IN THE COURT OF APPEAL OF NEW ZEALAND

CA414/2012
[2012] NZCA 508

BETWEEN	ROBERT ALEXANDER MOODIE Applicant
AND	THE EMPLOYMENT COURT First Respondent
AND	ELIZABETH GRACE STRACHAN Second Respondent

Hearing: 19 September 2012

Court: O'Regan P, French and Asher JJ

Counsel: Applicant in person
D Consedine for First Respondent
P B C Churchman for Second Respondent

Judgment: 7 November 2012 at 10.30 am

JUDGMENT OF THE COURT

A The application for judicial review of the Employment Court's decision is struck out.

B The application for an extension of time to appeal against the Employment Court's decision is dismissed.

C The applicant must pay the respondent costs for a standard application for leave to appeal plus usual disbursements.

REASONS OF THE COURT

(Given by O'Regan P)

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Introduction

[1] The applicant, Dr Moodie, has applied to this Court for judicial review of an Employment Court decision delivered by Chief Judge Colgan, dealing with a dispute between the applicant and the second respondent, Ms Strachan.[1] Ms Strachan has applied to strike out the application for judicial review on the basis that the application for judicial review cannot possibly succeed and is an abuse of process. She says that the application for judicial review is really an impermissible attempt to appeal against factual findings and is vexatious.

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1 *Strachan v Moodie* [2012] NZEmpC 95.

[2] In this judgment we deal with the application by Ms Strachan to strike out the application for judicial review. During the hearing of the strike out application, the applicant indicated that he also wished to apply for leave to appeal against the Employment Court decision. With the consent of Ms Strachan's counsel, we agreed to also deal with the applicant's oral application for an extension of time to seek leave to appeal and we also deal with that in this judgment.

[3] The Employment Court abides this Court's decision. Counsel for the Employment Court appeared as a matter of courtesy and was given leave to withdraw.

Factual background

[4] In late 2004/early 2005 the applicant and Ms Strachan agreed that Ms Strachan would become associated with the applicant's legal practice in a voluntary capacity. Ms Strachan would gain experience and skill, while the applicant would gain assistance in the preparation of his files. Ms Strachan's involvement in the applicant's practice developed quickly, and during 2005 she asked that she be remunerated consistently with her input into the practice. There was dispute about the agreed remuneration, but the Employment Court found that the parties agreed that Ms Strachan would share equally in the net profits of the practice with the applicant.

[5] Ultimately, the parties' employment relationship broke down. Ms Strachan concluded working with the applicant in December 2006 after they had had a disagreement about the level of remuneration to which Ms Strachan was entitled. Ms Strachan filed a statement of claim in the Employment Relations Authority alleging unjustified constructive dismissal. The proceeding was removed to be heard at first instance by the Employment Court.

[6] The issues before the Employment Court were:

(a) whether Ms Strachan was the applicant's employee, and the length and terms of any employment relationship (in particular any agreed remuneration);

(b) whether the applicant breached any employment agreement by not paying Ms Strachan any agreed remuneration;

(c) whether office purchase and rental arrangements were incidents of any employment relationship, or a separate commercial transaction and so beyond the Employment Court's jurisdiction;

(d) whether Ms Strachan raised her personal grievances with the applicant within time;

(e) whether Ms Strachan was unjustifiably constructively dismissed;

(f) what remedies and damages were available to Ms Strachan for any unjustified dismissal or breaches of contract, and whether the applicant was liable for any penalties for breaches of the Employment Relations Act.

[7] The Employment Court held that:

(a) Between January 2006–December 2006 Ms Strachan was the employee of the applicant.

(b) Ms Strachan was entitled to half of the net profits of the applicant's practice for the period of her employment together with half of the practice's bank balance as at 31 January 2006, representing an allowance for work performed by her before that date.

(c) The office purchase and rental arrangements were beyond the Employment Court's jurisdiction.

(d) Ms Strachan's personal grievance was raised within time.

(e) Ms Strachan was dismissed constructively and unjustifiably by the applicant.

