



Employment Court of New Zealand

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Courage v Attorney-General [2024] NZEmpC 247 (12 December 2024)

Last Updated: 16 December 2024

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2024\] NZEmpC 247](#)

EMPC 363/2021

IN THE MATTER OF a declaration under [s 6\(5\)](#) of the
[Employment Relations Act 2000](#)
AND IN THE MATTER of an application to strike out part of
claim
BETWEEN HOSEA COURAGE, DANIEL PILGRIM
AND LEVI COURAGE
Plaintiffs
AND THE ATTORNEY-GENERAL SUED ON
BEHALF OF THE MINISTRY OF
BUSINESS, INNOVATION AND
EMPLOYMENT, LABOUR
INSPECTORATE
First Defendant
AND HOWARD TEMPLE, FERVENT
STEDFAST, ENOCH UPRIGHT, SAMUEL
VALOR, FAITHFUL PILGRIM, NOAH
HOPEFUL AND STEPHEN STANDFAST
Second Defendants
AND FOREST GOLD HONEY LIMITED AND
HARVEST HONEY LIMITED
Third Defendants
AND APETIZA LIMITED
Fourth Defendant

EMPC 85/2022

IN THE MATTER OF a declaration under [s 6\(5\)](#) of the
[Employment Relations Act 2000](#)
AND IN THE MATTER of an application to strike out part of
claim

HOSEA COURAGE, DANIEL PILGRIM AND LEVI COURAGE v THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTRY OF
BUSINESS, INNOVATION AND EMPLOYMENT, LABOUR INSPECTORATE [\[2024\] NZEmpC 247](#) [12 December 2024]

BETWEEN SERENITY PILGRIM, ANNA COURAGE,
ROSE STANDTRUE, CRYSTAL LOYAL, PEARL
VALOR AND VIRGINIA COURAGE
Plaintiffs
AND THE ATTORNEY-GENERAL SUED ON BEHALF
OF THE MINISTRY OF BUSINESS,
INNOVATION AND EMPLOYMENT, LABOUR
INSPECTORATE
First Defendant

AND HOWARD TEMPLE, SAMUEL VALLOR,
FAITHFUL PILGRIM, NOAH HOPEFUL AND
STEPHEN STANDFAST
Second Defendants

Hearing: On the papers
Appearances: B P Henry, counsel for plaintiffs
A Boadita-Cormican, counsel for first defendant
No appearance for second, third and fourth
defendants R Kirkness, counsel to assist the Court
Judgment: 12 December 2024

INTERLOCUTORY JUDGMENT (NO 16 FOR EMPC 363/2021 AND NO 37 FOR EMPC 85/2022) OF CHIEF JUDGE CHRISTINA INGLIS

(Applications to strike out part of claim)

Introduction

[1] Applications have been made by the Attorney-General to strike out a claim for breach of statutory duty against the Labour Inspector in respect of these proceedings.

[2] The strike out applications arise in the context of two sets of proceedings against the Gloriavale Christian Community (Gloriavale) for declarations under s 6(5) of the [Employment Relations Act 2000](#) (the Act), and against the Labour Inspector for breach of statutory duty in failing to properly investigate Gloriavale's alleged breaches of employment standards. Split hearing orders were made in both proceedings, directing that the preliminary issue of the plaintiffs' employment status in relation to

Gloriavale be heard first and that the Attorney-General could appear but only take an active role in limited circumstances.¹

[3] In respect of the first set of proceedings (which I will refer to as the *Courage* proceedings) I found that an employment relationship existed.² In a subsequent judgment I determined that the employer was the person holding the position of the Overseeing Shepherd, but observed that there may have been other employers as well.³ For the second set of proceedings (which I will refer to as the *Pilgrim* proceedings) I found that an employment relationship existed,⁴ and that the employer was the person holding the position of Overseeing Shepherd.⁵ Leave to appeal that judgment has been granted by the Court of Appeal, on limited grounds.⁶ Special leave has been granted by this Court, in both *Courage* and *Pilgrim*, to remove proceedings against the Overseeing Shepherd for lost wages, penalties, and other entitlements from the Authority to the Employment Court.⁷

[4] Further, by way of background and in parallel to the plaintiffs' personal grievance and wage arrears claims, the Labour Inspector has filed a claim for serious breaches of minimum entitlements, compensation orders, and pecuniary penalties in relation to the plaintiffs in both proceedings. Counsel for the plaintiffs has also confirmed an intention to seek pre-commencement discovery orders in the High Court in respect of proposed proceedings against the Labour Inspector.

