IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 121
EMPC 4/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ANA SHAW Plaintiff
AND	BAY OF PLENTY DISTRICT HEALTH BOARD Defendant

EMPC 100/2019

IN THE MATTER OF	an application for leave to bring a challenge out of time
BETWEEN	ANA SHAW Applicant
AND	BAY OF PLENTY DISTRICT HEALTH BOARD Respondent

Hearing:	On the papers
Appearances:	A Halse, advocate for plaintiff C Goodspeed, counsel for defendant
Judgment:	6 September 2019

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The issue before the Court is whether leave to extend time should be granted to Ms Ana Shaw to file a late challenge to a determination of the Employment Relations Authority (the Authority), in which a time limitation issue was considered.[1]

[2] The preliminary determination was issued on 16 October 2017; in it the Authority concluded that personal grievances of unjustified disadvantage which had been raised on behalf of Ms Shaw by her representatives, had not been raised within 90 days of the grievance occurring contrary to the requirements of s 114 of the Employment Relations Act 2000 (the Act).

[3] The Authority subsequently investigated Ms Shaw's dismissal grievance and issued a determination on 7 December 2018.[2]

[4] On 4 January 2019, a statement of claim was filed in this Court, challenging the substantive determination of the Authority. A hearing de novo was sought. The statement of claim alleged there were two disadvantage grievances and a dismissal grievance. The first disadvantage grievance asserted a failure to provide a safe workplace environment due to alleged bullying and harassment. The second alleged a failure to retrain.

[5] On 4 March 2019, I held a telephone directions conference with the representatives. In the course of that conference, an issue arose as to whether the disadvantage grievances which had been pleaded in the statement of claim, could be considered by the Court given the preliminary determination of the Authority that those disadvantage grievances were not raised within 90 days as required in s 114 of the Act, a conclusion which had not been challenged. As a result of that discussion, I made directions for filing an application for leave to extend the time for filing a challenge to the preliminary determination out of time.

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1 *Shaw v Bay of Plenty District Health Board* [2017] NZERA Auckland 322 (preliminary determination).

2 *Shaw v Bay of Plenty District Health Board* [2018] NZERA Auckland 390 (substantive determination).

[6] Such an application was filed on 5 April 2019; the DHB opposes the application. Affidavits and submissions have also been filed by both parties.

Overview of the parties' cases

[7] Ms Shaw's application for leave outlines the circumstances arising from the Authority's preliminary determination. It states she was distressed by the findings made by the Authority; this contributed to significant ill health on her part which meant she was not able to address the possibility of a challenge; and/or she had been unable to give instructions to take the necessary steps.

[8] A long affidavit in support of the application was filed by Ms Shaw. It annexes the affidavit which was the focus of the preliminary determination. I shall refer to all this evidence in detail later.

[9] The Bay of Plenty District Health Board (the DHB) filed a notice of opposition opposing the application for leave; emphasis was placed on the very long delay in raising the challenge, from October 2017 to April 2019. A supporting affidavit from an employee of the DHB, Ms Angela Brown, Senior Advisor Governance and Quality, outlined the process followed by the Authority in the lead up to the preliminary determination. Again, I shall refer to this information in detail later.

[10] Turning to the representatives' submissions, Mr Halse, advocate for Ms Shaw, submitted that she would be severely prejudiced in presenting her claims, if she was unable to bring her disadvantage grievances. Declining leave would prevent her from advancing her case properly.

[11] Medical certificates were annexed to Mr Halse's submissions, all relating to Ms Shaw's circumstances shortly before the issuing of the preliminary determination. Also attached was a letter relating to a referral to a cardiologist, apparently in early 2018. These documents were intended to support the submission that Ms Shaw had suffered long-term stress. It was argued that Ms Shaw's health had plummeted as a result of the preliminary determination, and during the period leading up to the investigation of the dismissal grievance in early October 2018.

[12] Turning to the submissions filed for the DHB, its counsel, Ms Goodspeed, focused on the legal tests which it was submitted are relevant to an application for leave. She also said the effect of s 179(5) of the Act was that a challenge to a procedural matter could not be brought at all, and the preliminary determination related to a matter of procedure.

[13] After outlining authorities relating to the grant of leave, it was submitted that the delay was excessive, that Ms Shaw had been actively engaged in the substantive proceedings throughout, and that on the evidence, she had chosen not to take any steps to challenge the preliminary determination. The medical certificates provided were insufficient as they failed to identify any diagnosis to support the broad assertions made that ill health had precluded the bringing of the challenge in time. It was argued there would now be prejudice or hardship to the DHB were leave to be granted, because relevant staff had left the DHB's employment, and staff who were available no longer had a recall of events that occurred between five and eight years ago. Finally, it was submitted that the merits did not favour the grant of leave.

