Employment Court of New Zealand

Fechney v Employment Relations Authority [2022] NZEmpC 52 (23 March 2022)

Last Updated: 28 March 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2022] NZEmpC 52
EMPC 305/2021

IN THE MATTER OF	an application for judicial review
BETWEEN	ASHLEIGH FECHNEY Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	NEW ZEALAND CUSTOMS SERVICE Second Respondent
AND	ATTORNEY-GENERAL ON BEHALF OF MINISTRY OF BUSINESS AND INNOVATION Intervener

Hearing:	12 October 2021 (Heard at Wellington and Auckland via VMR)
Appearances:	A Fechney, applicant in person and K Murray, advocate for applicant No appearance for first respondent H Kynaston and H Khan, counsel for second respondent S McKechnie and T Bremner, counsel for intervener
Judgment:	23 March 2022

JUDGMENT OF JUDGE J C HOLDEN

[1] Ms Fechney is an employment advocate who recently has been acting in a number of cases in which employees, or former employees, have challenged the application of the Government's COVID-19 mandates. One of the people who was

challenging the application of the mandates was GF, a former employee of New Zealand Customs Service (Customs), whose employment was terminated after GF did not get the COVID-19 Pfizer vaccine within the time mandated. GF's claim of unjustifiable dismissal was considered by the Employment Relations Authority (the Authority) which first issued a determination dismissing GF's claim on 31 August 2021 (the "original determination"). As explained in this judgment, the Authority subsequently reissued its determination three times, with three erratum. It also issued a subsequent determination dealing with the rescinding of a non-publication order over Ms Fechney's name (the "further determination").1 The substantive determination published on the Authority's website is dated 1 September 2021 (the "published determination").2

[2] The present case is an application for a judicial review brought by Ms Fechney in respect of various statements made by the Authority that Ms Fechney says are findings about her that are pejorative, potentially discriminatory and which have the potential to damage her reputation.

[3] She says she was not aware the Authority was intending to make these findings and that they should have been put to her for comment and submissions. Ms Fechney seeks declarations that the Authority breached her right to natural justice and that the Authority acted in bad faith.3

[4] The statements in the published determination that Ms Fechney objects to comprise:

(a) "Further delays were caused by GF's representative disclosing additional information after the investigation closed and a dispute over its admissibility and, issues over a breach of the non-publication order that identified Customs and details of the dispute on a "Givealittle" web

1 *GF v New Zealand Customs Service* [2021] NZERA 455 (Member Beck).

2 *GF v New Zealand Customs Service* [2021] NZERA 382 (Member Beck).

3. In her statement of claim Ms Fechney had sought an injunction, prohibiting the Authority from publishing the determination as it was then written, but the publication issue was resolved before the substantive hearing.

site page seeking donations for GF's legal costs."4 (the "non- publication comment")

(b) In relation to additional documentation provided by Ms Fechney, the comment by the Authority, "I note that the presentation of such material initially without any coherent analysis, unnecessarily put Customs to further cost and I will consider such in due course".5 (the "documentation comment")

(c) "I observe that GF's representative continued to seek litigation funding using publicity surrounding the dispute whilst identifying and impliedly disparaging Customs on-line when the interim non- publication order was in place."6 (the "litigation funding comment")

[5] Ms Fechney had also objected to statements in the original determination:

(a) "Ms Fechney, on health grounds, could not attend the first investigation meeting which necessitated timetabling of submissions."7 (the "timetabling comment")
(b) "I find Ms Fechney inappropriately continued to seek litigation funding using publicity surrounding the dispute whilst identifying and impliedly disparaging Customs on-line when the interim non- publication order was in place."8 (the "original litigation funding comment")

The parties before the Court

[6] Ms Fechney appears for herself.

4 At [15].

5 At [16].

6 At [17].

7 At [14] of the determination as issued on 31 August 2021.

8. At [17] of the determination as issued on 31 August 2021, amended in the published determination to the form set out above at [4](c).

[7] The Authority abides the decision of the Court.

[8] Customs appears in opposition to the application, although it has no special interest in the subject matter of the application as its role in the dispute was as the employer of GF.

[9] The Attorney-General appears as intervener after being granted leave to do so on the basis that the Court was likely to be assisted by the Crown's intervention and that the Crown has a demonstrable interest in the proceeding.9 It was the Attorney- General who made the principal submissions as contradictor to the application.

The relevant history of these proceedings is not in dispute

[10] GF's employment with Customs ceased on 20 April 2021 and they filed a claim for unjustifiable dismissal in the Authority.

[11] Ms Fechney created a "Givealittle" fundraising page to raise funds for GF's proceedings, which named Customs as the employer.

[12] The Authority subsequently made interim non-publication orders over the identities of both GF and Customs.

[13] The matter was timetabled. Ms Fechney then became unwell and was hospitalised.

