IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 150
ARC 34/13

IN THE MATTER OF	challenge to a determination of the Employment Relations Authority
BETWEEN	BARBARA MCCONNELL Plaintiff
AND	BOARD OF TRUSTEES OF MT ROSKILL GRAMMAR SCHOOL Defendant

Hearing:	17 June 2013 and by submissions filed by the defendant on 10 July 2013 and by the plaintiff on 18 July 2013 and correspondence by the defendant on 22 July 2013
Appearances:	Tim Oldfield and Shelly Kopu, counsel for plaintiff Richard Harrison, counsel for defendant
Judgment:	9 August 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] This challenge relates to a decision of the Employment Relations Authority (the Authority) granting the defendant's application for certain paragraphs of the plaintiff's proposed evidence to be withdrawn and resubmitted prior to an investigation meeting.

[2] The background to the challenge, which is pursued on a non de novo basis, is as follows.

[3] An employment relationship problem arose between the parties and they subsequently attended mediation. In February 2013 the plaintiff filed a statement of problem with the Authority. The statement of problem identified three issues that the plaintiff wished to have addressed. Firstly, an allegation that she had been

unlawfully suspended and given an unjustified final warning; secondly, that the defendant had breached its obligations of good faith to her by failing to be responsive and communicative regarding the allegations giving rise to the plaintiff's suspension and to mediate the subject matter of the personal grievance; and thirdly, an alleged breach of the employment agreement by suspending her in the absence of a contractual power to do so.

[4] Briefs of evidence were filed by the plaintiff. The defendant took issue with the contents of certain paragraphs of the briefs and sought an order from the Authority that the allegedly offending paragraphs be removed. In a minute dated 10 May 2013, the Authority partially granted the defendant's application. In doing so the Authority member found that the impugned evidence referred to what had been discussed at mediation, and that its prejudicial effect outweighed its probative value. She directed the plaintiff's briefs be resubmitted.

[5] The plaintiff contends that the Authority erred in excluding the proposed evidence. In summary, the plaintiff submits that the Authority member misapplied s 148 of the Employment Relations Act 2000 (the Act) and previous authority of this Court in *Rose v Order of St John*,[1] and ought not to have concluded that the impugned evidence's prejudicial effect outweighed its probative value.

[6] The defendant opposes the challenge.

[7] The plaintiff's challenge raises a number of issues. This first relates to the jurisdiction of the Court under s 179 of the Act to entertain it. The second relates to the scope of s 148 of the Act and, in particular, the meaning of the phrase "statement, admission, or document created or made for the purposes of the mediation." Because the second question only arises if the first question is answered in the plaintiff's favour I deal with the jurisdictional issue first.

[1] [2010] ERNZ 490.

Jurisdiction for challenge?

[8] The jurisdictional issue involves consideration of whether the Authority has made a "determination" for the purposes of s 179 of the Act and, if so, whether the determination is immune from challenge having regard to the scope of s 179(5).

[9] Section 179 sets out the circumstances in which a challenge may be pursued. It provides that:

> **Challenges to determinations of Authority**
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> (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.
>
> (2) Every election under this section must be made in the prescribed manner within 28 days after the date of the determination of the Authority.
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> (3) The election must—
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> (a) specify the determination, or the part of the determination, to which the election relates; and
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> (b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as a hearing de novo).
>
> (4) If the party making the election is not seeking a hearing de novo, the election must specify, in addition to the matters specified in subsection (3),—
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> (a) any error of law or fact alleged by that party; and
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> (b) any question of law or fact to be resolved; and
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> (c) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the court and the other parties of the issues involved; and
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> (d) the relief sought.

[10] Section 179(5) provides that:

> (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.

[11] It follows that the Authority must have issued a "determination" and that the challenge cannot relate to the procedure that the Authority has, is, or intends to follow.

