Employment Court of New Zealand

Bowen v National Australia Bank Ltd [2024] NZEmpC 234 (29 November 2024)

Last Updated: 6 December 2024

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2024] NZEmpC 234
EMPC 474/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for a stay of proceedings
AND IN THE MATTER OF	applications to dismiss proceedings
BETWEEN	MELISSA JANE BOWEN Plaintiff
AND	NATIONAL AUSTRALIA BANK LIMITED First Defendant
AND	ANTHONY HEALY Second Defendant
AND	ANNIE BROWN Third Defendant
AND	REBECCA LEE Fourth Defendant

Hearing:	14 May 2024 (Heard at Auckland and further submissions filed on 9, 23 and 24 September 2024)
Appearances:	M O'Brien and J Plunket, counsel for plaintiff R Rendle and J Grenheld, counsel for first and second defendants T Oldfield, counsel for third and fourth defendants
Judgment:	29 November 2024

JUDGMENT OF JUDGE K G SMITH

(Protest as to jurisdiction, applications to dismiss proceedings and an application for a stay)

MELISSA JANE BOWEN v NATIONAL AUSTRALIA BANK LIMITED [2024] NZEmpC 234 [29 November 2024]

[1] On 8 December 2023, the Employment Relations Authority released a determination by Member Larmer. In that determination, she declined to recuse herself from investigating a preliminary issue in a claim brought by Melissa Bowen against the National Australia Bank Ltd (NAB), Anthony Healey, Annie Brown and Rebecca Lee.1 Ms Bowen challenged the determination.

[2] The preliminary issue Member Larmer intends to decide concerns the admissibility of evidence in a proceeding where Ms Bowen has alleged that the defendants aided and abetted certain breaches by her former employer, the Bank of New Zealand (BNZ).

[3] Ms Bowen made a separate successful claim in the Authority against BNZ.2 In that proceeding, Member Larmer also made a preliminary decision about the admissibility of evidence Ms Bowen wished to rely on in her claim.3 The evidence in question in both proceedings is essentially the same.

[4] Ms Bowen sought the Authority member's recusal because she has already considered the admissibility of the evidence once. She considers the member should not do so again, because the member is "biased in law" given her earlier decision.

[5] Ms Bowen applied for a stay of the Authority's investigation of the admissibility issue pending the resolution of her challenge. It has not been necessary to address that application because the Authority has taken no further steps pending the outcome of this proceeding.4

[6] The defendants responded to the challenge by protesting the Court's jurisdiction and seeking to have it dismissed. The common ground of the protests was that s 179(5) of the Employment Relations Act 2000 (the Act) precludes a challenge to the member's determination.

1 *Bowen v National Australia Bank Ltd* [2023] NZERA 735 (Member Larmer).

2 *Bowen v Bank of New Zealand* [2024] NZERA 361 (Member van Keulen).

3 *Bowen v Bank of New Zealand* [2022] NZERA 19 (Member Larmer).

4. The parties did not address the Court's jurisdiction to grant such a stay, but see the discussions in *Citadel Capital Ltd v Miles* [2024] NZEmpC 51, [2024] ERNZ 126 at [7]–[11] and *Maheta v Skybus NZ Ltd* [2022] NZCA 516, [2022] ERNZ 1005.

The first proceedings: BNZ litigation

[7] The facts are not materially disputed. Ms Bowen worked for BNZ between 1979 and 1999. In late 2015 she resumed working for the bank and remained there until her employment was terminated for redundancy in July 2018. After her employment ended she began a claim alleging unjustifiable dismissal and unjustified disadvantage. She was successful.5

[8] Part of Ms Bowen's claim against BNZ was that the bank breached its duty to her by failing to maintain confidentiality in certain disclosures she made to it. A dispute arose during the investigation about the content of a brief of evidence Ms Bowen intended to use. BNZ objected to some of the proposed evidence, claiming it was inadmissible. The Authority separated this dispute from the substantive investigation and allocated it to Member Larmer.

