IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 99
EMPC 112/2015

IN THE MATTER OF	proceedings removed by the Employment Relations Authority
AND IN THE MATTER	of an application by the defendants to strike out a question of law referred to the Court
BETWEEN	NEW ZEALAND MEAT WORKERS UNION INC Plaintiff
AND	SOUTH PACIFIC MEATS LIMITED First Defendant
AND	MICHAEL ANTHONY TALLEY Second Defendant

Hearing: By memoranda of submissions filed on 2, 11 and 12 June 2015

Appearances: P Churchman QC, counsel for plaintiff
G Malone and R Webster, counsel for defendants

Judgment: 25 June 2015

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] In preparation for the hearing and decision of a question of law referred to the Court by the Employment Relations Authority, two questions have arisen about whether that referral is prohibited from consideration by the Court.[1] The first is whether this is a question of law referred by the Authority under s 177 of the Employment Relations Act 2000 (the Act) or a partial removal of the substantive proceeding before the Authority under s 178. The second question is whether the referral under s 177 (or the partial removal under s 178) is prohibited by s 177(4) (or s 178(6)) of the Act.

[1] *New Zealand Meat Workers Union Inc v South Pacific Meats Ltd* [2015] NZERA Christchurch 54.

[2] Although having signalled the first of these two grounds in support of their strike-out application, counsel for the defendants, Mr Malone, did not pursue in written submissions his contention that the matters referred by the Authority to the Court were the subject of s 178 rather than s 177 which the Authority confirmed after some initial confusion. In these circumstances, I understand Mr Malone to have conceded that this argument would not be used in support of the strike-out application. In case I am wrong in that regard, however, I will deal with the merits of that particular ground subsequently.

[3] As always, background and context are important and are as follows.

[4] The New Zealand Meat Workers Union Inc (the Union) contends that South Pacific Meats Limited (SPML) has interfered unlawfully with the Union's rights in law of access to the company's meat works at Awarua and Malvern. The Union also contends that the company breached its obligations of good faith by imposing unlawful conditions on the commencement of collective bargaining with it. The Union further alleges that the second defendant, Michael Talley, has incited, instigated, aided or abetted the company's alleged breaches outlined above.

[5] A dispute about the company's disclosure of documents arose in preparation for the Authority's investigation meeting. The Union then sought from the Authority a direction under s 160(1)(a) of the Act requiring both SPML and Mr Talley to forthwith disclose and provide copies of all documents between the company's directors and managers relating to the exercise of the Union's statutory rights of access to the named workplaces. South Pacific Meats and Mr Talley resisted disclosing such documents on the ground that to do so would be self-incriminatory and in breach of their privilege to resist doing so.

[6] By a determination issued of its own volition on 30 April 2015, the Authority posed the following question of law for determination by the Court:[2]

> … whether in an application by a party for orders seeking the disclosure of documents which would appear to be pertinent to a proceeding in the Authority, such an order can be granted even although it appears that the

[2] At [12].

> granting of such an order may have the effect of putting before the Authority material which could support an application against the party providing the documents, for the imposition of a penalty.

[7] There was initially some confusion about whether the Authority had acted under s 177 or s 178 of the Act. It resolved that confusion at the Court's invitation by confirming formally that this was the referral of the question of law to the Court under s 177 which provides:

> **177 Referral of question of law**
> (1) The Authority may, where a question of law arises during an investigation,—
> (a) refer that question of law to the court for its opinion; and
> (b) delay the investigation until it receives the court's opinion on that question.
> (2) Every reference under subsection (1) must be made in the prescribed manner.
> (3) The court must provide the Authority with its opinion on the question of law and the Authority must then continue its investigation in accordance with that opinion.
> (4) Subsection (1) does not apply—
> (a) to a question about the procedure that the Authority has followed, is following, or is intending to follow; and
> (b) without limiting paragraph (a), to a question about whether the Authority may follow or adopt a particular procedure.