[12] Neither issue is easy, although both have recently been considered by the Chief Judge in *Morgan v Whanganui College Board of Trustees*.[2] There the Chief Judge held that a minute issued by the Authority at an interlocutory stage, on issues relating to the admissibility of evidence proposed to be given in a forthcoming investigation, constituted a "determination" for the purposes of s 179 and that a challenge in relation to it fell within the jurisdiction of the Court notwithstanding the apparently restrictive wording of s 179(5).

[13] Mr Oldfield, counsel for the plaintiff, submitted that *Morgan* was directly on point and that it ought to be followed unless I was satisfied of two things. Firstly, that *Morgan* was wrong. Secondly, that it was desirable that any perceived error be corrected. He referred to two judgments of the former Chief Judge in support of this proposition.[3]

[14] The Employment Court is not bound by its previous decisions. There is, however, an interest in judicial comity, certainty, and consistency of approach. I have considered the jurisdictional issues in this case afresh, but having had the advantage of the analysis in *Morgan* and other judgments of this Court and of the Court of Appeal in relation to the scope of s 179(5).

[15] Section 179 must be interpreted in light of its text and purpose.[4] Statutory context is also pivotal. As Tipping J observed in *Commerce Commission v Fonterra Co-operative Group Ltd*:[5]

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning

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[2] [2013] NZEmpC 55.
[3] *Central Clerical Workers IUOW v Victoria University Students' Association* [1990] 2 NZILR 294 at 300 and *New Zealand Public Service Association v Electricity Corporation of NZ Ltd, Marketing Division* [1991] 2 ERNZ 365 at 376-377.
[4] Interpretation Act 1999, s 5.
[5] [2007] 3 NZLR 767 (SC) at [22].

> of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[16] The practical desirability of a particular interpretation is also relevant to the interpretative exercise.[6]

[17] "Determination" is not defined in the Act, although the Act variously refers to determinations, directions and other orders.

[18] The fact that the Authority member elected to issue her decision on the defendant's application by means of a minute suggests that she did not consider it to be in the nature of a determination. However, I accept that the label ascribed to a document is not, and cannot be, determinative of its legal status. That would allow form to trump substance.

[19] Section 174 (entitled "Determinations") sets out the procedural requirements relating to determinations. It provides that:

> In recording its determination on any matter before it, the Authority, for the purpose of delivering speedy, informal, and practical justice to the parties,-
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> (a) Must –
>
> (i) State relevant findings of fact; and
>
> (ii) State and explain its findings on relevant issues of law; and
>
> (iii) Express its conclusions on the matters or issues it considers require determination in order to dispose of the matter; and
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> (iv) Specify what order (if any) it is making; but
>
> (b) Need not-
>
> (i) Set out a record of all of the evidence heard or received; or
>
> (ii) Record or summarise any submissions made by the parties; or
>
> (iii) Indicate why it made, or did not make, specific findings as to the credibility of any evidence or person; or

[6] JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 182.

(iv) Record the process followed in investigating and determining the matter.

[20] In *Morgan* the Chief Judge held that a minute relating to admissibility issues met the bare requirements of s 174. The same conclusion can be reached in the present case having regard to the way in which the Authority member's minute is crafted. However, even assuming that the ruling in this case did amount to a determination for the purposes of s 179(5) (and the defendant did not seek to argue otherwise) it must still surmount the additional "procedural" stumbling block to fall within the Court's jurisdiction.

[21] Mr Oldfield submitted that the Authority's minute dealt with matters of substance, not procedure, and that the limitation in s 179(5) therefore does not apply. Mr Harrison, counsel for the defendant, submitted that a decision by the Authority member as to which evidence the Authority wishes/does not wish to consider in the context of its investigation is a matter of procedure that falls within s 179(5) and is accordingly excluded from the Court's jurisdictional reach.

[22] The definition of "procedure" for the purposes of s 179(5) was first considered by this Court in *Keys v Flight Centre (NZ) Ltd*.[7] In finding that the question of whether the Authority could issue Anton Piller orders was not a matter of procedure and therefore amenable to challenge under s 179(5), a full Court held that:[8]

> ... the notion of 'procedure' is limited to the manner in which the Authority conducts its business and does not include outcomes, substantive or interim, and certainly not a determination of jurisdiction.

