**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA72/2024**
**[2025] NZCA 11**

| | |
|---|---|
| BETWEEN | ALLAN GEOFFREY HALSE<br>Applicant |
| AND | EMPLOYMENT COURT OF NEW ZEALAND<br>First Respondent |
| | EMPLOYMENT RELATIONS AUTHORITY<br>Second Respondent |
| | TURUKI HEALTH CARE CHARITABLE TRUST<br>Third Respondent |
| | CULTURESAFE NZ LTD (IN LIQUIDATION)<br>Fourth Respondent |
| | TRACEY SIMPSON<br>Fifth Respondent |

| | |
|---|---|
| Court: | Ellis and Hinton JJ |
| Counsel: | Applicant in person<br>D Jones and S Cvitanovich for First Respondent<br>A P Lawson for Second Respondent<br>A F Drake and R G Judd for Third Respondent<br>No appearance by Fourth Respondent<br>No appearance by Fifth Respondent |
| Judgment:<br>(On the papers) | 14 February 2025 at 10.30 am |

---

**JUDGMENT OF THE COURT**

---

**A The application for judicial review is struck out.**

**B The application for an order under s 166 of the Senior Courts Act 2016 is declined.**

**C The applicant must pay costs to the third respondent for a standard application on a band A basis together with usual disbursements.**

---

**REASONS OF THE COURT**

(Given by Hinton J)

[1] Allan Halse filed an application in this Court for judicial review of four Employment Court decisions or directions, under this Court's review jurisdiction in s 213 of the Employment Relations Act 2000.

[2] Mr Halse is subject to a civil restraint order under s 166(4) of the Senior Courts Act 2016, but it is accepted the order does not apply to this application for judicial review.[1]

[3] The third respondent, the Turuki Health Care Charitable Trust (Turuki), has made interlocutory applications seeking:[2]

(a) strike out of the judicial review application under r 44A of the Court of Appeal (Civil) Rules 2005; and

(b) that Mr Halse be made subject to an extended order under s 166(4) of the Senior Courts Act that restrains him from commencing or continuing any proceedings on this matter or any related matter in any senior court, other court or tribunal.

---

1 *Halse v Rangiura Trust Board* [2023] NZHC 1519 [HC civil restraint order]. This order was confirmed on appeal and leave to appeal to the Supreme Court was declined: *H v RPW* [2024] NZCA 263 [CA civil restraint order decision]; and *Halse v Rangiura Trust Board* [2024] NZSC 143 [SC civil restraint order decision]. Turuki initially applied for a declaration that Mr Halse is restrained from commencing or continuing these proceedings because of the order made against him under s 166(4) of the Senior Courts Act 2016 in HC civil restraint order. However, Turuki no longer seeks that declaration following this Court's decision in the CA civil restraint order decision, which clarified the scope of the phrase "any related matter".

2 Turuki is able to participate in this litigation as its own entity because it is an incorporated charitable trust board with separate legal personality from its trustees.

[4] The two applications are considered below. We note in respect of the s 166 application that there is a preliminary issue raised by Katz J in a minute dated 30 April 2024, namely whether, given that s 166 confers jurisdiction on a judge of the High Court to make orders, an order can appropriately be made in this Court.

[5] The first and second respondents, the Employment Court and Employment Relations Authority (the Authority), abide the Court's decision. The fourth and fifth respondents have not been involved in the proceeding in this Court.

**Background**

[6] Mr Halse is a busy litigant. What follows is most relevant for these purposes.[3]

[7] Mr Halse is the sole director and shareholder of CultureSafe NZ Limited (CultureSafe) — the fourth respondent — which is now in liquidation. Through CultureSafe Mr Halse acted as an employment advocate in various employment disputes. As this Court noted in *H v Employment Relations Authority*, a common theme emerged with regard to his role as an advocate:[4]

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

[8] As relevant in this context, CultureSafe briefly represented an employee of Turuki, Ms Simpson (the fifth respondent). A settlement agreement (the Agreement) was signed following a successful mediation that contained confidentiality and non-disparagement clauses. Although Mr Halse did not sign the Agreement, the Authority found Mr Halse, Ms Simpson and CultureSafe had breached the confidentiality clause and ordered them to pay penalties and general damages.[5] On 14 October 2020, Judge Holden in the Employment Court largely dismissed a

---

3 These facts are drawn from the various decisions in this Court and the Employment Court.

4 *H v Employment Relations Authority* [2021] NZCA 507, [2021] ERNZ 858 [CA 2021 judicial review application]. The non-publication orders referred to in this Court's decision have subsequently been revoked: see *Halse v Employment Relations Authority* [2022] NZEmpC 167, [2022] ERNZ 808 at [4]; and SC civil restraint order decision, above n 1, at [2], n 5.