(f) Ms Strachan was entitled to compensation of $30,000 for non-economic loss as a result of the applicant's conduct following Ms Strachan's dismissal. This conduct included accusing Ms Strachan of tampering with the practice's accounts, making it unnecessarily difficult for Ms Strachan to deal with a property that she owned jointly with the applicant, complaining unmeritoriously to the Law Society about Ms Strachan, withdrawing a reference made in support of Ms Strachan's application to adopt a child, and accusing Ms Strachan of stealing a portable hard drive. The applicant was also held liable for a penalty of $2,500 for refusing to provide or enter into a written employment agreement with Ms Strachan.

The statement of claim

[8] The applicant's statement of claim in the application for judicial review set out six wide-ranging causes of action. In his notice of opposition to the strike out application, he referred to seven bases on which he said his application for judicial review was founded. These are:

(a) *Delay:* The Employment Court's decision was delivered over two years after the hearing concluded. The applicant argues that this led to errors that impaired the decision.

(b) *Discrimination:* The applicant takes issue with passages from the Employment Court's decision that suggest that the applicant allowed Ms Strachan to work at his practice because he needed assistance and to reduce his "intense involvement" in the practice. He argues that such statements reveal a bias against him and discrimination based on his age.

(c) *Bias:* The applicant says the decision gives rise to an "unmistakeable presumption of bias" by the Judge against him.

(d) *Unsubstantiated findings:* The applicant says the decision included findings that did not arise from the pleadings or from material that was properly before the Court.

(e) *Failure to consider evidence adduced by the applicant:* The applicant submits that a major plank of his defence in the Employment Court was evidence that Ms Strachan had falsified documents and issued false invoices to Moodie & Co clients under her own name. He argues that the Court reached its conclusion that Ms Strachan was constructively dismissed without dealing with these allegations.

(f) *Excess of jurisdiction:* The applicant argues that the Employment Court exceeded its jurisdiction.

(g) *Bad faith and nullity:* The applicant also alleges that the Employment Court acted in bad faith, and that in all the circumstances the decision of the Employment Court was a nullity.

[9] The applicant also says the pleadings include an application to grant leave to appeal out of time. In fact, this is pleaded as one aspect of the relief sought in the judicial review proceeding rather than a separate application, so there was no operative application for leave before the Court. As mentioned earlier, we agreed to consider and deal with an oral application for an extension of time to seek leave.

Our approach

[10] We will consider each of the grounds for judicial review in turn and then consider their cumulative effect. Before we do, we will first consider this Court's jurisdiction in relation to judicial review of Employment Court decisions and whether this Court has jurisdiction to strike out such an application.

Judicial review of an Employment Court decision

[11] Under the Employment Relations Act 2000, appeals against, and applications for judicial review of, decisions of the Employment Court must be made to this Court. This Court's judicial review jurisdiction is limited and must be seen in its statutory context, including the relevant appeal provisions.

Appeals

[12] There is no general right of appeal from the Employment Court. A party may appeal an Employment Court decision only with the leave of this Court.[2] The appeal must be on a question of law. This Court may grant leave only if it is satisfied that, because of the general or public importance of the point of law, or for any other reason, the Court ought to hear the appeal.

Judicial review

[13] Sections 193 and 213 of the Employment Relations Act set out when a decision of the Employment Court may be judicially reviewed. Section 213 sets out the right of review, and that an application for review must be made to this Court:

> **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 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.
>
> (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.
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> (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.

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2 Employment Relations Act 2000, s 214(1).

(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.

[14] Section 193 then limits the grounds of review available:

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

(c) the court acts in bad faith.

[15] The extent of this Court's jurisdiction in relation to applications for judicial review of decisions of the Employment Court has been authoritatively determined by this Court in *Parker v Silver Fern Farms Ltd*.[3] In that case, the Court traced the legislative history of s 193, in particular s 48(7) of the Industrial Relations Act 1973, which was inserted into the 1973 Act by an amendment passed in 1977. The Court concluded that this Court's jurisdiction on judicial review was limited to:

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

(b) a decision that the tribunal (here, Court) had no power to make; or

(c) a decision made in bad faith.

[16] The Court in *Parker v Silver Fern Farms Ltd* made it clear that this Court's jurisdiction did not extend to a case where the Employment Court failed to comply

[3] *Parker v Silver Fern Farms Ltd* [2011] NZCA 564, [2012] 1 NZLR 256.

with the rules of natural justice or made an error of law. Such cases were to be dealt with on appeal, if leave to appeal could be, and was, granted.