[23] In a subsequent judgment of this Court in *Oldco PTI (New Zealand) Ltd v Houston*,[9] Judge Couch found that an Authority decision relating to a non-publication order was a matter of procedure and could not be challenged under s 179(5) of the Act. Judge Couch observed that, in assessing whether a decision of the Authority is procedural or not, it is more important to consider the effect of the

[7] [2005] ERNZ 471.
[8] At [51].
[9] [2006] ERNZ 221.

decision on the parties, rather than the nature of the power being exercised. He drew a distinction between substantive determinations, which affect the rights and obligations of the parties and which may be interim or final; procedural determinations, which direct the manner in which the employment relationship problem between the parties is resolved or determines the environment in which the investigation process takes place; and jurisdictional determinations, which determine whether the Authority has the power to make a substantive or procedural determination.[10] It was said that a key indication of whether a determination is substantive will be whether it affects the remedies sought and (if so) the determination will almost certainly be a substantive one.[11] I pause to note that in this case the plaintiff is seeking a penalty for an alleged breach of good faith relating to the position said to have been adopted by the defendant at mediation. For the reasons set out below, I do not consider that this is open to the plaintiff.

[24] Judge Couch concluded that:[12]

> If a determination is substantive or jurisdictional, it will be outside the scope of s 179(5) and open to challenge under s 179(1). If it is neither substantive nor jurisdictional, it is likely to be "about the procedure" of the Authority. Section 179(5) will then apply and no right of challenge will be available.

[25] In *Grant v Vice-Chancellor of the University of Otago*,[13] the following analysis was adopted:[14]

> By asking *whether* the Authority is empowered to do something, the question tends to indicate that s 179(5) is not applicable. By contrast, asking *how* the Authority may do (or did) something it is empowered to do, tends to engage s 179(5). ...

[26] Most recently, in *Morgan* the Chief Judge took a more restrictive approach to the definition of "procedure". While acknowledging what he saw as Parliament's intention in enacting s 179(5) that Authority investigations should run their course with limited interruption through interlocutory challenges in the Court, the Chief Judge nevertheless observed that:[15]

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[10] At [47]-[52].
[11] At [49].
[12] At [52].
[13] [2011] ERNZ 491.
[14] At [28].
[15] At [38].

> ... it is not a sound or satisfactory response to a litigant dissatisfied with a significant decision made by the Authority in the course of its investigation, that the litigant should wait patiently and stoically for the investigation to conclude and the Authority to issue its (final) determination before having an opportunity to right the Authority's perceived wrong. Such an approach will involve delay and the expenditure of sometimes precious and limited resources on concluding the Authority's investigation. If the Authority has erred in the course of its investigation, why should the error not be put right by a discrete challenge so that the Authority can continue to determine the employment relationship problem as Parliament wishes and reduce the inevitability of a challenge by hearing de novo with the greater attendant costs and delays?

[27] The Chief Judge also noted that "procedural" errors of the Authority carried the potential for irrevocable consequences which could not be remedied by delayed challenge in the Court.[16] Given the potential for such substantive consequences emanating from ostensibly procedural decisions of the Authority, it was held that the definition of "procedure" for the purposes of s 179(5) ought to be construed as strictly and narrowly as possible:[17]

> A decision of the Authority may both affect the nature of its process but also have substantive effect on the outcome of the case. Simply because the matter decided may have a procedural element does not engage automatically subs (5). Rather, I consider that the Court must stand back and make an overall assessment of whether the Authority's determination is both procedural and is not substantive, in which case subs (5) will be engaged. If, however, there are elements of procedure but also substantive consequences, the subsection may not preclude a challenge. There is no bright line that separates procedure and substance, at least in all cases. A decision that might be said to address *how* the Authority will conduct its investigation might also have significant effects on its outcome.