5 *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 136.

challenge brought by Mr Halse and Ms Simpson to the Authority's determination.[6] The Judge found the Authority had jurisdiction to make the orders.

[9] Mr Halse then applied for judicial review in this Court of the Authority's determination and the Employment Court judgment (along with other decisions relating to employment disputes with other parties). Mr Halse identified the following questions in this Court:[7]

> Did Parliament intend to give the Employment Relations Authority and Employment Court jurisdiction:
>
> (a) over third parties to the employment relationship;
>
> (b) in relation to contracts other than employment agreements;
>
> (c) to enforce void or illegal arrangements;
>
> (d) to enforce contracts against third parties to those contracts; [and]
>
> (e) to suppress the fundamental right of freedom of expression?

[10] Mr Halse also sought interim orders. On 4 October 2021, this Court struck out the judicial review application.[8] This Court held that it had no jurisdiction to judicially review the determination of the Authority and the arguments Mr Halse sought to run in the review of the Employment Court decision were appropriately dealt with through an application for leave to appeal and not a judicial review. On 21 December 2021 the Supreme Court declined leave to appeal.[9]

[11] Matters did not end there. Mr Halse filed a judicial review of the Authority's determination in the Employment Court.[10]

[12] On 1 February 2022, Judge Holden made a direction via email through the Registry that the Authority was excused from appearing before the Employment Court. The direction was in response to a notice lodged by Crown Law, on behalf of the

---

6 *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 165 [14 October 2020 EmpC decision]. The Employment Court upheld these findings but reduced the penalties and set aside the order for general damages.

7 CA 2021 judicial review application, above n 4, at [3].

8 At [43].

9 *H (SC 135/2021) v Employment Relations Authority* [2021] NZSC 188.

10 Employment Relations Act 2000, s 194.

Authority, indicating it abided by the Employment Court's decision and seeking to be excused from the proceeding.

[13] On 2 May 2023, Judge Holden in the Employment Court struck out an application for judicial review brought by Mr Halse "in respect of four 'acts' of the … Authority".[11] The Judge also declined to grant a stay. Mr Halse had submitted his application could not be struck out because the Authority had not filed a statement of defence but the Judge found this was not required.[12] Rather, the Judge considered that the Authority's decision to abide was appropriate.[13] The issue of proceedings by Turuki — one of the four acts challenged by Mr Halse — was not reviewable because Turuki was not exercising a statutory power.[14] The other "acts" had been superseded by the challenge in the Employment Court and so there was no longer any extant substantive determination capable of review.[15] Strike-out succeeded on that basis. The Judge also noted that the strike-out would have succeeded on the grounds the application was vexatious and an abuse of process.[16]

[14] Costs were still to be determined and Mr Halse had also applied for a stay. On 15 June 2023, Mr Halse applied for an order that Judge Holden recuse herself from determining costs and that the current timetabling of costs and stay applications be varied until recusal was determined. On 16 June 2023, the Judge issued a minute declining to amend timetabling orders for the costs and stay applications.[17] On 22 June 2023, the Judge issued a further minute declining to recuse herself from the matter "at [that] stage", but allowed Mr Halse to file submissions in support of his application.[18]

---

11 *Halse v Employment Relations Authority* [2023] NZEmpC 69 [2 May 2023 EmpC decision] at [1]. One "act" identified was Turuki issuing the proceedings and the other three were determinations of the Authority.
12 At [26] and [29].
13 At [29].
14 At [39]–[40].
15 At [42]–[43].
16 At [54] and [57].
17 *Halse v Employment Relations Authority* NZEmpC Auckland EMPC 406/2021, 16 June 2023.
18 *Halse v Employment Relations Authority* NZEmpC Auckland EMPC 406/2021, 22 June 2023 at [2].