[5] In relation to the strike out applications, submissions were filed by the Attorney-General and by counsel assisting the Court. The plaintiffs advised at an earlier directions conference that they took no position on the jurisdictional point,⁸ and subsequently confirmed that they will abide the decision of the Court. I understand the second defendants to adopt the same position.

1. *Pilgrim v Attorney-General (No 2)* [2022] NZEmpC 83 at [3]; *Courage v Attorney-General* [2022] NZEmpC 77, (2022) 18 NZELR 746 at [22].

2 *Courage*, above n 1.

3 *Courage v Attorney-General (No 2)* [2024] NZEmpC 222.

4 *Pilgrim v Attorney-General* [2023] NZEmpC 105, [2023] ERNZ 454.

5 *Pilgrim v Attorney-General (No 2)* [2023] NZEmpC 227, [2023] ERNZ 1020.

6. *Temple v Pilgrim* [2023] NZCA 631, [2023] ERNZ 998; *Temple v Pilgrim* [2024] NZCA 147. The grounds are whether the plaintiffs worked for hire or reward and whether they were volunteers.

7 *Pilgrim v Overseeing Shepherd* [2024] NZEmpC 146.

8 *Pilgrim v Attorney-General* EmpC Christchurch 85/2022, 11 June 2024 (Minute).

[6] The Attorney-General's applications identify two grounds for strike-out. First, that the Employment Court lacks jurisdiction to hear these claims; second (or alternatively), it is said that there is no longer any dispute between the plaintiffs and the Attorney-General in relation to the claims for breach of statutory duty that requires a determination by this Court because the plaintiffs have indicated an intention to issue proceedings for breach of statutory duty against the Labour Inspector in the High Court, and the plaintiffs have advised the Court that they do not oppose the Attorney-General's application.

Discussion

[7] The Court has the power to strike out all or part of a proceeding before it.⁹ Under the [High Court Rules 2016](#) (which the Court has previously applied by analogy),¹⁰ there are four grounds for strike out. The Attorney-General's application focuses on two: the pleadings disclose no reasonably arguable cause of action, and/or the claim is otherwise an abuse of process.

[8] The Attorney-General's argument that the claim should be struck out because the same type of claim has been signalled for filing in the High Court does not appear to me to fall under either ground. The mere fact that a claim for breach of statutory duty has been flagged, but has not yet been filed, does not seem to me to warrant a strike out; it might provide a basis for a stay. A stay was not, however, a potential option that counsel for the Attorney-General was drawn to.¹¹

[9] While the issue before the Court appears on its face to be straightforward – namely, does this Court have jurisdiction to determine a tort claim for breach of statutory duty – it is complicated by a number of factors. Those factors include the exclusive jurisdiction of the Court (s 187 “Jurisdiction of the court”); the statutory role of the Labour Inspector in respect of employment relationships and breaches of employment standards; and this Court's exclusive powers of judicial review (s 194 “Application for review”).

9. *Newick v Working In Ltd* [2012] NZEmpC 156 at [2]; [High Court Rules 2016](#), r 15.1; [Employment Court Regulations 2000](#), reg 6(2)(a)(ii).

10 [Employment Court Regulations 2000](#), reg 6(2)(a)(ii).

11 *Pilgrim v Attorney-General* EmpC Christchurch EMPC 85/2022, 11 June 2024 (Minute) at [7].

