IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2025] NZEmpC 118
EMPC 255/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AIRWAYS CORPORATION OF NEW ZEALAND LIMITED Plaintiff
AND	JARED SMALL Defendant

Hearing: 3 April 2025

Appearances: G Davenport, counsel for plaintiff
J S Hall, counsel for defendant

Judgment: 16 June 2025

JUDGMENT OF JUDGE J C HOLDEN

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[1] This judgment resolves a non-de novo challenge to a determination of the Employment Relations Authority.[1]

[2] Airways Corporation of New Zealand Ltd is challenging what it says are errors of law and errors of fact in the determination, namely:

(a) the failure of the Authority to hold that the unjustifiable disadvantage claims brought by Jared Small are outside the jurisdiction of the Authority, insofar as they relate to actions that occurred prior to

[1] *Airways Corporation of NZ Ltd v Small* [2024] NZERA 362.

3 September 2022, that date being 90 days before Mr Small raised personal grievances with Airways;[2]

(b) the failure of the Authority to hold that the unjustifiable dismissal claim brought by Mr Small is outside the jurisdiction of the Authority insofar as it relates to actions that occurred prior to 3 September 2022, particularly given that:

(i) Mr Small is not claiming a course of conduct/continuum of conduct on the part of Airways;

(ii) Mr Small has not pleaded the pre-3 September 2022 actions as evidence forming part of the context in which an action on or after 3 September 2022 is to be considered – rather, he has claimed that these earlier (pre-3 September 2022) actions themselves comprise actionable personal grievances; and

(iii) Mr Small's basis for asserting that jurisdiction exists rests on the flawed assertion that the 90-day timeframe in s 114 of the Employment Relations Act 2000 commences from the date when he says it occurred to him that he had a personal grievance.

[3] Mr Small says that the Authority has acted entirely within its jurisdiction and that Airways has mischaracterised his claims in the Authority. He says too the Authority was only dealing with whether Mr Small raised his constructive dismissal claim within time.

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[2] Employment Relations Act 2000, s 114. Section 114 has been amended since this problem arose, but not in a way that is relevant to the issues in these proceedings.

[4] He also says the challenge cannot be brought under s 179 of the Act. He says that:

(a) the powers of the Court in relation to the jurisdiction of the Authority are proscribed by s 184(2);

(b) s 194 applies to all such questions of jurisdiction when the Authority has reached a determination on them;

(c) Airways' challenge is therefore not properly brought under s 179 but under s 194;

(d) it is precluded (for now) by s 184(1A);

(e) in the alternative, it is a procedural claim which is precluded by s 179(5);

(f) in any event, it would be a breach of Mr Small's right to natural justice for the Court to uphold the challenge when the Authority has not yet heard evidence from Mr Small;

(g) it also would breach the Authority's exclusive jurisdiction to determine what kind of employment relationship problems, if any, are disclosed by Mr Small's claims; and

(h) therefore, the Court should dismiss the challenge.

[5] At this point, I note that Mr Small raised an objection to some of the material filed by Airways. The parties agreed that no separate interlocutory hearing was required to deal with that objection, and that the evidential matters could be considered in the course of the substantive hearing. It has not been necessary for me to rely on the affidavit evidence objected to, which Mr Small claimed amounted to submissions, or the part of the plaintiff's chronology that was of concern, and that material has been put to one side. Both parties, however, referred to the exhibits attached to the affidavit

filed for Airways that Mr Small objected to, including written submissions that were before the Authority, and I have considered those documents.

Section 114 sets timeframes for raising personal grievances

[6] Pursuant to s 114 of the Act, an employee who wishes to raise a personal grievance with their employer generally must do so within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is later, unless the employer consents to the personal grievance being raised after the expiration of that period. If an employee wishes to pursue a personal grievance outside this period, they must obtain leave from the Authority to do so.

[7] Airways has not consented to Mr Small raising a personal grievance in relation to the pre-September 2022 matters outside of the 90-day period, and Mr Small has not obtained leave to do so.

