

[3] In its preliminary determination, the Authority accepted the University's concern and ordered Dr Bird to lodge and serve an amended statement of problem that did not include the mediation material. Dr Bird filed a challenge to that determination.¹

[4] The University says the preliminary determination concerned a matter of procedure that cannot be challenged due to the effect of s 179(5) of the Employment Relations Act 2000 (the Act). On that basis the University says the Court is without jurisdiction to hear the challenge and it must be dismissed. This judgment resolves that issue.

The Authority has an investigative role

[5] The Authority is a creature of statute and is required to act in accordance with the Act. It is an investigative body whose role is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case and is to discharge its role without regard to technicalities.²

[6] The Courts have discussed the important role of the Authority on a number of occasions. In *FMV v TZB*, the Supreme Court pointed out that the language of the legislation reflects the relational framework of the Employment Relations Act 2000 and drives the fact-based, problem-solving approach of the Authority when dealing with employment relationship problems.³ In *Dollar King v Jun*, Chief Judge Inglis noted that Parliament had intended the Authority to be an accessible forum for parties (of varying financial means, capabilities and resources) to bring their employment issues to it for speedy, non-technical, pragmatic resolution. She noted the Authority Member's inquisitorial role, effectively driving the investigative process.⁴

[7] As an investigatory tribunal, the Authority is equipped with particular powers, including an enhanced ability to control proceedings. It is an express object of the Act

¹ *Bird v Vice Chancellor, University of Waikato* [2022] NZERA 52 (Member Fuiava).

² Employment Relations Act 2000, s 157(1); see also *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466 at [57].

³ *FMV v TZB*, above n 2, at [60].

⁴ *Dollar King Ltd v Jun* [2020] NZEmpC 91, [2020] ERNZ 246 at [8].

to ensure that decisions are not inhibited by strict procedural requirements. The aim is to have employment relationship problems resolved as efficiently and cheaply as possible.⁵ The Authority may call for evidence and information from the parties or from any other person and may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.⁶ It is not bound by the way the parties have framed their dispute. If it considers the parties have not understood the real nature of their problem, it can reframe the problem and resolve that. The design of the Authority is therefore premised on a fact-oriented, merits-based approach.⁷

[8] During the Authority's investigation, there are limits to challenge rights, including that a challenge is not available in respect of a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow.⁸ It is not a function of the Court to advise or direct the Authority in relation to the exercise of its investigative role, powers, and jurisdiction or the procedure that it has followed, is following or is intending to follow.⁹

[9] Dr Bird's case is that the Authority's decision to strike out content from his statement of problem is a breach of his right to natural justice. He says its inclusion forms a critical part of his statement of problem. Much of the submissions filed by Dr Bird concern his substantive argument. The submissions did not address in detail the preliminary issue for the Court, which is whether it can consider the challenge, given the restriction imposed by s 179(5) of the Act.

⁵ *Gill Pizza Ltd v Labour Inspector* [2021] NZSC 184, [2022] 1 NZLR 1 at [64(a)].

⁶ Section 160(1)(a) and (2).

⁷ Section 160(3); see also *FMV*, above n 2, at [58].

⁸ Section 179(5)(a).

⁹ Section 188(4); see also *Dollar King*, above n 4, at [9].

Procedure relates to the mode of conducting the proceedings

[10] Section 179(5) provides:

(5) Subsection (1) does not apply—

...

- (a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; and
- (b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

[11] Statutory interpretation is guided by s 10 of the Legislation Act 2019, which provides that the meaning of legislation must be ascertained from its text and in the light of its purpose and context.

The text

[12] The key word in s 179(5) is “procedure”. No statutory definition is provided for that word, but dictionary definitions refer to the steps taken in a legal action and the mode of conducting judicial proceedings.¹⁰ Those definitions are consistent with the use of the words “followed” or “adopted” in s 179(5).

[13] Other legislation that specifically deals with procedure describes the proper mode of conducting judicial proceedings.¹¹

[14] Within the Act itself, the word “procedure” is used in a number of situations. Unions are described as having “rules or procedures”;¹² union representatives and Labour Inspectors are required to comply with safety, health and security “procedures and requirements” in workplaces;¹³ the “procedure” for notifying the public of various union actions is set out;¹⁴ the object of pt 9 of the Act is to recognise that access to

¹⁰ Michael Proffitt (ed) “Procedure” (June 2007) Oxford English Dictionary <www.oed.com>; and Peter Spiller *New Zealand Law Dictionary* (10th ed LexisNexis, Wellington, 2022) at 245.

¹¹ For example, the Criminal Procedure Act 2011 and the Judicial Review Procedure Act 2016.

¹² Employment Relations Act 2000, s 18A(1)(a).

¹³ Sections 21(2)(c) and 233(1).

¹⁴ Sections 93 and 94.

both information and mediation services is more important than “adherence to rigid formal procedures”.¹⁵ In all these instances, the word “procedure” is used in the sense of rules or the proper way of doing things.