[10] I have concluded that, while arguable, the better view is that this Court has exclusive jurisdiction to determine the elements of the duties owed (and powers exercisable) by the Labour Inspector under the [Employment Relations Act 2000](#), and whether they were breached. The appropriate vehicle for that is via judicial review proceedings in this Court. The outcome of any such proceedings might provide a basis for any tort claim for breach of statutory duty in the High Court, which is excluded from this Court's jurisdiction. I see this approach as being consistent with the evident statutory purpose and with the Supreme Court's observations in *FMV v TZB*.¹²

[11] At the heart of the plaintiffs' claim, as currently pleaded, is a concern that the Labour Inspector failed to meet their statutory obligations under the [Employment Relations Act](#). While an application for judicial review differs from a claim for breach of statutory duty (as counsel point out), the nub of the plaintiffs' complaint remains the same; in such circumstances it is just to provide the plaintiffs with an opportunity to reformulate their claim. That being the case, it is premature to strike the current claim out in the two proceedings.

[12] I explain the basis for my conclusions below.

What is being pleaded?

[13] In *Pilgrim* the pleadings against the Attorney-General are described as being for breach of statutory duty. Reference is made to statutory duties the Labour Inspector is alleged to have, being to enforce applicable employment standards, including minimum standards, and to seek compensation under [s 142A\(1\)\(a\)\(iii\)](#). It is alleged that the Labour Inspector breached their duties by failing to exercise their statutory enforcement powers in the plaintiffs' interests, and that the Labour Inspector knew, or acted recklessly if they did not know, that the plaintiffs were not volunteers. A similar pleading is made in the *Courage* proceedings.

[14] As will be evident, in order to assess whether or not the Labour Inspector was in breach of any statutory duties it will be necessary to first understand what those duties entailed and which court has jurisdiction to decide the point.

12 *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, [2021] ERNZ 740.

This Court's jurisdiction

[15] I start with an analysis of this Court's jurisdiction.

[16] The [Employment Relations Act](#) establishes the Employment Court as a Court of record.¹³ It is a specialist court with jurisdiction carved out of the High Court's jurisdiction.¹⁴

[17] As the Act makes clear, the Employment Relations Authority and the Employment Court have exclusive jurisdiction to hear and determine various matters. In respect of the Court, those matters are set out in s 187(1)(a)-(m). Section 187(2) states that the Employment Court does not have jurisdiction to entertain an application for summary judgment. Section 187(3) states that:

Except as provided in this Act, no other court has jurisdiction in relation to any matter that, under subsection (1), is within the exclusive jurisdiction of the [Employment] court.

[18] In order to support its exclusive jurisdiction, and reflective of the carve-out of jurisdiction from the High Court, Parliament has conferred on the Employment Court a judicial review function. Section 194 ("Application for review") provides that:¹⁵

(1) If any person wishes to apply for review under the [Judicial Review Procedure Act 2016](#), or bring proceedings seeking a writ or order of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or injunction, *in relation to the exercise, refusal to exercise, or proposed or purported exercise by—*

- (a) the Authority; or
- (b) an officer of the Authority or the court; or
- (c) an employer, or that employer's representative; or
- (d) a union, or that union's representative; or
- (e) the registrar of Unions; or
- (f) the Minister; or

¹³ [Employment Relations Act 2000, s 186](#).

14. Paul Roth "The Place of the Employment Court in the New Zealand Judicial Hierarchy" [\(2019\) 50 VUWLR 233](#).

¹⁵ Emphasis added.

(g) the chief executive; or

(h) *any other person—*

of a statutory power or statutory power of decision (as defined in [section 4](#) of the [Judicial Review Procedure Act 2016](#)) conferred by or under this Act ...

(2) Despite any other Act or rule of law, but subject to section 184(1A), the court has *full and exclusive jurisdiction* to hear and determine any application or proceedings of the type referred to in subsection (1) and *all such applications or proceedings must be made or brought in the court*.

...

[19] Labour Inspectors are designated by the Chief Executive of the Ministry of Business, Innovation and Employment, from time to time as considered "necessary" for the purposes of the [Employment Relations Act](#) (and other Acts).¹⁶

[20] The functions of a Labour Inspector are set out in [s 223A](#), and include:

- (a) determining whether the provisions of the Act have been complied with;
- (b) taking all reasonable steps to ensure that the relevant Acts are complied with; and
- (c) monitoring and enforcing compliance with employment standards.