[15] On 11 September 2023, the Judge issued a judgment declining to recuse herself (no longer on an interim basis), declining to grant a stay, and making an order for costs in favour of Turuki.[19]

[16] In the meantime, Mr Halse continued to litigate other employment disputes. On 19 June 2023, Moore J in the High Court struck out a claim brought by Mr Halse in deceit, fraud, conspiracy to defraud and knowing assistance against four defendants not parties to this proceeding.[20] The Judge also made an order, sought by three of the defendants in that proceeding, restraining Mr Halse under s 166(4) of the Senior Courts Act from commencing or continuing civil proceedings on that matter or any related matter in any senior court, another court, or tribunal. On 24 June 2024, this Court dismissed Mr Halse's appeal against Moore J's decision.[21] The Supreme Court declined Mr Halse's application for leave to appeal on 24 October 2024.[22]

**Mr Halse's current judicial review application**

[17] The statement of claim Mr Halse filed in this Court on 7 February 2024 identifies "four reviewable decisions of the Employment Court":

(a) "[S]teps in the proceedings taken by the Court in reaching its judgment of 14 October 2020."[23]

Mr Halse claims that the Court wrongly concluded that third parties to a settlement could be liable for a breach of the terms of that settlement.

---

19 *Halse v Employment Relations Authority* [2023] NZEmpC 151 [11 September 2023 EmpC decision].

20 HC civil restraint order, above n 1.

21 CA civil restraint order decision, above n 1.

22 SC civil restraint order decision, above n 1.

23 14 October 2020 EmpC decision, above n 6. In that decision, the Employment Court largely dismissed a challenge brought by Mr Halse and Ms Simpson to the Authority's determination, ruling that the Authority did have jurisdiction to make orders against Mr Halse: see above at [8].

(b) "[S]teps in the proceedings taken by the Court in reaching its judgment of 1 February 2022."[24]

Mr Halse claims that the Court exceeded its jurisdiction because it should have required the Authority and Turuki to file a statement of defence and an application for leave to appear. Mr Halse submits this violated his right to be heard under s 27 of the New Zealand Bill of Rights Act 1990 (NZBORA).

(c) "[S]teps in the proceedings taken by the Court in reaching its judgment of 2 May 2023."[25]

Mr Halse submits that his judicial review application should not have been struck out by the Court because of a number of claimed procedural issues and because of errors in legal reasoning and fact.

(d) "[S]teps in the proceedings taken by the Court in reaching its judgment of 11 September 2023."[26]

Mr Halse submits the Court should not have declined the stay application and not ordered costs against him. He submits he was not provided with the opportunity to file submissions opposing the costs application, that he was denied the "right to a hearing", that the Court denied him natural justice by not providing its reasoning, and did not give him the opportunity to comment on the category of costs. He also submits there were a number of errors in the decision itself.

---

24 Mr Halse is referring to Judge Holden's direction through the Registry via email that the Authority was excused from appearing before the Employment Court: see above at [12].

25 2 May 2023 EmpC decision, above n 11. In that decision, the Employment Court struck out an application for judicial review brought by Mr Halse "in respect of four 'acts' of the Authority": see above at [13].

26 11 September 2023 EmpC decision, above n 19. In that decision, the Employment Court declined to recuse himself, to grant a stay and made an order for costs: see above at [15].

[18] Section 213 of the Employment Relations Act provides this Court with jurisdiction to determine an application for judicial review of the Employment Court:

*Review of proceedings*

**213 Review of proceedings before court**

(1) If, in relation to any proceedings before the court, any person wishes to apply for a 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 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.

(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.

(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.

[19] Importantly, the scope of such review is "narrowly confined".[27] Section 193 of the Employment Relations Act provides:

**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.

---

[27] CA 2021 judicial review application, above n 4, at [24].

[20] The Authority and the Employment Court have exclusive statutory jurisdiction to determine employment relationship problems.[28] This Court in *Moodie v Employment Court* summarised the position as follows:[29]

> [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*. 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 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.

[21] A judicial review is therefore not normally the appropriate vehicle for a challenge to a decision made in the Employment Court. As this Court noted, there is an appeal pathway under the Employment Relations Act, but leave is required.[30]

**Strike-out**

[22] Turuki applies for strike out of the judicial review application under r 44A of the Court of Appeal (Civil) Rules on the basis that: Mr Halse's claim discloses no reasonably arguable cause of action, defence or case appropriate to the nature of the pleading; it is frivolous and vexatious; and it is otherwise an abuse of process of the Court.