[17] In short, the scope of the Court's judicial review power is very limited. That is an important context for Ms Strachan's strike out application.

Jurisdiction to strike out

[18] The application to strike out the application for judicial review is said to be made under r 5 of the Court of Appeal (Civil) Rules 2005 (the CA Rules) and r 15.1 of the High Court Rules (HC Rules).

[19] Rule 5(1) of the CA Rules provides that this Court "may give any directions that seem necessary for the just and expeditious resolution of any matter that arises in a proceeding". This is amplified by r 5(4) which provides:

> If any matter arises in a proceeding for which no form of procedure is prescribed by these rules, the Court must dispose of the matter as nearly as practicable in accordance with these rules affecting any similar matter, or, if there are no such provisions, in the manner that the Court thinks best calculated to promote the ends of justice.

[20] The CA Rules do not contain provisions on strike out, although r 37 does allow the Court to strike out an appeal where security for costs has not been paid.

[21] Section 213(3) of the Employment Relations Act contains a similar power to that set out in r 5(4) in relation to applications for judicial review of decisions of the Employment Court.[4]

[22] Rule 15.1 of the HC Rules sets out when the High Court may strike out a proceeding:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (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

[4] See the text of s 213 at [13] above.

(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.

...

[23] These criteria apply equally to applications to strike out a judicial review proceeding as to any other proceedings.[5] The Supreme Court recently set out the test for whether a proceeding should be struck out: a court should only strike out a claim if "the court can be certain that it cannot succeed", or that the case is so "'certainly or clearly bad' that it should be precluded from going forward".[6]

[24] This Court lacks an explicit power of the kind conferred on the High Court by r 15.1 and has no inherent jurisdiction, as the High Court does.[7] However, as the analysis of the history of the statutory provisions conferring the judicial review jurisdiction on this Court in *Parker v Silver Fern Farms Ltd* shows, this Court is exercising effectively a first instance jurisdiction of the kind usually exercised by the High Court (and, indeed, actually exercised by the High Court until 1987). It is perhaps not surprising that the CA Rules focus on this Court's functions in relation to appeals and applications for leave to appeal, as well as interlocutory matters relating to appeals and leave applications. Whether that is the case or not, the fact is that the CA Rules do not provide a form of procedure to deal with the present application. This is the very situation that s 213(3) of the Employment Relations Act and r 5(4) of the CA Rules are designed to deal with.

[25] This Court is in essentially the same position as the High Court would be in circumstances where an application for judicial review has been made to the High Court. If an application for judicial review is made to the High Court then the respondent can apply to strike out the application for review under r 15.1. In those circumstances we are satisfied that, for the purposes of s 213(3) and r 5.4, applying

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5 *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA) at 63.

6 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

7 This Court has in the past struck out appeals in situations such as that arising where the issue has already been determined (see, for example, *Clark v Libra Developments Ltd* [2008] NZCA 416 but in *Nicholls v Victoria University of Wellington* (2001) 15 PRNZ 33 (CA), the Court refused to strike out an appeal on a matter that was no longer a live issue).

r 15.1 of the HC Rules and the law developed in relation to that rule is the manner of disposing of the current application that is best calculated to promote the ends of justice. We therefore deal with the present application as if r 15.1 of the HC Rules applies to it.

Grounds of review

[26] We will now deal with the individual grounds of review. As a prelude to this, it is instructive to contrast the background particulars provided at the beginning of the applicant's statement of claim with the limited scope of this Court's judicial review power highlighted earlier. The paragraph in the statement of claim setting out the particulars begins by saying that the application for review results from unfairness, unreasonableness, perceived bias and a denial of the applicant's legitimate expectation of and right to due process and natural justice. These failings are said to result from:

(a) delay;

(b) mistakes in and unreasonableness of the decision due to a failure to have sufficient regard to pleadings, evidence and documentation in reaching the decision;

(c) failure to take into account relevant matters;

(d) taking into account irrelevant matters;

(e) unfounded criticisms of the applicant;

(f) failure to have proper regard to inconsistencies in Ms Strachan's evidence and the lack of such inconsistencies in that of the applicant when assessing credibility;

(g) excess of jurisdiction;

(h) generalised wording and lack of articulated grounds for findings, denying the applicant the chance to assess and exercise his appeal rights.