[14] The investigation meeting took place on 24 and 25 June and 6 August 2021.

[15] After that, on 17 August 2021, Ms Fechney provided further material to the Authority under cover of an email in which Ms Fechney records:

Good Evening,

I have recently come across some information which I believe may assist Member Beck in his decision making. It is information obtained by the Official information Act, and which was uploaded on FYI.org.nz:

9 *HG v Employment Relations Authority* [2021] NZEmpC 148 at [6].

https://fyi.org.nz/request/15553-border-executive-board-documents#incoming- 61878

They were uploaded on 16 July 2021: however, this is not a website I frequent, and they were only brought to my attention over the weekend.

I have attempted to seek advice about my obligations with respect to this material. I understand that it is my obligation to provide information which is relevant, even after the conclusion of the investigation meeting.

I believe that the two attached documents will assist the Authority in its decision-making process: the Border Executive Board was chaired by the Chief Executive for Customs New Zealand, and was tasked with informing Cabinet and the Minister of COVID-19 Response about employment-related vaccination issues.

It is apparent to me that there was an inherent bias with the Vaccination Order. I understand that this is outside the jurisdiction of the Authority, and proceedings are commencing in the High Court for Judicial Review.

However, for the purposes of these proceedings, the documents show that the applicant was not subjected to a fair and reasonable process: and that, irrespective of whether the Vaccination Order applies, [they were] unjustifiably dismissed due to the significant procedural flaws.

The termination of [their] employment was predetermined: predating any vaccination order.

The documents speak for themselves. Please let me know of the following steps. Kind regards

Ashleigh Fechney

[16] The Authority issued a minute noting that the material was extensive, and that Ms Fechney had failed to identify which specific content she was seeking to rely upon and claim relevance for. Subsequently, Ms Fechney was directed to provide a memorandum, which she did.

[17] On 25 August 2021, the Authority emailed the parties noting that, despite there being an interim non-publication order in place covering both parties and Ms Fechney seeking to extend such order, the link in the “Givealittle” page continued to publicly disclose the identity of Customs in sufficient detail to link it to the extant matter. The same day, Buddle Findlay, acting for Customs, emailed Ms Fechney asking her to rectify the matter as soon as possible.

[18] Mr Beck, the Authority Member, considered the memorandum provided by Ms Fechney in relation to the material supplied under cover of her email of 17 August 2021 but determined that the material did not assist him with his determination.

[19] The original determination was sent to the parties’ representatives on 31 August 2021. In the original determination, the non-publication order in respect of GF was made permanent but the interim non-publication order in respect of Customs was not continued.

[20] As soon as she received the original determination, Ms Fechney emailed the Authority raising concerns.

[21] In relation to the timetabling comment, she said: 10

This is not true, as timetabling for written submissions had been agreed between representatives before I was admitted to hospital. My admission to hospital, while amounting to a barrier, did not delay the process. The prior timetabling of submissions was a great part of my decision-making in seeking Peter Moore’s assistance, rather than rescheduling the Investigation Meeting.

[22] In relation to the non-publication comment, Ms Fechney said:

- This is a finding, rather than a statement. There was no breach of the non- publication order.
- There was no dispute. New Zealand Customs Service have been invited to raise this with me directly. This has not occurred.

[23] In respect of the documentation comment Ms Fechney said:

- The Authority has been formally notified that I have a cognitive disability, and I am especially upset that this has been published in a judgment without any consideration of my rights under natural justice.11
- If New Zealand Customs Service wished to raise this as part of costs, it is entitled to do so. This is unnecessary.

[24] Finally, in relation to the litigation funding comment, Ms Fechney said:

- This is a finding which is outside the jurisdiction of the Authority's investigative powers.

10 Mr Moore was appearing alongside Ms Fechney at the Authority's investigation meeting.

11. Ms Fechney had disclosed to the Authority that she has ADHD as well as other conditions causing chronic fatigue and chronic pain.

- The Authority was not asked to make any determination about any potential breach of non-publication order.
- The Authority should be very aware of the judicial review matters relating to Rowland Samuels, where the Employment Court found that the Authority breached Mr Samuels' rights to natural justice.

[25] Ms Fechney said she considered those four comments to be pejorative findings, and potentially damaging to her reputation. She invited the Authority to reconsider the content of the determination, including its release.

[26] Mr Kynaston, counsel for Customs, responded that Customs agreed with Ms Fechney's comment that the submissions were timetabled prior to her hospital admission. Mr Kynaston also said that Customs did not intend to pursue any claim in relation to the publication of its name on the "Givealittle" page. He said that Customs did not have an issue with the Authority revisiting the points noted or giving Ms Fechney an opportunity to comment on those, to the extent it had the power and was prepared to do so.

[27] Mr Kynaston concluded, however, that Customs was keen to see matters resolved quickly as there was a broad interest in the determination.