---

28 At [24], citing Employment Relations Act, ss 161 and 187.

29 *Moodie v Employment Court* [2012] NZCA 508, [2012] ERNZ 201 (footnote omitted), referring to *Parker v Silver Fern Farms Ltd* [2011] NZCA 564, [2012] 1 NZLR 256.

30 At [16]. See Employment Relations Act, s 214.

[23] Rule 44A relevantly provides:

> **44A Court's power to strike out or stay appeal**
>
> (1) In addition to any express power in these rules to strike out an appeal, the Court may, on an interlocutory application or on its own initiative, make an order striking out or staying an appeal in whole or in part if—
>
> …
>
> (c) the appeal is frivolous, vexatious, or otherwise an abuse of the process of the Court.

[24] Mr Halse submits in opposition that the right to seek judicial review is a constitutional right, protected by s 27 of NZBORA. He submits that Turuki does not have "jurisdiction" and that the application is without merit.

[25] There is a possible issue, raised elsewhere, but not by the parties here, as to whether r 44A only applies to "an appeal" (the language used in the rule) and not to the limited jurisdiction of this Court to determine applications for judicial review at first instance.[31] However, in *Moodie v Employment Court* this Court struck out a judicial review application, explaining its basis for doing so as follows:[32]

> [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 [of the High Court Rules 2016]. In those circumstances we are satisfied that, for the purposes of s 213(3) [of the Employment Relations Act] and r 5(4) [of the Court of Appeal (Civil) Rules], applying r 15.1 of the [High Court] 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 [High Court] Rules applies to it.

---

[31] This point was raised recently in a minute of Miller J in this Court in another application for judicial review of the Employment Court brought by Mr Halse: see *Halse v Employment Court of New Zealand* CA253/2023, 11 July 2023. The Judge noted that the jurisdiction to strike out that proceeding was unclear and requested counsel to assist in that case to address the issue. The matter was set down for a hearing but upon discovery of the s 166 order against Mr Halse the issue of strike-out was stayed until resolution of the appeal against that order: see *Halse v Employment Court of New Zealand* [2024] NZCA 232, [2024] ERNZ 437.

[32] *Moodie v Employment Court*, above n 29. This Court also struck-out a judicial review application on the same basis in *New Zealand Fusion International Ltd v Employment Court of New Zealand* [2021] NZCA 434.

[26] Rule 5(4) of the Court of Appeal (Civil) Rules referred to above, provides:

> (4) 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 the provisions of 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.

[27] Rule 15.1 of the High Court Rules relevantly provides:[33]

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (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.
>
> …
>
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> (4) This rule does not affect the court's inherent jurisdiction.

[28] We agree that on the above basis there is jurisdiction to strike out the judicial review application.[34]

---

[33] It is not uncommon for this Court to refer to the High Court Rules 2016 for guidance where this Court's rules are silent on a matter, applying the High Court Rules by analogy: see, for example, *Forest Holdings (NZ) Ltd v Sheung* [2021] NZCA 108 at [20]–[23].

[34] It is also arguable that the "appeal" in the Court of Appeal (Civil) Rules 2005 should be read to include an application for judicial review. It is not apparent that the drafters intended that judicial review application be excluded from all the procedural provisions in those rules, with the Court instead having to rely on its inherent jurisdiction to manage its own affairs.

[29] In our view, Mr Halse has no reasonably arguable cause of action. The approach to a strike-out application on this basis is well-settled. *McGechan on Procedure* summarises the principles:[35]

> The established criteria for striking out [were] summarised by the Court of Appeal in [*Attorney-General*] *v Prince* … and endorsed by the Supreme Court in *Couch v* [*Attorney-General*]… per Elias CJ and Anderson J:
>
> (a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.
>
> (b) The cause of action or defence must be clearly untenable. In *Couch* Elias CJ and Anderson J … said: "It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed."
>
> (c) The jurisdiction is to be exercised sparingly, and only in clear cases. This reflects the Court's reluctance to terminate a claim or defence short of trial.
>
> (d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.
>
> (e) The Court should be particularly slow to strike out a claim in any developing area of the law, perhaps particularly where a duty of care is alleged in a new situation. In *Couch* … Elias CJ and Anderson J said: "Particular care is required in areas where the law is confused or developing." There is considerable authority that developments in negligence need to be based on proved rather than hypothetical facts.