[8] Again at the request of the Court, the Authority has subsequently stated fully the material facts of the problem or matter to which the question of law relates.[3] That was done by Minute of the Authority issued on 21 May 2015.

[9] Observing that the Authority has not considered evidence in the proceeding before it but relies on the pleadings filed, it says that the relevant facts are as follows:

> [4] The essence of the claim made by the applicant Union is that the first respondent has unlawfully interfered with the Union's rights to have access to two of the first respondent's meat works at Awarua and Malvern, that that interference constitutes a breach of the good faith obligation and further that the second respondent incited, instigated and aided and abetted the first respondent to commit the breaches alleged.
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> [5] In addition to resisting the Union's claims, the respondents also filed an application for a non publication order in respect to the second respondent on the footing that the allegations would damage Mr Michael Talley's reputation with *"unsubstantiated and spurious allegations."*

[3] See Employment Relations Authority Regulations 2000, reg 11.

[6] South Pacific Meats Limited is a wholly owned subsidiary of AFFCO New Zealand Limited which itself is a wholly owned subsidiary of AFFCO Holdings Limited which in turn is a wholly owned subsidiary of Talley's Group Limited.

[7] The second respondent, Michael Anthony Talley, is one of three directors of Talley's Group Limited (Talley's) and it is said for the applicant Union that Michael Talley *"effectively controls the first respondent"*.

[8] South Pacific Meats Limited operates meat processing plants, the subject of the employment relationship problem, at Awarua in Southland and at Malvern in Canterbury. Those two plants employ meat workers who are members of the applicant Union or who are eligible to become members of the applicant Union.

[9] Bargaining has been initiated for a collective employment agreement and in that context, the Union has sought access to the subject plants pursuant to s.20 of the Employment Relations Act 2000 (the Act) in order to engage with members and/or to recruit members.

[10] In two separate determinations of the Authority, respectively in 2012 and 2014, the Authority held that South Pacific Meats Limited had imposed unlawful restrictions on the exercise by the applicant Union of its statutory rights of access pursuant to s.20 of the Act.

[11] Those determinations are respectively *New Zealand Meat Workers Union Inc v. South Pacific Meats Ltd* [2012] NZERA Christchurch 21 (10 breaches of s.20 of the Act identified in a less than 12 month period), and *New Zealand Meat Workers Union Inc v. South Pacific Meats Ltd* [2014] NZERA Christchurch 141 (where the Authority found seven breaches of s.20 of the Act in a six week period between mid-October and late November 2013).

[12] Penalties were imposed by the Authority on each occasion and in the earlier determination, the Authority attempted to provide some guidance to South Pacific Meats Limited on its legal obligations in the matter.

[13] Despite those two determinations of the Authority, the Union alleges that South Pacific Meats Limited has continued to breach s.20 of the Act; the Union also alleges, relevantly to the position of the second respondent, Mr Talley, that Michael Anthony Talley disagrees with the Authority's determinations and seeks to encourage South Pacific Meats Limited to continue to breach s.20 of the Act.

[14] The present application encompasses allegations of breaches of s.20 of the Act pertaining to both sites. There are over a dozen individual claims of breach by the applicant Union. Characteristic of these alleged breaches were the artificially constraining of the time allowed for Union officials to attend at one or other of the sites, the requirement that a member of the management team of South Pacific Meats Limited be in attendance during some of the access visits sought, a failure to disclose to the applicant Union when new staff were being inducted so as to frustrate (it is said) the recruiting of those staff as Union members, a refusal on one occasion to allow the Union to distribute its newsletter, a refusal to accommodate an

access visit at all on the date the Union sought, and a refusal to respond in a timely manner to an access request.

[15] When the applicant's Mr Carran attended at the Awarua plant on 12 December 2014, as part of an access visit, Mr Carran spoke with the Plant Manager, Mr Kevin Hamilton, in which the two men discussed the initiation of bargaining for a collective agreement, according to the Union.