[21] A Labour Inspector has a raft of statutory tools available to them to enforce compliance with the Act, including enforceable undertakings ([ss 223B, 223C](#)); improvement notices ([ss 223D-223G](#)); demand notices ([ss 224-227](#)); and actions on behalf of employees to recover any wages or holiday pay ([s 228](#)). A Labour Inspector may issue improvement and demand notices, enter premises, interview persons, and require the production of documents ([s 229](#)).

[22] [Section 229A](#) ("Investigating question of employment") provides that, for the purposes of performing the Labour Inspector's functions and duties under the Act, they

¹⁶ [Employment Relations Act 2000, s 223\(1\)](#).

may, subject to [ss 229\(5\)](#), [229\(5A\)](#), and [229\(6\)](#) and [230](#) to [233](#), also exercise any of the powers under [s 229](#) to investigate:

- (a) whether any place is a workplace; or
- (b) any person performing work is an employee (“as distinct, for example, from an independent contractor or a volunteer”); or
- (c) any person for whom work is being performed is an employer.

[23] [Section 229A\(2\)](#) provides that:

In relation to the exercise of those powers in such an investigation, [section 229](#) is to be read with any appropriate modifications, including that—

- (a) The power of entry under [section 229\(1\)\(a\)](#) applies with respect to any premises where the Labour Inspector has reasonable grounds to believe work is performed; and
- (b) The power to interview under [section 229\(1\)\(b\)](#) applies with respect to any person present in such premises; and
- (c) employee**, except in the reference in [section 229\(1\)\(a\)](#) to any other employee of the department, includes any person who performs work; and
- (d) employer** includes any person for whom work is performed; ...

[24] As both counsel for the Attorney-General and counsel assisting the Court observe, this Court’s jurisdiction is explicitly defined under [s 187\(1\)](#) of the Act. There is no controversy in the proposition that breach of statutory duty is a tort.¹⁷ It is tolerably clear that the Employment Court’s jurisdiction in tort is restricted only to those actions founded on or relating to strike or lockout.¹⁸

[25] The Court has appellate jurisdiction from the Employment Relations Authority. The Authority’s jurisdiction is, in a sense, broader. It has “exclusive jurisdiction to make determinations about employment relationship problems generally”.¹⁹ The Act

17. Stephen Todd and others *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2019) at [7.1]. See also *Hally Labels Ltd v Powell* [2015] NZEmpC 92, [2015] ERNZ 940 at [130].

18 [Employment Relations Act 2000](#), s 187(1)(h).

19 [Section 161](#).

includes a long list of examples of what constitutes an employment relationship problem within the Authority’s jurisdiction:²⁰

- (a) disputes about the interpretation, application, or operation of an employment agreement:
 - (b) matters related to a breach of an employment agreement:
 - (c) matters about whether a person is an employee (not being matters arising on an application under [section 6\(5\)](#)):
- (ca) facilitating bargaining under [sections 50A](#) to [50I](#):
- (cb) fixing the provisions of a collective agreement under [section 50J](#):
- ...
- (d) matters alleged to arise under [section 68](#) because a party to an individual employment agreement has bargained unfairly:
- (daa) determining whether an employer has complied with [section 69AAE](#): (dab) determining whether an employer has complied with [section 69ABE](#)
- (including, without limitation, whether the employer has avoided non-compliance with [section 69ABE](#), as that term is defined in [section 69ABA](#)):
- (da) investigating bargaining under [section 69O](#) and, if necessary, determining redundancy entitlements under that section:

(e) personal grievances:

(ea) joining a controlling third party to a personal grievance under [section 103B](#):

(f) matters about whether the good faith obligations imposed by this Act (including those that apply where a union and an employer bargain for a collective agreement) have been complied with in a particular case:

(g) matters about the recovery of wages or other money under [section 131](#): (ga) determining the apportionment of liability for the costs of service-

related entitlements under [section 69LB\(4\)](#):

(h) matters about whether the rules of a union, or of an incorporated society that wishes to register as a union, comply with the provisions of this Act:

(i) matters about whether an incorporated society is entitled to register under this Act as a union or is entitled to continue to be so registered:

(j) matters about whether a person is entitled to be a member of a union:

20 [Section 161\(1\)](#) (emphasis added).

