IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 33
EMPC 212/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	the extent/nature of the hearing
BETWEEN	DARREN PYNE Plaintiff
AND	INVACARE NEW ZEALAND LIMITED Defendant

Hearing: On the papers

Appearances: P Pa'u, advocate for plaintiff
E Butcher and C Joy, counsel for defendant

Judgment: 7 March 2023

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(As to the nature/extent of the hearing)

Introduction

[1] The plaintiff pursued a claim in the Employment Relations Authority.[1] Under the Employment Relations Act 2000 a party who is dissatisfied with a determination of the Authority may elect to have the matter heard by the Court. Such an election is referred to as a challenge. The election must state "whether or not" the challenging party is seeking a full hearing of the entire matter, referred to as a hearing de novo.[2]

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1 *Pyne v Invacare New Zealand Ltd* [2022] NZERA 240 (Member Arthur).
2 Employment Relations Act 2000, s 179(3)(b).

[2] In this case the plaintiff (through his statement of claim) has stated that he is not seeking a hearing de novo. When a hearing de novo is not sought (which I will refer to for convenience as a non-de novo hearing), a plaintiff must specify the determination, or part of the determination, to which the election relates; any error of law or fact alleged; any question of law or fact to be resolved; and the grounds on which the election is made. And the Court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.[3]

[3] The parties are at odds over what evidence may appropriately be heard on the plaintiff's challenge. The plaintiff wishes to call evidence afresh; the defendant says that is not permissible. A tangential issue has also been identified by the parties, namely whether a claim of breach of the employment agreement can be pursued on the challenge given that it was not expressly pleaded in this way in the Authority – the plaintiff says it can; the defendant says it cannot.

[4] This judgment deals with these two preliminary issues. Both parties filed submissions and agreed that the matter could be dealt with on the papers.

[5] In summary, I have concluded that there is no automatic bar to evidence being given afresh on a non-de novo hearing. Whether such evidence will be admitted is a different matter and is one for the trial judge. Further, a narrow or overly technical reading of provisions relating to what can and cannot be challenged is not supported by the underlying statutory scheme. A purposive approach is required when interpreting the challenge rights contained within the Employment Relations Act. An application of such an approach in the circumstances of this case leads me to the conclusion that the plaintiff may pursue a challenge in respect of an alleged breach of the employment agreement by the defendant, such a matter having broadly been before the Authority in its investigation.

What is the Court expected to do on a non-de novo hearing?

[6] The Employment Relations Act generally provides a tiered approach to resolving employment disputes/problems. The parties are encouraged, including via

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[3] Employment Relations Act 2000, s 182(3).

the good faith obligations statutorily imposed on them, initially to seek to resolve matters between themselves;[4] access to free mediation services is then provided by specialist mediators appointed by the Chief Executive of the Ministry of Business Innovation and Employment;[5] then an investigation and determination by a specialist inquisitorial body (the Employment Relations Authority);[6] followed by challenge rights to the Employment Court;[7] limited appeal rights to the Court of Appeal on questions of law;[8] and finally limited appeal rights to the Supreme Court.[9]

[7] The essence of the defendant's objection to the plaintiff's proposal to adduce evidence afresh on his challenge can be summarised as follows. A non-de novo hearing of a challenge "is in the nature of an appeal" and accordingly the evidence is limited to the evidence which was before the Authority in its investigation; if the plaintiff wishes the Court to hear evidence afresh he ought to have sought a de novo hearing. This interpretation is said to be reinforced by s 179(4) (which requires the plaintiff to specify alleged errors of law and/or fact in the determination); s 182(3) (which requires the Court to direct the nature and extent of the hearing "in relation to *the issues* involved in *the matter*");[10] and s 183 (which provides that the Court must make its own decision on the matter).

[8] The supervisory methodology and scope to be applied on a non-de novo hearing have caused confusion over the years. This may, in part, have been an effect of the statutory language and what might be called procedural gaps. In this regard the Employment Relations Act refers to challenges, not appeals. It expressly refers to a de novo hearing. And while it provides for "other" hearings it is silent as to what characteristics that category of hearing might have. It is also silent as to how the Court is to go about exercising its challenge function, what material parties may appropriately put before the Court and what (if any) weight or level of deference is to be accorded to findings in the Authority.