[28] On this interpretation of s 179(5) a "determination" of the Authority as to the admissibility of evidence was not only procedural but also substantive in that it affected the substantive outcome of the case and "confines and prejudices the case of the party ruled against". Accordingly it was capable of giving rise to a challenge under s 179 of the Act.[18]

[29] Section 179(5) was enacted under the Employment Relations Amendment Act (No 2) 2004, as part of a broader suite of amendments to the Act. The nature

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[16] At [50].
[17] At [58].
[18] At [68].

and scope of the amendments is telling, and reflects a clear Parliamentary desire to limit the role of the Court in relation to matters that are before the Authority.

[30] The explanatory note to the Employment Relations Law Reform Bill, from which the Act was derived, stated that:[19]

> 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.

[31] The 2004 amendments inserted s 184(1A) which limited applications for judicial review in relation to matters before the Authority to instances where the Authority had issued a "final determination". Section 188(4) was also enacted, providing that it is "not a function" of the Court to advise or direct the Authority in relation to the procedure "that it has followed, is following or intending to follow" or that it may follow or adopt. Section 143(fa) provided that one of the legislative objectives was to ensure that the Authority's investigations were generally concluded before the Court became involved. Sections 177(4) and 178(6) sought to limit the powers of the Authority to refer questions of law to the Court and remove matters to the Court, respectively, to exclude the referral or removal of any question or matter about the procedure the Authority has followed, is following, or is intending to follow.

[32] It is apparent that a considerable number of submissions were made on the Employment Relations Law Reform Bill,[20] including by the then judges of the Employment Court who expressed particular concern about what would ultimately become s 179(5) of the Act (then cl 57 of the Bill), observing that: "considerable irreparable damage may be done by interlocutory decisions that could be described as procedural, and that there would be a risk of arbitrary decisions if the Authority

[19] Employment Relations Law Reform Bill (92-1) (explanatory note) at 7.
[20] See JF Burrows and RI Carter *Statute Law in New Zealand* at 281, noting that reliance may be placed on parliamentary materials, including governmental reports and submissions to select committees, in the course of the interpretative exercise.

was immune from review."[21] The Department of Labour, however, recommended no changes to the Bill in relation to this clause, commenting that:[22]

> The policy intent is to enable the Authority, as an investigative body, to more effectively exercise its role and functions in examining and resolving employment relationship problems. This should be done without undue focus on procedural technicalities.

[33] In relation to what is now s 184(1A), which was the subject of similar concerns, it was said that:[23]

> The policy intent is to enable the Authority to settle the matter at the appropriate level, with as little legalistic intervention during the process as is possible.
>
> The right of appeal or review is still available to parties once the Authority has made a final determination on the matter before it. This allows any technical or legal or procedural matters to be addressed if required.
>
> It is considered that the ability to appeal Authority determinations will allow procedural problems to be resolved. If any procedural problems remain after the appeal has been decided, judicial review may be pursued.

[34] As it transpired, the Department's recommendations appear to have prevailed as no changes were made to these provisions.

[35] In my view this material reinforces what is evident from a consideration of the Act as a whole, having particular regard to the provisions relating to the jurisdiction of the respective employment institutions and the statutory indicators as to the way in which the Authority is to undertake its functions – namely that the ability of the Court to intervene before or during an Authority investigation is limited to matters not related to the procedure followed or intended to be followed by the Authority. The Act makes it clear that matters are generally to be concluded in the Authority before the Court may intervene, reinforcing the low level, cost effective, non technical, and practical way in which employment relationship problems are to be resolved.

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[21] Department of Labour *Employment Relations Law Reform Bill* (ER/DOL/5, 2004).
[22] At 131.
[23] At 133.

[36] Section 143 sets out the objects of the Part 10 of the Act ("Institutions"). It focuses on the expeditious resolution of employment relationship problems and the relatively informal manner in which the Authority is expected to operate. The following clauses of the provision are particularly relevant:

> The object of this Part is to establish procedures and institutions that –
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> ...
>
> (c) recognise that, if problems in employment relationships are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available at short notice to the parties to those relationships; and
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> (d) recognise that the procedures for problem solving need to be flexible; and
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> ...
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> (f) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and
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> (fa) ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to investigations; and
>
> (g) recognise that difficult issues of law will need to be determined by higher courts.

