

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 58
EMPC 320/2019
EMPC 321/2019**

IN THE MATTER OF	a challenge to determinations of the Employment Relations Authority
BETWEEN	SUSAN MARGARET KENNEDY Plaintiff
AND	THE CHIEF EXECUTIVE OF ORANGA TAMARIKI – MINISTRY FOR CHILDREN Defendant

Hearing: 5 February 2020
(Heard at Auckland)

Appearances: A Halse, advocate for plaintiff
H Kynaston and S R Clark, counsel for defendant

Judgment: 5 May 2020

JUDGMENT OF JUDGE J C HOLDEN

[1] Ms Kennedy has two challenges before the Court. She challenges:

- (a) A minute of the Employment Relations Authority (the Authority) dated 28 August 2019 in which Member McKinnon granted non-publication orders on an interim basis until the Authority has determined Ms Kennedy’s substantive claims. The orders cover the names of non-expert witnesses that the defendant (Oranga Tamariki) identifies will give evidence in the proceeding on its behalf; the names of employees or former employees of Oranga Tamariki that Ms Kennedy alleges bullied her, treated her unfairly, or otherwise disadvantaged her in her

employment; and pleadings and evidence, including any briefs of evidence and supporting documents filed by the parties as their intended evidence.

- (b) A minute of the Authority dated 29 August 2019 declining Ms Kennedy's request that Ms Kennedy be exempted from attendance at the investigation meeting that was scheduled to hear her claims.

[2] This judgment resolves these challenges.

Section 179 allows for challenges to determinations

[3] Section 179 of the Employment Relations Act 2000 (the Act) allows parties to challenge a determination of the Authority that they are dissatisfied with, electing to have the matter heard by the Court.¹ However, challenges are not allowed with respect to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow.²

[4] Section 179 gives rise to two preliminary issues:

- (a) First, are either or both minutes covered by s 179 at all?
- (b) Second, if they are covered by s 179, are they about the procedure that the Authority has followed, is following or is intending to follow, meaning a challenge is precluded by s 179(5)(a)?

Ms Kennedy says that the minutes comprise directions, not determinations

[5] Ms Kennedy says she is not challenging determinations of the Authority, but rather directions made by the Authority. She says that s 179(5) therefore does not apply.

¹ Employment Relations Act 2000, s 179(1).

² Employment Relations Act 2000, s 179(5)(a).

[6] However, she does not point to any jurisdiction for the Court to consider a challenge with respect to a direction that is not a determination. She says the reason she has brought these matters to the Court as challenges is because of the lack of another adequate avenue through which to challenge the Authority's directions.

[7] Oranga Tamariki submits that the minutes are determinations, but that they are about the procedure that the Authority intends to follow. It says, therefore, they cannot be challenged in the Court.

If these are not determinations, there is no ability to challenge them

[8] The difficulty with the position being taken by Ms Kennedy is that if she is right and these minutes are not determinations, then they cannot be the subject of a challenge. That would be the end of the matter.

[9] However, the Court has previously said 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.³ Section 179(5)(a) reflects that determinations can include procedural decisions that might be termed elsewhere either as interlocutory judgments or minutes.⁴

[10] The way in which a document from the Authority is described is not determinative of whether it is a determination.⁵ Here the documents are described as 'minutes', but the Authority previously has issued determinations dealing with applications for interim non-publication orders⁶ as well as other procedural matters such as applications for a stay of proceedings.⁷

³ *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271.

⁴ *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 55, [2013] ERNZ 460 at [15].

⁵ *Morgan*, above n 4, at [22]; *McConnell v Board of Trustees of Mt Roskill Grammar School* [2013] NZEmpC 150, [2013] ERNZ 310 at [18].

⁶ *XRR v EBD* [2019] NZERA 694.

⁷ *Rudling v Bridgestone New Zealand Ltd* [2019] NZERA 487; *Maritime Union of New Zealand Inc v Ports of Auckland Ltd* [2018] NZERA Auckland 189.

[11] The minutes at issue resolved contested applications and included findings and orders in relation to those contested applications. For the purposes of s 179, they are determinations of the Authority.

The next question is whether challenges are precluded by s 179(5)

[12] I now turn to the question of whether a challenge to either or both determinations is precluded by s 179(5) of the Act, because they are about the procedure that the Authority has followed, is following or is intending to follow.