[30] The first pleaded reviewable act is that the Employment Court erred in concluding that third parties were liable for a breach of settlement terms. This is a matter of law, to be challenged through an appeal. As noted, judicial review under s 213 of the Employment Relations Act does not extend to a case where the Employment Court failed to comply with the rules of natural justice or made an error of law. The first ground should be struck out.

[31] The pleadings in respect of the other three allegedly reviewable acts do not suggest that the Employment Court exceeded its jurisdiction in the narrow and original sense or granted itself powers not conferred in the Employment Relations Act. Mr Halse's claim is largely directed at the process followed in the Employment Court,

---

[35] JK Gorman and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR15.1.02], citing *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) and *Couch v Attorney-General* [2008] NZSC 45.

making allegations of natural justice breaches or, otherwise, errors of law — not matters within the scope of this judicial review jurisdiction. Again, an application for leave to appeal is the appropriate vehicle to bring such claims.[36] Other parts of the pleading attempt to challenge the merits and reasoning in the Employment Court's decision, challenges which also require an application for leave to appeal. They should also be struck out.

[32] Overall, the application discloses no reasonably arguable cause of action. It is not strictly necessary to consider the other grounds put forward for a strike-out, although they too have merit.

[33] Mr Halse has sought to judicially review decisions of the Employment Court on substantially similar grounds before. This Court has already considered an application for judicial review brought by Mr Halse against the parties in this application (as well as others) in which he claimed the Employment Court erred in finding that the Authority had jurisdiction under the Employment Relations Act to make orders against him.[37] This Court struck out the judicial review application, holding that the appropriate vehicle for a challenge to this jurisdiction was through an application for leave to appeal.[38] This current judicial review application is another attempt by Mr Halse to relitigate matters, supporting the conclusion that the claim is vexatious and an abuse of process. As Moore J said in the context of a different matter, Mr Halse exhibits an entrenched "refusal to accept adverse decisions".[39] The other grounds for strike-out are also arguably established.

[34] For the above reasons, the strike-out application is granted.

---

36 We note for possible future reference that, although not relevant for the determination of this issue (particularly because facts pleaded are generally assumed to be true in this context), Turuki contests many of Mr Halse's factual allegations.

37 CA 2021 judicial review application, above n 4.

38 At [40].

39 HC civil restraint order, above n 1, at [115].

## Civil restraint application

[35] Turuki seeks "[e]xtended orders under s 166(4) of the Senior Courts Act … restraining Mr Halse (in any capacity) from commencing or continuing *any* proceeding concerning Turuki".[40]

[36] Section 166 provides jurisdiction to make a civil restraint order:

> **166 Judge may make order restricting commencement or continuation of proceeding**
>
> (1) A Judge of the High Court may make an order restricting a person from commencing or continuing a civil proceeding.
>
> (2) The order may have—
>
> (a) a limited effect (a **limited order**); or
>
> (b) an extended effect (an **extended order**); or
>
> (c) a general effect (a **general order**).
>
> (3) A limited order restrains a party from commencing or continuing civil proceedings on a particular matter in a senior court, another court, or a tribunal.
>
> (4) An extended order restrains a party from commencing or continuing civil proceedings on a particular or related matter in a senior court, another court, or a tribunal.
>
> (5) A general order restrains a party from commencing or continuing civil proceedings in a senior court, another court, or a tribunal.
>
> (6) Nothing in this section limits the court's inherent power to control its own proceedings.

[37] Section 167 sets out the grounds for making an order:

> **167 Grounds for making section 166 order**
>
> (1) A Judge may make a limited order under section 166 if, in civil proceedings about the same matter in any court or tribunal, the Judge considers that at least 2 or more of the proceedings are or were totally without merit.
>
> (2) A Judge may make an extended order under section 166 if, in at least 2 proceedings about any matter in any court or tribunal, the Judge considers that the proceedings are or were totally without merit.

---

[40] Emphasis added.

(3) A Judge may make a general order if, in at least 2 proceedings about any matter in any court or tribunal, the Judge considers that the proceedings are or were totally without merit.

(4) In determining whether proceedings are or were totally without merit, the Judge may take into account the nature of any interlocutory applications, appeals, or criminal prosecutions involving the party to be restrained, but is not limited to those considerations.