[9] On 28 January 2022, Member Larmer decided that the evidence in question was inadmissible.6 Ms Bowen unsuccessfully challenged that determination in the Court. The Court held that a challenge was not available under s 179(5) because it involved the procedure the Authority was following or intended to follow.7 Her application for leave to appeal to the Court of Appeal was unsuccessful.8 Consequently, Ms Bowen's case against BNZ continued without the evidence she had intended to rely on.

The second proceedings: NAB litigation

[10] Ms Bowen lodged a claim in the Authority against NAB and the other defendants on 24 November 2022. As already mentioned, the claim was that the bank, and certain of its employees, aided and abetted the breaches by BNZ that were dealt with in the first proceeding.

5 *Bowen*, above n 2.

6 *Bowen*, above n 3.

7 *Bowen v Bank of New Zealand* [2023] NZEmpC 29, [2023] ERNZ 76.

8 *Bowen v Bank of New Zealand* [2023] NZCA 512.

[11] In February 2023, NAB filed a statement in reply to the claim. In addition, it applied to dismiss the claim. In April 2023, the third and fourth defendants (as respondents in the Authority) also sought to dismiss the claim.

[12] On 9 May 2023, Ms Bowen filed an affidavit as part of her opposition to the applications to dismiss her claim. Some of the evidence included in that affidavit was the same as the evidence she unsuccessfully attempted to rely on in the BNZ litigation. Mr O'Brien, counsel for Ms Bowen, advised the Court during submissions that this evidence could be described as a subset of what Member Larmer dealt with in the BNZ litigation.

[13] Not surprisingly, the defendants objected to this evidence and argued it was inadmissible. To deal with this new disagreement the Authority again separated it from the substantive claim. The parties were informed that Member Doyle would deal with the admissibility issue. In response, Ms Rendle, counsel for NAB and the first defendant, requested that the issue be reassigned to Member Larmer because she had dealt with it before. This request brought a swift reaction from Mr

O'Brien, who considered the requested reallocation was interfering. He asked the Authority to ensure Member Doyle dealt with it, as previously advised. The Authority did not agree to his request. Instead, Member Larmer issued directions to deal with it.

[14] Ms Bowen's reaction to the allocation of this part of the investigation was to apply to Member Larmer asking her to recuse herself. The member issued a determination declining to do so.9

The pleadings

[15] Ms Bowen's challenge seeks to set aside the recusal determination, to revisit the decision allocating the admissibility issue to Member Larmer, and to prevent her from having any further involvement in this employment relationship problem.

[16] The statement of claim contains an inconsistency which needs to be noted but is not material. Ms Bowen elected to challenge the whole of the recusal determination

9 *Bowen*, above n 1.

but pleaded that she was not seeking a full rehearing. Rather, the challenge was advanced as being in the nature of an appeal.

The protests to jurisdiction

[17] The defendants protested the jurisdiction of the Court to hear the challenge. Their protests are essentially the same, that s 179(5) of the Act precludes challenges to determinations about the Authority's procedure.

[18] Additionally, two of the remedies claimed by Ms Bowen were described in the defendants' protests as attempts to challenge the Authority's internal administrative processes. The protests claimed that there was nothing irregular or improper in the way this dispute was assigned.

[19] The defendants applied to dismiss the challenge.10

The defendant's submissions

[20] Ms Rendle took primary responsibility for supporting the protests to jurisdiction and the applications to dismiss the challenge. The recusal determination was described as being about the procedure of the Authority by reference to:

(a) section 160(1) of the Act empowering the Authority to follow any procedure it considers appropriate;
(b) section 173, headed "procedure", requiring the Authority to comply with the principles of natural justice and to act in a manner that is reasonable, having regard to its investigative role. The section was used to argue that all natural justice considerations, including decisions on recusal, are procedural by definition;
(c) the policy considerations discussed in *H v A Ltd*, emphasised that the Authority is to resolve problems in a speedy and non-legalistic way, to keep costs down and avoid delay;11 and

10. Relying on High Court Rules 2016, r 5.49(3). That rule is applied by reg 6(2)(a)(ii) of the Employment Court Regulations 2000.

11 *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [23].