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4 Section 101(ab).
5 Section 144.
6 Section 156.
7 Section 179.
8 Section 214.
9 Section 214A.
10 Emphasis added.

[9] In my view, and contrary to the defendant's submission, the methodology issue is not answered by asking whether a challenge pursued by way of non-de novo hearing is in the nature of an appeal (plainly it is, as is a challenge pursued by way of de novo hearing[11]) but rather *where* on the appellate spectrum it sits.[12] As observed most recently by the Legislation Design and Advisory Committee in its 2021 Legislation Guidelines:

> **28.6 What type of appeal should be granted?**
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> *Legislation should identify the type of appeal procedure to be adopted where existing appeal procedures cannot be relied on.*
>
> If new legislation does not rely on an existing appeal procedure, the appeal model that is most appropriate to the context of the legislation should be identified. The most commonly used models are "re- hearings" or "hearings de novo".
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> - **Re-hearing:** The appeal is heard on the record of evidence considered by the previous decision maker, but the appellate body has the discretion to re-hear some or all of the evidence and to admit new evidence. Re-hearings are generally appropriate where specific legal or factual errors are the focus.
> - **Hearing de novo:** In a hearing de novo (from the beginning again), the appellate body may approach the case afresh and the appellant receives an entirely new hearing. Hearings de novo will generally only be appropriate when there is a reasonable possibility that the first instance decision maker may have incorrectly ascertained the facts.
>
> Re-hearings will generally be cheaper and faster than hearings de novo, but will still involve significant time and cost.
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> Two other appeal models are appeals by way of "case stated" and pure appeals (or "stricto sensu"). These two models can be restrictive in terms of the evidence that the court can consider and what outcomes can be achieved and it is now very rare to provide for them in statutes. Legal advisers and the Ministry of Justice should be consulted if an appeal model other than either a re-hearing or hearing de novo is being considered.

[10] In general terms the de novo hearing model sits at one end of the appeal spectrum – the appellate court stands in the shoes of the first instance decision-maker and hears the matter afresh, which may include the provision of fresh evidence. This

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11 *Sisson t/a Edgeware Law v Lewis* [2004] 1 ERNZ 200 (EmpC) at [53].

12 Legislation Design and Advisory Committee "Legislation Guidelines – 2021 Edition" (September 2021) at [28.6].

has been described as the most "vigilant" form of judicial supervision.[13] At the other end of the appeal spectrum the appellate court's ability to intervene is at its most restricted. At this end of the spectrum the court can overturn an error of law or fact but only based on the evidence that was actually provided in the first instance – no new evidence is permitted.[14] I pause to note that, while this is the way in which the defendant implicitly seeks to characterise challenges by way of non-de novo hearing under the Employment Relations Act, the Legislation Design and Advisory Committee labelled this sort of restrictive appeal model "cumbersome" and advised against it less than a year after the Employment Relations Act came into force.[15] I note too that there appears to be nothing in the pre-legislative material to suggest that Parliament intended to limit the non-de novo hearing model in this way.

[11] In between the two ends of the appellate spectrum lies appeals by way of re-hearing. As the Legislation Design and Advisory Committee Guidelines point out, these appeals are generally heard on the record of evidence which was before the primary decision-maker,[16] but there is often an ability to re-hear or receive more evidence.[17] The appellate court may also reach its own independent findings on the evidence, although there are presumptions about the circumstances in which it can differ from the decision-maker under review.[18]

[12] Against this backdrop it is convenient to return to the statutory provisions relating to challenges as the question of "what the [appeal] court is actually expected to do" ultimately depends on the interpretation of the statute conferring the right of appeal.[19]

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13 Rayner Thwaites and Dean Knight "Review and Appeal of Regulatory Decisions: The Tension between Supervision and Performance" in Susy Frankel (ed) *Learning From the Past, Adapting for the Future – Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 215.

