IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 214
EMPC 246/2014

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for stay of proceedings
BETWEEN	THE SELWYN FOUNDATION Plaintiff
AND	JOYCE NAYATHODAN Defendant

Hearing: By memoranda of submissions filed on 10 and 31 October 2014

Appearances: S Langton, counsel for plaintiff
D Hart, counsel for defendant

Judgment: 17 November 2014

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] The question for decision is whether the plaintiff is entitled in law to challenge the Employment Relations Authority's determination issued on 1 September 2014.[1]

[2] The Authority decided three preliminary questions in a determination. First, it refused to consider what it concluded was hearsay and therefore inadmissible evidence about a conversation between two persons. Next, the Authority concluded that what was claimed to be a settlement agreement between the parties was unenforceable and therefore did not prevent the Authority from determining the defendant's personal grievance which it decided had been raised with the employer within time. Finally, the Authority concluded that it would determine whether the

[1] *Nayathodan v The Selwyn Foundation* [2014] NZERA Auckland 362.

defendant's separate racial harassment grievance had been raised within time, after the Authority's substantive investigation of the proceeding.

[3] At the same time as filing its challenge to the Authority's determination, the plaintiff applied to the Court to stay further investigation of those grievances by the Authority until its challenge had been determined.

[4] By a Minute issued on 26 September 2014, the Court indicated that it was arguable that the plaintiff's challenge is precluded by s 179(5) of the Employment Relations Act 2000 (the Act) as interpreted by the full Court in *H v A Ltd*.[2] The Court invited the parties to make submissions on whether s 179(5) prohibits the plaintiff's challenge at this point. Unless and until it is determined that the Court is empowered to consider the challenge, any question of staying the Authority's investigation pending the determination of the challenge must be postponed.

[5] Subsections (1) and (5) of s 179(5) provide as follows:

> **179 Challenges to determinations of Authority**
> (1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the court.
> …
> (5) Subsection (1) does not apply—
> (a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; and
> (b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

[6] Whether subs (5) precludes the challenge depends on whether the Authority's determination is about its "procedure", whether generally in cases or that it has followed, is following, or is intending to follow in a particular case.

[7] Counsel for the plaintiff submits that the Authority's determination is not about the procedure it has followed, is following, or is intending to follow. Rather, it is submitted that it is a substantive determination about the defendant's right to pursue her personal grievances. The plaintiff says that it cannot and should not have

[2] *H v A Ltd* [2014] NZEmpC 92.

to wait to challenge those parts of the Authority's determination with which it disagrees as part of any subsequent challenge to the Authority's substantive determination. It says that it is required to lodge its challenge within 28 days after the Authority's determination was issued, pursuant to s 179(2).

[8] Further, the plaintiff says that the time and resources of both parties, their witnesses, and the Authority may be wasted if the Authority proceeds to hear the merits of the defendant's grievance and determines these, in the event that the Authority's preliminary determination was wrong. The plaintiff points to the full Court's judgment in *H v A Ltd* where it wrote:[3] "… a determination of the Authority will be amenable to challenge where it has a substantive effect, which cannot otherwise be remedied on a challenge or by way of review."

[9] The plaintiff says that the Authority's determination was substantive in that it was about the defendant's right to pursue her personal grievances. It concluded that she had raised them in time and that no effective agreement had been concluded between the parties to settle those grievances. The plaintiff says that if it were to wait until the Authority's substantive determination on the merits of the grievances and then include in a challenge allegations that the grievances were raised out of time or were settled, it would be met with an irrefutable defence to that part of the challenge that it was out of time. It says in these circumstances that the Authority's interim determination on these preliminary issues would not be able to be remedied.

[10] The defendant, through counsel, submits that the Authority's determination in this case is a jurisdictional one as was discussed by the full Court in *H v A Ltd*.[4] She relies on the statement of the full Court that:[5]

> We agree with Judge Couch [in *Oldco PTI (New Zealand) Ltd v Houston*][6] that, in assessing whether a decision of the Authority is procedural or not, it is more important to have regard to the effect of the decision rather than the nature of the power being exercised.

[3] At [28].
[4] At [12].
[5] At [14].
[6] *Oldco PTI (New Zealand) Ltd v Houston* [2006] ERNZ 221 (EmpC).

