

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2014] NZEmpC 221
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 recall and re-issue of
judgment

BETWEEN THE SELWYN FOUNDATION
Plaintiff

AND JOYCE NAYATHODAN
Defendant

Hearing: By memoranda of submissions filed on 24 and 1 December
2014

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

Judgment: 2 December 2014

INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE G L COLGAN

[1] The plaintiff applies to the Court for recall and re-issue of the Court's first interlocutory judgment issued on 17 November 2014.¹

[2] That first judgment decided that only one of three preliminary issues, decided by the Employment Relations Authority, is justiciable by challenge at this time.² The Court reached that decision by applying s 179(5) of the Employment Relations Act 2000 (the Act).

[3] The plaintiff says that the Court should have determined a further issue, which is whether s 179(5) bars from challenge the Authority's determination that,

¹ *The Selwyn Foundation v Nayathodan* [2014] NZEmpC 214.

² *Nayathodan v The Selwyn Foundation* [2014] NZERA Auckland 362.

except for what the parties know as her racial harassment grievance, the defendant raised her personal grievances within time.

[4] The plaintiff is correct that the following passages from the Authority's determination confirm that, except in relation to her racial harassment grievance, she had raised other personal grievances within time:

C. The applicant has, with the exception of the allegation of racial harassment, raised her personal grievances pursuant to s114 of the Act. Whether the racial harassment concern was raised as a personal grievance within time shall be determined at hearing.

...
[53] The statutory tests in s.103 and s.114(2) are satisfied for all of the grievances with the exception of the racial harassment complaint. There was less clarity about when the racial harassment complaint was raised. I accept the respondent's submission it was surprised by the evidence at hearing. It should be given an opportunity to speak with Mary Richard about the raising of this complaint. The other complaints were well documented in Ms Sobotka's evidence. There cannot be any surprise about the applicant's evidence in this regard.

[54] The applicant has, with the exception of the allegation of racial harassment, raised her personal grievances pursuant to s114 of the Act. Whether the racial harassment concern was raised as a personal grievance within time shall be determined at hearing.

[5] I accept that paras 14-20 of the plaintiff's statement of claim of 25 September 2014 do seek to place in issue the correctness of the Authority's determination that these grievances were raised within time.

[6] Those parts of the Authority's preliminary determination were not matters of the Authority's "procedure" in the same way that its determination that there had not been an accord and satisfaction which precluded access to the personal grievance procedure was not a question of procedure but, rather, one of jurisdiction. The Authority determined that it has the jurisdiction in this case to investigate and determine personal grievances. Had that determination gone the other way, against jurisdiction, there is no question that the defendant would not have been barred by s 179(5) from challenging that conclusion.

[7] On the basis of the same reasoning as the Court used in reaching that conclusion in its first interlocutory judgment of 17 November 2014, I accept the

plaintiff's application for recall and re-issue of that judgment. It will re-issue, amended appropriately, and with an additional finding that the plaintiff is not precluded by s 179(5) from challenging that part of the Authority's preliminary determination.

GL Colgan
Chief Judge

Judgment signed at 9 am on Tuesday 2 December 2014