IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 55
WRC 3/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	LEE MORGAN Plaintiff
AND	WHANGANUI COLLEGE BOARD OF TRUSTEES Defendant

Hearing: By written submissions filed on 11, 20 and 21 March 2013

Appearances: David Burton, counsel for plaintiff
Peter Churchman, counsel for defendant

Judgment: 10 April 2013

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] The defendant has applied to dismiss the plaintiff's challenge from what I will refer to deliberately as a decision of the Employment Relations Authority. The defendant says that there is no determination of the Authority to be challenged but, even if there is, the Employment Relations Act 2000 (the Act) prevents the Court from entertaining such a challenge.

[2] The parties have agreed to the Court dealing with what amounts to a strike-out application on written submissions without a hearing to expedite either the challenge on its merits (if the plaintiff is successful) or the Authority's convening of the investigation meeting (if the defendant is successful).

[3] The plaintiff was employed as a teacher and claims to have been dismissed unjustifiably by the defendant. The plaintiff seeks to rely on evidence of communications between the parties' lawyers that preceded the dismissal. He has

referred to the fact and detail of these discussions in his statement of problem filed in the Authority. I have not seen this and the parties do not wish me to do so. The defendant has objected to this evidence being considered by the Authority, saying that the communications took place "without prejudice" or otherwise by agreement that they could not be brought up in litigation subsequently. The defendant raised its objections with the Authority not only to the content of the statement of problem but as an anticipatory objection to evidence being introduced by the plaintiff of these discussions.

[4] The Authority issued what it described as a "Minute" on 29 January 2013 which said that these discussions would not be admissible in evidence. It is that decision contained in the "Minute" that is the subject of the plaintiff's challenge.

[5] The defendant says that this decision by the Authority is not amenable to challenge now and the plaintiff will simply have to wait to challenge the Authority's determination on the merits of his claims in due course if he is dissatisfied with the outcome of its investigations. By the then lawful process of a challenge to this Court, the defendant says that the issue will be able to be argued so the plaintiff will have another opportunity to submit that the impugned discussions are admissible.

[6] There are two issues for decision. The first is whether there is a determination of the Authority that may be challenged. Second, if there is, does s 179(5) prohibit the plaintiff from challenging that determination?

Is there a "determination" of the Employment Relations Authority's challenge?

[7] The starting point for decision of the defendant's application is the statute, both the particular section or sections dealing with this issue, and the scheme of the legislation as a whole, in light of which the individual provisions must be interpreted.

[8] Section 179 ("Challenges to determinations of Authority") of the Employment Relations Act 2000 (the Act) permits a party "to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of

that determination …" to elect to have the matter heard by the Court. What amounts to a "determination" is not specified as such in the legislation. A determination is a new term of art coined by Parliament in 2000 as part of what was a broader and deliberate strategy to get away from a conventional judicial approach to employment dispute resolution and its nomenclature. So, for example, the Employment Relations Authority holds "investigation meetings" rather than "hearings", and "challenges" rather than "appeals" are the mechanism to be used by dissatisfied parties. A "determination" instead of a "decision" or a "judgment" defines an outcome in the Authority.

[9] The reference in s 179 to "*the* determination of the Authority or any part of *that* determination" (my emphasis) may tend, by use of the definite articles, to suggest that the Authority will issue one determination in a matter before it. That does not occur in practice: for example, the Authority frequently issues substantive and supplementary (costs) determinations in the same matter. To use another practical example, in a case in which the existence of an employment relationship is disputed, the Authority frequently conducts a preliminary investigation into that issue, deciding it by issuing a determination. If it finds that there was an employment relationship, the Authority will then go on to decide a grievance or other complaint on its merits by issuing a second determination in the same matter.

[10] As a matter of reality and practicability, I do not consider Parliament could have intended, by using the definite articles "the" and "that" in relation to the word "determination" in s 179, to refer only to a single determination in a matter. The Authority can and does issue multiple determinations in matters before it so that, subject to s 179(5), there is no single right of challenge to an Authority determination in any particular case.