There are two claims in the Authority

[8] In his statement of problem dated 14 August 2023, Mr Small claims that he was constructively and unjustifiably dismissed by Airways by means of a constructive dismissal having the following elements:

(a) there was a breach of the terms and conditions of employment by Airways that was sufficiently serious to warrant termination action taken by Mr Small;

(b) that breach is said to be Airways:

(i) failing in its duty to provide a safe workplace;

(ii) failing in its duty to give Mr Small a reasonable opportunity to contribute to decision-making, concerning decisions made to support his mental health, including during rehabilitation and return to work;

(iii) failing to communicate and make available a means by which Mr Small could raise concerns about his own mental health.

[9] Mr Small also claims he was unjustifiably disadvantaged by the same failures.

[10] As can be seen, the personal grievances described in the statement of problem reference alleged breaches of Mr Small's terms and conditions of employment, being breaches relating to health and safety. Mr Small's statement of defence also includes as a positive defence, that alleged breaches of contract gave rise to a constructive dismissal and to an unjustifiable disadvantage. There is, however, no separate breach of contract claim. Such a claim would, in any event, be precluded for the alleged unjustifiable dismissal claim.[3]

[11] In summary, in setting out the facts that Mr Small says have given rise to the employment relationship problem, Mr Small's statement of problem records some history of friction involving Mr Small and a second Airways employee, starting in 2020. This included a memorandum of understanding between Mr Small and the second employee, and a settlement between Mr Small and Airways, recorded in a record of settlement. Both the memorandum of understanding and the record of settlement were entered into in 2020.

[12] The statement of problem records further issues being raised with Mr Small later in 2020, which led to him receiving a written warning and to Mr Small engaging with an aviation psychologist arranged by Airways. The statement of problem records that Mr Small was stood down from work from November 2020, and that there were discussions over a return-to-work plan, which continued into the first half of 2021.

[13] Other issues arose in June 2022 involving the second employee, and a telephone call on 22 June 2022 between Mr Small and a third Airways employee. There were communications about those matters between Mr Small and Airways in June and July 2022.

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[3] Employment Relations Act, s 113.

[14] The statement of problem then records that, on or about 5 October 2022, Mr Small received notification of a disciplinary investigation into his behaviour following a complaint being received from the second employee concerning the call on 22 June 2022. This notification was addressed directly to Mr Small by Airways. The allegations were that:

(a) his handling of the 22 June call with the third employee may have breached the memorandum of understanding;

(b) in that call, Mr Small may have verbally abused the second employee, in breach of Airways' Code of Conduct; and

(c) his actions may not have been in line with Airways' values.

[15] Mr Small resigned by email dated 6 October 2022.

[16] In his resignation, Mr Small advised that his last day of work would be Friday 31 March 2023. He said that:

> Over the previous two/three years I have been subjected to a diverse range of bullying and harassment from Airways management and an employee within Airways. This behaviour continues to this day and the effect this behaviour has had on me has changed me. At my lowest point, I suffered a mental health episode in the form of a breakdown, caused directly by the emotional toll this behaviour had on me. With this behaviour still ongoing, I no longer have the desire to fight and put my Family or myself through another horrific ordeal.[4]

[17] Mr Small raised personal grievances for unjustifiable dismissal and unjustifiable disadvantage by letter from the New Zealand Air Line Pilots' Association, dated 1 December 2022. That letter traverses the history back to 2020, then says that Mr Small "found the stress of being told that the complaint would be investigated on its face to be too much. Consequently, on 6 October 2022, Jared provided notice of resignation from Airways." Mr Small's grievance, as expressed in NZALPA's letter, was that Airways allowed him to discover the complaint concerning him in "a fragmented, undocumented and unofficial manner that was liable to misrepresent Airways' intended treatment of that complaint."

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4 Affidavit of Marielle Christian, p 87.