[13] The general principles that apply in considering whether a determination is procedural are:⁸

- (a) The general principle is that Authority proceedings should not be interrupted by challenges at a pre-determination stage.⁹
- (b) The policy reasons for this are to increase speedy and non-legalistic decision-making, to keep costs down, and avoid delays. Access to justice considerations are dealt with in the right of challenge or review once the Authority has made a final determination on the matter before it.¹⁰
- (c) The Court must have regard to the effect of the determination in light of the policy objectives. It can consider determinations that have an irreversible and substantive effect. But it is not enough that an order has an impact on the parties. Any decision will have some impact on the parties.¹¹
- (d) The Court can consider questions of jurisdiction. These are distinguishable from procedural questions in that they concern whether

⁸ *Johnstone v Kinetic Employment Ltd* [2019] NZEmpC 91 at [27].

⁹ *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [17].

¹⁰ At [23].

¹¹ *Fletcher v Sharp Tudhope Lawyers* [2014] NZEmpC 182 at [18].

the Authority has the power to do something, and not how it goes about it.¹²

Whether interim non-publication orders can be challenged depends on effect

[14] The Court previously has considered situations where the Authority has declined an application for interim non-publication orders and found that a challenge was available. That is because the denial of interim non-publication orders has an irreversible and substantive effect that cannot be remedied at a later stage; at that point the horse would have well and truly bolted.¹³

[15] The same concern is not present here, where the Authority has made interim non-publication orders. As interim orders, they do not have an irreversible and substantive effect, they simply preserve the position of the subject of the orders for a finite period. If permanent non-publication orders are sought, the Authority will consider the issue again. If permanent orders are made, those are open to challenge to the Court.

[16] The directions granting interim non-publication orders are captured by s 179(5)(a); they are not open to challenge.

Second minute is procedural

[17] The second minute is more straightforward. The way in which the Authority hears from witnesses and parties is quintessentially procedural. The Authority is expressly empowered to:¹⁴

...

- (a) call for evidence and information from the parties or from any other person:

¹² *Keys v Flight Centre (NZ) Ltd* [2005] ERNZ 471 at [55]; *Oldco PTI (New Zealand) Ltd v Houston* [2006] ERNZ 221.

¹³ *H v A Ltd*, above n 9, at [25]–[26]; *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511.

¹⁴ Employment Relations Act 2000, s 160(1).

- (b) require the parties or any other person to attend an investigation meeting to give evidence:
- (c) interview any of the parties or any person at any time before, during, or after an investigation meeting:
- (d) in the course of an investigation meeting, fully examine any witness:
- (e) decide that an investigation meeting should not be in public or should not be open to certain persons:
- (f) follow whatever procedure the Authority considers appropriate.

[18] The Authority is required to comply with the principles of natural justice¹⁵ and to allow cross-examination.¹⁶ These requirements mean, if a party wishes to cross-examine another party's witness, that will need to be accommodated. Whether a direction as to the manner of giving evidence has an irreversible and substantive effect must be considered in view of those requirements.

[19] Ms Kennedy pleads her health status and likelihood of her post-traumatic stress disorder being triggered by attendance at the hearing. I accept that, appearing at the investigation will have some impact on her, as it does to a greater or lesser extent on almost any party or witness. However, I am not satisfied that the directions made could be said to have an irreversible and substantive effect on Ms Kennedy. The minute is not able to be challenged in the Court.

Authority directions appropriate in any event

[20] That deals with both challenges. However, if I had been able to adjudicate on the substantive concerns raised by Ms Kennedy, she would not have succeeded in any event. The directions made by the Authority Member are sensible ones in the circumstances.

[21] In the first minute, the Authority Member recognises the serious allegations that Ms Kennedy has made against other people who are or were employed at Oranga Tamariki and has, rightly in my view, found that interim non-publication orders are warranted. As noted, that does not mean that permanent non-publication orders for

¹⁵ Employment Relations Act 2000, s 157(2)(a).

¹⁶ Employment Relations Act 2000, s 160(2A).

some, or all of the matters over which interim non-publication orders have been made, will be made following the investigation meeting. Ms Kennedy will have a further opportunity to address the Authority on any application that Oranga Tamariki might make in that regard.

[22] In the second minute, Member MacKinnon has made careful directions for the hearing of Ms Kennedy's evidence and also has allowed for further discussion on additional protections that may be put in place. The directions are appropriate.

Costs are reserved

[23] If Oranga Tamariki seeks costs and they cannot be agreed, it is to file and serve a memorandum within 14 days of the date of this judgment. Ms Kennedy then has 14 days in which to file and serve her memorandum in response, and Oranga Tamariki has seven days thereafter to file and serve any memorandum in reply.

J C Holden
Judge

Judgment signed at 3.30 pm on 5 May 2020