14 Legislation Design and Advisory Committee, above n 12, at [28.6].

15 Legislation Design and Advisory Committee "Guidelines on Process and Content of Legislation – 2001 edition and amendments" (May 2001) at 284.

16 Legislation Design and Advisory Committee, above n 12, at [28.6]. See also Andrew Beck and others *McGechan on Procedure* (online looseleafed, Brookers) at [HRPT 20.16.01].

17 See *Telecom Corp of New Zealand Ltd v Commerce Commission* [1991] 2 NZLR 557 (CA) at 558.

18 See, for example, *Kacem v Bashir* [2010] NZSC 112, [2010] 2 NZLR 1 at [31]-[32].

19 Andrew Beck *Principles of Civil Procedure* (3rd ed, Brookers, Wellington, 2012) at 266. See too Kenneth Keith "Appeals from Administrative Tribunals: The Existing Judicial Experience" (1969) 5 VUWLR 123 at 137-138.

[13] As I have said, the defendant effectively submits that the non-de novo hearing right conferred by the Employment Relations Act falls at the pure appeal/stricto sensu end of the spectrum. I disagree. While s 179(4) requires a plaintiff to identify any error of law or fact, it is notably silent about what evidence may be used to establish that error, and there is nothing to suggest that the evidence is restricted to evidence that was before the Authority. Rather, s 182(3) confers on the Court a very broad power to direct the nature and extent of the hearing where a party seeks a non-de novo hearing of their challenge. And while s 179(4) refers to the challenge being restricted "to the issues involved in the matter" (so the error/s of fact or law allegedly made by the Authority) an error of fact or law can be established with new evidence, as noted above.

[14] Further, s 189(2) allows the Court to admit evidence "as in equity and good conscience it thinks fit". The defendant submits (correctly) that this power of admission is limited by the "jurisdictional boundaries created in s 179(4)", but the point does not assist the defendant's argument once the ambit of s 179 is properly understood.

[15] Finally, if Parliament intended a challenge pursued by way of non-de novo hearing to be in the nature of a strict appeal, it is likely it would have put in place appropriate mechanisms to enable that to occur, such as a requirement that the Authority record evidence received during the course of an investigation meeting. Quite the opposite – Parliament has made it very clear that the Authority is *not* required to do so.[20]

[16] All of this inexorably leads to the conclusion that the Court has wide powers to decide the basis on which a challenge pursued by way of non-de novo hearing will proceed in terms of the evidence that may be admitted on it. That is hardly surprising given the thrust of the legislation is on fit-for-purpose employment relationship problem solving.

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[20] Employment Relations Act 2000, s 174E(b).

[17] The defendant submits that a judgment of the full Court in *Xtreme Dining* supports its (narrow) interpretation of non-de novo hearings. There the Court listed four differences between a de novo hearing and a non-de novo one:[21]

> (a) A non de novo hearing is in the nature of an appeal. The challenger or plaintiff is required to show that the Authority's determination was wrong.
>
> (b) Thus, the challenger has an onus of persuading the Court of the existence of an error of fact and/or law by the Authority in its determination.
>
> (c) Making such an election does not indicate the way in which the appeal is to be heard. *There may be evidence or further evidence about the matters at issue in the non de novo challenge.* The Court must make its own decision, as required by s 183 of the Act.
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> (d) Section 182(3) of the Act requires that where an election states that the person seeking the election is not seeking a hearing de novo, the Court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.

[18] The defendant submits that the words "the matters at issue" mean that only evidence relating to how the Authority got it wrong may be given – fresh evidence cannot. So, for example, a plaintiff may call evidence as to what evidence was given in the Authority in respect of the humiliation, loss of dignity and injury to feelings suffered as a result of the alleged breach, and may be cross-examined on that evidence. They cannot give evidence afresh as to the impact of the employer's default on them; in other words they cannot take the opportunity on a non-de novo hearing to have a second bite at the cherry. If they wish to have a second bite at the cherry the appropriate procedural avenue is a de novo hearing, where the Authority's determination is put to one side and the Court hears the whole matter itself.