(5) The proceedings concerned must be proceedings commenced or continued by the party to be restrained, whether against the same person or different persons.

(6) For the purpose of this section and sections 168 and 169, an appeal in a civil proceeding must be treated as part of that proceeding and not as a distinct proceeding.

[38] Section 168 addresses the terms of the order:

**168 Terms of section 166 order**

(1) An order made under section 166 may restrain a party from commencing or continuing any proceeding (whether generally or against any particular person or persons) of any type specified in the order without first obtaining the leave of the High Court.

(2) An order made under section 166, whether limited, extended, or general, has effect for a period of up to 3 years as specified by the Judge, but the Judge making it may specify a longer period (which must not exceed 5 years) if he or she is satisfied that there are exceptional circumstances justifying the longer period.

[39] Procedural matters and appeal rights are provided for in s 169:

**169 Procedure and appeals relating to section 166 orders**

(1) A party to any proceeding may apply for a limited order or an extended order.

(2) Only the Attorney-General may apply for a general order.

(3) A Judge of the High Court may make a limited order, an extended order, or a general order either on application (under subsection (1) or (2), as applicable) or on his or her own initiative.

(4) An application for leave to continue or commence a civil proceeding by a party subject to a section 166 order may be made without notice, but the court may direct that the application for leave be served on any specified person.

(5) An application for leave must be determined on the papers, unless the Judge considers that an oral hearing should be conducted because

there are exceptional circumstances and it is appropriate to do so in the interests of justice.

(6) The Judge's determination of an application for leave is final.

(7) A section 166 order does not prevent or affect the commencement of a private criminal prosecution in any case.

(8) The party against whom a section 166 order is made may appeal against the order to—

(a) the Court of Appeal:

(b) the Supreme Court, with the leave of that court, in any case.

(9) The appellant in an appeal to the Court of Appeal under subsection (8) or the applicant for the section 166 order concerned may, with the leave of the Supreme Court, appeal to the Supreme Court against the determination of that appeal by the Court of Appeal.

(10) A court determining an appeal under this section has the same powers as the court appealed from has to determine an application or appeal, as the case may be.

(11) In this section, a **section 166 order** means an order made under section 166.

[40] In relation to the preliminary point as to this Court's jurisdiction, s 166 of the Senior Courts Act grants the power to make an order to a judge of the High Court.[41] Turuki relies on s 103 which provides that a judge of this Court continues to be a judge of the High Court and may sit as, or exercise the powers of, a High Court judge. Section 166 grants the power to make an order to a judge of the High Court. On that basis, it is strictly possible for a judge of this Court to exercise the power in s 166.

[41] Parts of the legislative history of the civil restraint regime could also be seen to support Turuki's submission. The predecessor to the current regime in ss 166 to 169 of the Senior Courts Act was s 88B of the Judicature Act 1908. Section 88B provided that an order could be made by the "*High Court*". In contrast, ss 166 to 169 of the Senior Courts Act provide that an order may be made by a "*[j]udge of the High Court*". It is possible this change in language with the introduction of the new scheme was intended to expand the jurisdiction, although it would be more likely express reference would be made to a judge of the Court of Appeal.

---

41 Section 4 of the Senior Courts Act also defines "Judge" as a "Judge of the High Court".

[42] The current regime is modelled on the system of civil restraint implemented in the United Kingdom, which expressly provides a judge of the Court of Appeal in that jurisdiction with the power to make a civil restraint order.[42] In fact, the Law Commission, in its final report that led to the enactment of the Senior Courts Act, identified as an issue with the Judicature Act regime that "only the High Court has the power to make an order".[43] Nonetheless the report did not go on to explicitly address whether the power to make an order should be expanded to appellate courts. The Law Commission did, however, refer to "courts", when describing the power to make such an order, such as when recommending that "the courts should be able to initiate an application for a civil restraint order themselves, as they will often be uniquely placed to assess the behaviour of a party to one or more proceedings".[44]

[43] We consider, however, that the scheme, read as a whole, does not contemplate this Court making s 166 orders, for the reasons that follow. First, ss 166 to 169 refer to "[j]udge" in the singular but s 49 of the Senior Courts Act requires any application in this Court that "effectively determines or disposes of the substantive proceeding" to be determined by two or more judges. A s 166 order would dispose of proceedings brought by Mr Halse so two judges would be required to determine the application. The use of the singular "[j]udge" in ss 166 to 169 suggests that the legislature did not intend a panel of this Court, as required in s 49, to be making such orders.[45]

[44] Second, this Court making such orders would undermine its position as a supervisory appellate court.[46] Section 169 provides that there is a right of appeal to this Court against a s 166 order made in the High Court, but to appeal to the

---

42 See Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, 2012) at [16.22]–[16.32]; and Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012). See Civil Procedure Rules 1998 (UK), r 3.11 and Practice Direction 3C – Civil Restraint Orders, 4.1.