The plaintiff's statement of claim

[14] It is necessary to start by summarising the challenge filed against the substantive determination, since it provides the context for the application for leave.

[15] It is pleaded that Ms Shaw was employed by the DHB as a echocardiographer/cardiac technologist, from August 2010. She provided echocardiographic and other predominantly cardiac diagnostic services to DHB patients. She had 32 years previous experience in South Africa as an echocardiographer, where she owned and operated her own business.

[16] In pleading the first disadvantage grievance, relating to bullying and harassment, reliance is placed on an assertion that in late 2014, Ms Shaw advised Mr Neil McKelvie, Business Leader (Medical Services) of the DHB, that she had been subjected to bullying and harassment in the workplace since she commenced her employment. As requested by him, she provided extensive documentation, in January 2015, about alleged bullying and harassment over a period of years. These included patient records. She asserts that her concerns were not adequately considered, and

instead she was accused of a breach of patient confidentiality, which eventually led to her dismissal.

[17] Then, the statement of claim provides examples which are said to be illustrative of the DHB's actions towards Ms Shaw, and of the environment and context in which she was subjected to bullying. Those assertions consist of alleged inconsistent treatment, evidenced by complaints she made on 27 September 2013, 27 February 2014, 28 July 2014 and 12 September 2014.

[18] Reference is also made to a complaint that was made against Ms Shaw on 7 August 2014, which led to a full investigation of an email she had written on 29 July 2014. She alleges that she was unreasonably singled out, and that this was an example of disparity amounting to systemic and institutionalised bullying of her. She also alleges her team leader publicly humiliated her about the email.

[19] Next, it is alleged the DHB failed to respond to concerns raised in performance reviews during the period 2012-2014.

[20] It is also pleaded that derogatory and racist comments had been made about Ms Shaw in April 2011, and in July 2012.

[21] Then, Ms Shaw says she was excluded from career progression, as a result of interactions which occurred in 2011 and 2012.

[22] She alleges her competence was undermined in events that occurred in 2012 and she was publicly humiliated.

[23] In summary, Ms Shaw asserts, for the purposes of her first disadvantage grievance, there was a pattern of behaviour by the DHB, which supports her contention that workplace hazards had not been eliminated, isolated or minimised.

[24] The second disadvantage grievance relates to an assertion that there was a failure to retrain. Ms Shaw pleads she was removed from an echocardiogram roster in May 2011; that her work is alleged to have been assessed in August 2011; that she was keen to upskill herself thereafter with regard to echocardiogram work; and that

although she had various discussions with her manager over the following four years, she did not receive echocardiogram supervision or training.

[25] The final personal grievance relates to Ms Shaw's dismissal. There is overlap in some of the facts pleaded for the earlier disadvantage grievances, and the dismissal grievance.

[26] Reference is made again to the email sent by Ms Shaw to colleagues on 29 July 2014, and the public rebuke she says she received from her team leader in response to it. Then, it is asserted Mr McKelvie requested disclosure of evidence to support allegations of bullying which Ms Shaw had made, in a letter to her of 19 December 2014. It is pleaded that this was the first time the DHB had treated her complaints seriously. She provided some 150 pages of documentation on 9 January 2015, which was followed by a meeting to clarify the relevance of some documents. Included were clinical patient records, which it is pleaded Ms Shaw had retained for the purpose of providing evidence of her bullying complaint in the event that the DHB investigated it.

[27] It is alleged that the privacy officer at the DHB then wrote to Ms Shaw, advising her that concerns were held because she had accessed patient documents. A disciplinary meeting took place on 21 January 2015. This was followed by a letter dated 23 January 2015, raising an assertion of serious misconduct; and directing her immediate suspension. Ms Shaw's lawyer wrote to the DHB contesting these conclusions on 11 February 2015. The statement of claim states that further correspondence was exchanged between the parties, which led to a final meeting between them on 19 March 2015, at which Ms Shaw explained that the practice in the department with regard to patient notes was different to the standard against which she was being judged. On 24 March 2015, the DHB advised her that her employment would be terminated for serious misconduct arising from breaches of patient privacy.

[28] The statement of claim goes on to allege steps taken to obtain alternative employment.

[29] Ms Shaw seeks a range of remedies, including lost wages from the date of dismissal, and compensation for humiliation, loss of dignity and injury to feelings in the sum of $50,000 in respect of each grievance.

[30] Finally, it is confirmed that the challenge is brought on a de novo basis.