(d) the approach in *H v A Ltd*, namely that in assessing whether an Authority decision is able to be challenged, it is more important to have regard to its effect than the nature of the power being exercised.12

[21] Ms Rendle referred to three cases, all of which were said to show that the recusal decision was procedural: *Nisha v LSG Sky Chefs New Zealand Ltd*, *Owen v Chief Executive of the Department of Corrections*, and *GEA Process Engineering Ltd v Schicker*.13

[22] Mr Oldfield, counsel for the other defendants, essentially adopted those submissions.

The plaintiff's submissions

[23] Mr O'Brien's submissions developed from a central proposition that Ms Bowen's challenge was about the Authority member's jurisdiction and could not, therefore, be prevented by s 179(5). The argument was that the Authority, through Member Larmer, will act beyond its jurisdiction by embarking on an investigation into the admissibility issues while "presumptively/apparently biased at law". The alleged bias arises from the member having dealt with essentially the same

issue in Ms Bowen's claims against BNZ. There was no suggestion that the member should have disqualified herself for any other reason.

[24] Mr O'Brien was careful to separate submissions about s 179(5) from any analysis of the substance of the challenge. He separated them in this way because the protests to the Court's jurisdiction meant the issue was a confined one; about the ability to challenge the recusal determination. In this way the substantive issue, about whether the member should have recused herself, would only be considered if the protests failed. That approach was taken because r 5.49 of the High Court Rules 2016 is concerned with whether the Court has jurisdiction over the challenge not whether relief can be granted.

12 At [14].

13 *Nisha v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 162, [2013] ERNZ 626 at [38]; *Owen v Chief Executive of the Department of Corrections* [2015] NZEmpC 201 at [39]–[41]; and *GEA Process Engineering Ltd v Schicker* [2019] NZEmpC 166.

[25] Mr O'Brien submitted that to succeed the defendants need to establish two propositions, that:

(a) an Authority member's decision refusing recusal on the basis of an allegation of presumptive bias is not jurisdictional; and
(b) jurisdictional determinations are "procedural" within the meaning of s 179(5).

[26] That submission was supplemented by the proposition that the question for the Court to consider is whether the Authority is entitled at law to "conduct a biased investigation and reach conclusions therein". He submitted it was not.

[27] Mr O'Brien characterised the recusal determination as jurisdictional because:

(a) the Authority must adhere to and not stray beyond its powers or jurisdiction;
(b) if the Authority strays beyond them, it lacks jurisdiction and is amenable to correction through review and a challenge;
(c) the powers and restrictions affecting jurisdiction include:
    (i) the Authority must comply with the principles of natural justice;14
    (ii) the Authority in exercising its equity and good conscience jurisdiction may not act inconsistently with the Act;15 and
    (iii) Authority members must be true to their oaths of office, including that they will faithfully and impartially perform their duties;16

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

15 Section 157(3).

16 Section 168.

(d) if the Authority acts beyond its powers, any resulting decision is ultra vires, because it did not have jurisdiction to act in the manner it did; and

(e) where an Authority member ought to recuse himself or herself on the basis of presumptive/apparent bias, and does not do so, there is no jurisdiction to issue a determination. The resulting determination would be ultra vires.

[28] Mr O'Brien also submitted that:

(a) the Court has never been asked before to consider whether determinations of the Authority concerning recusal are justiciable by way of a challenge;
(b) the notion that jurisdictional determinations are not procedural is uncontroversial;17
(c) jurisdictional decisions concern whether the Authority has the power to do something, not how the Authority goes about doing it;18
(d) to characterise jurisdictional issues as procedural is contrary to established authority and makes a mockery of natural justice; and
(e) the Court should be mindful of a "logical and bizarre" conclusion arising from the defendant's argument; if the Authority member's recusal determination is unable to be challenged now, the member will be the first and last instance decision-maker on the recusal issue.

17 Relying on *Keys v Flight Centre (NZ) Ltd* [2005] NZEmpC 59; [2005] ERNZ 471 (EmpC); *Oldco PTI (New Zealand) Ltd v Houston* [2006] NZEmpC 26; [2006] ERNZ 221 (EmpC); *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 55, [2013] ERNZ 460; *H v A Ltd*, above n 11, at [11]–[14]; and *Bowen,* above n 8.