[27] Some (but not all) of these grounds would be orthodox grounds for seeking judicial review in the High Court in circumstances where the jurisdiction of the Court is not limited by statutory restrictions of the kind in play in this case. However, they do not (with the exception of "excess of jurisdiction", which is not particularised) meet the criteria for judicial review by this Court of decisions of the Employment Court under ss 193 and 213 of the Employment Relations Act.

[28] We now turn to the grounds of review pursued by the applicant (listed above at [8]) and deal with the submission made by Mr Churchman in relation to each one that, given the narrow basis of this Court's judicial review jurisdiction, it cannot possibly succeed.

Delay

[29] The Judge's decision was delivered more than two years after the hearing. That is obviously a matter for concern. The applicant argued that this delay tainted the decision. Counsel for Ms Strachan made periodic informal inquiries of the Registrar of the Employment Court after having filed a formal memorandum in October 2011 (some 16 months after the hearing) seeking an indication of progress in finalising the judgment The applicant argued that this could have caused the Chief Judge to decide the case in her favour to avoid criticism.

[30] Such speculation by the applicant is regrettable and does not have any evidential basis. He did not suggest any other basis for the alleged tainting of the decision. Indeed, his response to the memorandum sent to the Court by Ms Strachan's lawyer seeking an indication of progress was to send a memorandum to the Court criticising that sent by Ms Strachan's lawyer. In that memorandum, the applicant did not express any concern about the delay.

[31] Nevertheless, we acknowledge that the applicant is entitled to feel aggrieved about the delay (as, for that matter, is Ms Strachan). It is simply unacceptable.

[32] We regret to say that this is not the first time that a decision of the Employment Court has been contested in this Court in circumstances where the judgment was the subject of significant delay. This Court has previously considered whether delay in delivery of a decision would give rise to a question of law for the purposes of s 214 of the Employment Relations Act (dealing with leave to appeal). In *New Zealand Cards Ltd v Ramsay*, a case involving a 19 month delay in delivery of the judgment, this Court said the delay was a matter of concern but did not necessarily give rise to a question of law.[8] In *Bagchi v Chief Executive of the Inland Revenue Department*, a case involving a 33 month delay, this Court noted that there was authority for the proposition that delays of such length could provide a basis for an appellate court to take a closer look at, for example, decisions about the credibility of witnesses.[9] But the matter was not pursued in that case and the Court did not take the point further.

[33] The present case did require the assessment of the credibility of witnesses and the concern raised in *Bagchi v Chief Executive of the Inland Revenue Department* therefore does resonate. But the issue for decision in this case is whether the delay in issuing the decision could call into question the Employment Court's jurisdiction to adjudicate on the issues in dispute or its power to make the decision that it did, or provide the basis for an allegation of bad faith on the part of the Judge. The answer is "no" on all counts. We are therefore satisfied that delay would not provide a proper basis for judicial review of the Employment Court's decision under s 193 and s 213 of the Employment Relations Act.

Discrimination

[34] The applicant took issue at the Judge's comment to the effect that the present case may be the applicant's last. He said this was contrary to what he told the Judge,

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8 *New Zealand Cards Ltd v Ramsay* [2012] NZCA 285 at [10].

9 *Bagchi v Chief Executive of the Inland Revenue Department* [2008] NZCA 544, [2008] ERNZ 580 at [15], citing *Goose v Wilson Sanford & Co* [1998] EWCA Civ 245 at [112] and [113] and *Cobham v Frett* [2001] 1 WLR 1775 at 1783–1784 (PC).

namely that he was "as retired as [he] would ever be". He also disputed passages from the Employment Court's decision that suggested that the applicant allowed Ms Strachan to work at his practice because he needed assistance and to reduce his "intense involvement" in the practice. He argues that such statements reveal a bias against him and discrimination based on his age. As he puts it, these comments "were unfair, mistaken, unnecessary, unreasonable, gratuitous, discriminated against the applicant because of his age, and were calculated to lower his professional and personal standing by casting him in the light of being an old codger".