[37] While mindful of the Chief Judge's concerns voiced in *Morgan*, I do not consider that a narrow approach to what constitutes a procedural determination of the Authority is consistent with these objectives. It would likely encourage challenges at a pre-investigative stage, increase costs and the incidence of judicial intervention, place an enhanced focus on technicalities, and cause (as this case demonstrates) significant delays.

[38] Section 157(1) ("Role of the Authority") reinforces this point. 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.

[39] The position is also underscored by the special nature of the Authority, including the provisions conferring powers on it. The Authority has broad powers, both in relation to the sort of evidence and information it may receive during the course of an investigation, and more generally to determine its own processes. It may, in investigating any matter, follow "whatever procedure [it] considers appropriate",[24] and it may decide who to hear from (and, by logical extension, who it will not hear from) throughout the course of an investigation.[25] It may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.[26] And it enjoys exclusive jurisdiction "to make determinations about employment relationship problems generally", including personal grievances.[27]

[40] In my view a narrow reading of s 179(5), subjecting a broad range of rulings made by the Authority prior to the conclusion of the investigative process to challenge in this Court, is not consistent with the clear legislative intent of the provision and the statutory scheme more generally. I cannot agree that Parliament intended that only rulings in the nature of, for example, a decision about whether to take evidence by telephone or to conduct an investigation meeting around the table, would be excluded from challenge.[28] Conversely nor can I accept that Parliament intended that rulings of the sort at issue in the present case would be subject of challenge in this Court, and I do not consider that the wording of the provision leads to such a result.

[41] As the Court of Appeal observed in *Employment Relations Authority v Rawlings*:[29]

> The Act provides for the Employment Court to supervise the Authority either by challenge under s 179 or by way of review under s 194. The Act makes it clear, albeit in different ways, that the general policy of the Act is against such supervision being exercised in relation to procedural rulings.

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[24] Section 160(f).
[25] Section 160(1)(a).
[26] Section 160(2).
[27] Section 161(1).
[28] The two examples referred to in *Morgan* as the sort of determinations to which s 179(5) was intended to apply, at [27].
[29] [2008] ERNZ 26 (CA) at [23].

[42] The Court went on to say that:[30]

> We are satisfied that ss 179(5) and 184(1A) are intended to prevent challenge or review processes disrupting unfinished Authority investigations. But once the investigation is over and a determination has been made, there is no reason for limiting the challenge and review jurisdictions of the Employment Court. If the procedure adopted by the Authority has had a decisive influence on result (eg by refusing an adjournment and proceeding in the absence of a witness), the affected party, in the course of questioning that result, will be entitled to put in issue that procedure.

[43] The refusal of an adjournment or proceeding in the absence of a witness may have a substantive impact. However, the judgment in *Rawlings* emphasises the particular statutory framework provided for the resolution of employment disputes, and the fact that disappointed litigants have an ability to pursue a challenge in the Court on a de novo basis. The conclusion that a ruling on the content of proposed witness briefs constitutes a determination for the purposes of s 179(5) sits uncomfortably with the distinction the Court of Appeal appears to draw between a ruling and a determination following an investigation. It is tolerably clear that what the Court was referring to was a substantive determination of the employment relationship problem.

[44] Mr Oldfield submitted that s 179(5) constitutes a privative provision and accordingly ought to be construed restrictively. I do not agree. A privative provision is generally one that ousts a right of appeal or review. By contrast, s 179(5) simply operates to regulate, by deferring, the involvement of the Court.

[45] As the Court of Appeal emphasised in *Rawlings*, although s 179(5) limits the right of challenge in respect of ongoing Authority investigations, once that investigation has been completed the affected party retains a right of challenge in the Court by way of hearing de novo. Via this means perceived deficiencies in the process followed by the Authority can be revisited. I therefore do not accept that excluding a right of challenge in the circumstances of this case inhibits or excludes the plaintiff's right to justice.

