We are, of course, not bound by *David*. Nor is it necessary for us to decide whether it should be overruled. We make three comments on it.

[50] First, it was concerned with a different section of the Act with a different history. The relationship between the Employment Relations Authority and the Employment Court is not on all fours with the relationship between the Employment Court and this Court. Whether the Employment Court was correct in the context in which it was operating is best left to a case where the jurisdiction of the Employment Court is in issue.

[51] Secondly, in so far as the Court relied on *Bulk Gas Users Group v Attorney-General*,⁴² the decision is in error. Contrary to what the Employment Court said at [30] of its decision, *Bulk Gas* was not concerned with “a statutory provision similar to s 184(1)”. The privative provision in issue in *Bulk Gas* did not have the restricted meaning of “lack of jurisdiction” which is to be found in both s 193(2) and s 184(2) of the ERA. Nor was *Bulk Gas* concerned with the rules of natural justice.

[52] Thirdly, the Employment Court misstated what this Court had held in *New Zealand Rail*. It said that this Court had “made clear that the [privative provision] would not have prevailed in the presence of a breach of natural justice”.⁴³ We do not consider, with respect, the Court made that “clear”. On the contrary, it refrained from comment on it.

[53] Having determined the limits of our jurisdiction on an application for review under the ERA, we now revert to the two causes of action pleaded. Obviously the natural justice cause of action cannot be pursued. The essence of the error of law cause of action is a complaint, no more no less, that the Chief Judge erred in law when he took into account what he thought was negligence on the part of Mr Parker’s lawyers. This sort of allegation is not within striking distance of the ground of “lack of jurisdiction” in respect of which, under s 193, judicial review may be brought.

⁴² *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

⁴³ *David* at [33].

[54] We accordingly hold we have no jurisdiction with respect to this application for review.

Name suppression

[55] In the name suppression decision, Chief Judge Colgan made the following interim order:

[26] The interim order prohibiting publication of A's name or other identifying particulars is to continue until the disposal of Mr Parker's intended appeal against this Court's judgment of 18 November 2009 and/or A's associated judicial review proceedings in the Court of Appeal. This order is conditional upon the timely filing and prompt prosecution of that appeal and/or judicial review application. The Court's judgment of 18 November 2009 is to issue in modified form with A's name represented by a letter of the alphabet as will be his name in this judgment.

[56] There was no equivalent explicit order in the case of Mr C, but presumably the Judge intended something similar in his case.

[57] We heard no argument as to whether the interim orders should continue (and be made permanent) or should be discharged. Probably that was because it is not an issue Mr Parker cares about one way or the other. Clearly, however, the Chief Judge did not necessarily intend the suppression orders to be permanent.

[58] In light of the fact the application for leave to appeal has been dismissed and the application for review has been dismissed, proceedings are now at an end. We have decided the appropriate course is to maintain the Chief Judge's interim orders in the meantime, but to refer back to him the question of whether the interim orders should be made permanent or should be discharged.

Costs

[59] Mr Parker was legally aided. Because of that, Mr Cleary did not seek costs. There will accordingly be no order as to costs.

Solicitors:

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