[35] We accept there was no basis for the Judge to say that this would be the applicant's last case. We place on record that we accept the applicant's assertion to the contrary and we accept he did say in evidence in the Employment Court that he was "as retired as [he] will ever be now". And we acknowledge that the applicant strongly disputes the Judge's observation about the motivation for Ms Strachan being asked to join the applicant's practice.

[36] But all of this needs to be seen in perspective. The Judge's comments were stated by way of background and had no bearing on the decision. The Judge did not use the term "old codger" and we do not think a reasonable reader would infer that the Judge considered that the applicant was an old codger. He is not. For present purposes, all that needs to be said is that all of the applicant's complaints are matters of fact, on which there is no right of appeal, and they do not indicate any bad faith on the Judge's part, so there is no basis for judicial review either.

Bias

[37] The applicant asserts that the comments relating to his age in the Judge's decision (highlighted above) as well as other aspects of the Judge's decision, such as the Judge's observation about the applicant's description of himself as a pro bono lawyer, indicate that the Judge was biased against him. For example he criticises the Judge's extensive analysis of the fee he received in an unrelated case that predated Ms Strachan's involvement in his practice. He said this had no purpose other than to create an opportunity to criticise him. He even went so far as to say the comments were "dripping with bias and bad faith, and raise a very strong presumption also of

malice existing toward [him]". Mr Churchman accepted there was no claim in relation to the unrelated case and that it did not need to be dealt with but said the Judge should not be criticised for trying to deal with evidence put before the Court by the applicant. There were other allegations that we do not need to repeat.

[38] The applicant sought to adduce new evidence in this Court explaining the background to the fee he received for the case in question. We see no purpose in allowing it to be adduced. It is not fresh and in the end its objective is to call into question the Judge's factual finding, something that is not permitted in relation to Employment Court decisions whether on appeal or on review. The limited nature of both the appeal provisions and those relating to review do not permit a second look at factual findings of the Employment Court. That is an aspect of the unique nature of the Employment Court process. It is not acceptable for the applicant to seek to circumvent this restriction on any form of second look at factual matters by converting a dispute about factual findings into an allegation of bias and bad faith. He has no proper basis for the allegations and they should not have been made.

Unsubstantiated findings

[39] This ground again relates to factual findings that the applicant says were not properly founded in the evidence. Again, that seeks to convert a challenge to a factual finding into an issue going to jurisdiction. We do not accept that is permissible.

Failure to consider evidence adduced by the applicant

[40] The applicant made an allegation against Ms Strachan to the effect that she had created false invoices that involved effectively diverting about $850 of fees from the applicant's practice to her. The Judge did not uphold the allegation and the applicant said this involved accepting Ms Strachan's evidence in circumstances where it should have been rejected and without referring to what the applicant said were inconsistencies in her evidence. Our comments about the unavailability of a right of appeal or review of factual findings apply here.

[41] The applicant also alleged Ms Strachan had charged more to his practice for computer equipment than she had paid for it and had altered invoices to facilitate this. He also said she had claimed and been paid amounts she was not entitled to and had falsified cheque butts in relation to those payments. The Judge did not deal with these allegations expressly. He indicated early in his judgment that he did not intend to engage with every matter placed before him by the applicant. However, he accepted the calculations presented by Ms Strachan's lawyer of the amount due to her for unpaid salary and Mr Churchman said this meant the Judge must have concluded the allegations against Ms Strachan were not substantiated.

[42] We accept that this was unsatisfactory because the Judge has rejected the allegations against Ms Strachan only implicitly and without giving reasons for doing so. However the Judge found that invoices rendered to Moodie & Co by Ms Strachan were rendered on instruction from the applicant and, as already noted, he accepted her calculations of what was owed to her, which necessarily involved acceptance of the validity of the disputed invoices. In the present procedural context, the issue is whether a ground for judicial review emerges from these issues. We do not accept that one does. There is nothing affecting jurisdiction and no proper basis for any allegation of bad faith on the part of the Judge.

Excess of jurisdiction

[43] This essentially duplicates grounds that have already been dealt with. Excess of jurisdiction would be a ground for judicial review but there is nothing in the applicant's submissions that establishes any basis for arguing that the Employment Court acted in excess of its jurisdiction.