(k) matters related to a failure by a union to comply with its rules:

(l) any proceedings related to a strike or lockout (other than those founded on tort or seeking an injunction):

...

(m) actions for the recovery of penalties—

(i) under this Act for a breach of an employment agreement:

(ii) under this Act for a breach of any provision of this Act (being a provision that provides for the penalty to be recovered in the Authority):

(iia) under the [Support Workers \(Pay Equity\) Settlements Act 2017](#): (iib) under [section 18](#) of the [Equal Pay Act 1972](#):

(iii) under [section 76](#) of the [Holidays Act 2003](#):

(iia) under [section 25](#) of the [Home and Community Support \(Payment for Travel Between Clients\) Settlement Act 2016](#):

(iv) under [section 10](#) of the [Minimum Wage Act 1983](#):

(v) under [section 13](#) of the [Wages Protection Act 1983](#):

...

(n) compliance orders under section 137:

(o) objections under section 225 to demand notices:

(p) orders for interim reinstatement under section 127:

(q) actions of the type referred to in section 228(1):

(qa) disputes about an invention made by an employee (either alone or jointly with any other person) or any patent granted, or to be granted, in respect of that invention:

(qb) reviews under [section 30](#) of the [Patents Act 2013](#):

(qc) determining whether an employer has complied with [section 30D](#) of the [Parental Leave and Employment Protection Act 1987](#):

(qd) all matters arising under the [Equal Pay Act 1972](#) and, in particular,—

- (i) determining equal pay claims and unlawful discrimination claims:
- (ii) determining disputes as to whether a pay equity claim is arguable:
- (iii) determining disputes as to whether work is comparable work for the purpose of assessing a pay equity claim:
- (iv) determining disputes as to whether work is in fact undervalued:
- (v) fixing remuneration that is consistent with pay equity under that Act:
- (vi) determining whether the terms and conditions of employment in an employee's employment agreement are more or less favourable than the terms and conditions of employment in a pay equity claim settlement for the purposes of [section 13ZM](#) of that Act:
- (vii) determining whether to provide for recovery of an amount of remuneration for past work, and the amount to provide, under [section 13ZZD](#) of that Act:
- (viii) determining the applicable start date for the purposes of [section 13ZZE](#) of that Act:

....

(r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):

(s) determinations under such other powers and functions as are conferred on it by this or any other Act.

[26] While there is no question that the Authority's jurisdiction is extensive, it is clear that none of the explicit matters listed in s 161 accurately describe the claim for breach of statutory duty in these two proceedings. While it might be argued that the claim falls within, for example, s 161(1)(c) (determining whether a person is an employee), it is not fundamentally about that issue (that has already been decided). Rather, it is about the manner in which that question was investigated by the Labour Inspector. In other words, the substantive question at the heart of the claim is whether the Labour Inspector acted appropriately based on their powers as set out in the Act, not whether the plaintiffs were employees.

[27] It is equally clear nevertheless that the claim is one that relates to an employment relationship generally. Relevantly, the Labour Inspector is an office created by the [Employment Relations Act](#) to investigate employment relationships and compliance with employment standards.

[28] It follows, in my view, that the claim falls under [s 161\(1\)\(r\)](#). The Authority would have jurisdiction if the claim was not a tort claim (as currently formulated).

[29] The interpretation of [s 161\(1\)\(r\)](#) was recently the subject of a Supreme Court decision: *FMV v TZB*.²¹ That case concerned an employee, FMV, who brought claims against her employer, TZB, both in the Authority and in the High Court. There was no dispute about the claims she brought in the Authority; they were within the Authority's jurisdiction. Her claim in the High Court related to the same facts but was framed as a tort action in negligence. A majority of the Supreme Court was satisfied that her claim in the High Court was an employment relationship problem;²² the High Court could not hear it.²³ It was not within the Authority's jurisdiction, however, because it was a tort. The Supreme Court acknowledged that this was an unsatisfactory position but noted that it was open to FMV to proceed with her personal grievance claims.²⁴

[30] In the context of that decision, the Supreme Court considered that FMV's personal grievance claims were a "more than adequate substitute" for the negligence claim.²⁵ The majority made it clear, however, that where there is an employment relationship problem that cannot be addressed within one of the other examples in [s 161\(1\)](#), the tort exception should be read as preserving the right to bring those tort claims in the ordinary courts.