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[30] At [26].

[46] As the Chief Judge noted in *Morgan*, a broader interpretation of s 179(5) may potentially lead to prejudicial impact in some cases. However, any such impact is ameliorated, at least to some extent, by the expansive challenge rights conferred under the Act and must in any event be viewed against Parliament's clear intention of ensuring the effective operation of the employment institutions by allowing the Authority to conduct its investigative processes freely and with minimal interference from the Court at an interlocutory stage.

[47] I consider that a ruling on whether the Authority member would receive certain evidence prior to the investigation meeting falls into the procedural categorisation. It related to the way in which the Authority would conduct its investigation, and decisions were made as to the extent to which it would hear from the various witnesses (as it is empowered to do under s 160). Accordingly the question posited in *Grant* in the circumstances of this case is answered by way of reference to "how" not "whether".

[48] The plaintiff submits that her rights and interests are affected by the Authority's decision relating to what evidence she can call. In particular it is said that her ability to establish a breach of good faith, and the associated penalties she seeks, will be undermined. In *Rawlings*, the Court of Appeal held that an "unless" order issued by the Authority was not procedural because it brought the Authority's investigation to an end. It accepted that the Authority's actions impacted on the defendant's rights and interests. The Authority's decision in the present case does not substantively determine the plaintiff's rights or interests. Rather it affects the way in which it will come before the Authority for substantive determination. The plaintiff's claim remains intact, although the evidence that the Authority will receive will be limited. That is always the case where rulings have been made about, for example, what witnesses the Authority will and will not hear from, and what evidence will and will not be heard.

[49] While Mr Oldfield invited me to adopt a narrow interpretation of s 179(5), significantly reducing the range of procedural determinations and therefore opening the scope for challenges at an interlocutory stage, I am driven to the view that this

would be contrary to the text and purpose of the provision, and the overall scheme and purpose of the Act. Accordingly, I decline to do so.

[50] I conclude that the Court does not have jurisdiction to hear the challenge. It is accordingly dismissed.

The merits of the challenge

[51] Even if I am wrong about the jurisdictional point, I would not otherwise have found in favour of the plaintiff's challenge.[31]

[52] The Authority considered the proposed evidence and concluded that it ought not to be received by it. It had particular regard to s 148 of the Act, which provides that, except with the consent of the parties, a person who provides mediation services, or is a person to whom mediation services are provided, must:

> (1) … keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of mediation, is disclosed orally in the course of the mediation.
>
> …
>
> (3) No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document, or information that, by subsection (1), is required to be kept confidential.

[53] The underlying policy objectives of the provision are well known, namely to encourage parties to mediation to speak freely and frankly and safe in the knowledge that their words cannot be used against them in subsequent litigation if the dispute does not prove capable of settlement: *Just Hotel Ltd v Jesudhass*.[32]

[54] While Mr Oldfield suggested that the Court of Appeal had failed to adequately consider the scheme and purpose of s 148 in its approach to the interpretative exercise having regard to the Supreme Court's earlier judgment in *Commerce Commission v Fonterra Co-operative Group Ltd*,[33] I do not consider that that submission can be sustained. In any event, *Just Hotel* is binding on this Court.

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[31] Which was limited, in terms of the Statement of Claim.
[32] [2008] 2 NZLR 210, [2007] ERNZ 817 (CA) at [34].
[33] [2007] 3 NZLR 767 (SC).

[55] Mr Oldfield relies on a recent judgment of the Chief Judge in *Rose v Order of St John*[34] as authority for the proposition that evidence may be led about the subject matter, as opposed to the content, of mediation. Mr Harrison submits that while *Rose* may have opened the door to such an inquiry it did not go so far as permitting evidence relating to what occurred at mediation. That would, he said, overreach the boundaries referred to by the Court of Appeal in *Just Hotel* where only a limited exception was acknowledged (relating to blackmail). I agree with Mr Harrison that the protections afforded by s 148 are to be jealously guarded if they are to be effective.