[16] The Union further contends that Mr Carran expressed frustration at the Union's attempts to gain appropriate access to discuss the proposed collective agreement and that within the course of the discussion, Mr Hamilton wished Mr Carran *"good luck"* and indicated that Michael Talley would never *"give up"* in his opposition to the Union's access to the plant and attempts to negotiate a collective agreement for the plant.

[17] Affidavit evidence before the Authority from Mr Hamilton denies any such observations of the sort alluded to in the preceding paragraph, were made, and denies having a conversation with Mr Carran about Michael Talley.

[18] Mr Tony Matterson is an organiser for the applicant Union in the Canterbury area and during an access visit on 28 January 2014 at the Malvern plant, Mr Matterson spoke with South Pacific Meats Limited's Wayne Lindsay about the Union's frustration at the employer's resisting its right of access and other associated frustrations and Mr Matterson alleges that Mr Lindsay confirmed that South Pacific Meats Limited's actions were *"about the company not wanting the union on site affecting Talley Js right to pay an employee as they wished without union interference"*.

[19] During an access visit at the Malvern plant on 9 October 2014, Mr Matterson claims to have suggested to Mr Lindsay (who was accompanying him), that Mr Lindsay read the 11 September 2014 determination of the Authority in relation to access at Awarua. Mr Lindsay is said to have responded by saying *"Michael Talley did not agree with that decision"*.

[20] An affidavit filed by South Pacific Meats Limited from Mr Lindsay denies making either remark, and denies ever having a conversation with Michael Talley about the Authority determination.

[21] It is said on behalf of the Union, but denied by the respondents, that Mr Michael Talley has incited, instigated, aided or abetted South Pacific Meats Limited's ongoing actions in breaching the Union's rights of access in the manner outlined above.

[22] It is further contended that Mr Michael Talley has made it clear to the management of South Pacific Meats Limited that he does not agree with the prior determinations of the Authority concerning access rights and in consequence he has encouraged management to continue to frustrate the Union's pursuit of access rights.

[23] Moreover, it is said for the Union that Mr Talley has indicated to South Pacific Meats Limited that it should be able to hire whomsoever it chooses and pay them whatever it wants without *"interference"* by the Union.

> [24] Further and finally, the Union contends that Mr Michael Talley has taken those steps to ensure that South Pacific Meats Limited complies with its access obligations and with the determinations of the Authority previously referred to.
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> [25] In pursuance of those allegations by the Union against Mr Michael Talley, the applicant Union made a further application to the Authority dated 7 April 2015 wherein counsel sought a direction that the respondents produce certain evidence. Counsel for the applicant Union put the matter thus in his application:
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> > *The issue of exactly what the second defendant did and didn't do in communicating with the managers of the first respondent in relation to access by the applicant's officials is therefore at the heart of these proceedings. For that reason, the applicant sought disclosure by the first and second respondents of the communications between the directors of the first respondent and its managers on issues of access.*
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> [26] The applicant Union sought an order from the Authority requiring the respondents to provide copies of all documentation between the directors of the first respondent and managers of the first respondent in relation to the exercise of statutory rights of access by the applicant Union.

[10] Although SPML and Mr Talley have sought by memorandum in effect to strike out the proceedings in this Court rather than by filing a formal application, in order to expedite the proceeding I have decided to deal with their claims as ones to strike out on the grounds of absence of jurisdiction. Both parties are concerned to know where they stand both as regards union access to the meat plants and as to the commencement of collective bargaining and these questions are still before the Authority. Delay, of the sort now flowing from this interlocutory application by the defendants, is not in the interests of good employment relations.

Whether this is a referral under s 177 or a removal under s 178

[11] I can deal with a preliminary submission made by counsel for SPML and Mr Talley shortly. Mr Malone submits that the referral by the Authority to the Court was pursuant to s 178, not s 177, of the Act. Although that was initially a matter of some confusion, it was clarified by the Authority upon invitation of the Court and it was clearly the Authority's intention to seek an answer to a question of law in the proceedings before it (under s 177) rather than to remove the proceedings or any part of them to the Court for hearing and decision under s 178. Although it remains open

to the Authority to remove the proceedings to the Court under s 178, I am satisfied it has not yet had recourse to this section. I will therefore treat the referral as one under s 177.