[28] An erratum was issued by the Authority addressing the timetabling point, rewording [14] of the original determination to the form it takes in [14] of the published determination.

[29] On 2 September 2021, Ms Fechney filed these proceedings in the Court. Her proceedings included an interlocutory application for an urgent interim injunction, seeking an order prohibiting the Authority from publicly publishing its determination, or, in the alternative, an order requiring non-publication of the names of all parties and representatives. In the face of that application, the Authority agreed to reissue the determination with an interim non-publication order with respect to Ms Fechney's name and Ms Fechney, through her representative at the time, accepted that would resolve the interim application. This led to a further erratum and to the reissued, published determination dated 1 September 2021, which was put on the Authority's website.

[30] The Court also made an interim non-publication order with respect to Ms Fechney's identity in these proceedings.12

[31] A further erratum was issued by the Authority on 6 September 2021, reinserting some paragraphs into the determination and amending others to include reference to interim non-publication.

[32] Ms Fechney then advised that she no longer sought non-publication over her own name. Her revised position was addressed at the hearing of this matter and the Court lifted its non-publication order.13 The Authority then issued the further determination, dated 18 October 2021, lifting the Authority's non-publication order over Ms Fechney's name.14

The issues in this case

[33] The following issues arise:

(a) Whether the Court has jurisdiction to determine Ms Fechney's judicial review claim that the Authority failed to observe her rights of natural justice.
(b) If so, whether the Authority did fail to observe Ms Fechney's rights of natural justice.
(c) Whether the Authority acted in bad faith in that it discriminated against Ms Fechney in its determination.
(d) Whether the Authority acted with dishonest or unfair intent in publishing its determination.

[34] Ms Fechney said that the Authority did not have jurisdiction to do what it did. I do not take Ms Fechney to be meaning "jurisdiction" in the narrow sense. Clearly

12 *HG v Employment Relations Authority*, above n 9, at [8].

13 *Fechney v Employment Relations Authority* [2021] NZEmpC 173.

14 Above n 1.

the Authority has jurisdiction to make determinations under s 161(1) and non- publication orders pursuant to cl 10 of sch 2 to the Employment Relations Act 2000 (the Act).

[35] Rather, Ms Fechney submits that the Authority's determination is open to review by the Court, both in respect of the ground of breach of natural justice by the Authority and on the ground that the Authority has discriminated against Ms Fechney, amounting to bad faith.

[36] In relation to the allegation of breach of natural justice, Ms Fechney submits that there was no evidence to support the Authority's findings and the Authority did not allow her to respond.

[37] Ms Fechney's claim of discrimination amounting to bad faith principally relates to the documentation comment. Ms Fechney says the documentation comment was discriminatory. She relies on the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. She says there was no basis for the Authority to make that comment which she says was irrelevant and without basis and therefore unjust and prejudicial.

[38] Ms Fechney says that repeating the documentation comment in the published determination was not reasonable and was done with the intent that it would personally affect Ms Fechney.

[39] Ms Fechney raises other concerns about the determination (in each of its iterations). She says she was treated differently from Mr Kynaston throughout the determination in a way that was deliberate, demeaning and potentially sexist. She says that she was repeatedly referred to by name, in comparison to Mr Kynaston who was referred to as "Customs' lawyer". She also points to other comments that she says were personal about her rather than about her client, which was not the case with Mr Kynaston. In respect of the published determination, Ms Fechney points to the Authority Member referring to her as "the second representative" when she was lead representative.

[40] Customs made brief submissions, noting its interest in maintaining the determination insofar as it relates to the substantive issues, recognising the general and public importance in the legal issues involved in the present application and otherwise adopting the Attorney-General's written submissions.

[41] The Attorney-General did not dispute that Ms Fechney had standing.

[42] His principal submission is that s 184 of the Act ousts the Court's jurisdiction to hear the aspects of the claim relating to natural justice and discrimination.

[43] The Attorney-General says further:

(a) if there is jurisdiction in relation to natural justice, the applicable thresholds are such that this claim should be dismissed;
(b) the Authority did not discriminate against Ms Fechney;
(c) while there is jurisdiction to hear the bad faith claim, the high evidential burden to establish such a claim has not been met; and
(d) if a breach of natural justice is established:
    (i) the Court should decline the relief sought; and
    (ii) if not, then the only appropriate relief is a declaration.

There are restrictions on review

[44] Section 184 of the Act places a restriction on the reviewability of determinations, orders or proceedings of the Authority. It provides:

184 Restriction on review

(1) Except on the ground of lack of jurisdiction or as provided in section 179, no determination, order, or proceedings of the Authority are removable to any court by way of certiorari or otherwise, or are liable to be challenged, appealed against, reviewed, quashed, or called in question in any court.