Bad faith and nullity

[44] This also duplicates earlier grounds. We are satisfied there is no basis for an allegation of bad faith on the part of the Judge. The applicant did not provide any detail of how a finding of nullity could be made. None exists.

Conclusion: application to strike out

[45] We conclude that, applying the test set out in *Couch v Attorney General* for the striking out of proceedings, the applicant's claim is so clearly bad that it should be precluded from going forward. None of the applicant's proposed grounds for judicial review can succeed in light of the very restricted basis on which this Court may review decisions of the Employment Court under ss 193 and 213 of the Employment Relations Act. We therefore make an order striking out the claim for judicial review.

Extension of time for seeking leave to appeal

[46] As noted earlier, the applicant indicated during oral submissions that he now wished to seek leave to appeal against the Employment Court decision, having initially chosen to forego that opportunity in favour of seeking judicial review. The applicant and Mr Churchman indicated that they consented to our treating the applicant's indication as an application for an extension of time to seek leave and for us to deal with that application and, if necessary, the application for leave, in this judgment.

[47] We should note that the statement of claim seeking judicial review sought as one of a number of remedies in relation to each cause of action: "Such other findings and orders as the Court in its discretion thinks appropriate including, without limitation, granting leave for the applicant to appeal the decision of the Chief Judge". Of course, leave to appeal is something that must be the subject of an application under s 214 of the Employment Relations Act: it is a self-standing statutory process, not a potential remedy in a judicial review case.

[48] The Employment Court judgment was delivered on 14 June 2012 and the hearing before this Court at which the applicant intimated his desire to seek leave to appeal was on 19 September 2012. Under s 214(2) of the Employment Relations Act, leave should be sought within 28 days after the Employment Court decision, so the present application is, in effect, just over two months out of time.

[49] While this Court has usually taken a benign approach to applications for extensions of time where an error has been made by counsel or a litigant in person has made an understandable error, this case does not fall in either category.[10] Rather, the applicant is himself legally trained and he made a deliberate decision to seek judicial review rather than to appeal. It may be because he realised the difficulty in bringing the present case with the restrictive terms of s 214. The Supreme Court in *Bryson v Three Foot Six Ltd* warned this Court against taking too broad an approach to the s 214 requirements and emphasised that matters of fact are not to be relitigated in this Court.[11] The basis on which the applicant seeks to pursue an appeal to this Court is the same as the bases for his judicial review claim. He did not put forward any different points of appeal that could be brought within the rubric of s 214.

[50] As the earlier discussion has shown, the essential complaint of the applicant is that the Judge made wrong findings of fact on key issues and, in particular, that the Judge accepted the evidence of Ms Strachan on the key issues and this credibility finding led the Judge to discount the applicant's position on virtually all factual issues on which there was a dispute. We do not see this as an auspicious context for an appeal to this Court.

[51] We conclude that the merits of the proposed application for leave are weak and the application is more than two months out of time, not because of any error on the applicant's part but a decision not to seek leave in favour of pursuing a claim for judicial review. More generally, we do not see any meritorious appeal grounds in the applicant's many complaints about the decision of the Employment Court. In those circumstances, we do not consider that it would be in the interests of justice to grant the applicant an extension of time to seek leave to appeal and we therefore dismiss his application.

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[10] This Court has previously viewed applications for an extension of time to apply for leave to appeal as being brought under r 29A of the Court of Appeal (Civil) Rules 2005: *New Zealand Cards Ltd v Ramsay*, above n 8, at [2]. The general approach taken by this Court to applications made under r 29A and the relevant considerations are set out in *My Noodle Ltd v Queenstown Lakes District Council* [2009] NZCA 224, (2009) 19 PRNZ 518.

[11] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

Costs

[52] Mr Churchman sought indemnity costs in the event that Ms Strachan's application to strike out was successful. We do not see that as appropriate in the present circumstances. The applicant was unsuccessful in resisting the strike out application but that would normally lead to a costs award at the normal scale. We do not accept that there is any basis for a higher than normal award of costs arising from the conduct of the proceedings before us. We therefore award costs as for an application for leave to appeal on a band A basis plus usual disbursements.

Solicitors:
Crown Law, Wellington for First Respondent
Rainey Collins, Wellington for Second Respondent