[11] Section 174 of the Act, without defining what are "determinations", nevertheless sets out what must and may not be included in "recording its determination on any matter before it". The delivery of determinations is to be "for the purpose of … speedy, informal and practical justice to the parties". A "determination" must, nevertheless, state relevant findings of fact, state and explain findings on relevant issues of law, express the Authority's conclusions on matters or

issues it considers require determination in order to dispose of the matter, and specify what orders (if any) it is making: s 174(a).

[12] A determination need not set out a record of law or any of the evidence heard or received, record or summarise any submissions made by the parties, indicate why it made, or did not make, specific findings as to the credibility of any evidence or person, or record the process followed in investigating and determining the matter: s 174(b).

[13] To decide whether an utterance of the Authority amounts to a determination can, therefore, be assisted by a consideration of whether the minimum requirements under s 174(a) have been met. That is not to say, of course, that the presence or absence of those mandatory features determines whether a decision is a determination or not. The Authority might issue to the parties what would, for other intents and purposes, be a determination (in the sense of being its final decision on a case) but fail inadvertently to specify what orders it is making. That would not disqualify the result from being a determination[1] but the appearance of those factors in s 174(a) is helpful in determining whether what the Authority has issued is a "determination".

[14] Also relevant in defining a determination is s 179(5) added by Parliament in 2004[2] which limits the application of the balance of the section allowing challenges. Subsection (5) provides:

> 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.

[15] So it may be seen that Parliament has intended that a determination can include a procedural decision, what might be termed elsewhere either an interlocutory judgment or a minute.

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[1] It would be an incomplete or defective determination, but a determination nonetheless.
[2] Section 179(5) is at the centre of the second question for decision but it also assists in deciding this first question.

[16] Also relevant is s 184(1A) which addresses restrictions on judicial review proceedings in relation to matters before the Authority. It provides:

> No review proceedings under section 194 may be initiated in relation to any matter before the Authority unless—
> (a) the Authority has issued *final determinations* on all matters relating to the subject of the review application between the parties to the matter; and
> (b) (if applicable) the party initiating the review proceedings has challenged the determination under section 179; and
> (c) the court has made a decision on the challenge under section 183.

[17] As can be seen by the words italicised by me, s 184(1A) refers to the Authority issuing "final determinations on all matters … between the parties to the matter". This begs the question whether they are both "determinations" and "final determinations" and, if so, what constitutes the former. That also reinforces my conclusion that s 179's reference to "the" and "that" determination, is not confined to a single decision in any case.

[18] The full Court considered the definition of a "determination" for the purposes of s 179 in *Abernethy v Dynea New Zealand Ltd.*[3] Although not on an analogous point to that which arises in this case, the Court nevertheless held that what is a "determination" is to be interpreted broadly and encompasses not just the matters on which the Authority relied in disposing of proceedings but also the entirety of the employment relationship problem before it. That is an approach which is consistent with a definition that is not restricted to the single document that the Authority issues containing its decision and reasons for it at the conclusion of its investigation.

[19] Relevant, although not determinative of the question, is the description by the Authority of the document in which it gave directions in this case. This was styled a "Minute", a common term used by courts and the Employment Relations Authority for giving formal directions to parties about the matters before it. That is to be contrasted with the final decisions issued by the Authority which are almost inevitably styled "Determination of the Authority".

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[3] [2007] ERNZ 271.

[20] Despite being entituled (fully) "Member's Minute 'Without Prejudice Discussions'" and, at [1] saying that it concerned "a preliminary procedural matter for resolution prior to the Authority investigating the substantive employment relationship problem", the impugned decision looks like a determination of the Authority. It is fully entituled. It sets out the dates on which submissions were received, and the decision and reasoning runs to 19 paragraphs over five pages. The Authority Member reserved costs at the conclusion of this document. In appearance, it is not dissimilar to many Authority determinations, especially those that deal with preliminary issues that are dispositive of the matter before the Authority such as whether there has been an effective settlement of the litigation, that a grievance has been raised or filed out of time, and the like. There is no doubt that such documents are determinations.

[21] But it is, of course, the substance rather than the form of the document that is important, and that makes it clear that the Authority Member was dealing only with whether certain evidence (albeit evidence relied upon crucially by one party) would be admissible at its investigation meeting.