[31] I accept that there is no express jurisdiction for the Court to hear a claim for breach of statutory duty, either from its own jurisdiction under [s 187](#) or from its appellate jurisdiction of the Employment Relations Authority under [s 161](#).

[32] A further issue that arises is whether the Court may, by implication, hear the claim.

²¹ *FMV v TZB*, above n 12.

²² At [110].

²³ At [134]-[136].

²⁴ At [135].

[33] Counsel for the Attorney-General, Ms Boadita-Cormican, submitted that the answer is clearly “no”. That is because the Court is statutory and it does not have any inherent jurisdiction.²⁶ This is said to be supported by [s 186\(1\)](#) of the Act, which establishes the Employment Court as a court of record having the jurisdiction specially conferred on it by the Act, as well as the powers inherent in a court of record.

[34] Mr Kirkness, counsel appointed to assist the Court in these proceedings, submitted that there is a distinction between implied powers, which the Employment Court has, and implied jurisdiction, which it does not. He referred to *Hynds Pipe Systems Ltd v Forsyth* as an example.²⁷ There the Court found that it had the power to punish for contempt of court, despite an absence of express statutory provision.

[35] I did not understand Mr Kirkness to suggest that *Forsyth* was wrongly decided, and indeed I agree that the judgment supports his conclusion. In particular, the full Court in *Forsyth* discussed the Court’s implied powers as the ability to do a particular thing or to take a particular action, and suggested that such an implication must arise only out of necessity.²⁸ It listed three situations where necessity arises: where the Court has jurisdiction to make orders with no express jurisdiction to enforce them; where the Court must preserve the status quo prior to the exercise of its jurisdiction; and where a superior appellate court must revisit its original decision to correct a fundamental error. None of these situations are engaged in the present circumstances.

[36] However, I see it as significant that Parliament has conferred on the Court a judicial review function that enables it to decide issues as to the nature and extent of the Labour Inspector’s powers under the Act and the exercise of them, or refusal to exercise them. Any such application would need to be advanced in this forum, not the High Court. If that is so, it would seem odd (and inconsistent with the scheme of the Act) for a party to invite the High Court to determine issues such as, for example, whether the Labour Inspector reasonably concluded that the plaintiffs were not employees of the Overseeing Shepherd or any of the Gloriavale entities; whether the

²⁶ Citing *BDM Grange Ltd v Parker* [\[2005\] NZHC 515](#); [\[2006\] 1 NZLR 353](#), [\[2005\] ERNZ 343 \(HC\)](#).

²⁷ *Hynds Pipe Systems Ltd v Forsyth* [\[2017\] NZEmpC 89](#), [\[2017\] ERNZ 484](#).

²⁸ At [10]-[11].

plaintiffs were (as the Labour Inspector concluded) volunteers; and whether enforcement or other action ought to have been taken in the particular circumstances.

[37] Mr Kirkness raised the possibility that [s 194](#) (judicial review) is the correct procedural route when seeking to challenge a Labour Inspector’s investigation process. However, he submitted that if [s 194](#) was the exclusive way to challenge a Labour Inspector’s process it would mean that neither the High Court nor the Employment Court would have jurisdiction to consider a claim for breach of statutory duty. I agree that is a result that is unattractive. Unlike in *FMV*, where a personal grievance claim was considered to be a sufficient alternative to a negligence claim, it seems to me that judicial review is not an adequate alternative to a claim for breach of statutory duty; the remedies differ substantially between the two types of claim.²⁹ As the Supreme Court in *FMV* stated, the Court should be slow to read legislation in a way that diminishes common law rights.³⁰