[12] Mr Malone's stronger alternative point is that s 177(4) (set out above) applies to the circumstances of this case to preclude the Authority from referring the question of law that it has posed for the Court.

The defendants' case in support of strike-out

[13] This relies on the privative provision contained in s 177(4) of the Act. The subsection must be read in a broader context of s 177 under which the referral of the question of law was made. This section has already been set out at [7].

[14] Mr Malone relies on broadly similar privative provisions in ss 178(6), 179(5) and 184(1A) of the Act. These subsections relate to removals of proceedings or parts of proceedings under s 178, challenges to Authority determinations under s 179, and applications for judicial review of the Authority under s 184.

[15] On 7 April 2015 the Union applied to the Authority for an order or direction in the following terms, that:

> the respondents provide copies of all documentation including letters, emails, memoranda and notes of telephone conversations between the directors of the first respondent [SPML] and managers of the first respondent in relation to the exercise of statutory rights of access by the applicant [the Union].

[16] It is unclear from the terms of the order, or directions sought, whether it was intended that such documents be provided by SPML and Mr Talley directly to the Union, or whether the application contemplated that these documents should be provided to the Authority for the purpose of its investigation, although acknowledging that some or all of them may have then been provided by the Authority to the Union. If there is a privilege in the documents as the defendants assert, their first destination is immaterial.

[17] Next, Mr Malone highlights the terms of the question of law which the Authority referred to the Court on 30 April 2015 in support of his argument that this is a matter concerning the Authority's procedure within the ambit of s 177(4). The Authority posed the question thus:

> … whether in an application by a party for orders seeking the disclosure of documents which would appear to be pertinent to a proceeding in the Authority, such an order can be granted even although it appears that the granting of such an order may have the effect of putting before the Authority material which could support an application against the party providing the documents, for the imposition of a penalty.

[18] Mr Malone argues that the essence of the Authority's question, which is whether it is empowered to make an order for disclosure of documents which may be self-incriminatory, is a question about whether the Authority may follow or adopt a particular procedure under s 177(4)(b).

[19] Mr Malone's argument is that the Authority's question of law referred to the Court is one about "discovery" (or disclosure) of documents which, counsel submits, makes this "clearly procedural" in the sense that document discovery or disclosure is a basic procedural question in civil litigation. Mr Malone submits that the Court is being asked by the Authority whether it may adopt a particular procedure; that being to order disclosure of documents that might give rise to liability for a penalty.

[20] In support of that broad contention Mr Malone argues that, in general, document discovery or disclosure processes are contained in rules or regulations empowered in legislation to be rules regulating the practice and procedure of the relevant court. Counsel uses the examples of s 122(1) of the District Courts Act 1947, s 51(1) of the Judicature Act 1908, although accepts that the regulation making power under s 237 of the Employment Relations Act does not refer to the word "procedure" when it permits regulations "… prescribing any act or thing necessary to supplement or render more effectual the provisions of this Act as to the conduct of proceedings before the Authority or the court."

[21] The defendants rely on the recent judgment of this Court in *Austin v Yoobee Lt.*[4] That was a case in which a party wished to challenge the Authority's preliminary determination about the admissibility of intended evidence. The Court held in *Austin*:[5]

> Determining that proposed evidence is inadmissible is a matter of the Authority's procedure. The scheme of the Act is for the Authority to get on and determine the proceeding on its merits. If Mr Austin is dissatisfied with the Authority's substantive determination of his grievance, he will have a right of challenge by hearing de novo. In the course of this, he will be entitled to re-argue the question of the admissibility of the evidence which the Authority has refused to consider. Thus, the Authority's determination on the inadmissibility of the evidence does not create an irrevocable injustice for Mr Austin.