Decision – a determination?

[22] I conclude that although styled a "Minute", the Authority's decision which is the subject of challenge, is a determination of the Authority. It is a determination other than a final determination and is, arguably, a determination about the Authority's procedure (s 179(5)) although that is the next question for decision in this judgment. It contains the criteria that a determination of the Authority must contain. It is, in short, a determination of the Authority.

An unchallengeable determination?

[23] This is the second and more difficult question for the Court and will depend for its decision upon an examination of s 179(5) and principles emerging from cases decided under this subsection. I have already set out s 179(5) at [14].

[24] The defendant says that the Authority's decision to exclude what it categorises as inadmissible evidence, was the exercise of a discretion by it to admit or receive evidence. Mr Churchman submits that the Court is not entitled to review the exercise of such a discretion by the Authority and is not entitled to direct the Authority as to what evidence it will or will not admit under ss 184 and 188(4) of the Act.

[25] I can and should deal with that submission immediately. Whether the Authority is exercising a discretion is not determinative of whether s 179(5) applies. Matters of procedure may be discretionary but all are not necessarily so. Conversely, matters that are not procedural, and may be described as substantive, may nevertheless involve the exercise of a discretion by the Authority.

[26] Nor is it determinative of the issue under s 179(5) whether the Court may direct the Authority about the admission of evidence under ss 184 and 188(4). If there is a right of challenge to a determination of the Authority,[4] then the Court may determine that the Authority erred. Identifying error in Authority determinations is not what Parliament sought to prohibit by ss 184, 188(4) and 179(5). Rather, in a narrower sense, Parliament has intended that the Authority should be able to get on generally with the development of its own investigative methodology for solving employment relationship problems without undue interference by the Court. On the other hand, the Court's role is to ensure the Authority's compliance with applicable legal principles and if this requires the Court to determine whether evidence ought to be admitted or excluded from the Authority's investigation under its broad statutory powers to admit or exclude evidence, then that is the Court's function.

[27] The Parliamentary intention behind the enactment of subs (5) may be discerned from the statute itself to be a wish to prohibit the Court from advising or directing the Employment Relations Authority about its investigative and decision making methodology. So, for example, it would not be open to a party to challenge, and therefore for the Court to rule on, an Authority practice such as taking evidence by telephone or taking evidence by swearing in all participants at the same time and

[4] Particularly if the challenger elects to challenge otherwise than by hearing de novo, but very arguably also in de novo challenges.

engaging them collectively in a round table discussions. These are both examples of methodologies that I am aware that the Authority Members have adopted on a case by case basis on occasions. Those are the sorts of unique procedures that are foreign to traditional adversarial courts, and would seem to be behind the prohibition on the Court dealing with the rights and wrongs of them.

[28] Section 143(fa) of the Act, inserted by Parliament in 2004, relates to the object of Part 10. It governs how s 179(5) is to be interpreted and is as follows:

> (fa) [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;

[29] As the submissions made for the defendant by Mr Churchman point out, s 143(fa), which addresses the object of Part 10 of the Act, says that it establishes procedures and institutions that (among other things): "… ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations; …". I interpret "the specialist decision-making body" to be the Employment Relations Authority and "any higher court" to include the Employment Court.

[30] A privative provision (as is s 179(5)) that purports to oust access to the courts should be interpreted strictly and restrictively. That is a principle of statutory interpretation enunciated by the Court of Appeal in *Bulk Gas Users Group v Attorney-General*[5] and has been followed since including in this Court. To deprive effectively citizens of access to courts of justice, those courts require Parliament to do so unambiguously and to the minimum extent necessary in a democratic society in which there is access to justice.

[31] *Bulk Gas Users* was decided before the New Zealand Bill of Rights Act 1990 (NZBORA) affected statutory interpretation. Section 6 of the NZBORA does not merely confirm, but reinforces, the common law approach to statutory interpretation of privative provisions in *Bulk Gas Users*. It provides:

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[5] [1983] NZLR 129 (CA).