18 *Bird v Vice-Chancellor, University of Waikato* [2023] NZEmpC 16, [2023] ERNZ 32 at [20].

[29] Complementing the submission that the Authority must adhere to the principles of natural justice, Mr O'Brien relied on s 27(1) of the New Zealand Bill of Rights Act 1990 and the Court of Appeal's decision in *Muir v Commissioner of Inland Revenue*.19

[30] Section 27 of the New Zealand Bill of Rights Act requires any tribunal that has the power to make determinations in respect of a person's rights, obligations or interests as protected or recognised by law to comply with natural justice. *Muir* stated that the principles of natural justice require Judges (and other judicial officers) to act independently and impartially.

[31] Mr O'Brien addressed the three decisions dealing with recusal referred to by Ms Rendle. The first was *Nisha* where its comments about natural justice and bias were described as obiter and unsupported by authority.20 The second was *Owen* where the Court held that a recusal determination was procedural.21 The judgment was said to be distinguishable from the present case because it did not engage the argument relied on by Ms Bowen. It was also described as misconceived on the basis that having assumed the justiciability of the challenge, the Court then dealt with it under s 179(5).

[32] The third decision was *Schicker*.22 The case was described as "self- distinguishing", touching on allegations of alleged bias or partiality in the context of an application for a rehearing. Mr O'Brien submitted that the Court in *Schicker* did not discuss whether the determination resolved a jurisdictional issue.

[33] Mr O'Brien relied on a recent Court of Appeal decision for the propositions that the Authority could only exercise the powers lawfully bestowed on it, and that the proper interpretation of the empowering legislation involves a question of law which it is the Court's duty to determine.23

[34] While the Court was cautioned against evaluating the member's recusal decision at this stage, the plaintiff's case was said to be stronger than the circumstances

19 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [32].

20 *Nisha,* above n 13, at [38].

21 *Owen*, above n 13, at [40].

22 *Schicker*, above n 13.

23 *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions* [2024] NZCA 128, [2024] 2 NZLR 534 at [29].

in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd.*24 That was because her case is about the member's association with a decision on the same issue, concerning the same evidence, relating to at least one litigant who is the same and where counsel expressly sought the member's involvement. As an example of a situation in which a decision-maker should step aside, Mr O'Brien referred to the Australian Federal Court judgment in *Kirby v Centro Properties Ltd (No 2).*25

Further submissions

[35] After the hearing the parties were invited to provide further submissions on two areas of concern that had emerged. The first was about s 184 of the Act, which in subs (2) provides that the Authority lacks jurisdiction only in three ways. That is, in the narrow and original sense of the term "jurisdiction" it has no entitlement to enter upon the inquiry in question, or the determination or order is outside the classes of determinations or orders the Authority is authorised to make, or it acts in bad faith. Submissions were sought as to whether the section had any bearing on the challenge and protests.

[36] The second area was about a case brought to the Court's attention after submissions concluded: *A (SC106/2015) v R*.26 That case was a decision of the Supreme Court which dealt with an application to recall a judgment in a criminal matter. The basis for the recall application was that two of the three-member panel in the Supreme Court who dismissed an application for leave to appeal sat on an earlier Court of Appeal decision which developed certain sentencing guidelines.27 The appellant seeking to recall the Supreme Court's judgment wanted to challenge those guidelines.

[37] The reason this decision was drawn to counsel's attention was because the Supreme Court made comments about when it is appropriate for Judges to sit and the obligation to apply precedent. The Court favourably referred to a decision from the High Court of Australia in *Minister for Immigration & Multicultural Affairs v Legeng*,

24. *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 73, [2010] 1 NZLR 35 at [3].

25 *Kirby v Centro Properties Ltd (No 2)* [2011] FCA 1144, (2011) 202 FCR 439.

26 *A (SC106/2015) v R* [2016] NZSC 31.