(1A) No review proceedings under section 194 may be initiated in relation to any matter before the Authority unless—

(a) the Authority has issued a determination under section 174A(2), 174B(2), 174C(3), or 174D(2) (as the case may be) on all matters relating to the subject of the review application between the parties to the matter; and
(b) (if applicable) the party initiating the review proceedings has challenged the determination under section 179; and
(c) the court has made a decision on the challenge under section 183.
(2) For the purposes of subsection (1), the Authority 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 determination or order is outside the classes of determinations or orders which the Authority is authorised to make; or
(c) the Authority acts in bad faith.

[45] A similar provision places restrictions on the review of decisions, orders or proceedings of the Court:

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.

[46] In *Samuels v Employment Relations Authority*, her Honour Chief Judge Inglis determined that s 184 did not oust the Court's jurisdiction to hear an application for judicial review alleging breach of natural justice by the Authority.15 Understandably, Ms Fechney relies on *Samuels* in her submission that the Court has jurisdiction to hear her claims in respect of an alleged breach of natural justice and discrimination.

15 *Samuels v Employment Relations Authority* [2018] NZEmpC 138, [2018] ERNZ 406.

Ms McKechnie, counsel for the Attorney-General, says that the Court's findings in

Samuels were wrong.

Ouster clauses approached with caution

[47] The modern approach of Courts to treating ouster clauses with caution was led by the House of Lords in *Anisminic Ltd v Foreign Compensation Commission*.16 In that case, it was held that the decision made by the Foreign Compensation Commission was not a "determination" within the meaning of the Act in question,17 but rather a "nullity" which could not be protected by the relevant ouster clause. The House of Lords held that a decision was a nullity where the decision-maker had made an error, including, among others, by asking itself the wrong question, making the decision in bad faith, or failing to comply with natural justice.

[48] This approach was adopted in New Zealand by the Court of Appeal in *Bulk Gas Users Group v Attorney-General.*18 In that case, the Court of Appeal held that, because the Secretary of Energy made an error of law, he acted beyond his jurisdiction, meaning his decision was not protected by the relevant ouster clause. Cases following *Bulk Gas* generally regarded any ouster clause to be ineffective and courts proceeded to evaluate decisions on all the ordinary grounds of review.19

[49] Given the constitutional importance of judicial review, reinforced as it is by s 27(2) of the Bill of Rights Act, the courts approach ouster clauses cautiously and in particular will give anxious consideration to their interpretation and application. Judges should be slow to conclude that an ouster provision precludes applications for judicial review alleging unlawfulness of any kind.20

[50] The Courts have, however, recognised that ouster clauses may be desirable in certain circumstances and balance this with the goal of ensuring adequate oversight of

16 *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6; [1969] 2 AC 147 (HL).

17 Foreign Compensation Act 1950 (UK), s 4(4).

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

19 See for example *National Hydatids Council v Ward* HC Tauranga M55/88, 7 June 1989 at 1;

Martin v Attorney-General HC Christchurch AS370/83, 12 February 1986 at 8.

20. *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335, at [43]; *H v Refugee and Protection Officer* [2019] NZSC 13, [2019] 1 NZLR 433 at [63].

administrative decision-making. Courts have considered the availability of alternative avenues of appeal or review; whether judicial review is wholly or partially ousted; and policy reasons, including the speed and finality of decision-making, to be relevant factors when interpreting an ouster clause.21 Relevantly in this case, an ouster clause may be looked upon more favourably where it exists in a specialist context like employment relations.22

> [51] Further, notwithstanding the caution exercised by the Courts, it is relevant here that, unlike the High Court, but like the Court of Appeal, the Employment Court is a creature of statute.23

The Court of Appeal has considered s 193

> [52] As noted, ss 184 and 193 are substantively similar, ss 184(1) and 193(1) operate in the same way and ss 184(2) and 193(2) are in all material respects identical: "the Authority" is simply replaced with "the Court" and "determination" with "decision". Section 184 has the addition of sub-section (1A), which introduces a further procedural hurdle to judicial review of Authority determinations, but that does not detract from the other sub-sections.
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> [53] In approaching s 193, the Court of Appeal has noted on a number of occasions that it has a very narrow jurisdiction on review.24
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> [54] In *Parker*, the Court of Appeal noted the terminology used by Parliament in s 48(7) of the Industrial Relations Act 1973, being the predecessor to s 193 of the Act, commenting that it was clear that Parliament intended to permit judicial review only

21 See *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153; *Ramsay v Wellington District Court* [2006] NZAR 135 (CA); *Love v Porirua City Council* [1984] 2 NZLR 308 (CA).

22 *New Zealand Rail Ltd v Employment Court* [1995] NZCA 371; [1995] 3 NZLR 179, [1995] 1 ERNZ 603 (CA);

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

23 *AFFCO New Zealand Ltd v Employment Court* [2017] NZCA 123, [2017] 3 NZLR 603, [2017] ERNZ 137 at [35].