> **Interpretation consistent with Bill of Rights to be preferred**
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[32] Section 27 of the NZBORA is the relevant provision that is engaged and is as follows:

> **27 Right to justice**
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
> …

[33] Subsection (2) speaks of the right of every person whose rights, obligations, or interests protected or recognised by law may have been affected by a determination of any tribunal, to apply for judicial review of that determination. In this jurisdiction where there are arguably concurrent rights of challenge (appeal) and judicial review, the principle must be applicable not simply to judicial review under the Judicature Amendment Act 1972,[6] but also to review by challenge. Section 6 of the NZBORA therefore mandates a restrictive interpretation of s 179(5) as opposed to a liberal one.

[34] The enactment by Parliament in 2004 of s 179(5) and associated restrictive subsections was directed at cases such as (and probably in particular to) *David v Employment Relations Authority*[7] where a grievant challenged successfully (and before an investigation meeting by the Employment Relations Authority), an Authority practice direction which expressed a general policy that cross-examination of witnesses would not be permitted in that forum. Parliament intended that the Authority's "procedure" (including discouraging or prohibiting cross-examination of witnesses) should not be the subject of the Court's direction.

[6] And, in the employment sphere, by s 194 of the Employment Relations Act 2000.
[7] [2001] ERNZ 354.

[35] The explanatory note to the Employment Relations Law Reform Bill 2003 addressed the intentions of ss 179(5) and 188(4) (in which it is said to be not a function of the Court to advise or direct the Authority in relation to the procedure that it has followed, is following, or is intending to follow, or that it may follow or adopt). The explanatory note says:

> … 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.

[36] Whilst the desirability of the Authority to deliver speedy, effective and non-legalistic problem resolution services is referred to, the bigger picture must necessarily include whether the objective of speedy, effective and just problem resolution (not just in the Authority), should be a factor. It is very arguable that if the Authority gets wrong in the course of its investigative function something that affects the rights and duties of the parties substantively, having to await a corrective judgment of the Court, following the conclusion of the Authority's investigation, will not promote speedy, effective and just problem resolution.

[37] So it can be seen that Parliament's intention is that generally, although not in every case, Employment Relations Authority investigations should run their course in that forum without the interruptions of interlocutory challenges to the Employment Court. It is difficult to quibble with the commonsense of that philosophy in most cases, especially where the legislation provides for a right of challenge (appeal) by hearing de novo so that a dissatisfied litigant in the Authority may, as of right, have the proceeding reheard by the Employment Court.

[38] On the other hand, 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?

[39] As in all these things, a balance must be struck. Parliament has done so in s 179(5) by reserving the right of parties in some cases to challenge other than final determinations that are not "procedural". What is "procedural" is, therefore, the central question.

Textbook commentary

[40] As the learned authors of *Brookers* note in their commentary:[8]

> There appears to be, at least implicitly, a legislative philosophy underlying these amendments that any party who fails before the Authority and feels aggrieved over the way it dealt with some procedural issue, is sufficiently protected by reason of having the right to challenge the determination in the Court, and to the benefit in that forum of a more legalistic approach to procedural issues. While this may be a supportable approach for the general run of cases, there may well be instances where an inability to challenge procedural rulings results in irreparable harm to a party. An example would be an erroneous ruling that documents that are protected by privilege must be disclosed to the other party. Another example would be adjournment of proceedings by the Authority at the defendant's request in circumstances where the resulting delay unfairly prejudices the plaintiff in some respect …
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> The fact that the legislation makes it extremely difficult, if not impossible, to challenge even significant and draconian orders or directions that the Authority makes, may lead the Court to be very reluctant to impute to the Authority powers of a far-reaching or draconian kind: *Axiom Rolle PRP Valuations Services Ltd v Kapadia* [2006] ERNZ 639 (EmpC), where the full Court considered that the unchallengeability by appeal or review of an Anton Pillar order made by the Authority would make it wrong to impute that the Authority has power to make such orders.

Case law

[41] Although dealing primarily with the issue of whether an Authority power was one of "procedure", the Court added at [55] of *Keys v Flight Centre (NZ) Ltd*:[9]

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[8] At ER179.02
[9] [2005] ERNZ 471

> Jurisdiction is a substantive question rather than one of process. It is not a question of how the Authority does it: rather, it is a question whether the Authority can do it. That is not "procedure".