[22] Mr Malone also relies on another recent decision of this Court in *Fletcher v Sharp Tudhope Lawyers.*[6] In that case a party purported to challenge an Authority Member's determination declining to order full disclosure of certain documents. Both *Austin* and *Fletcher* judgments referred to the full Court's unanimous judgment in *H v A Ltd*[7] finding that the privative restriction in s 179(5) precluded a challenge to a procedural determination of the Authority.[8] Mr Malone submitted that *H v A Ltd* is authority for the proposition that a determination of the Authority will not be "procedural" if it has substantive effect on rights, which cannot otherwise be remedied on a challenge, or by way of review. In particular, counsel emphasised the following passage from *Fletcher*:

> [17] The Authority has broad powers under the Act to call for evidence and information, and to take into account such evidence and information as it thinks fit, as part of its investigative process. … [A] determination by the Authority as to what documentation is relevant to its investigation is a matter of procedure. …
> …
> [19] While the determination may impact on the outcome of the Authority's investigation it will have no irreversible and substantive effect. That is because the issue of relevance may fall for later consideration on a subsequent de novo challenge, following an application of the formal disclosure provisions in this Court under the Regulations (which are a notably absent feature of the Authority's processes).

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[4] *Austin v Yoobee Ltd* [2014] NZEmpC 105.
[5] At [4].
[6] *Fletcher v Sharp Tudhope Lawyers* [2014] NZEmpC 182.
[7] *H v A Ltd* [2014] NZEmpC 92.
[8] *Fletcher*, above n 6, at [11], *Austin*, above n 4, at [4].

[23] So, Mr Malone submits, matters of "disclosure and admissibility are clearly procedural" and, in particular, ones about whether the Authority may or may not follow a procedural step in matters before it. Lastly, counsel for the defendants submits that it does not change the procedural nature of the question referred even if, as a result of following that step, the Authority might then make a determination which would affect substantive rights. That is said to be because it would only be after the determination had been made that any such substantive rights might be affected and the opportunity to challenge would then be available to the plaintiff.

The case for the Union

[24] This has been encapsulated in brief submissions from Mr Churchman QC. Counsel submits that the question of law referred to the Court by the Authority relates to the existence of a privilege against self-incrimination. Mr Churchman submits that the defendants have fundamentally mis-stated the nature of the application that was made to the Authority by describing it as one for "an order for discovery". Rather, the Union submits that its application was one for a direction made to the Authority under s 160(1)(a) of the Act.

[25] Counsel submits that this case is distinguishable from the judgments in *Austin* and *Fletcher* because it does not concern a question of admissibility of evidence, as did those cases, and in fact the Authority has not even seen the documents which are asserted to be privileged for reasons of self-incrimination.

[26] In these circumstances, Mr Churchman submits that the question of law referred is one of jurisdiction and not procedure, a fundamental question of law of the sort recognised by this Court in *Aarts v Barnados New Zealand.*[9]

[27] Alternatively, Mr Churchman submits that s 177(4) does not operate to preclude the Authority from referring this question of law to the Court. That is because, in counsel's submission, the Authority has not yet elected to follow any particular procedure and has not made any procedural ruling. Mr Churchman submits that the Authority has not decided whether the evidence is disclosable

[9] *Aarts v Barnardos New Zealand* [2013] NZEmpC 85.

because the defendants have challenged its entitlement to do so. Counsel submits that the defendants' position should be categorised directly as one challenging the power or jurisdiction of the Authority to exercise its powers under s 160 on the basis of a principle of law, privilege against self-incrimination. In other words, the Union submits that the referred question of law concerns whether jurisdiction exists to grant the order for which the plaintiff has applied and, in this regard, the Authority is seeking the Court's guidance on that question.