24 *AFFCO*, above n 23; *Parker v Silver Fern Farms Ltd*, above n 22; *Moodie v Employment Court* [2012] NZCA 508, [2012] ERNZ 201; *Kennedy v Employment Relations Authority* [2022] NZCA 12 at [10].

in three of the circumstances that Lord Reid had listed in *Anisminic* as being captured by the term "jurisdiction". Lord Reid had included:25

- the narrow and original sense of the tribunal [not] being entitled to enter on the inquiry in question;
- a decision which [the tribunal] had no power to make;
- decision[s] made in bad faith; or
- where the Tribunal had failed in the course of the inquiry to comply with the requirements of natural justice.

> [55] As can be seen, s 193(2) of the Act (and its predecessors) does not include an inquiry into an alleged breach of the requirements of natural justice. The Court of Appeal was clear that it has no jurisdiction to review an Employment Court decision on the grounds of breach of natural justice.26 The Court of Appeal has maintained that position in subsequent decisions.27
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> [56] To date, the Court of Appeal has not considered whether such a barrier exists in respect of review of the Authority by the Employment Court. While the Employment Court decision in *David v Employment Relations Authority*28 was raised in the context of the *Parker* case, the Court of Appeal declined to engage with it substantively. It did, however, make three comments on it.29
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> > [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*, 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

25 *Anisminic*, above n 16.

26 *Parker*, above n 22, at [47], [53].

27 *Moodie*, above n 24, at [16]; *AFFCO*, above n 23, at [22]-[23].

28 *David v Employment Relations Authority* [2001] NZEmpC 75; [2001] ERNZ 354 (EmpC) at [49]- [52].

29 *Parker*, above n 22, at [50]-[52] (footnotes omitted).

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". We do not consider, with respect, the Court made that "clear". On the contrary, it refrained from comment on it.

[57] Thus, while the Court of Appeal did not make any findings with respect to

David, its comments cannot be seen as any form of endorsement of that decision either.

***Samuels* compared ss 184 and 193**

[58] In *Samuels*, the Court found that Mr Samuels had standing to pursue an application for judicial review in the Employment Court for an alleged breach of natural justice by the Authority. In reaching that finding, the Chief Judge took a different approach to s 184 than the Court of Appeal did to s 193 and relied on *David*.

[59] In summary, the reasoning of the Chief Judge was:

(a) The rationales behind ss 184 and 193 are different, and, as noted by the Court of Appeal, have different legislative histories. The Chief Judge said the reason for the ouster clause in s 193 was to ensure that the employment law jurisdiction is kept as separate as possible from the ordinary common law courts, which have historically failed to recognise that an employment relationship is something beyond a simple contractual interpretation exercise. That rationale does not apply in relation to s 184.30
(b) There is a presumption that Parliament does not intend to make invalid decisions unreviewable, rebuttable where the wording of a provision is very clear. While the Chief Judge acknowledged that s 184 is very clear, she says it becomes "somewhat murkier if Parliament's intention (as to whether judicial review should be available on the grounds of natural justice) is considered, having regard to subsequent amendments

30 *Samuels*, above n 15, at [21].

to the Act". The Chief Judge noted that s 184 was amended after *David* and the subsequent decision in *Metargem v Employment Relations Authority*,31 both of which had found that natural justice was an available ground for judicial review. The amendment was to introduce s 184(1A), requiring parties to wait until after the Authority had made its determination and after a challenge against the determination had been decided in the Court, before an application for judicial review could be advanced. The Chief Judge found it revealing that, in responding to *David* and *Metargem,* Parliament did *not* take the opportunity to make it plain that natural justice was unavailable as a ground for judicial review.32

(c) Section 157(2)(a) makes it crystal clear that the Authority must comply with the principles of natural justice and, while the statute allows for challenges, when a challenge is unavailable the only remaining avenue would be judicial review.

(d) Section 184(1A) was introduced to reverse the decision in *David*, because the judicial review in that case was applied for before the Authority completed its investigation. The statutory purpose underlying the amendment appears to have been designed to ensure that the process remains streamlined.

(e) While *Bulk Gas*33 did not concern natural justice, *Anisminic*34 and other cases have referred to the possibility of natural justice as a ground of review in the face of an ouster clause.35

(f) New Zealand Rail v Employment Court,36 relied on in *David*, "may suggest that Judge Castle [the Judge at first instance in *New Zealand*

31 *Metargem v Employment Relations Authority* [2003] NZEmpC 26; [2003] 2 ERNZ 186 (EmpC).

32 At [26].

33 *Bulk Gas Users Group*, above n 18.

34 *Anisminic*, above n 16.

35 *Samuels*, above n 15, at [29].

36 *New Zealand Rail Ltd v Employment Court*, above n 22.