27 At [2].

which held that to be disqualified for bias in the form of pre-judgment, a Judge's state of mind must be "so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented".28

[38] The Supreme Court also drew on comments from the Supreme Court of the United States in *Liteky v United States*.29 The United States Court held that opinions formed by a Judge on the basis of facts introduced or events occurring in the course of proceedings, or of prior proceedings, do not constitute a basis for bias or partiality unless they displayed a deep-seated favouritism or antagonism that would make a fair judgment impossible.30

[39] Ms Rendle's further submissions were that s 184(2) favoured the first and second defendants by confining jurisdictional grounds for review purposes.31 She accepted that this approach meant some of the Authority's procedural decisions may be unchallengeable. Nevertheless, she argued, s 179(5) could not be bypassed by framing procedural complaints as jurisdictional ones.32 The Supreme Court's decision in *A (SC106/2015) v R* was said to support the defendants' case that allegations of presumptive bias are procedural in nature and that a decision about recusal is within the Authority's "inherent jurisdiction".

[40] Mr Oldfield filed further submissions. His approach was to read ss 179 and 184(2) together. He submitted that those provisions restrict the right to challenge determinations, even where a question of jurisdiction might arise. In that context, s 184(2) was a backstop to enable a review of determinations. He submitted that Ms Bowen's position would lead to a conclusion that jurisdiction is lost or absent where the plaintiff disagrees with a decision on recusal.

28. At [22], citing *Minister for Immigration and Multicultural Affairs v Legeng* [2001] HC 17, (2001) 205 CLR 507 at 532.

29 *Liteky v United States* 510 US 540 (1994).

30 *A (SC106/2015) v R,* above n 26, at [23], citing *Liteky*, above n 29, at 555.

31 Relying on *Fechney v Employment Relations Authority* [2022] NZEmpC 52, [2022] ERNZ 196; *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6; [1969] 2 AC 147 (HL); and *Halse v Employment Relations Authority* [2022] NZEmpC 167, [2022] ERNZ 808.

32 Relying on *McDermott v Employment Relations Authority* [2022] NZEmpC 160, [2022] ERNZ 759 at [33].

[41] Mr Oldfield described the plaintiff's challenge as being based on the argument that she does not want the same Authority member to decide about admissibility because of the adverse decision on the same issue in a related proceeding. That was said not to give rise to the alleged bias at law under the approach in *A (SC106/2015) v R* so that the jurisdictional argument falls away.

[42] Mr O'Brien's responses were that Ms Rendle's supplementary arguments were flawed because the Authority does not exercise "inherent jurisdiction". The Court was invited to not take into account Mr Oldfield's further submissions where they went beyond the extent of the request and attempted to reopen the hearing.

[43] In Mr O'Brien's view, the debate over s 179(5) was not advanced by looking at s 184 but that *A (SC106/2015) v R* supported Ms Bowen's case because the judgment was written in mandatory language, about when a Judge (or other judicial officer) should stand aside.

Analysis

Section 179

[44] A party to a matter in the Authority dissatisfied with a written determination may elect under s 179(1) to have the matter heard by the Court. An election must specify the determination, or the part of the determination, to which it relates. The election must state whether or not the party making it is seeking a full hearing of the entire matter. If a full hearing is not what is being sought, the election must specify any errors of law or fact alleged to have been made by the Authority, any question of law or fact to be resolved and the grounds on which the election is made.33

[45] Despite the broad introductory words in s 179(1), some determinations cannot be challenged. Section 179(5) limits what may be challenged in the following ways:

(5) Subsection (1) does not apply—

(aa) to an oral determination or an oral indication of preliminary findings given by the Authority under section 174(a) or (b); and

33 Employment Relations Act, s 179(4).

(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.