Discussion of s 177(4) issue

[28] Although adopting the same or materially very similar jurisdictional privative or ouster provisions as did other contemporaneous amendments to the Act (for example, s 179(5)), s 177 is not in the same category as those other provisions relating to review by the Court of Authority determinations. That is because s 177 contemplates expressly that where a question of law arises during an Authority investigation, the Authority may refer this to the Court for its opinion and delay its investigation until it receives the Court's opinion. It thus constitutes a statutory exception to the philosophy of the Act and its institutional arrangements, that matters generally should be disposed of in the Authority before they are subject to consideration or reconsideration by the Court. That general (but not immutable) philosophy was recognised and accepted by the full Court in *H v A Ltd* as expressed in the following paragraphs:

> [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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> [19] This intention is further supported by a number of other amendments introduced by the 2004 Act, namely ss 143(fa), 178(6), 184(1A) and 188(4).

[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 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.

[22] Section 160 details the Authority's powers. It states that, in investigating any matter, the Authority may follow whatever procedure it considers appropriate and take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[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.

[26] A refusal to make a non-publication order does not fall within s 179(5), not because such an order directly impacts on a party's rights or obligations but rather because the denial of such an order has an irreversible and substantive effect. It cannot have been Parliament's intention that a litigant in the plaintiff's shoes would have such an important issue (non-publication) determined at first and last instance by the Authority, with no recourse to the Court to review the Authority's refusal.

> [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.
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> [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.

[29] The referral and determination of a question of law such as in this case does not have the same substantive and irremediable consequences as were those of a refusal to make a non-publication order in *H v A Ltd*. It is, however, awkward, if not tortured, to say that the question of law posed by the Authority in this case affecting a party's obligation to disclose documents to the Authority (by asserting privilege in them), is a question about the procedure that the Authority is following, or is intending to follow, or about whether the Authority may follow, or adopt, a particular procedure.

[30] Turning to the case relied on particularly by Mr Malone, *Fletcher v Sharp Tudhope Lawyers*,[10] this 2014 judgment post-dated and both referred to and relied on the unanimous part of the judgment of the full Court in *H v A Ltd*.

[31] *Fletcher* was a case about whether a party was entitled to challenge a determination of the Authority not to require the other party to disclose fully (ie in unredacted form) certain documents. It is unclear from the judgment whether such disclosure was to be to the Authority or to the other party. Mr Fletcher challenged that determination and Sharp Tudhope Lawyers applied to strike out the challenge because, it said, this was precluded from consideration by the Court under s 179(5) of the Act.

[32] At [8] and following, Judge Inglis addressed the question as follows. After setting out subs (5) of s 179, which is materially identical to subs (4) of s 177, and referring to what was then the recent case of *H v A Ltd*, the Judge concluded:[11]

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[10] *Fletcher*, above n 6.
[11] At [11].

> … s 179(5) operates to preclude a litigant from challenging a procedural determination of the Authority. A determination will not be 'procedural' and will not be caught by s 179(5) where it has a substantive effect on rights, which cannot otherwise be remedied on a challenge or by way of review.

[33] The Judge in *Fletcher* relied on another recent judgment issued by the Court, *Austin v Yoobee Ltd.*[12] At [4] of *Austin* the Court held:

> … s 179(5) of the Employment Relations Act 2000 (the Act), as interpreted by the full Court in *H v A Limited*, precludes statutorily a litigant from challenging a determination of the Authority about its procedure. Determining that proposed evidence is inadmissible is a matter of the Authority's procedure. The scheme of the Act is for the Authority to get on and determine the proceeding on its merits. If Mr Austin is dissatisfied with the Authority's substantive determination of his grievance, he will have a right of challenge by hearing de novo. In the course of this, he will be entitled to re-argue the question of admissibility of the evidence which the Authority has refused to consider. Thus, the Authority's determination on the inadmissibility of the evidence does not create an irrevocable injustice for Mr Austin.

[34] It is notable that although *Austin* addressed an evidential admissibility question, the instant case, as did *Fletcher*, addresses the different question of disclosure of documents. Documents which may be required to be disclosed may not necessarily be admissible in a proceeding. Nor did *Austin* or *Fletcher* address the ground of objection to disclosure of documents raised in this case, privilege and, in particular, a contended-for non-statutory or common law privilege against self-incrimination.