Rail] might (if it had been necessary) have concluded that a breach of natural justice was an available ground of review".37

> (g) While the Court of Appeal raised several issues with the approach adopted by the Employment Court in *David*, it did not exclude natural justice as a ground of review in relation to a decision by the Authority but "left it open". Her Honour noted that "if s 184(1) was interpreted literally, it would not be open at all". She also noted that the Court of Appeal, while critical of aspects of the Employment Court's reasoning in *David*, did not criticise the ultimate conclusion reached in that case.38
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> [60] Ultimately, the Chief Judge concluded that s 184, "when read in context and in light of the usual presumption applying to ouster clauses, does not exclude judicial review based on an alleged breach of natural justice by the Authority".39

On a plain reading, s 184 is clear

> [61] The comments made by the Court of Appeal in respect of the limits on review in s 193 can equally be made in respect of s 184. Indeed, the decisions of the Court of Appeal on s 193 focussed in large part on the inclusion of the reference to s 213 in s 193(1). That is not an issue that has any correlation in respect of s 184. In the most recent Court of Appeal decision on s 193, the Court commented on limits to review in s 193 as follows:40

[10] Ms Kennedy's application for review is not grounded on a lack of jurisdiction in this narrow sense. She does not contend that the Employment Court had no jurisdiction to deal with her application for review of the ERA decision; she herself invoked its jurisdiction to do so. The Employment Court plainly had jurisdiction to entertain Ms Kennedy's application. Its decision dismissing that application was within the class of decisions it was authorised to make. Ms Kennedy does not suggest the Employment Court acted in bad faith. It follows that the application for review of the Employment Court's decision falls outside the scope of this Court's very narrow jurisdiction on review. This aspect of the application must also be dismissed.

37 *Samuels*, above n 15, at [33].

38 At [34].

39 At [35].

40 *Kennedy*, above n 24.

> [62] As noted, in *Samuels*, the Chief Judge acknowledged that, if s 184(1) was interpreted literally, an application for judicial review based on a claim of breach of natural justice would not be open at all.
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> [63] In *AFFCO*, the Court of Appeal said that the scheme of the Employment Relations Act is to limit access to the Court of Appeal. The Court said that was a deliberate and, in the Court of Appeal's view, rational policy choice by Parliament reflecting, as it does, that employment disputes involve dynamic relationships and should therefore be resolved speedily and informally without undue legalism and excessive judicial intervention. The Court of Appeal noted that at s 3(a)(vi) of the Act it is expressly stated that the object of the Act is "to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship", and that one way of achieving that object is "by reducing the need for judicial intervention".41
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> [64] It noted too that New Zealand's courts and tribunals for the resolution of employment matters have a long pedigree of minimal appellate intervention, especially in the context of collective bargaining.
>
> [65] The first points made by the Court of Appeal in respect of the desire for employment disputes to be resolved speedily and informally without undue legalism and excessive judicial intervention are reflected in the pathways from the Authority to the Court. In particular, s 179(5) prevents challenges on procedural matters. Put simply, the Authority is to go about its business generally without interference from the Court. This too is reflected in s 184(1A). While it was dealing with a different issue, the policy intent that the Authority should be able to make its decisions as efficiently and cheaply as possible was recently recognised by the Supreme Court in *Gill Pizza Ltd v A Labour Inspector*.42
>
> [66] For completeness, in taking Parliament to have confidence that the settled statutory pathways for appeal and review by the Court of Appeal provide sufficient

41 *AFFCO*, above n 23, at [38].

42. *Gill Pizza Ltd v A Labour Inspector (Ministry of Business, Innovation and Employment)* [2021] NZSC 184 at [64](a).

security of natural justice in the context of a complex area of public policy, the Court of Appeal in *AFFCO* made two further points. It found that, in respect of access to the Court of Appeal, there were two adjudicative entities primarily tasked with enforcing the Act – the Authority and the Employment Court – which are specialist bodies which the Court of Appeal is not. Further, it said that most of the decisions the parties seek to challenge in the Court of Appeal will already have had two hearings, both of which must be conducted in accordance with the rules of natural justice.43 The first of these points is not engaged in considering s 184. There also will not have been two hearings that must comply with the principles of natural justice but only one – the Authority's investigation meeting.44

> [67] However, a further point can be made. In *Parker*, the Court of Appeal recognised that the insertion of an appeal right lessened the need for the normally strict construction of privative provisions.45 That suggestion has even more force when looking at the pathway from the Authority to the Court. An appeal to the Court of Appeal is generally by leave only and restricted to questions of law that, by reason of their general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.46 In contrast, parties dissatisfied with an Authority's substantive determination have an unfettered right to challenge that determination in the Employment Court, including on a de novo basis.47 Non-parties (such as Ms Fechney), of course, do not have a right to challenge a determination, but that is true too of a right to appeal from the Employment Court to the Court of Appeal.
>
> [68] In *Parker*, the Court of Appeal outlined in some detail the history of s 193. Section 184 is a relatively new section, having been introduced in the Employment Relations Act.
>
> [69] The history of s 184, nevertheless, is informative. It is not clear whether this history was before the Court when it heard *Samuels*.