43 Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act*, above n 42, at [16.3(e)].

44 At [16.20]. Although other courts, such as the Employment Court, have jurisdiction to make orders in relation to proceedings on particular and related matters, that power is limited to proceedings in the court the order was made: see ss 222C–222F of the Employment Relations Act. It may have been that the Law Commission was referring to these other courts, although this is not clear.

45 We note however the possible application of s 19 of the Legislation Act 2019.

46 See Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [21.7.1].

Supreme Court, leave on limited grounds is required.[47] Civil restraint orders made in this Court would not have the benefit of the "ordinary constitutional entitlement to a first appeal as of right" by virtue of the leave requirement of the Supreme Court.[48] The Law Commission explicitly recommended a right of appeal against civil restraint orders.[49] That is understandable given such orders can significantly restrict access to civil justice. Accordingly, we consider the legislative history and terms of the provisions indicate it was intended that s 166 orders be made in the High Court so they may be subject to appellate scrutiny as of right.

[45] Third, the explanatory note to the Bill which became the Senior Courts Act, explained the clause that became s 166 as "provid[ing] for the *High Court* to make limited orders, extended orders, and general orders, which restrict a person from commencing or continuing a civil proceeding".[50] The explanatory note also described appeals as "against orders made by the *High Court*".[51] This again indicates Parliament contemplated orders being made in the High Court, even if the legislative drafting employed slightly different terminology.

[46] In summary, we conclude that the scheme does not contemplate this Court making s 166 orders. Rather it contemplates that they be made where appropriate in the High Court. This case appears to be one suitable for determination by originating application in the High Court, with permission.[52]

[47] Turuki also submits that judges of this Court should constitute themselves as the High Court to make the order it seeks, relying on the power in s 103 of the Senior Courts Act to "sit as" a judge of the High Court. Turuki says that because this Court is seized of this proceeding and has exclusive jurisdiction over judicial review of the

---

47 The criteria for leave to appeal to the Supreme Court is set out in s 74 of the Senior Courts Act.

48 *Borrowdale v Director-General of Health* [2020] NZCA 156 at [14]. There are naturally exceptions to the right of appeal — such as this case, concerning applications to judicially review the Employment Court — but it would be expected that the legislature would make those exceptions clear.

49 Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act*, above n 42, at [16.37]–[16.40].

50 Judicature Modernisation Bill 2013 (178-1) (explanatory note) at 30 (emphasis added).

51 At 30 (emphasis added).

52 High Court Rules, r 19.5. Originating application processes have been accepted as suitable in other applications for s 166 order. See *Siemer v Attorney-General of New Zealand* [2022] NZCA 200.

Employment Court, it would be most efficient for a s 166 application to be determined in this Court.[53]

[48] There are a number of cases in which judges of this Court have reconstituted themselves as a Full Court of the High Court. They are exceptional. In *Nottingham v Registered Securities Ltd (in liq)*, Mr Nottingham, who was self-represented, sought to set aside a summary judgment by default and a bankruptcy notice, on appeal.[54] Mr Nottingham had been overseas at the time the orders were made. At the hearing, it was drawn to the attention of counsel for the respondent that there was no jurisdiction to hear the appeal. Counsel asked the Court to resolve the matter and consented to anything that might be required. The Judges were prepared to exercise their powers as High Court judges given the circumstances of the case, the fact that counsel for the respondent consented and the fact that Mr Nottingham was unrepresented.[55] The Court noted this course was exceptional and unlikely to be followed on future occasions. In *Broadcasting Corporation of New Zealand v Attorney-General*, Cooke J in this Court said it was doubtful the panel had jurisdiction and that the judgment could be regarded as given under their authority as judges of the High Court "if necessary".[56]