[35] *Fletcher's* case dealt with the relevance of documents which were the subject of a claim for disclosure. Also, in *Fletcher*, the Authority had examined the documents which had been provided to it and concluded that these were not relevant to the matters before it. So the Court in *Fletcher* concluded that a determination by the Authority as to what documents were relevant to its investigation, was a matter of procedure under s 179(5). The Judge also concluded that the test as to whether something was a matter of procedure, was not whether the Authority's determination impacted on the parties. She held:

> [18] … Adopting such an expansive interpretation [of *H v A Ltd*] is not consistent with the wording of the provision and would undermine the scheme and purpose of the Act, for the reasons set out in *H v A Ltd*. The

[12] *Austin*, above n 4.

> reality is that any decision is likely to have some sort of impact. That cannot be the touchstone for founding a challenge from a determination at an interlocutory stage.
>
> [19] While the determination may impact on the outcome of the Authority's investigation it will have no irreversible and substantive effect. That is because the issue of relevance may fall for later consideration on a subsequent de novo challenge, following an application of the formal disclosure provisions in this Court under the Regulations (which are a notably absent feature of the Authority's processes).

Decision

[36] The present is not a case about the procedure that the Authority is following, or is intending to follow, or a question about whether the Authority may follow or adopt a particular procedure. The Authority's powers set out in s 160 clearly cover what it has been asked by the Union to do, that is to require SPML and Mr Talley to provide relevant documents to it. The power to do so is included within the Authority's investigative power to "call for evidence and information from the parties or from any other person".[13]

[37] I should also clarify the document disclosure process in the Authority because it is not the same as in the Employment Court or in other courts. The legislation does not provide a procedure for dealing with document disclosure and inspection directly between the parties as is the case, for example, under the Employment Court Regulations 2000. It may be possible theoretically for the Authority to direct one party to disclose to the other party alone, a document or class of documents or documents generally, that are relevant to the employment relationship problem. The more appropriate course for an investigative body such as the Authority may be for it to call for those documents to be provided to the Authority itself. It can then determine questions of relevance, privilege and the like. If documents disclosed to the Authority are relevant and are not subject to claims to privilege so that they will be considered as part of the Authority's investigation, then natural justice dictates that the Authority should provide these to the other party or parties.

[38] This is the filtering mechanism which can ensure that documents, to the disclosure of which a party objects, will not be disclosed to the other party or parties

[13] Employment Relations Act 2000, s 160(1)(a).

if the Authority determines they ought not to be. There is also the inbuilt safeguard that it will be open to the Authority to direct that the Member who inspects such documents, and determines their relevance and admissibility, is not the same Member who conducts the substantive investigation of the employment relationship problem, so that there can be no question of bias or predetermination by the Authority as a result of its consideration of documents that are inadmissible in the proceedings and/or may be privileged from disclosure.

[39] Unlike the other sections of the Act in which there are similar privative provisions preventing the Court from dealing with matters before the Authority has concluded its investigation and determined a case, s 177 contemplates expressly that the Authority may refer an issue of law to the Court for advice during the course of its investigations. It follows necessarily that these will be delayed pending the receipt of that advice from the Court. That is an exception to the general scheme of the legislation identified by the full Court in *H v A Ltd* that matters before the Authority should generally be allowed to take their expeditious and uninterrupted course to a conclusion in that forum before the Court exercises its statutory roles in respect of those proceedings.[14] So, in that sense, the privative provisions of s 177(4) may be seen, although in materially identical words, to arise in a very different context to the same privative provisions elsewhere in the Act.

[40] In these circumstances, it cannot be said that the same legislative philosophy governs their interpretation, at least in the same way as it does under, for example, s 179(5). Indeed, the referral of a question of law, as here, to determine the scope of the Authority's powers, or the existence of a claim to privilege which might confine those very broad general powers, narrows the otherwise very broad definition that the Court has applied to questions of the Authority's "procedure" in cases decided to date.