Legal principles

[31] Section 179 of the Act provides for challenges to determinations of the Authority. It relevantly states:

> **179 Challenges to determinations of Authority**
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> (1) A party to a matter before the Authority who is dissatisfied with a written determination of the Authority under section 174A(2), 174B(2), 174C(3), or 174D(2) (or any part of that determination) may elect to have the matter heard by the court.
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> (2) An election under subsection (1) must be made in the prescribed manner and within 28 days after the date of the determination.
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> ...
>
> (5) Subsection (1) does not apply—
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> (aa) to an oral determination or an oral indication of preliminary findings given by the Authority under section 174(a) or (b); and
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> (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
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> (b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

[32] The Court's jurisdiction to extend time for talking such a step is conferred by s 219(1) of the Employment Relations Act 2000 which provides:

> **219 Validation of informal proceedings, etc**
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> (1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.

[33] The discretion conferred by s 219 is not subject to any statutory criteria. Like any other discretion conferred upon the Court, however, it must be exercised judicially and in accordance with established principles.

[34] The fundamental principle which must guide the Court in the exercise of its discretion is the justice of the case. The justice of the case has in the past been assessed with reference to the following factors:[3]

(1) The reason for the omission to bring the case within time.

(2) The length of the delay.

(3) Any prejudice or hardship to any other person.

(4) The effect on the rights and liabilities of the parties.

(5) Subsequent events.

(6) The merits of the proposed challenge.

[35] Ms Goodspeed referred to the Supreme Court judgment in *Almond v Read*.[4] This comparatively recent case has important implications for leave applications. Although it related to the granting of leave under the Court of Appeal (Civil) Rules 2005, the observations made by that Court potentially have general application.

[36] After reviewing many New Zealand cases, and some United Kingdom cases, the court summarised the relevant principles. It emphasised that the ultimate question when considering the exercise of the discretion to extend time is what the interests of justice required. An assessment of the particular circumstances of the case was required. Factors likely to require consideration include:

a) *Length of the delay*: the court observed that this was obviously relevant, and that the longer the delay, the more an applicant would be seeking an "indulgence" from the court, and the stronger the case for an extension would need to be.

b) *Reasons for the delay*: the court stated it would be particularly relevant to know whether the delay resulted from a deliberate decision not to proceed followed by a change of mind or from indecision; there would be less justification for an extension in such a case, than where the delay

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3 For instance, as expressed in *An Employee v An Employer* [2007] ERNZ 295.

4 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

resulted from error or inadvertence, particularly if those factors were understandable.

c) *Conduct of the parties, particularly of the applicant*: the court referred to the fact that a history of non-cooperation and/or delay by an applicant might be relevant.

d) *Any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome*: the court considered that the greater the prejudice to the other party, the stronger the case would have to be to justify the grant of an extension of time. Where there was significant delay coupled with significant prejudice, it might well be appropriate to refuse leave even though the appeal appeared to be strongly arguable.

e) *Significance of the issues raised by the proposed appeal, both to the parties and more generally*: if there was a public interest in the issues, the case for an extension was likely to be stronger than if there was no such interest.

f) *Merits*: there would be cases where the merits or otherwise of a proposed appeal would be overwhelmed by other factors, such as the length of the delay and the extent of prejudice, and so would not require consideration. The merits would not generally be relevant in a case such as that which was before the Supreme Court, where there had been insignificant delay as a result of a legal advisor's error, and there was no prejudice. Consideration of the merits in the context of a leave application would necessarily be relatively superficial. The court agreed with the Court of Appeal of England and Wales in *R (on the application of Hysaj) v Secretary of State for the Home Department*, to the effect that the court should firmly discourage much argument on the merits and should reach a view about them only where they are obviously very strong or very weak.[5]

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5 *R (on the application of Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ1633, [2015] 1 WLR 2472.

[37] I proceed in light of these authorities.

Summary of the Authority's process

[38] Before turning to analyse the various factors which must be weighed, I must refer in more detail to the process adopted by the Authority when investigating the employment relationship problems before it, and to its determinations.

[39] First, I record the process leading up to the preliminary determination after the proceeding had been convened by Ms Shaw. On 1 June 2016, an Authority Officer told the representatives on behalf of the Authority Member that Ms Shaw needed to file a properly particularised statement of problem, which stated where, who, what and when the allegations of bullying and harassment which spanned a number of years, took place.

[40] This resulted in an amended statement of problem being filed on 26 September 2016, to which a substantial number of documents were attached. An amended statement in reply was filed on 17 October 2016, to which a significant number of other documents were attached. It raised an affirmative defence in respect of particular aspects of the alleged disadvantage grievance, on time limitation grounds.