[56] The Authority member had regard to *Rose*, but concluded that it was distinguishable on the facts. She expressed doubts as to whether the Authority member dealing with the matter would obtain any real assistance from the disputed material in reaching a decision on the merits of the plaintiff's personal grievance and that allowing evidence of what had been said undermined the purpose of s 148. She noted that it was vitally important for the viability of the mediation process that parties came to it with confidence that what was said and communicated during the process, and particularly statements which may be prejudicial to them, remained confidential. She concluded that paragraphs of the plaintiff's evidence referred either directly or indirectly to what had occurred at mediation, and ought not to be received.

[57] I turn to consider the proposed evidence and the Authority's conclusions in relation to it.

[58] The Authority upheld the defendant's objection to certain paragraphs of the plaintiff's proposed evidence, referring to a discussion between the parties' representatives. The conversation (which the plaintiff was not privy to) included reference to the position the defendant might take at a mediation meeting the parties had agreed to attend. The plaintiff's proposed evidence that was the subject of the Authority's consideration refers to the conversation and concludes with the assertion that: "As matters transpired, that was exactly what happened at the mediation." The Authority concluded that the proposed evidence indirectly referred to discussions at

[34] [2010] ERNZ 490.

mediation, was prejudicial, and referred to communications within the mediation which were not part of the subject matter. She also noted that the proposed evidence was based on hearsay.

[59] Mr Oldfield submits that the parties were not being provided with mediation services at the time the discussion took place, and nor were the representatives making or creating statements for the purposes of mediation. He submits that while the parties had agreed to mediate, mediation is not a "jinx" word that casts a cloak of confidentiality over all subsequent negotiations. Nor, he says, does s 148 prevent the Authority from inquiring into what the parties agreed to mediate about, their discussions or correspondence leading to the agreement to mediate or the subject matter or topic of mediation. Mr Oldfield says that the Authority's concerns about hearsay are remedied by a new brief of evidence from the plaintiff's former representative, who can give direct evidence in relation to the telephone conversation.

[60] Mediation had been agreed to between the parties before the discussion took place, although it is (as Mr Oldfield points out) unclear as to whether mediation had by that stage been formally accessed under s 146. The mediation was plainly the subject of discussion between the parties' representatives and extended to what may or may not be traversed in that forum. In this sense the discussion was inextricably linked to mediation, and comprised statements made for that purpose. While it was submitted that s 148 is limited to communications that occur during the course of mediation and, accordingly, excludes pre-mediation communications I do not consider that the provision has such limited application. If it were so, documentation produced by the parties for the purposes of pending mediated discussions would not be protected under s 148's umbrella. That would be inconsistent with the underlying purpose of the provision.[35] It is less clear whether the protections afforded by s 148 extend to circumstances preceding an application for mediation or some later point in the process. That is not however an issue that needs to be decided in the context of this challenge.

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[35] See *Lowe v New Zealand Ltd* [2003] 2 ERNZ 172, where it was held that a letter did not exist independently of the mediation process despite having been prepared before the mediation occurred, and was protected under s 148. See also *New Zealand Fire Service Commission v McEnaney* AC36A/03, 21 August 2003.

[61] The Authority's conclusion that paragraphs 117 to 122 of the plaintiff's proposed brief of evidence should not be received was based on an assessment that they indirectly referred to what was discussed at mediation. That conclusion follows from references to the telephone conversation and alleged statements about what the defendant's position at mediation would be and her concluding remark that that was exactly what had come to pass at mediation. I agree with Mr Harrison that the proposed evidence considered by the Authority effectively amounted to a backdoor way of giving evidence about what was actually said or not said at mediation. I do not consider that the Authority member erred in concluding that it ought not to be received. Any residual issues relating to the extent to which the plaintiff's former representative's proposed evidence may be objectionable (on the basis that the conversation was conducted on a without prejudice basis) cannot be resolved in the context of this challenge and on the material before the Court.