[19] It seems to me that the defendant's interpretation strains the reference to "further evidence" in the full Court's judgment. "Further" evidence must logically refer to evidence that the Authority did not have before it, and there is nothing to suggest that the full Court was limiting any "further" evidence to evidence in the nature of fresh evidence, such as evidence which has come to light following the Authority's investigation. This is supported by two further points.

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[21] *Xtreme Dining Ltd, (T/A Think Steel) v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628 at [16] (footnotes omitted; emphasis added).

[20] First, the full Court cites *Cliff v Air New Zealand Ltd*. In that case, Chief Judge Colgan, said:[22]

> [7] The election that challengers must make under s 179(3) refers not so much to the nature of the presentation of the case in Court but, rather, to the extent to which the decision under appeal is challenged. An election by the challenger *"seeking a full hearing of the entire matter (... a hearing de novo)*" indicates that all matters that were before the Authority will be at issue on the challenge. What has become known colloquially as a "non-de novo challenge" (because of the absence of reference to this in s 179) is a narrower form of appeal in the sense that it identifies some but not all of the determination that is under appeal. That is exemplified by s 179(4) which requires a party not seeking a hearing de novo to specify what it says are errors of law or fact in the Authority's determination and other particulars as to the issues to enable the Court to conduct a restricted and more focused hearing of the appeal. *But the election does not dictate the way in which the appeal will be heard. So, as here, there may be evidence or further evidence about the matters in issue in the non-de novo challenge and in such a case it is particularly appropriate, and indeed necessary, for the Court to make its own decision on the point or points as required by s 183.*
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> [8] *So I do not accept that the Court is constrained in its consideration of the parties' cases as the defendant submitted.*

[21] This passage, referenced approvingly by the full Court, supports the view that there is no restriction on bringing in fresh evidence in a challenge pursued by way of non-de novo hearing.

[22] The second point emerges from the passages that immediately followed the passages relied on by the defendant in the *Xtreme Dining* judgment:

> [17] One of the difficulties which parties must consider when electing to proceed on the basis of a non de novo hearing is the scope and extent of the evidence which will be before the Court on such a challenge. No transcript is kept of the evidence received at an investigation meeting, since there is no requirement on the Authority to do so. The Act also stipulates that in its written determination the Authority need not set out a record of all or any of the evidence heard or received, or record or summarise any submissions made by the parties. These features are consistent with the statutory intention that the Authority is required to dispose of problems and disputes promptly and without undue regard to technicalities. Consequently, when electing a non de novo challenge, careful attention should be given to the issue as to whether any additional information should be before the Court beyond that which is apparent from the determination under challenge.
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> [18] In the present case, the parties required the Court to consider not only the evidence referred to in the determination, but also briefs of evidence and

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22 *Cliff v Air New Zealand Ltd* [2005] (EmpC) (emphasis added).

> documents which had been placed before the Authority, as well as the extensive oral evidence which was led.
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> [19] Although this approach resulted in a substantial quantity of evidence being placed before the Court, the statutory provisions require a focus on the conclusions reached in the Authority's determination, and whether there are errors of fact and/or law in any of the asserted respects. In this case, the challenge relates to remedies only; however, that includes an assessment of issues relating to contributory fault. Accordingly, the Court must obtain a detailed understanding of the factual context. For the purposes of this issue in particular, the Court must reach its own conclusions as to the sequence of events; only then can it determine whether there is an error of fact or law as to contributory fault. This is not a case where the additional evidence called in the Court comes into play only after an error of fact or law has been established.