[41] On 28 February 2017, Ms Shaw filed a witness statement with regard to the allegations of unjustified disadvantage that Ms Shaw alleged had taken place between 2010 and 2015. In a minute of 15 March 2017, the Authority said the statement contained more information than was necessary for the purposes of context or background information to the bullying and harassment allegations. Moreover, that information appeared to suggest that personal grievances had been raised with the DHB as early as 2010.

[42] The Authority concluded that in fairness to all concerned, and taking into account the relative costs, the issue of if and when personal grievances were raised with the DHB should be dealt with as a preliminary matter. The Authority stated that

if some or all of the grievances were not raised within the 90-day period specified in s 114 of the Act, then they would be barred from investigation.[6]

[43] For the purposes of her proceedings in the Authority, Ms Shaw was initially represented by a lawyer, Mr Delaney. On 5 May 2017, the Authority was advised that Ms Shaw had a new representative, Mr Halse. In a minute of 23 May 2017, the Authority referred to this development and said that Mr Halse had proposed that the evidence relating to the time limitation issue be presented as an aspect of a substantive investigation hearing. The Authority said this seemed to be a claim that Ms Shaw was unable to have her issues dealt with in a timely and cost-effective manner by the Authority. However, the Authority considered that the preliminary matter could be dealt with "on the papers", and that this could save time and for costs of all involved. Ms Shaw was directed to file an affidavit setting out her evidence as to when she raised grievances with the DHB, what grievances were raised and with whom they were raised. She was to include evidence as to when she took legal advice or obtained union support. Relevant exhibits would need to be attached to the affidavit.

[44] Ms Shaw filed that affidavit on 26 September 2017. On 9 October 2017, an Authority Officer asked the representatives to confirm whether any further submissions or comment on the preliminary issue would be provided. Mr Halse responded on 10 October 2017 stating that Ms Shaw's position was well known to the Authority, and nothing further would be added. Counsel for the DHB filed a memorandum on 12 October 2017, stating that the disadvantage grievances were expressed in vague terms without reference to particular incidences of bullying or unfair treatment that gave rise to identifiable grievance or grievances.[7]

[45] On the evidence before the Court, no detailed submissions as to the chronology, or how the Authority should analyse the extensive materials for the purposes of the limitation issue, were provided.

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6 Minute of 15 March 2017, see *Shaw v Bay of Plenty District Health Board*, above n 1, at [18].
7 *Shaw v Bay of Plenty District Health Board*, above n 1, at [24].

Preliminary determination

[46] In the preliminary determination, the Authority summarised the fact that Ms Shaw's team leader had written to her on 13 August 2014 after a complaint had been received about the email sent by Ms Shaw on 29 July 2014, and that an investigation was then carried out culminating in an investigation report dated 23 September 2014 which made findings and recommendations with regard to her conduct.[8]

[47] Then the Authority stated that a personal grievance was raised with the DHB on 3 October 2014.[9] Although the letter from Ms Shaw's then advocate, Mr Single, raising the grievance is not fully set out in the determination, for the Court's purposes I reproduce the salient paragraphs of the letter as follows:

> ...
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> 2) We are in receipt of the draft Investigation report into allegations of Breached Principle 1 of Shared Expectations, Respect for Other People & the BOPDHB Email Usage Protocol.
>
> 3) Our client is no longer represented in this matter by the Union and we advise that the process that has been followed to get to the stage you have presented is not acceptable.
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> 4) Our client instructs that we raise the matter as a **personal grievance** on the basis of disadvantage in that the matters that were the cause of the investigation are as a result of ongoing procedures and failures which have been documented over time and presented to the Clinical Physiology Manager without any result and finalisation of those matters.
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> ...
>
> 12) Our investigations suggest that there is a deep-seated resentment of our Client's qualifications and work experience to the point that she has been excluded from direct training by the suppliers of new equipment, prevented from carrying [out] the duties for which she is ably qualified and actually was employed to do.
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> ...

[48] Then the Authority referred to the fact that after termination of Ms Shaw's employment on 24 March 2015, a barrister who by then had been briefed for Ms Shaw,

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8 *Shaw v Bay of Plenty District Health Board*, above n 1, at [8]-[9].
9 At [10].

Ms Gilbert, raised two grievances in a letter dated 5 May 2015.[10] For present purposes it is necessary to refer in some detail to the statements made in the letter.