[18] As can be seen, the facts upon which Mr Small relies in his statement of problem go back to early 2020; the only action by Airways Mr Small refers to that occurred within 90 days prior to Mr Small lodging his personal grievances was Airways sending the notification to Mr Small on 5 October 2022. It was a day after receiving that notification, that Mr Small gave notice of his resignation.[5]

The personal grievances have shifted

[19] Before the Court, Mr Hall, counsel for Mr Small, agreed that Mr Small's disadvantage personal grievance is that, given the historic issues between himself and the second employee, Airways should have had procedures in place to deal with any issues that might arise between Mr Small and the second employee, and that Mr Small was disadvantaged by Airways not doing so. He says it was only when Mr Small was advised of the proposed outcome of the investigation into the complaints on 9 December 2022 that he realised that no such procedure was in place.[6]

[20] That, however, is not the grievance identified in the personal grievance letter of 1 December 2022, and no further personal grievance was raised.

[21] The claim of unjustifiable constructive dismissal has also shifted. It seems to be that, in view of the preceding actions and inactions of Airways, Airways breached its obligations to Mr Small by its intended handling of the complaint. In light of that breach, Mr Small says his resignation was reasonably foreseeable and amounted to a constructive dismissal. In submissions, Mr Hall also said this is a "last straw" constructive dismissal; that learning of the disciplinary investigation, on top of the historic issues, was the "last straw" that caused Mr Small to resign.

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5 It seems that Mr Small's employment did not end until 31 March 2023. This judgment does not consider any timing issues that may arise from that.

6 The investigator did not uphold the complaints made by the second employee.

The current issue before the Court concerns the pre-September 2022 matters

[22] Airways' position is that, while the matters that arose prior to the beginning of September 2022 can be introduced as background contextual evidence before the Authority, they cannot now be raised as personal grievances without leave.

[23] Prior to the hearing of this matter, Mr Small filed an affidavit in which he said that he was referring to matters that occurred more than 90 days before the date he raised the grievance as "background information". Mr Davenport, counsel for Airways, suggested that, if that was Mr Small's position, and he was not contending that the matters that occurred in 2020, 2021, and the first eight months of 2022 were being raised as personal grievances, then the challenge could be resolved by recording exactly that in a consent judgment. That suggestion was not accepted by Mr Small.

Airways may challenge the determination of the Authority

[24] Airways has brought these proceedings as a challenge to a determination of the Authority under s 179 of the Act.

[25] Section 179 generally allows a party to a matter before the Authority, who is dissatisfied with a written determination of the Authority, to elect to have the matter heard by the Court. There are, however, some limits to a party's ability to bring a challenge. Section 179(5) of the Act precludes a challenge to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; or to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

[26] A challenge may be de novo, seeking a full hearing of the entire matter, or non-de novo, dealing only with part of a determination.

[27] Where a challenge is non-de novo, the plaintiff must identify any error of law or fact alleged by that party; any question of law or fact to be resolved; the grounds on

which the election is made; and the relief sought.[7] The Court then must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.[8]

[28] The Authority issued a determination that Airways was dissatisfied with; it elected to challenge that determination under s 179.

[29] Although Mr Small submits that the challenge was precluded by s 179(5), I do not agree. The determination is not about the procedure the Authority has, or intends to follow; it is about whether the Authority can consider grievances based on the pre-3 September 2022 actions or inactions.[9] Section 179(5) therefore does not bar the challenge.

[30] Prior to the hearing of this matter, the Court directed that it would be in relation to issues concerning the jurisdiction of the Authority to consider the claims made in the statement of problem, bearing in mind that if an employee who has been dismissed wishes to challenge that dismissal, or any aspect of it, for any reason, that challenge may be brought only as a personal grievance,[10] and further, that a personal grievance generally may only be raised during the period of 90 days beginning on the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is later.[11]

[31] Contrary to what seems to be the submissions of Mr Hall, Airways is not required to initiate judicial review proceedings pursuant to s 194 of the Act. Indeed, s 184(1A) generally requires a matter to be completed in the Authority, and a challenge to be brought and resolved, before judicial review proceedings are commenced.

[32] I see no difficulty in me determining the challenge, and proceed on that basis.