43 *AFFCO*, above n 23, at [39].

44 Employment Relations Act 2000, s 157(2)(a).

45 *Parker*, above n 22, at [33].

46 Employment Relations Act 2000, s 214.

47 Employment Relations Act 2000, s 179.

> [70] Section 184 was introduced at the Select Committee stage during the passage of the Employment Relations Bill. In the commentary to the Employment Relations and Related Petitions Bill (8-2), the Employment and Accident Insurance Legislation Committee relevantly said of then cl 194A:48

We recognise that the bill is structured so that at each stage (mediation, Authority, Court) the focus of the institution is to be on the employment relationship problem, rather than the actions of the previous institution. Accordingly, the majority recommends protection of the Authority from judicial review except where it relates to fundamental jurisdictional error. It recommends insertion of a new clause 194A [s 184], *which replicates clause 203 [s 193] that already protects the Court from similar scrutiny*.

> [71] Put simply, the intention in inserting s 184 was to keep the focus on the employment relationship problem and to do so by replicating s 193.
>
> [72] The suggestion that *New Zealand Rail* supported the possibility that a breach of natural justice was an available ground of review must be read in light of the Court of Appeal's comments in *Parker* that *New Zealand Rail* did not involve an alleged breach of natural justice and that the comment referred to "is not even an obiter dictum: the Court refused to make any comment on the possibility".49
>
> [73] The decision in *David* also must be approached with caution given the comments the Court of Appeal made about that decision in *Parker*, referred to above.50
>
> [74] I recognise the point made by her Honour in *Samuels* that Parliament did not amend s 184 to make it plain that natural justice was unavailable as a ground for judicial review when it amended the section following the Employment Court's decisions in *David* and *Metargem*.51 Under orthodox principles of statutory interpretation, Parliament is taken to be aware of the Court's settled interpretation.52

48 Employment Relations Bill and Related Petitions (8-2) (explanatory note) at 40 (emphasis added).

49 *Parker*, above n 22, at [40].

50 Above, at [56]-[57].

51 It is worth noting that in *Metargen*, above n 31, the Authority expressly accepted that a breach of natural justice was reviewable, see [37]. In *Bennett v Employment Relations Authority* [2020] NZEmpC 54, [2020] ERNZ 136, the Attorney-General's argument proceeded on

the basis that issues relating to natural justice may be determined by the Court, see [31](a). Therefore, neither judgment substantively addresses the issue.

52 *AFFCO*, above n 23, at [29].

That point, therefore, supports the suggestion that Parliament was content for natural justice to remain a ground for review. It is not, however, determinative.

> [75] Standing back and looking at the words of s 184 in the context in which they appear, including the legislative history of ss 184 and 193, and having regard to the Court of Appeal's interpretation of s 193, I take a different view from the Chief Judge in *Samuels*. While Parliament did not choose to reinforce the position when it amended s 184, the section nevertheless is clear. It deliberately adopts the same formulation as in s 193 of the same Act and in the same general context of resolution of employment relationship problems. The claim advanced for breach of natural justice does not fall within the scope of the Court's very narrow jurisdiction on review as set out in s 184(1) and (2). The Court has no jurisdiction to consider Ms Fechney's claim for breach of natural justice.53

Would the claim for breach of natural justice have succeeded?

Ms Fechney's comments were considered

> [76] While Ms Fechney says that the Authority did not allow her to provide a response to its concerns, if that was an issue, it was rectified by her commenting on the original determination, which comments were clearly considered by the Authority Member prior to him issuing the published determination. Effectively, the Authority treated Ms Fechney's email raising concerns as an application for a recall; the Authority Member revisited the determination and then he reissued it.54

There was evidence to support the Authority's comments

> [77] In respect of the non-publication comment, Ms Fechney says there was not an "issue" over a breach of the non-publication order. She relies on two factors: first, that

53 For completeness I note that, in her reply submissions, Ms Fechney suggested that s 194(2) of the Act broadened the judicial review jurisdiction, but that subsection is to give the Employment Court the full and exclusive jurisdiction to hear and determine any application for judicial review in respect of the matters listed in s 194(1) (which include the exercise of its powers under the Act by the Authority). It does not broaden the jurisdiction.

54 The Authority has previously determined that it has jurisdiction to recall its determinations: *Carrothers v Jasons Travel Media Ltd* ERA Auckland AA 30A/07, 21 March 2007 at [23]-[28]; *Connelly v Nelson Pine Industries Ltd (No 2)* [2012] NZERA Christchurch 133 at [11].