[49] The preamble stated that Ms Shaw had suffered an unjustified disadvantage "arising from various breaches of her employment agreement by the BOPDHB, during the term of her employment". Then it was asserted there had been an unjustified dismissal for an alleged breach of patient privacy.

[50] The letter then went on to spell out at some length the alleged breaches of employment terms, which it was said gave rise to the unjustified disadvantage. They included:

- Removal from echocardiology on a permanent basis from approximately August 2011, and no retraining despite these being listed as a goal in subsequent performance reviews and discussed subsequently over the next four years.

- Disparate treatment, in that Ms Shaw asserted she was regularly treated unfavourably by comparison with her peers. Undated examples were given.

- Bullying and harassment, a topic to which Ms Shaw had referred to in her performance reviews of 2012 and 2013. It was stated that the issue had also been discussed recently, with the DHB stating it could not advise Ms Shaw what steps had been taken, for privacy reasons.

- The letter went on to raise the dismissal grievance, in some detail. It also alleged breaches of the Human Rights Act 1993.

[51] After referring to this letter, the Authority noted it had required Ms Shaw to file an affidavit setting out her evidence with regard to the asserted personal

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[10] At [15].

grievances, including dates. It was recorded she filed a lengthy affidavit on 26 September 2017, attaching numerous exhibits.[11]

[52] The Authority analysed three particular exhibits for the purpose of considering the question of whether the asserted personal grievances had been raised within 90 days of their occurrence.[12] It went on to conclude that in none of these or other exhibits was a personal grievance raised.[13] The Authority was not satisfied that Ms Shaw had identified unjustified actions or disadvantages. There was no discussion of the events referred to in the letters which had been sent, raising disadvantage grievances.

[53] It will be necessary to discuss, later in this judgment, all the evidence that was before the Authority at that time, and its reasoning, as one of the matters I am required to consider when granting leave to extend time.

Investigation relating to the dismissal grievance

[54] Sometime later, the investigation of the dismissal grievance took place. Two points should be made as to the leadup to that hearing.

[55] The first relates to timing. In the substantive determination, the Authority recorded that the rate of progress of the proceeding before the Authority had been delayed for a number of reasons outside its control.[14] It was noted Ms Shaw had engaged a number of advocates and counsel to represent her from the time she raised her personal grievance claim in 2014, and throughout the Authority's investigation. Mr Halse was recorded as being the fifth representative. Understandably each new representative had to become familiar with the facts of the case and the considerable volume of documentation.

[56] The Authority also said delay was occasioned by the necessity of dealing with a complaint which had been made about the Authority's process, the need to resolve the preliminary issue on the papers, and the fact that an investigation meeting

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11 At [21]-[22].
12 At [25]-[28].
13 At [29].
14 *Shaw v Bay of Plenty District Health Board,* above n 2, at [14]-[18].

originally scheduled for mid-July 2018 could not proceed because of a strike which affected the DHB's ability to participate.

[57] The second point to record is that the investigation when it was held spanned two days. There was obviously a significant volume of information which the Authority was required to review, which included multiple submissions. As will become clear shortly, the Authority was required to review the entire duration of Ms Shaw's employment, from 2010 to 2015. On the basis of the evidence which is now before the Court, it is apparent that included in the evidence considered by the Authority was information which may well have been relevant to the disadvantage grievance had it been permitted to proceed.

Substantive determination

[58] For the purposes of its substantive determination, the Authority considered the background circumstances in considerable detail.

[59] The Authority began with a description of Ms Shaw's initial role at the DHB. Then it outlined her induction and orientation, including as to the DHB's anti-bullying policy.[15]

[60] Then the Authority recited early issues that arose with regard to Ms Shaw's employment, including a knee injury in 2010 – 2011, and clinical competency concerns in 2011 when a review of Ms Shaw's echocardiography scanning was undertaken.[16]

[61] Next, the Authority recorded Ms Shaw's evidence that from the beginning of her employment she had encountered difficulties with members of the team in the Echocardiology Unit. It was noted Ms Shaw had raised issues of concern which she considered amounted to bullying and harassment with her team leader in 2012, but no formal complaint had been lodged. The Authority found that the first formal mention of these issues was when her disadvantage grievance was raised on 3 October 2014.[17]

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15 At [20]-[27].
16 At [28]-[34].
17 At [35]-[48].