[11] Despite acknowledging that if the current challenge is permitted to proceed, there may be (potentially) four separate hearings of the case (two in the Authority and two by way of challenge in the Court), the defendant concedes the plaintiff's right to challenge the Authority's preliminary determination. She relies on the judgment of this Court in *Morgan v Whanganui College Board of Trustees.*[7]

[12] Notwithstanding the defendant's apparent concession that the plaintiff is entitled in law to have its challenge heard, I do not agree, at least in respect of two of the three questions determined by the Authority. On questions of jurisdiction such as this, the Court is not bound to accept an agreed position put forward by the parties, albeit reluctantly by one of them. If a provision such as s 179(5) prohibits the exercise of a jurisdiction or power, then the Court is bound to apply that provision, irrespective of the views of the parties.

[13] Section 179(5) has been recently and comprehensively examined and interpreted by a full Court of three judges. The judgment in *H v A Ltd* modified the position taken by the Court in the *Morgan* case relied on by the defendant and I propose to follow the reasoning of the full Court in *H v A Ltd*. It is encapsulated in the following paragraphs from the judgment:

> [17] The Authority's investigatory procedures and meetings should generally proceed uninterrupted by challenges. It would undermine the evident purposes of s 179(5) and the Act more generally to allow or encourage challenges at a pre-determination stage, thereby increasing costs, reliance on legalities and technicalities, and generating delays.
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> [18] Parliament's intention in limiting the powers of the Employment Court in relation to the proceedings of the Authority is reflected in the Explanatory Note to the Employment Relations Law Reform Bill (No 2):
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> > …the Bill improves the ability of the Employment Relations Authority to deliver speedy, effective, and non-legalistic problem resolution services by restricting the ability of the Employment Court to intervene during Authority investigations. This will ensure that the focus remains on the immediate employment relationship problem itself, rather than on how the institutions deal with it.
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> …
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> [20] Section 179 falls within Pt 10 of the Act. Its objects are set out in s 143. It is immediately apparent that the statutory focus is on the expeditious resolution of employment relationship problems and the relatively informal way in which the Authority is to operate, without undue regard to

[7] *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 55.

technicalities. Section 143(fa) provides that one of the objects of this Part of the Act is to:

> …ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations…

[21] This is reinforced by s 157(1), which sets out the role of the Authority. It provides that:

> The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.

…

[23] It is clear that the policy intent underlying s 179(5) is to enable the Authority to settle matters coming before it at the appropriate level, with as little judicial intervention during the investigative process as possible. A balance is struck between the policy imperatives underlying the reforms and access to justice considerations in the retention of the right of challenge or review once the Authority has made a final determination on the matter before it.

[24] We do not, however, consider that s 179(5) is to be construed as wholly ousting access to the Court at an interlocutory stage. This would be the effect of adopting the defendant's approach in the present case. Instead, the Court must have regard to the effect of the Authority's determination in light of the policy objectives set out above.

[25] While not impacting on (and, in particular, delaying) the substantive outcome of a proceeding, a refusal to grant a non-publication order may well cause significant and irreversible damage – not only to the applicant but also affected non-parties. Although an ability to challenge the refusal of a non-publication order at an interlocutory stage may disrupt unfinished Authority business, in the sense identified by the Court of Appeal in *Rawlings*, its distinguishing characteristic is that it is not the sort of determination that can subsequently be remedied on a challenge or by way of review. The horse will have well and truly bolted by that stage.

…

[27] In this regard, it is evident that the new sections introduced by the 2004 amendments are not intended to deny a party access to justice, but are rather intended to facilitate the resolution of employment relationship problems through providing a forum that is not unduly preoccupied with legal technicalities. Section 179(5) operates to defer, in order to give effect to the important policy imperatives underlying the provisions, but not deny access to the Court. To apply subs (5) to the circumstances of this case would be to deny access to justice.

[28] Accordingly, a determination of the Authority will be amenable to challenge where it has a substantive effect, which cannot otherwise be remedied on a challenge or by way of review.