[23] In short, the full Court recognised that a large amount of evidence may be required, including evidence not before the Authority (for whatever reason), when determining whether the Authority made an error of fact or law. I do not accept that the full Court's judgment supports the limited interpretation of non-de novo hearing rights advanced by the defendant, or that the subsequent judgments referred to by counsel (namely *Sefo* and *Evans*) were wrong on this point.[23]

[24] Nor do I accept the submission that *Robinson v Pacific Seals New Zealand Ltd*[24] is authority for the proposition that fresh evidence on a non-de novo hearing may be admitted, but only after an error of fact or law has been established.[25] The relevant passages in *Robinson* make this clear:

> [34] I do not accept that Judge Couch's direction as to the nature and scope of the hearing had the effect of broadening the challenge to a consideration of all evidence afresh in order to determine what level of compensation under s 123(1)(c)(i) would be appropriate. As Judge Perkins observed in *Saipe v Waitakere Enterprise Trust Board*, it is the plaintiff's prerogative to decide the findings and determinations of the Authority which he wishes to challenge, but it is for the Court to determine the extent of the evidence the Court may hear in respect of those issues. This will be defined by the plaintiff's pleadings.
> …
> [36] I note that the evidence which the applicant contends ought to have been taken into account, but which was not, was from the applicant's mother. Her evidence was directed at corroborating the applicant's evidence as to the hurt

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23 *Sefo v Sealord Shellfish Ltd* [2007] ERNZ 680 (EmpC); *Evans v JNJ Management Ltd* [2020] NZEmpC 181, (2020) 17 NZELR 674.

24 *Robinson v Pacific Seals New Zealand Ltd* [2015] NZEmpC 84, [2015] ERNZ 720 (emphasis added).

25 See for example *Lim v Meadow Mushrooms Ltd* [2015] NZEmpC 192, (2015) 10 NZELC 79-060 at [23](e).

> and humiliation suffered. The applicant's evidence on this point had been accepted in the Authority.
>
> [37] It seems to me that the issue of whether or not there was a miscarriage of justice in the present case is answered by the applicant's pleadings. The applicant did not establish that the Authority had erred in any of the ways contended for by him in the statement of claim. *The evidence that the applicant says ought to have been considered by the Court was not relevant to a determination of the alleged errors, as pleaded.* There was no scope for the Court to substitute its own view in terms of quantum of compensation in the particular circumstances.

[25] These passages support the view that the evidence allowed on a non-de novo hearing of a challenge is decided on the basis of *relevance*, not on the basis of whether the evidence was before the Authority. In *Robinson*, the evidence in question was not relevant to the narrow issue before the Court on the plaintiff's challenge. Whether or not the evidence had been before the Authority was accordingly beside the point.

[26] Returning to the issues in this case, the plaintiff's challenge is directed at remedies (unsurprisingly he does not seek to challenge the Authority's finding that he was unjustifiably dismissed). He takes issue with the quantum of relief ordered in his favour. It follows that evidence on the challenge ought to be relevant to that issue. Such evidence might include:

- for lost wages, evidence regarding the plaintiff's earnings following dismissal, such as whether he found other employment or made attempts to do so;
- for humiliation, loss of dignity and injury to feelings, evidence regarding the harm suffered, including his own description or observations made by friends and family;
- for breach of good faith, evidence directed at the severity of the breach and the circumstances in which it occurred and why.

[27] The plaintiff has indicated an intention to call six witnesses. It is premature at this stage to assess whether the evidence that those intended witnesses may give is relevant or not. That can be reviewed, as necessary, after briefs of evidence have been filed and served.

Breach of the employment agreement

[28] The question of what matters can and cannot be raised on a challenge is as vexed as the evidence issue, and has also been raised in this case. The plaintiff's statement of claim contains allegations that the employer breached the employment agreement. The defendant submits that this aspect of the claim cannot be pursued on a non-de novo hearing of the challenge because it was not "a matter" the Authority dealt with. While the defendant accepts that an overly technical approach should not be taken for hearings de novo,[26] it submits that this is not the case for non-de novo hearings.