[42] A decision about a requirement to file amended pleadings will be open to challenge under s 179, despite the fact that it may have had a procedural overlay: *Rawlings v Employment Relations Authority.*[10] In that case at first instance, a direction of the Authority that a matter would be treated as withdrawn if certain steps were not taken by the applicant, was held to be a determination that could be the subject of judicial review and so, by analogy, could be challenged.

[43] On appeal in *Employment Relations Authority v Rawlings*[11] the Court of Appeal examined whether the substance/procedure distinction also rested on whether the Authority had disposed of the investigation. At [26] the Court of Appeal said:

> [26] 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.

[44] This paragraph from the judgment of the Court of Appeal appears to say that a party may, on a challenge to a substantive or final Authority determination, put in issue a procedural determination of the Authority if this can be said to have had a "decisive influence on the result". That is puzzling for the following reasons, the first pragmatic and the second statutory.

[45] If the challenger elects a hearing de novo, in most cases it will not matter how the Authority has gone about its task because everything will be examined anew by the Court. Given the methodological differences between the Court and the Authority, it will not matter how the Authority went about its investigative role and the Employment Court will not be interested in addressing an issue that is academic in the case.

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[10] [2008] ERNZ 26. [2006] ERNZ 729.
[11] [2008] ERNZ 26 (CA).

[46] There is, however, another issue that, with respect, the Court of Appeal appears to have overlooked in *Rawlings*. If the judgment in that case means that a procedural defect can then be identified and corrected by the Court, this will very arguably be prohibited by s 188(4) of the Act which provides:

> (4) It is not a function of the court to advise or direct the Authority in relation to—
> (a) the exercise of its investigative role, powers, and jurisdiction; or
> (b) the procedure—
> (i) that it has followed, is following, or is intending to follow; or
> (ii) without limiting subparagraph (i), that it may follow or adopt.

[47] In relation to the actions of the Employment Relations Authority in deeming a matter to be withdrawn because of non-compliance with a direction that it made about that matter, the Court of Appeal in *Rawlings* concluded:

> [27] Consistently with that approach we are of the view that the actions of the Authority in the present case are, for the purposes of s 179(5), not just a determination about procedure. Accordingly that subsection would not bar a challenge to the course taken by the Authority. We are likewise satisfied that s 184(1A)(a) does not preclude review proceedings. Both conclusions rest on the premise that, in substance, the Authority has determined the proceedings which were initiated by the statement of problem …

[48] In *Rawlings* what might have been said at first glance to be a procedural decision nevertheless had the effect of ending the proceedings in the Authority, a substantive outcome. Thus, s 179(5) was not engaged. Is the principle enunciated by the Court of Appeal in *Rawlings* applicable only to such an extreme outcome? Does the same principle apply, for example, to a decision which does not bring the Authority proceedings to a close but affects their substantive outcome significantly?

[49] In this case, of course, the Authority's decision has not "determined", finally in effect, the proceedings before it: rather, it has confined the nature and scope of the evidence that one party wishes it to consider.

[50] There may be other cases in which injustice would ensue if s 179(5) were to be interpreted other than strictly and narrowly. What of cases where "procedural" error (to give that error a liberal interpretation of procedural), cannot be rectified by

a delayed challenge? A theoretical but credible example might be where the Authority declines to prohibit the publication of evidence or the identity of a party or a witness in the course of its investigation meeting, and that information is published before there is an opportunity to challenge the substantive determination. Even though such a decision by the Authority might be said to be procedural, if s 179(5) is to operate pragmatically and justly, regard must also be had to the effect of the decision to determine whether it is practicably unchallengeable under s 179(5). This, in turn, means that the word "procedural" in that subsection must be interpreted to mean purely procedural and without substantive consequence or at least significant substantive consequence.

[51] That leads me to another judgment of this Court, *Oldco PTI (New Zealand) Ltd v Houston*.[12] That case concerned a challenge to a refusal by the Authority to issue a non-publication order in relation to information disclosed in the course of its investigation meeting. It also refused to direct that its investigation meeting be closed to members of the public.