[49] Subsequently, in *Young v Police*, this Court noted that "it was clear" the decision in *Nottingham* was influenced by the fact that all parties consented.[57] In contrast, in *Young* a respondent opposed reconstitution. The Court noted that a party could seek to appeal a decision of three Court of Appeal judges acting as High Court judges and that this would not "be desirable".[58] In another case, this Court declined

---

53 As noted, there is also a power in s 222C of the Employment Relations Act to impose restraints on civil litigation, but such an order only extends to proceedings "in the Employment Court". Sections 166–169 of the Senior Courts Act do not have this restriction and an order may apply to a "senior court, another court, or a tribunal." The broader scope of the Senior Courts Act jurisdiction appears to be why Turuki has not sought to restrain Mr Halse in the Employment Relations Act jurisdiction.

54 *Nottingham v Registered Securities Ltd (in liq)* (1998) 12 PRNZ 625 (CA).

55 At 628. The Judges exercised that power under the equivalent provision at that time in s 57(4) of the Judicature Act 1908. That section provided: "Every Judge of the Court of Appeal shall continue to be a Judge of the High Court, and may from time to time sit as or exercise any of the powers of a Judge of the High Court."

56 *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA) at 127.

57 *Young v Police* [2007] NZAR 92 (CA) at [16].

58 At [18].

to entertain, and described as "most unusual", a suggestion that involved the Court constituting as the High Court and then transferring the proceedings to this Court.[59]

[50] In *Harvey v R*, an appellant brought two related appeals — the appropriate court for one was this Court and for the other the High Court.[60] One of the appeals was initially rejected for filing by the Registrar but Wild J directed that it be accepted.[61] Counsel agreed that this Court should deal with both appeals, with the Judges constituting themselves as Judges of the High Court for that purpose.[62] Similar approaches were taken in *R v Cruden*, *R v Coughlan* and *R v McQuillan*.[63] In all of those cases it appears the parties consented. In *Coughlan* the Court noted that further delay was undesirable.[64]

[51] In summary, it is an unusual course for judges of this Court to reconstitute as the High Court. It is reserved for cases involving unique jurisdictional difficulties or that are otherwise exceptional. There are various policy reasons underpinning the reluctance to use this jurisdiction, including a concern for the preservation of judicial hierarchies and for the efficient use of judicial resources. Rather it is anticipated that parties simply file in the court where the matter has jurisdiction.[65] But there may be exceptional cases where the circumstances warrant reconstitution.

[52] Here, there is not sufficient reason for this Court to constitute itself as the High Court. Mr Halse has not consented. This particular proceeding is disposed of by the strike-out in any event. The suggested advantages of judges of this Court determining the matter are not sufficient. The fact that a s 166 application is generally dealt with on the papers and that the resolution of an application could be expedited through the use of the originating application procedure, may also mitigate some of the efficiency concerns raised by Turuki.

---

59 *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 (CA) at 37.
60 *Harvey v R* [2015] NZCA 420.
61 At [2].
62 At [4].
63 *R v Cruden* [2001] 2 NZLR 338 (CA); *R v Coughlan* CA70/00, 4 May 2000 at [4]; and *R v McQuillan* CA129/04, 12 August 2004 at [11].
64 *R v Coughlan*, above n 63, at [3].
65 *Nottingham v Registered Securities Ltd (in liq)*, above n 54, at 628.

[53] Finally, we note there may be an argument that this Court could use its inherent power to protect its own processes from abuse, to make a civil restraint order. In *Bhamjee v Forsdick (No 2)* the Court of Appeal of England and Wales held it had jurisdiction to make a civil restraint order under its inherent jurisdiction to protect its processes from abuse.[66] Importantly, however, this Court recently recognised that where an order can be made under statutory jurisdiction it should be.[67] The Court noted the various safeguards that the s 166 regime provides.[68] Turuki has not sought to rely on any inherent power and in any event we are not satisfied it is appropriate.

**Result**

[54] The strike-out application is granted.

[55] The application for a s 166 order is declined.

[56] The third respondent has been largely successful. The applicant must pay costs to the third respondent for a standard application on a band A basis together with usual disbursements.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for First and Second Respondents
Wynn Williams, Auckland for Third Respondent

---

66 *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113, [2004] 1 WLR 88.
67 *DFT v JDN* [2023] NZCA 15, [2023] NZAR 69 at [75].
68 At [76] and [80].