[46] Section 179(5) was introduced into the Act in 2004.34

The Court has previously considered s 179(5)

[47] The scope of s 179(5) has been considered by the Court on several occasions. A separation between procedural determinations that cannot be challenged and jurisdictional determinations that are open to being challenged can be traced back to early decisions such as *Keys v Flight Centre (NZ) Ltd* and *Oldco PTI (New Zealand) Ltd v Houston*.35 *Keys* was the first case to consider in any detail the definition of the word "procedure" in the section while deciding whether the Authority could make *Anton Piller* orders.36 The Court held that "procedure" in the section is limited to the manner in which the Authority conducts its business and does not include outcomes, whether substantive or interim, or a determination about its jurisdiction.37

[48] The discussion of the difference between procedure and jurisdiction continued in *Oldco*. In that case, the Court described substantive determinations as affecting the rights and obligations of the parties.38 Procedural determinations were described as being about the manner in which the employment relationship problem is resolved or the environment in which the investigation takes place.39

[49] Oldco considered that jurisdictional determinations were about the power to make either procedural or substantive determinations.40 The Court held that if a substantive or a jurisdictional determination was involved, then the decision was outside the scope of s 179(5) and could be challenged. If a determination is not

34 See Employment Relations Amendment Act (No 2) 2004, ss 47(2) and 59.

35 *Keys*, above n 17; and *Oldco*, above n 17.

36. See *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 (CA); and High Court Rules 2016, pt 33.

37 *Keys,* above n 17, at [51].

38 *Oldco,* above n 17, at [49].

39 At [50].

40 At [51].

substantive or jurisdictional, the Court considered it would likely be about the procedure of the Authority and would be captured by s 179(5). In such a situation, there would be no right to elect to challenge it.41

[50] A similar analysis was undertaken in *Morgan v Whanganui College Board of Trustees*.42 That case retained the distinction between procedural and substantive determinations from the earlier judgments; however, it sought to refine in a limited way some of the observations in *Oldco*.43

[51] Section 179(5) was considered by the Court of Appeal in *Employment Relations Authority v Rawlings*.44 The Court was satisfied that the general policy of the Act is against supervision of the Authority's procedural rulings by this Court.45 The Court of Appeal held that ss 179(5), and 184(1A), are intended to prevent challenges or review processes disrupting unfinished Authority investigations.46 However, the Court of Appeal was satisfied that once the investigation is over and a determination has been made, there is no reason for limiting the challenge and review jurisdiction of this Court. It went on to hold that, if the procedure adopted by the Authority has had a decisive influence on the result (giving as an example refusing an adjournment and proceeding in the absence of a witness), the affected party in the course of questioning that result is entitled to put that procedure in issue.47

[52] Rawlings was about a decision by the Authority to treat a statement of problem as having been withdrawn when it was not amended or replaced to remove certain offensive material. The Court of Appeal was satisfied that, for the purposes of s 179(5), that decision was not just about procedure.48 In substance the Authority had determined the proceeding initiated by the unacceptable statement of problem.49

41 At [52].

42 *Morgan*, above 17.

43 At [23]–[72].

44 *Employment Relations Authority v Rawlings* [2008] NZCA 15, [2008] ERNZ 26.

45 At [23].

46 At [26].

47 At [26].

48 At [27].

49 At [27].

[53] The scope of s 179(5) came before a full Court of this Court in *H v A Ltd*.50 The case was about an urgent application to the Authority for a non-publication order, pending the final determination of substantive matters under investigation.51 The Court described the history of s 179(5) from its introduction in 2004. The judgments in *Keys* and *Oldco* were reviewed in the context of discussing what is meant by "procedure" in the section. The Court agreed with *Oldco* that, in assessing whether or not a decision of the Authority is procedural, it is more important to have regard to its effect rather than the nature of the power being exercised.52 The Court went on to hold:53

The Authority's investigatory procedures and meetings should generally proceed uninterrupted by challenges. It would undermine the evident purposes of s 179(5) and the Act more generally to allow or encourage challenges at a pre-determination stage, thereby increasing costs, reliance on legalities and technicalities, and generating delays.