[52] Judge Couch undertook a broad examination of whether these decisions of the Authority were procedural and thus subject to s 179(5). I propose to address only the statements of principle set out in that judgment and not the decision on the particular facts of the case.

[53] The analysis of the interpretation and application of s 179(5) begins at [37] of the *Oldco* judgment. There the Judge wrote, having drawn on text book definitions of "procedure":

> … the proper meaning of the word "procedure" in the context of legal proceedings generally, … clearly encompasses any decision which affects the nature of the process by which the parties' rights and obligations are determined regardless of whether it may be said to advance that process.

[54] Next, at [46] the Judge wrote:

> It is important to emphasise that the scope of s 179(5) does not depend on the nature of the power being exercised by the Authority in its determination but rather on the effect of the determination itself. That effect must be

[12] [2006] ERNZ 221.

> analysed in order to decide whether or not the determination falls within the restriction imposed by s 179(5) on the right of challenge.

[55] Between [50] and [55] the Judge wrote:

> [50] A procedural determination will direct the manner in which the employment relationship problem between the parties is resolved or determine the environment in which the investigation process takes place.
> …
> [52] … 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.
> …
> [55] … Whether or not suppression or exclusion orders were made did not affect the rights and obligations of the parties. Nor did it form any part of the resolution of the employment relationship problem between the parties. It only affected the environment in which the Authority decided to conduct its investigation. As such, the determination was procedural and not substantive.

[56] At [42] the Judge appeared, however, to set the dividing line for procedure as being whether the act of the Authority will affect the substantive rights of the parties. He referred, by way of examples, to a number of the Authority's express powers in s 160. He said that the exercise of those powers under subs (1)(a), (b), (c) and (d) would not affect the substantive rights of the parties but would, rather, go "entirely to the nature and form of the investigation process".

[57] I respectfully disagree with Judge Couch in his assertion at [42] set out above that the exercise of these powers "would go entirely to the nature and form of the investigation process". I agree that those powers do go to the nature and form of the investigation process but they go further and may be influential, perhaps decisive, in determining the substantive outcome of the investigation in a particular case. I do not agree that all determinations can be so neatly and exclusively categorised.

[58] I respectfully consider that the passage at [37] in *Oldco* saying that procedure "clearly encompasses any decision which affects the nature of the process by which the parties' rights and obligations are determined regardless of whether it may be said to advance that process", is stated too broadly. 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.

[59] That is the way that the Employment Court has, in practice in other cases, tended to deal with cases in any event.

[60] In *X v Bay of Plenty District Health Board*[13] the Court found that a purported challenge was barred by s 179(5) in circumstances where the Authority had stayed proceedings before it because of the co-existence of defended criminal proceedings. The Employment Court found that there were no substantive consequences of this order for stay and the Authority's decision related only to the "manner in which the employment relationship between the parties is resolved".

[61] In *Pivot v Southern Adult Literacy Inc*[14] the Court applied subs (5) in refusing to consider a challenge to an interim determination of the Authority declining to join another party.

[62] Finally, in *Alim v LSG Sky Chefs New Zealand Ltd*[15] the question of an adjournment or deferment of an application in the Authority was held to be caught by s 179(5) as a matter of procedure.

[63] There are cases that have gone the other way under s 179(5). In *Grant v Vice-Chancellor of the University of Otago*[16] the Court held that a determination by the Authority to continue to investigate a grievance following the rejection of a s 173A recommendation, was not a matter of procedure but, rather, one of jurisdiction.

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[13] [2007] ERNZ 781.
[14] [2011] NZEmpC 67.
[15] [2012] NZEmpC 147.
[16] (2011) 9 NZELR 182.

[64] Finally, in *Vice-Chancellor of Lincoln University v Stewart*[17] the Court held that a challenge to a determination of the Authority on an application for removal of proceedings to the Court, was not subject to subs (5).

[65] Although I may disagree with the breadth of some of the proportions, I do not consider that my conclusion on the interpretation of s 179(5) is in conflict with that of Judge Couch in *Oldco.* Indeed I adopt one of the Judge's suggested tests for determining whether a determination is one on procedure.