[62] Then the Authority went on to summarise the issues that arose following Ms Shaw's email of 29 July 2014, the letter that was sent to her by her team leader on 13 August 2014, the investigation meeting of 15 September 2014, and the provision of a draft investigation report dated 24 September 2014. It was this report which was expressly referred to in the personal grievance letter of 3 October 2014.[18]

[63] Next, the Authority described how the DHB decided to investigate workplace allegations which Ms Shaw's advocate had particularised in that letter. Mr McKelvie was tasked to investigate the issues which had been raised.[19]

[64] About the same time, the DHB finalised its report concerning Ms Shaw's conduct in sending the email of 29 July 2014.[20]

[65] The Authority went on to describe how Mr McKelvie, for the purpose of considering the workplace allegations advanced by Ms Shaw, had asked her to provide information to support her claims about poor clinical practices, resentment of her qualifications, exclusion from training and underutilisation of her skills. The Authority said she had prepared a large binder of papers and left those with Mr McKelvie on 9 January 2015. He began reviewing those a short time later. It was noted various types of patient notes dating from 2010 to 2014 had been included.[21]

[66] This led to concerns being raised formally with Ms Shaw on 14 January 2015, as to the accessing of patient documents without a work-related need to do so. This was followed by the disciplinary process already alluded to, which ultimately resulted in her dismissal.[22]

[67] As an aspect of the Authority's analysis, there was an evaluation of the documentation provided by Ms Shaw to Mr McKelvie for the purposes of his investigation of her workplace concerns. The Authority recorded she accepted she had retained patient records. She told the Authority this was for the purpose of providing

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18 At [49]-[59].
19 At [65]-[70].
20 At [71]-[73].
21 At [74]-[77].
22 At [78]-[103].

evidence of her bullying complaint. The Authority went on to consider whether this was appropriate in light of the DHB's policy and the privacy legislation that applied to her as a health practitioner.[23]

[68] Ultimately, the Authority concluded that the employer's decision that it had lost trust and confidence in Ms Shaw to continue to perform in her role as a cardiac physiologist was one which was open to the DHB to make in all the circumstances.[24]

Analysis

What is the effect of s 179(5) of the Act?

[69] Ms Goodspeed submitted that the preliminary determination related to a matter of procedure, and this meant that there was no right of challenge to its conclusions.

[70] For two reasons, I do not accept this submission. The history of s 179(5) was carefully outlined in *Oldco PTY (New Zealand) Ltd v Houston*, in the course of which Judge Couch discussed the use of the language in the sub-section, and its application in previous cases.[25] He emphasised that a key indication of whether a determination is substantive in nature is whether it affects the remedies sought by the parties.[26] By contrast a procedural determination will direct the manner in which the employment relationship problem is to be resolved, or determine the environment in which the investigation process takes place.[27] I respectfully agree with this distinction.

[71] Here, the effect of the Authority's determination was that Ms Shaw could not proceed with her pleaded disadvantage grievances, and thus could not seek remedies in respect of it. That conclusion was substantive in nature because it meant the disadvantage grievance could go no further.

[72] Accordingly, s 179(1) of the Act, and not s 179(5), must apply. It was necessary for any challenge to be brought within 28 working days. Since a challenge was not

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23 At [120]-[124].
24 At [129].
25 *Oldco PTY (New Zealand) Ltd v Houston* [2006] ERNZ 221 at [12]-[23].
26 At [49].
27 At [50].

brought within that timeframe, it was necessary for an application for leave to be sought; this was ultimately placed before the Court on 5 April 2019.

[73] I now turn to consider the range of factors that require assessment on the application for leave.

Merits/subsequent events

[74] I deal with these two factors together, since they are connected, and together raise important issues for present purposes. In considering the merits, I remind myself of the dicta in *Almond* to the effect that a merits assessment at this preliminary stage must be "relatively superficial".[28]

[75] It is apparent that in the preliminary determination, the Authority focused primarily on information provided in Ms Shaw's affidavit of 26 September 2017. That affidavit has been provided to this Court. It is at once apparent that it is not an easy document to follow. It contains cross-references to many documents external to the affidavit in a shorthand way; some of these were apparently contained in a bundle of documents which was before the Authority. It leaves much to inference, and to some extent assumes a pre-existing understanding of the context and history of events. It appears to have been prepared by Ms Shaw, and not by a professional representative as it should have been in the circumstances. The Authority had sought assistance because of the volume of material. It is doubtful that this was provided by the affidavit.

[76] Because the Authority dealt with the preliminary issue on the papers, there was a further problem: it did not have the advantage of oral submissions from either side, which it is likely would have led to a clearer presentation of the history. Nor is there any evidence of written submissions having been filed to assist the Authority. It appears there were none. I emphasise these matters, because an accurate appreciation of the chronology was essential to the timing issues the Authority was required to resolve. Properly prepared submissions could well have provided the Authority with the assistance it should have been given.

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[28] *Almond v Read,* above n 4, at [39].