[54] The Court took support for this analysis from the explanatory note to the Employment Relations Law Reform Bill (No 2) 2003 (92-1) which became the Employment Relations Amendment Act (No 2) 2004 and introduced s 179(5) along with ss 178(6), 184(1A) and 188(4).54

[55] The Court stated what it considered to be the clear policy intention underlying the restriction on the right to elect to challenge a determination created by s 179(5). It was to enable the Authority to settle matters at the appropriate level, with as little judicial intervention during the investigative process as possible. The Court concluded that a balance is struck by the Act between the policy imperatives underlying the reforms and access to justice considerations in the retention of the right of challenge or to seek a review once the Authority has made a final determination.55

[56] However, the judgment held that s 179(5) is not to be construed as wholly ousting access to the Court at an interlocutory stage. Instead, regard must be had to the effect of the Authority's determination in light of the policy objectives that were

50 *H v A Ltd*, above n 11.

51 At [2].

52 At [8]–[14].

53 At [17].

54 At [18]–[19].

55 At [23].

identified. That led to a conclusion that the Authority's decision on non-publication could be challenged even though it was not part of a final determination. The reason for that outcome was that refusing non-publication could not be remedied subsequently because "[t]he horse will have well and truly bolted by that stage."56

[57] The Court concluded that it could not have been Parliament's intention that a litigant would have such an important issue determined at first and last instance by the Authority with no recourse to the Court.57 In a passage from the decision which has been frequently quoted, the Court said:58

In this regard, it is evident that the new sections introduced by the 2004 amendments are not intended to deny a party access to justice, but are rather intended to facilitate the resolution of employment relationship problems through providing a forum that is not unduly preoccupied with legal technicalities. Section 179(5) operates to *defer*, in order to give effect to the important policy imperatives underlying the provisions, but not *deny* access to the Court. To apply subs (5) to the circumstances of this case would be to deny access to justice.

[58] The conclusion was that a determination of the Authority is amenable to a challenge where it has a substantive effect which cannot otherwise be remedied on a challenge or by way of review.59 Arguably, *H v A Ltd* was a shift or development from earlier judgments. The shift was to endorse the position from *Oldco*, while reading in an exception to s 179(5) based on the effect of the determination.

[59] H v A Ltd was decided in 2014. Its conclusions were reconsidered recently by the Court of Appeal in *Bowen v Bank of New Zealand* in the context of an application for leave to appeal.60 That case had its origin in Ms Bowen's attempt to challenge the previous admissibility determination by Member Larmer. In dismissing Ms Bowen's challenge, this Court concluded that the determination was procedural.61 In rejecting the application for leave to appeal, the Court of Appeal described the approach in *H v A Ltd* as workable and principled.62 It commented:63

56 At [24]–[25].

57 At [26].

58 At [27] (emphasis in original).

59 At [28].

60 *Bowen*, above n 8.

61 *Bowen,* above n 7.

62 *Bowen*, above n 8, at [28].

63 At [28].

...in any event, a dissatisfied party has the right to challenge the final determination of the [Authority] de novo, including any evidential matters, in the Employment Court...

The policy of the Act is to prevent disruption of the Authority's investigations

[60] It is clear from *Rawlings*, *H v A Ltd* and *Bowen* that s 179(5) is to be applied to restrict challenges to Authority decisions that are not final. That conclusion is supported by other sections of the Act introduced in 2004, including ss 178(6), 184(1A) and 188(4). Section 178 deals with the Authority's power to remove a matter to the Court, but that is limited by subs (6). A matter cannot be removed if it is about the procedure the Authority has followed, is following or intends to follow.

[61] Similarly, s 184 restricts review proceedings. Parliament has decided that the ability to seek a review must be curtailed. It has done so in two ways. The first way is to narrow the available scope of review. The second way is by preventing review proceedings until the Authority has issued a determination on all matters that might be dealt with in the review and any rights to elect to challenge have been exercised.

[62] Section 188(4) deals with this Court's role in relation to its jurisdiction. The Act stipulates that it is not a function of the Court to advise or direct the Authority in relation to the exercise of its investigative roles, powers and jurisdiction, or direct it on the procedure that it has followed, is following or is intending to follow.

[63] While it is true that s 143(g) recognises that difficult issues of law will need to be determined by higher Courts, the overall policy thrust of the Act, as *H v A Ltd* found, is to confine issues arising in employment relationship problems as far as is possible to the Authority.

[64] Those sections all point towards an intention to have matters remain in the Authority and support the policy objective in s 143(fa), to ensure that investigations by it as a specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigation. Overall, this suggests that a constrained approach is appropriate in applying s 179(5).