[41] The Authority has not, in reality, sought the Court's advice on how it should deal with the plaintiff's application for an order requiring the defendants to disclose documents, whether to the Authority in the first instance or to the plaintiff. Rather, the essence of the question referred is whether the Authority is empowered in law to

[14] *H v A Ltd*, above n 7, at [17].

require a party to disclose, in proceedings for a statutory penalty, documents which may or will incriminate that party in the proceeding. Put another way, the essence of the Authority's question is whether its broad power under s 160 (to call for evidence,[15] whether strictly legal evidence or not)[16] is constrained by a residual common law (that is, a non-statutory) protection that entitles a party to assert privilege in self-incriminatory documents.

[42] The Authority's referral of a question of law to the Court under s 177 will not be struck out. The Authority has not stated a question of law for the decision of the Employment Court contrary to s 177(4). In particular, the question of law referred by the Authority is not one about the procedure that the Authority intends to adopt in the case.

[43] There is an alternative way to decide this strike-out application against the defendants. It applies the reasoning of the full Court in *H v A Ltd*. Will the substantive consequences of requiring a party to produce self-incriminatory document, in proceedings for a civil penalty, cause that party irremediable damage or loss in the event that it is determined, on a challenge to the Authority's substantive decision, that the defendants were correct in law to assert the existence of such a privilege and were thereby entitled to resist disclosing these self-incriminatory documents?

[44] If there are relevant documents in the possession or control of the defendants the contents of which are self-incriminatory, the consequences of doing so wrongfully may not be confined to the Authority's determination but nevertheless be remediable on a challenge by hearing de novo. It is clear that such documents would be privileged under reg 44(3)(b) of the Employment Court Regulations 2000 on a challenge to this Court.

[45] Even if the incriminatory documents themselves might be unavailable on disclosure to the plaintiff on a challenge by hearing de novo, it is very likely that their contents will have been made known already to the plaintiff, whether by their

[15] Employment Relations Act 2000, s 160(1)(a).
[16] Section 160(2).

direct disclosure to it or following a direction to this effect by the Authority on the basis of natural justice. Not only will such self-incriminatory documents be referred to by the plaintiff in the Authority's investigation but, more significantly for the purpose of this decision, their contents are likely to be the subject of spoken evidence at the Authority's investigation including cross-examination of the defendants' witnesses.

[46] Even if such documents, having been disclosed by direction of the Authority, may be the subject of privilege when the proceedings reached the Court, their contents may be sufficiently relevant, and therefore admissible, to be able to be effectively put before the Court by viva voce evidence of what was said by witnesses in the Authority.

[47] In such circumstances, the protection of any privilege would be lost irrevocably.

[48] So, in this sense, documents which may be the subject of the exercise by the defendants of a claim to privilege against self-incrimination, and which would themselves not be disclosable under the Regulations, may nevertheless, by erroneous disclosure at this stage, cause the defendants irremediable loss in the circumstances outlined above.

[49] In this way, therefore, the case is a further exception (as was that of non-publication in *H v A Ltd*) to the prohibition on examination by the Court of the issue under s 177(4). The true nature of the question referred to the Court by the Authority does not amount to a question about the procedure that the Authority intends to follow, so that s 177(4) is not engaged.

[50] The irony of the defendants' application to reject the Authority's referral for jurisdictional reasons other than on its merits, is that if the defendants' application had been successful, it may have exposed SPML and Mr Talley to irremediably and significantly disadvantageous consequences. As the old proverb goes: "Be careful what you wish for".

[51] For the foregoing reasons, the Authority's referral of a question of law to the Court under s 177 survives the defendants' application to strike it out and should now be progressed to a hearing on the merits of the question or questions of law identified in this judgment.

[52] The plaintiff is entitled to costs on this interlocutory application which I fix in the sum of $1,000.

[53] The Registrar should now arrange a further telephone directions conference with counsel to expedite the Authority's referral to a hearing.

GL Colgan
Chief Judge

Judgment signed at 9.30 am on Thursday 25 June 2015