[77] As mentioned, the Authority focused on three particular exhibits which were attached to the affidavit. These were difficult to follow; and they were not adequately explained in the text of Ms Shaw's affidavit.

[78] It is implied in the preliminary determination that no relevant event occurred within the 90 days prior to each of the two letters sent by Ms Shaw's representatives raising disadvantage grievances; those of 3 October 2014 and 5 May 2015, to which I made reference earlier.[29]

[79] However, there was no analysis of the 90-day period which preceded each letter, or of each of the events described in those letters, which it was said gave rise to the disadvantage grievances.

[80] In the first of the letters, reference was made to support the alleged disadvantage grievance to the inadequacies of a draft investigation report dated 24 September 2014, which had been presented to Ms Shaw; it was one of the two aspects of the disadvantage grievance raised in the letter of 3 October 2014. There was no limitation problem with regard to at least that aspect of the grievance. Nor was there any examination as to whether retraining had been raised within the 90-day period, this being the second area of concern raised in the grievance letter.

[81] In the second letter, reference was made in support of the disadvantage grievance not only to events which had occurred some years prior, but also to events that had occurred not long prior to that letter. For instance, Ms Shaw's lawyer referred to the recent steps taken with regard to her concerns as to workplace behaviour, in particular the consideration of Ms Shaw's complaints about bullying and harassment, as considered by Mr McKelvie in early 2015.[30] Ms Shaw's lawyer was raising a complaint about events which she said were recent. Again, there may well have been no limitation problem with regard to this aspect of the disadvantage grievance.

[82] It appears the difficulty was catalysed by the fact that the Authority's focus was on the attachments to the affidavit Ms Shaw had been directed to file. Reference was

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29 Above at paras [47] and [50].
30 For instance, at 26 to 28 of the letter.

not made to other key documents which were apparently before the Authority, including those attached to the pleadings. It appears some of those documents related to events that had occurred within the 90 days preceding each of the two letters raising disadvantage grievances. All of this material needed to be considered.

[83] The chronology of events from 2010 to 2015 was revisited by the Authority in its substantive determination, where the Authority set out a full and careful description of those events. The analysis given in the substantive determination reinforces my preliminary assessment that there were arguably material events which had occurred within the 90-day period prior to the two letters, some of which may have been inextricably linked to events which took place prior to those timeframes. The review of events as recorded in the substantive determination tends to confirm that some of Ms Shaw's disadvantage allegations did not give rise to a s 114 problem.

[84] On a provisional basis, therefore, and for leave purposes only, I conclude that the merits of Ms Shaw's proposed challenge are very strong because the Authority's focus at the preliminary stage was unduly narrow.

Period of delay/explanation

[85] In *Almond*, the Supreme Court made reference to the frequently cited decision of *My Noodle Ltd v Queenstown Lakes District Council*, where the Court of Appeal described a delay of some three and a half months as being "significant".[31]

[86] Given that most leave applications involve comparatively minor periods of delay, perhaps of a few days or weeks only, the delay in this instance, of some 18 months, must be regarded as gross.

[87] The explanation for this is problematic. Very serious medical health factors are referred to in the notice of opposition. The only medical certificates filed for Ms Shaw pre-date the date of the preliminary determination. They do not relate to the long period following the issuing of the preliminary determination. A referral letter to

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[31] *My Noodle Ltd v Queenstown Lakes District Council* [2009] NZCA 224, (2008) 19 PRNZ 518 at [21].

a cardiologist was placed before the Court. It is undated. According to the submission advanced on behalf of Ms Shaw, this related to stress which followed the issuing of the preliminary determination.

[88] Broad assertions are made by Ms Shaw in her supporting affidavit as to stress, trauma, psychological debilitation and that she held a fear for her mental state over the entire post-determination period. However, no independent medical report or reports have been provided to verify this assertion.

[89] I do not accept that Ms Shaw was not in a position to provide instructions to institute a challenge. Over the many months from October 2017 to April 2019, Ms Shaw was active with regard to her employment-related issues. For instance, in February 2018, she wrote a long and articulate letter to the Prime Minister, summarising her concerns. It is apparent that she was able to provide instructions for the purposes of the various steps that were taken for the substantive hearing, which was initially scheduled for July 2018, but which did not take place until October 2018.

[90] I accept there would have been a strong focus on preparation for the substantive hearing, which may well have created significant stress at times, but that does not explain adequately why instructions were not given to file the challenge.