Customs agreed that it did not intend to pursue any claim in relation to the publication of its name on "Givealittle"; and second, the "Givealittle" website was created before the Authority ordered non-publication on its own motion.

> [78] The first point is not relevant to the issue of whether there was a breach of a non-publication order; whether a party subject to a non-publication order takes objection to the publication of its name does not affect whether there was a breach of an order in place. I acknowledge that the initial publication of the "Givealittle" page preceded the non-publication order so Ms Fechney may have argued that continuing the publication did not constitute a breach. However, the Authority's statement is not definitive. As noted, it refers to "an issue". There was evidence to support that there was such an issue.
>
> [79] I acknowledge that the use of the word "coherent" has a particular negative implication for Ms Fechney. The point the Authority Member is making in the documentation comment, however, goes to the lack of detail in the email of 17 August 2021. Ms Fechney's email did not provide an analysis of the material; she simply left the documents to speak for themselves. As Ms Fechney notes, there are different ways in which the Authority Member could have expressed himself, referring for example to the analysis as "insufficient" or simply without any adjective. However, it is not the role of a Court on review to act as a wordsmith of a decision of a Tribunal or Court below it. There was a basis for the documentation comment.
>
> [80] The litigation funding comment was amended from the Authority's original statement. Accordingly, the Authority has received and considered Ms Fechney's comments and this is reflected in the published determination. There is no dispute that, through the "Givealittle" page, litigation funding continued to be sought after the non-publication order was in place, that publicity surrounding the dispute was used in so doing, and that the page identified and impliedly disparaged Customs. There was evidence to support the Authority's observation. Ms Fechney claims that the litigation funding issue is irrelevant to the Authority's investigation. That is not a ground to challenge the observation, which is included as part of the narrative.

Discrimination is not a separate ground for review

[81] Discrimination is not a separate ground for review under s 184.

[82] Ms Fechney, however, claims that the documentation comment amounts to discrimination against her on the basis of her cognitive disability, which she says constituted bad faith, which is a ground for review.55

Bad faith not established

[83] There are essentially two parts to Ms Fechney's bad faith claim: First, that the documentation comment was discriminatory amounting to bad faith; and, second, that the published determination was issued in bad faith, as the Authority Member did that with the intent of personally affecting her. In her second limb, Ms Fechney again points to the documentation comment but also refers to her other concerns, including the number of times her name is used in the determination compared to that of Mr Kynaston, the tone of the determination, and the reference to her as the second representative.

[84] In alleging bad faith, Ms Fechney says that the circumstances show dishonest or unfair intent. However, Ms Fechney expressly makes no submissions as to motive as she says this would be speculative and irrelevant.

[85] Bad faith has a particular meaning in the context of judicial review. It is the "deliberate commission of a reviewable error knowing that an error is being committed".56 An applicant has a high evidential burden.57

[86] Section 19 of the New Zealand Bill of Rights Act provides that everyone has the right to freedom from discrimination on the grounds of discrimination set out in the Human Rights Act. The Attorney-General acknowledges that it might be arguable that a breach of that provision could be bad faith, but says there would still be

55 Employment Relations Act 2000, s 184(2)(c).

56. *East Pier Developments Ltd v Napier City Council* HC Napier CP 28/98, 14 December 1998 at 43-44.

57 *Attorney-General v Ririnui* [2015] NZCA 160 at [78].

requirements with regard to intention on the part of the decision-maker, which are not met here.

[87] In any event, and while recognising Ms Fechney's view of the word "coherent", on an objective basis the documentation comment does not demonstrate discrimination. As previously discussed, it must be seen in context and having regard to Ms Fechney's email of 17 August 2021. Ms Fechney may have preferred the Authority Member used different language but there is no error.

[88] I also do not accept that the Authority Member issued the published determination with the intent of personally harming Ms Fechney. Ms Fechney relies on the circumstances, which I take to mean that not all her concerns were addressed in the published determination despite her raising those concerns with the Authority Member. But those circumstances show the Authority Member considered the points made by Ms Fechney, and, where he thought they might be justified, amended his determination to the form taken in the published determination.

[89] The evidence does not come close to reaching the high standard required for a claim of bad faith.

[90] Ms Fechney's judicial review claim alleging bad faith fails.

Costs

[91] Given the limited role that Customs took in this matter, it may well be that costs are not appropriate in this case.58 If, however, Customs does seek costs, then it may apply by memorandum filed and served within 15 working days of the date of this judgment. If an application is made, Ms Fechney may respond by filing and

58 The Attorney-General appeared on the basis that he may not apply for costs against any party.

serving a memorandum in response within a further 10 working days. The application for costs would then be dealt with on the papers.

J C Holden Judge

Judgment signed at 9.30 am on 23 March 2022