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7 Employment Relations Act, ss 179(3) and (4).
8 Section 182(3)(b).
9 Questions of jurisdiction are generally not questions of procedure caught by s 179(5). See *Keys v Flight Centre (NZ) Ltd* [2005] ERNZ 471 (EmpC) at [55]; *Oldco PTI (New Zealand) Ltd v Houston* [2006] ERNZ 221 (EmpC) at [51]–[52]; and *Grant v Vice-Chancellor of the University of Otago* [2011] NZEmpC 172, [2011] ERNZ 491 at [28]–[30].
10 Section 113.
11 Section 114(7)(b).

The issue is in respect of the pre-3 September 2022 events

[33] In its directions to the parties on 15 December 2023, the Authority recorded that, by agreement, the issue to be dealt with as a preliminary matter concerned the 90-day timeframe for raising personal grievances. Those directions link back to the statement of problem and to Airways' statement in reply, both of which refer to personal grievances for unjustifiable dismissal and for unjustifiable disadvantage. The parties' submissions also were directed to both the disadvantage and the dismissal personal grievances. While the Authority's determination commences by saying that it "resolves the preliminary question of whether Jared Small can pursue a personal grievance against his former employer, Airways Corporation of New Zealand Ltd (ACNZL) for constructive dismissal" the matter before the Authority also was in respect of the disadvantage personal grievance.[12] I agree with Mr Davenport, the determination ought to have addressed the disadvantage grievance and the Authority was in error in not doing so.

[34] Further, the dispute between the parties was not whether the grievance, recorded in NZALPA's letter of 1 December 2022, had been raised within 90 days of the alleged constructive dismissal on 6 October 2022, it was whether the earlier matters referred to in Mr Small's statement of problem could be raised as grievances. That is the issue I am being asked to determine on this challenge.

The Authority can consider grievances based on Airways' actions and inactions from 3 September 2022

[35] If Mr Small considers that Airways' actions or inactions from 3 September 2022 were unjustifiable and caused him disadvantage, and/or were such that his resignation on 6 October 2022 amounted to an unjustifiable constructive dismissal, those matters can be pursued. Airways accepts that. Within that context, the Authority can consider whether either of Mr Small's personal grievances are of a type other than that alleged.[13]

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12 *Airways Corporation of NZ Ltd v Small*, above n 1, at [1].
13 Employment Relations Act, s 122.

[36] Airways also accepts that background events may inform Mr Small's claims; Mr Small can refer to them in his evidence as context.

[37] The personal grievance lodged on 1 December 2022 does not claim that earlier acts or omissions only became known to Mr Small within the 90 days preceding him raising his grievances.[14] Nor does it suggest that there were new facts from before 3 September 2022 that Mr Small learned of only on or after that date. The letter was not claiming that the earlier events were part of a series of events so close in time and quality as to be fairly described as one continuous course of conduct.[15]

[38] Therefore, while the earlier matters can be raised as background context, it is not permissible for the Authority to consider whether the actions or inactions of Airways prior to 3 September 2022 were, themselves, unjustifiable disadvantages.[16]

[39] In summary, the position is as Airways suggested for a consent judgment. Matters that occurred outside the 90 days preceding the date Mr Small raised the grievances may be raised as "background information", but are not justiciable as personal grievances.

[40] The determination of the Authority dated 19 June 2024 is accordingly set aside and this judgment stands in its place.[17] The Authority should now proceed on the basis set out in this judgment.

Airways may apply for costs

[41] Airways has been successful on its challenge and is entitled to costs. In the event the parties are unable to agree on costs, Airways has 28 days from the date of this judgment within which to file and serve any memorandum in support of its claim for costs. Mr Small is to respond by filing and serving a memorandum within a further

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14 *Airways Corporation of NZ Ltd v Small*, above n 1, at [46]; and *Wyatt v Simpson Grierson* [2007] ERNZ 489 at [29].
15 *Premier Event Group Ltd v Beattie (No 3)* [2012] NZEmpC 79 at [14]–[20].
16 *Davis v Commissioner of Police* [2013] NZEmpC 226 at [33] and [47].
17 Employment Relations Act, s 183(2).

21 days. Any reply from Airways then is to be filed and served within a further seven days.

J C Holden
Judge

Judgment signed at 3.45 pm on 16 June 2025