[91] I note the distinction made by the Supreme Court in *Almond* concerning reasons for delay; that is whether there has been a change of heart or whether delay occurred through inadvertence. There is no evidence before me that Ms Shaw's representative identified a potential issue which needed attention, and/or that it was raised with Ms Shaw, as needed to occur, and/or a decision was made to either bring, or not bring, a challenge. It appears that the need to institute a challenge was simply not recognised; there is no evidence of any consideration being given to such a possibility at any time prior to the telephone directions conference with the Court. This is surprising given the fact that the Authority referred twice to the fact that the preliminary determination had not been challenged, once in a direction of 23 March 2018, and again in the substantive determination.[32]

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[32] Above note 2, at [9].

[92] On the evidence before the Court, it appears there was a failure to understand and consider the steps required by s 179(1) of the Act. This may not be a problem which can be laid at the feet of Ms Shaw but may be one for which Mr Halse must bear responsibility as her advocate instructed to represent her interests.

[93] Standing back, the egregious delay, and the weak explanation given for it, weigh strongly against the granting of leave.

Other factors

[94] Although a submission was made by Ms Goodspeed that there would be prejudice to the DHB were leave to be granted, due to witness difficulties, I do not agree with this assertion. In fact, it would appear that for the purposes of the dismissal grievance which the Court must hear, it will be necessary to review the full period of Ms Shaw's employment, as the Authority was required to do for the purposes of its substantive determination.

[95] Ms Goodspeed submitted that the defendant no longer has access to relevant documents or information. No particulars were given, and the assertion is not supported in the affidavit filed by Ms Brown.

[96] Accordingly, I am not satisfied that significant prejudice would arise for the DHB were leave to be granted.

[97] I also note that this is not an application which may have an "all or nothing" effect. Even if the Court were to decline leave, it will still have to resolve the challenge in respect of the dismissal grievance. The Court would accordingly have to receive evidence covering the 2010 to 2015 period which arose out of the provision of material by Ms Shaw and Mr McKelvie in early 2015, for the purposes of the bullying and harassment issues and other workplace issues which were before him. Thus, it would appear that evidence relating to the bullying and harassment issues will be before the Court in any event.

[98] There is a further factor requiring consideration. In her affidavit, Ms Brown referred to concerns held by the DHB as to the conduct of Mr Halse, the company with

which he is associated, CultureSafe NZ Ltd, and Ms Shaw, which she said has resulted in penalty and contempt applications being made. Those proceedings were removed to the Court and are the subject of a judgment also being issued today with regard to a leave issue.

[99] The allegations made in those proceedings are very serious. At this stage, however, since the relevant proceeding has yet to come on for hearing, it would be inappropriate for the Court to rule that the existence of those untested allegations should weigh into the scales for the purposes of the present leave application.

[100] I observe only that I expect exemplary behaviour from all parties about all the proceedings that are before this Court, in all the circumstances. Any failure to meet those standards will be of considerable concern to the Court.

Overall justice

[101] The final, and most significant part of the assessment relates to the overall assessment which the Court must make on this leave application, as to where the interests of justice lie.

[102] The assessment is finely balanced. As explained, on the one hand, I am provisionally of the view that Ms Shaw's proposed challenge to the preliminary determination is strong and favours the grant of leave. On the other hand, the length of the delay, and the weak explanation given for it, counts significantly against the grant of leave.

[103] I note the observations contained in *Almond v Read* that where the Court's assessment of the merits is that they are very strong (or for that matter very weak), then that factor will have a significant part to play when balancing the various factors requiring consideration. This is such a case. In my view, the merits assessment must be the prevailing factor.

[104] Although, as mentioned earlier, it appears that there was a failure to give Ms Shaw appropriate advice after the preliminary determination was issued, that factor should not count against Ms Shaw who I find wanted competent advice.

Without reaching any conclusions as to whether the assertions made by the various persons who previously represented Ms Shaw before and after the dismissal are correct, on the face of the documentation before me the letters sent by those persons, and the pleadings drafted, were prepared professionally and demonstrate her willingness to receive and act on appropriate advice.

[105] Were I not to grant leave, then Ms Shaw would be denied the opportunity of seeking disadvantage findings, and compensation for those. At this provisional stage I express no opinion that she will succeed in doing so. However, it would be contrary to the interests of justice to now deny her that opportunity.

[106] I emphasise that the circumstances the Court has had to review are exceptional, and should not be regarded as a precedent.

Disposition

[107] I grant leave to Ms Shaw to file a challenge in respect of the preliminary determination, on either a de novo or non-de novo basis. The statement of claim is to be filed and served within 28 days after the date of this judgment.

[108] I reserve costs.

B A Corkill
Judge

Judgment signed at 10.20 am on 6 September 2019