[29] While it is correct that the Court has limited jurisdiction under s 179, the point for present purposes is that its jurisdiction is unaffected by the type of hearing (de novo or non-de novo) a plaintiff elects to pursue. As stated by the full Court: [27]

> [46] To adopt Mr Couch's narrow construction of s 179(1) would be to reintroduce restrictions of the nature of s 95 of the Employment Contracts Act 1991 which in most cases prevented the introduction for the consideration by the Court in an appeal from the Employment Tribunal of any issues, explanations or facts that had not previously been placed before the Tribunal. We are satisfied that the thrust of the Employment Relations Act is to avoid such technicalities, provided that it is the same basic employment relationship problem that the Court is being asked to resolve on the challenge as that which was placed before the Authority.
>
> [47] We therefore agree with Mr Lawson's submissions that a broad approach to the meaning of "a matter" in s 179(1) is to be taken. If an issue raised in the challenge relates to the employment relationship problem or any other matter within the Authority's jurisdiction, these issues can be raised for the first time before the Court, whether or not they were raised before the Authority.

[30] The reference to a/the "matter" in s 179(1) is appropriately given a broad interpretation, consistently with the underlying statutory scheme and the focus on resolving the overall employment relationship problem rather than any individual claims. It would undermine, rather than support, Parliamentary intention to require claims in the Authority to be crafted with fine legal precision. Litigants are not required to be, or to engage, lawyers;[28] non legally qualified advocates routinely

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26 See *Udovenko v Offshore Marine Services (NZ) Ltd* [2013] NZEmpC 174 at [11].
27 *Sibly v Christchurch City Council* [2002] 1 ERNZ 476 (EmpC).
28 Employment Relations Act 2000, s 236.

represent claimants in the Authority; and Parliament has made it clear that the Authority is to be relatively informal and non-technical and that it may find a grievance other than as alleged by a party.[29]

[31] The position was described in the following way in *Udovenko v Offshore Marine Services (NZ) Ltd*:[30]

> [11] An overly technical approach is not to be taken. That would enable form to trump substance…
>
> [12] While no cause of action under the Wages Protection Act was pursued in the Authority, a dispute as to whether the plaintiff had been correctly paid during the periods referred to in the statement of claim was. As the Authority's determination records, the defendant sought a declaration that it had correctly paid the plaintiff and that it did not have any further liability in relation to his claim for arrears of wages. Broadly speaking the "matter" before the Authority was whether the defendant had paid the plaintiff appropriately and, if not, what wages he had owing to him. What the plaintiff is seeking to do is reformulate his claim, to argue that the defendant used the sums properly owing to the plaintiff without his knowledge or consent, which (he will argue) amounts to an unlawful deduction of wages which must now be repaid. The proposed amendment provides an alternative platform for effectively achieving the same ends.

[32] There are parallels with the present case. The plaintiff wishes to pursue a claim that the defendant breached cl 20.1 of the employment agreement, which allegedly "required the Defendant to investigate future employment options for the Plaintiff" in the context of a restructuring exercise.[31] The Authority's determination traversed the restructuring process in detail – what the defendant did and did not do, and why, in terms of its decision-making process leading to the plaintiff's termination on the grounds of redundancy. Broadly "the matter" which the plaintiff wishes to pursue on his challenge, namely whether there was a breach of the employment agreement by an alleged failure to investigate further employment options before terminating his employment for redundancy, was before the Authority in its investigation. Whether it was specifically pleaded in the statement of problem, whether it was expressly addressed by the parties in evidence and/or submissions in that forum, and whether the Authority referred to it in its determination are not determinative.

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29 Employment Relations Act 2000, ss 122, 157(1) and 160(3).
30 *Udovenko,* above n 26.
31 Statement of claim at [12].

[33] In the circumstances, I do not consider the plaintiff's claim of breach of contract to be objectionable on the basis that it falls foul of s 179(1).

Conclusion

[34] The Court is required to issue directions, in relation to the issues involved on the plaintiff's challenge and the nature and extent of the hearing. In this case the Court is asked to determine whether the Authority erred in law and fact in respect of the quantum of relief ordered in the plaintiff's favour. Those issues will be determined on the basis of relevant evidence heard afresh. Similarly, the plaintiff is entitled to pursue a challenge in respect of an alleged breach of the employment agreement.

[35] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 1.15 pm on 7 March 2023