Decision of s 179(5) issue

[66] What is the consequence to the parties and to the Authority's investigation of its decision not to consider the evidence of so-called "without prejudice" discussions between the parties' legal representatives in this case?

[67] It seems at least arguable for Mr Morgan that the content of such discussions is relevant to his personal grievance which alleges that he was dismissed unjustifiably. That will be determined by examining both the decision to dismiss, and how the employer reached that decision, under s 103A. The discussions between the legal representatives on behalf of their clients related to what should be the outcome of the complaint of misconduct made against Mr Morgan. The consequence of the Authority's determination is that Mr Morgan is not entitled to rely upon those discussions in the Authority's investigation and determination of his personal grievance. Therefore, the absence of the evidence which is the consequence of the Authority's ruling, will affect the substantive outcome of the grievance although it is not possible to go further than these hypothetical assessments at this stage.

[68] Deciding that evidence that a party wishes to adduce is inadmissible and thus excluding it from any consideration at all by the Authority, is not only, and is more than, procedural. It is also substantive in the sense that it confines and prejudices the case of the party ruled against. That is not to say that, eventually, this Court may not find the evidence to be inadmissible as the Authority did. But for the purpose of

[17] (2008) 5 NZELR 618.

determining whether the admissibility question can be the subject of a challenge, it falls outside s 179(5) construed strictly as I think that subsection must be.

[69] Following the judgments of the Court of Appeal in *Rawlings*, of the full Court in *Keys*, and the Court's acceptance of this in *Oldco*, I conclude that the Authority's rejection of any consideration of the evidence of the exchanges between the lawyers is challengeable. It is a matter affecting the substantive rights and obligations of the parties in the sense that it both disqualified Mr Morgan from having considered evidence that is arguably relevant to his claim and it has relieved the defendant from the obligation of answering this evidence before the Authority. In that sense, too, the Authority's refusal to consider the evidence is, and will be, a part of the employment relationship problem between the parties. It goes further than affecting the environment in which the Authority has decided to conduct its investigation. It is, in short, not a matter only of the Authority's procedure, excluded from challenge by s 179(5).

[70] There is another way of looking at the issue which has lead me to the same conclusion. When one examines the issue the decision of which is sought to be challenged, it cannot be said that it is a matter of the Authority's procedure in the sense of how the Authority goes about is investigation. Rather, the issue is one of evidence admissibility which is governed by a statutory provision (s 160(2)) which the Authority is bound to follow. It is also a question about the admissibility of discussions between legal representatives for both the employer and the employee undertaken in the course of events leading to the dismissal but which were labelled "without prejudice" or might be otherwise considered as having been in confidence or off the record. Determining the admissibility of this evidence is not a matter of the Authority's procedure. Nor is it a question that is necessarily confined to the Employment Relations Authority's investigation. If the grievance were to be before the Employment Court for consideration, the materially identical s 189(2) governing the Court's admission of evidence would also be engaged, as would the same matters of principle about discussions between lawyers in these circumstances. The decision sought to be challenged is one about communications between parties' representatives in the process that leads to a personal grievance.

[71] On this analysis, also, the question is not one about the procedure that the Authority is intending to follow, which would bring it within the scope of s 179(5).

[72] I decline to strike out the plaintiff's challenge without consideration of its merits.

Where to from here?

[73] Although the challenge has survived this jurisdictional strike-out application, it should not be assumed that it will, thereby, be successful. The merits of the Authority's exclusion of the evidence are still for review.

[74] Because the Authority's investigation of the grievance will not proceed until the challenge has been determined, it is important that there be an early hearing. The Registrar should, therefore, arrange a telephone directions conference with counsel for the parties at the earliest available opportunity to timetable the challenge to a hearing. Leave is reserved for either party to seek any further interlocutory orders or directions on reasonable notice.

Costs

[75] The plaintiff has been successful in resisting this application to strike out his challenge and is entitled to an order for contribution towards his costs of doing so. I consider, however, that the question of costs overall, and the amount of the order to date, are linked so inextricably with the challenge itself that these should be determined as one exercise at the conclusion of the challenge. Costs are, therefore, reserved in those circumstances.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Wednesday 10 April 2013