[15] In pt 10 of the Act, which establishes the Authority, s 143 identifies the object of the part being to establish “procedures and institutions” that recognise “that the procedures for problem-solving need to be flexible”.¹⁶ Section 160 gives the Authority the power to do specific things in its investigation, including to follow “whatever procedure the Authority considers appropriate”. Section 173 is specifically headed “Procedure” and requires the Authority to act in a manner that is reasonable, having regard to its investigative role. Section 173(4) includes the power of the Authority to make ex parte orders. Further matters of procedure are included in the Employment Relations Authority Regulations 2000, which were promulgated under s 237 of the Act under which regulations may be made prescribing the procedure in relation to the conduct of matters before the Authority.¹⁷

Purpose and context

[16] When s 179(5) was introduced, s 143(fa) was also inserted into the Act. That sub-section provides that the object of pt 10 is to establish procedures and institutions that “ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations”. The Act makes it clear, albeit in different ways, that the general policy of the Act is against supervision being exercised in relation to procedural rulings. Sections 179(5) and 184(1A) are intended to prevent challenge or review processes disrupting unfinished Authority investigations.¹⁸

[17] The policy reasons for this are to increase speedy and non-legalistic decision-making, to keep costs down, and avoid delays. Those matters are prioritised over any temporary impact on a party caused by a procedural determination.

¹⁵ Section 101.

¹⁶ Section 143(d).

¹⁷ Section 237(d).

¹⁸ *Employment Relations Authority v Rawlings* [2008] NZCA 15, [2008] ERNZ 26 at [23] and [26]; and *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [17].

[18] Access to justice considerations are dealt with through the right of challenge or review once the Authority has made a substantive determination on the matter before it.¹⁹ A challenge, which is able to be brought on a de novo basis, allows a party's concern over a procedural decision to be addressed through the hearing in the Court. Where there is a challenge, that is commenced by way of a fresh statement of claim in the form required by the Employment Court Regulations 2000.²⁰ During the challenge proceedings, questions about the admissibility of any evidence that the Authority has refused to consider may be re-argued before the Court.²¹

[19] The Court has also previously found that certain determinations will not fall within s 179(5) when the determination has an irreversible and substantive effect on the rights of the parties.²² However, it is not enough that an order has an impact on the parties. Any decision will have some impact on the parties.²³

[20] The Court can consider questions of jurisdiction. These are distinguishable from procedural questions in that they concern whether the Authority has the power to do something and not how it goes about it.²⁴

Dr Bird is still able to have his personal grievance considered by the Authority

[21] Dr Bird's personal grievance is in respect of treatment he says he has received from the University in the course of his employment.

[22] Given the nature of the Authority's role being investigative, it is for the Authority to determine how it investigates that personal grievance, including how it is framed, what evidence and other information it needs to receive, and who it needs to hear from. As noted, it drives the process.

¹⁹ *H v A Ltd*, above n 18, at [23].

²⁰ Employment Court Regulations 2000, reg 7 and form 1; compare Employment Relations Authority Regulations 2000, regs 5, 6 and form 1.

²¹ *Austin v Youbee Ltd* [2014] NZEmpC 105, [2014] ERNZ 699 at [4].

²² *H v A Ltd*, above n 18, at [25]; and *Johnstone v Kinetic Employment Ltd* [2019] NZEmpC 91, [2019] ERNZ 250 at [27](c).

²³ *Fletcher v Sharp Tudhope Lawyers* [2014] NZEmpC 182 at [18].

²⁴ *Keys v Flight Centre (NZ) Ltd* [2005] ERNZ 471 (EmpC) at [55]; and *Oldco PTI (New Zealand) Ltd v Houston* [2006] ERNZ 221 (EmpC) at [47]–[52].

[23] Here, in the context of trying to resolve Dr Bird's personal grievance, the parties attended mediation. The Authority has determined that it does not need to and should not receive information on what occurred at mediation and accordingly ordered reference to discussions at mediation to be removed from the statement of problem. The Authority commented that removing the references to mediation did not mean that anything was lost from Dr Bird's narrative of unjustifiable disadvantage against the University.²⁵ Dr Bird remains able to pursue his personal grievance, which is detailed in the other paragraphs of the statement of problem.

[24] If Dr Bird is unhappy with the ultimate outcome of the Authority's investigation, it is open to him to challenge the substantive determination, in which case matters of pleadings and evidence would be considered afresh before the Court.

[25] In conclusion, the Authority's determination was on a matter of procedure. It concerned how it would conduct its investigation. The outcome is not irreversible. It can be remedied on a challenge.

[26] The Court has no jurisdiction to consider Dr Bird's challenge. Dr Bird should progress his matter before the Authority with a view to getting a substantive determination, which the parties can then consider and, if either party wishes to do so, can challenge.

[27] The present challenge is accordingly dismissed.

Costs are reserved

[28] Costs are reserved, and the parties should endeavour to agree them. If that does not prove possible, the University may apply for costs by filing and serving a memorandum within 20 working days of the date of this judgment. Dr Bird is to respond by memorandum filed and served within 15 working days thereafter, with any

²⁵ *Bird v Vice Chancellor; University of Waikato*, above n 1, at [17].

reply from the University filed and served within a further five working days. Costs will then be determined on the papers.

J C Holden
Judge

Judgment signed at 12 noon on 17 February 2023