[62] I do not accept Mr Oldfield's submission that the circumstances of the present case are indistinguishable from *Rose*. In that case no personal grievance was raised prior to mediation and it was unclear what the subject of the mediation was. That is not the position here, as the Authority member noted. Further, it is evident that it is the response during the course of mediation that the proposed evidence is focused on, not the subject matter of mediation (which is otherwise clear from the parties' documentation).

[63] Mr McConnell's proposed brief of evidence (under the heading "Mediation") refers to discussions at mediation and the defendant representative's alleged responses. Mr Oldfield submitted that this proposed evidence dealt with the subject matter or topic of mediation and was unobjectionable, being "precisely the type of evidence the Court permitted the grievant to lead in *Rose*."

[64] In *Rose*, the Chief Judge observed that:[36]

> Ms Rose seeks to lead evidence that her complaints were not dealt with and that the mediation addressed issues other than her own dissatisfactions with her employment, for the resolution of which it had arranged the mediation.

[36] At [3].

[65] However, the focus of Mr McConnell's proposed evidence is on the responses said to have been made to alleged suggestions made by the plaintiff during the course of the mediation. This is a clear reference to alleged oral disclosures made during mediation, and is squarely within the protected category of communications referred to in *Just Hotel*.

[66] The proposed evidence also relates to the alleged impact of what went on at mediation with the plaintiff. Mr Oldfield submitted that Mr McConnell's observations in relation to his wife were comments about her state of mind and distress and were unobjectionable.

[67] While I agree with Mr Oldfield that s 148 may not extend to preventing a person describing their feelings at a point after mediation, that is plainly not the effect of the impugned evidence, which is squarely linked to what is said to have occurred at mediation. The Authority was right to exclude this proposed evidence.

[68] Ms Pulsford's intended evidence includes reference to her perception of the engagement or otherwise of Board members who attended the mediation. Mr Oldfield submits that this proposed evidence deals with the subject matter or topic of mediation, relying on *Rose*. I do not accept this submission. The proposed evidence plainly relates to what occurred at mediation and what was drawn from it.

[69] The Authority member considered whether the prejudicial effect of the proposed evidence would outweigh its probative value, including the extent to which it may compromise the defendant's ability to respond to it. Mr Harrison expressed a concern that, if evidence was permitted in relation to what occurred at mediation the defendant would be prevented from calling evidence to refute it, having regard to the restrictions in s 148. Mr Oldfield accepted that in fairness the defendant would need to be able to call evidence.

[70] However such a result points to the undesirability of the approach advanced on the plaintiff's behalf. Effectively the door that was partially opened in *Rose* would be blown off its hinges, and any party would be able to claim a breach of good faith based on what occurred, or did not occur, at mediation and call evidence in

relation to it. That would be contrary to s 148, and the concern to preserve mediation confidentiality expressed by the Court of Appeal in *Just Hotel*. Nor do I consider that the Authority member erred in failing to make express reference to the powers conferred on the Authority by s 160. The focus of her consideration was squarely on s 148, as it was required to be.

[71] Further, and as the Authority noted, there appears to be minimal probative value in much of the proposed evidence, and certainly not enough to outweigh the prejudicial effects its admission would otherwise have.

[72] Ultimately, the plaintiff is alleging that the warning that was given to her by the Board was unjustified, and that her transfer of duties was similarly unjustified. As Mr Harrison points out, these events preceded mediation by a number of months. He suggests that the purpose of trying to get the proposed evidence before the Court is to embarrass the defendant and cast a negative light on it, in an attempt to distract the Authority from the real issues before it. Whether that is so is not a matter that I need to resolve.

[73] I do not consider that the Authority erred in concluding that the proposed evidence should not be received as part of its investigation of the plaintiff's grievance.

[74] Costs are reserved at the request of the parties.

Christina Inglis
Judge

Judgment signed at 2.30pm on 9 August 2013