[38] However, I do not see the two routes as necessarily mutually exclusive; rather it is preferable to view them sequentially. In other words, the nature and extent of the Labour Inspector’s statutory powers and statutory powers of decision under the [Employment Relations Act](#) are matters properly within the Employment Court’s judicial review jurisdiction. That does not displace (just defers) the possibility of a subsequent tort claim for damages for breach of statutory duty, pursuable in the High Court. To put it another way, once the Employment Court has determined the nature and extent of the Labour Inspector’s statutory powers and statutory powers of decision, and determined issues about the way in which such powers were or were not exercised, it will be for the High Court to determine whether this amounts to a breach of statutory duty (if such a claim is advanced). While this specific scenario was not considered by the Supreme Court in *FMV*, I consider that it sits comfortably alongside the majority’s comments that there may be complex overlaps in certain types of claims.³¹

²⁹ See [Employment Relations Act, s 194\(1\)](#), which limits the remedies of a judicial review to mandamus, prohibition, certiorari, declaration, or injunction.

³⁰ *FMV*, above n 12, at [129], citing Philip Joseph *Joseph on Constitutional and Administrative Law*

(5th ed, Thomson Reuters, Wellington, 2021) at 38.

³¹ *FMV*, above n 12, at [102]-[109].

[39] For completeness, I refer to the Attorney-General’s submission that extending the Court’s jurisdiction to encompass this type of claim would be undesirable. That submission was directed at the claim as pleaded (in tort). It was said that it would be contrary to the scheme and purpose of the Act, that it might undermine efficient dispute resolution, and that it may have a chilling effect on enforcing employment standards. However, it might equally be said that the Act confers certain

responsibilities on the Labour Inspectorate,³² and it would be undesirable for there to be no means of ensuring those responsibilities are met.³³

[40] The issues raised by the Attorney-General's strike out applications are not straight forward, or beyond doubt. I consider that the better view, and one that seems to me to be more in alignment with the intention of Parliament, requires a sequential approach.

[41] The Employment Court does not have jurisdiction to decide whether the Labour Inspector's actions/inactions amount to an actionable claim in tort. That is for the High Court. However, Parliament has conferred exclusive jurisdiction on the Employment Court to judicially review the exercise or refusal to exercise statutory powers and statutory powers of decision of any person under the Act. That appears, on its face, to extend to the Labour Inspector. Judicial review is the procedure that Parliament has provided for and that is the process that should be completed first. The route advocated on behalf of the Attorney-General would likely give rise to difficult issues of encroachment on this Court's exclusive jurisdiction; the same objections would not arise in reverse.

What next?

[42] That leaves two options. The first option is that the claim for breach of statutory duty in both proceedings is struck out and the plaintiffs file fresh proceedings (along with a filing fee) if that is what they wish to do. The second option is to allow time for the plaintiffs to replead the claim (as an application for judicial review) within

³² [Employment Relations Act 2000, ss 223-235](#).

³³ See *Attorney-General v Chapman* [2011] NZSC 110, [2012] NZLR 462 at [26]; *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [3]- [4].

a certain period of time, if that is what they wish to do. I provided counsel with an opportunity to make submissions on these points.

[43] The Attorney-General was staunchly opposed to any order allowing the plaintiffs to replead their claim (in judicial review rather than breach of statutory duty). Mr Kirkness also raised concerns about the appropriate procedural route. The submissions were primarily focused on the fact that the nature of the proceeding would be fundamentally changed; and that the plaintiffs had indicated that they abided the decision of the Court on the strike-out.

[44] While I accept both points, the nub of the plaintiffs' concerns about the Labour Inspector, which they wish a court to hear, appears to be much the same whatever colour of procedural cloak is laid over the top of them. This Court has a broad jurisdiction and it is preferable to adopt a practical approach where possible, guided by the overall interests of justice. All of this is reflected in the Court's equity and good conscience jurisdiction under [s 189](#).

Conclusion

[45] I have concluded that it is premature to strike out the claim in both the *Courage* and *Pilgrim* proceedings in the circumstances and that it is in the overall interests of justice to grant the plaintiffs time to replead if that is what they wish to do. That must be done no later than 28 February 2025. If an appropriately repleaded statement or statements of claim are not filed and served within that timeframe the current proceedings will be struck out without further order of the Court.

[46] Costs are reserved.

Christina Inglis Chief Judge

Judgment signed at 10.30 am on 12 December 2024