[14] I deal first and separately with the challenges to the Authority's determination on the issues of evidence admissibility and postponement of the limitations question. Applying the definition of "procedure" identified by the above passages from *H v A Ltd*, I am satisfied that refusing the plaintiff a right of challenge at this point will not cause it significant and irreversible damage. Those matters on which it complains that the Authority decided, can be remedied subsequently on a challenge, or by way of judicial review. Using the analogy applied by the full Court in *H v A Ltd* at [25], the horse will not have bolted by that stage.

[15] To refuse the plaintiff's challenge on these points at this stage will not be to deny it access to justice. I am satisfied that to preclude the challenge under s 179(5) will facilitate the resolution of the parties' employment relationship problem by ensuring that it is heard and determined in a forum that is not unduly preoccupied with legal technicalities. The application of s 179(5) will operate, at worst from the plaintiff's point of view, to defer but not to deny access to the Court. Any substantive effect of the Authority's preliminary determination will be able to be remedied on a challenge or by way of review. Contrary to the plaintiff's submission, the defendant will not be able to assert that any challenge is out of time, at least where a challenge by hearing de novo is elected.

[16] The third issue decided by the Authority, and now challenged, is not as easily decided under s 179(5).

[17] The Authority elected to consider and determine as a preliminary point whether what the plaintiff claimed was an agreement by the defendant not to raise a personal grievance, precluded her from doing so. This was a jurisdictional question in the sense of deciding whether it was empowered to determine the defendant's grievances. Had the Authority upheld the plaintiff's contention and dismissed the defendant's grievances on this basis, it would have been open to Ms Nayathodan inarguably to have challenged that determination. Section 179(5) would not have been applicable in those circumstances. It is difficult, therefore, to conclude that a different answer given to the same question about the nature of the challenge, determines whether the determination is challengeable.

[18] Although in *H v A Ltd*, the Court defined "procedure" very broadly, it is not possible to bring within the ambit of the subsection's words a threshold jurisdictional question about whether the Authority is empowered to consider the defendant's grievances on their merits. The plaintiff is not seeking to challenge when or how the Authority went or is to go about determining this question, which would be a matter of its procedure. It is the substantive result of the Authority's assessment that there was no accord and satisfaction which is the subject of the challenge. That cannot be, to use the words of subs (5), "… about the procedure that the Authority has followed, is following, … is intending to follow … [or] may follow or adopt a particular procedure."

[19] This case is not in the same category as was *H v A Ltd*. There an erroneous determination by the Authority refusing to prohibit publication of a party's identity could have brought about an irrevocable injustice if the Court had refused to hear and decide a challenge to that decision before the Authority's substantive determination was issued. In this case it will still be open to the plaintiff to challenge the Authority's determination that there was no accord and satisfaction precluding the defendant from bringing her grievances, even if that was an erroneous determination, and the plaintiff has to wait for a remedy. However, even if a refusal to apply s 179(5) to these circumstances might appear to be contrary to the dispute resolution policies of the Act set out in the passages quoted earlier from *H v A Ltd*, the words in the statute cannot be ignored in the pursuit of the Act's broad policy for its own sake.

[20] Because the Court is not permitted by statute to tell the Authority how to exercise its investigative jurisdiction,[8] I will simply comment that the present situation has been brought about by the Authority's agreement to hear and determine this and other preliminary points before its investigation process in circumstances where it could have decided these issues as part of that investigation and such a decision would have been immune from challenge under s 179(5).

[8] Employment Relations Act 2000, s 188(4).

[21] In the end, however, it is simply not possible to categorise the determination of the Authority which is sought to be challenged on this jurisdictional issue as being about its "procedure", so that s 179(5) is not invoked.

[22] It follows that the only justiciable challenge to the Authority's determination relates to the second question whether there was a lawful and enforceable agreement that Ms Nayathodan was precluded from bringing any claims against her former employer arising out of their employment relationship.

[23] The challenge on this issue will have to wait until 2015 for a fixture. In these circumstances, it would be just that the Authority's investigation be stayed until the Court has determined this ground of challenge and there is an order for stay of the Authority's investigation accordingly.

[24] The Registrar should arrange a directions conference with counsel to timetable the challenge, now on a single issue, to a hearing.

GL Colgan
Chief Judge

Judgment signed at 12.30 pm on Monday 17 November 2014