Natural justice issues are procedural issues

[65] Judicial decision-makers are required by the law to be fair, both in reaching substantive outcomes and in the procedure followed in reaching them.64

[66] The principles of natural justice have developed to ensure the fairness of the procedure followed by a decision-maker. One of those principles is that a decision- maker must be disinterested and unbiased.65 Another principle is that parties likely to be affected by a decision have the right to be heard.66

[67] Section 173 of the Act encompasses both of those principles. The section is headed "procedure" and is the only one of its type in the Act. The section provides that the Authority must comply with the principles of natural justice and act in a manner that is reasonable having regard to its investigative role. To that extent the section repeats part of the role of the Authority in s 157(2)(a) which states that, in making a determination, it must comply with those principles. The section mirrors s 27 of the New Zealand Bill of Rights Act.

[68] Sections 173(2) to (4) engage with the right to be heard. Where the Authority is exercising its powers under s 160, the section provides that it may do so in the absence of one or more of the parties. However, that ability is subject to the Authority providing the absent party with relevant material and an opportunity to comment, unless it is making an ex parte order. While s 173(4) deals with making ex parte orders, by clarifying that the Authority cannot make freezing and search orders, that is an expression of the restriction on its jurisdiction dealt with in s 160(4).

[69] The balance of s 173 addresses procedural matters, providing that the Authority may meet with the parties at times and places it determines and adjourn from time to time and from place to place.

[70] The preponderance of s 173 is, therefore, directed towards establishing and controlling the Authority's procedure. The wording of the section points towards an

64. Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 1099–1101.

65 At 1101.

66 At 1101.

intention to treat matters involving natural justice in the Authority as procedural for the purposes of s 179(5). That conclusion is consistent with other restrictions on the ability to challenge or review the Authority's decisions.

Natural justice issues are not jurisdictional issues for the purposes of s 179(5)

[71] There is no dispute that the Authority was empowered to investigate an employment relationship problem between Ms Bowen and the defendants. There was nowhere else that such a claim could be brought. It follows that the Authority had jurisdiction at that point. There is also no dispute that the Authority, when exercising its role and performing its function, is entitled to evaluate evidence and decide whether it might be admitted. The Authority's jurisdiction in relation to evidence is broad because it can receive any material, whether or not it might be regarded as strictly legal evidence. It must follow that the Authority has jurisdiction to decide whether the evidence Ms Bowen wanted to rely on is admissible.

[72] The challenge, and Mr O'Brien's submissions, seemed to accept that the Authority member must also have had the power to consider arguments for and against her recusal. That was the point made by Ms Rendle, when inadvertently referring to "inherent jurisdiction" rather than inherent powers.

[73] The jurisdictional issue here is perhaps more nuanced. Ms Bowen's challenge intends to argue that the Authority member should be presumed to be biased at law, having been compromised by her earlier determination. Such an argument relies on establishing that this Authority member, who might ordinarily be acting within the Authority's powers and functions, would step outside them by continuing to deal with this aspect of the investigation. Mr O'Brien's submissions seem to be that, while the Authority normally has jurisdiction to consider admissibility issues, Member Larmer's earlier determination means she does not have jurisdiction in this case.

[74] It is possible to contemplate a semantic discussion about the ways in which the word "jurisdiction" is capable of being used. It may have a wide use encompassing situations where a decision-maker fails to comply with natural justice, but the word is also used in a narrow and original sense focusing on whether the tribunal is entitled to

enter on the inquiry in question.67 Implicit in Mr O'Brien's submissions was that he favoured a wider interpretation over a narrow one.

[75] I do not accept that where earlier judgments discussed "jurisdiction" when analysing s 179(5) they were doing so in a wider sense of the word. For example, in *Oldco*, the Court referred to a jurisdictional decision determining whether the Authority had the power to make particular substantive or procedural determinations. That is more in line with a narrower interpretation than a wider one. Similarly, in the recent case of *Bird v Vice-Chancellor of the University of Waikato*, the Court distinguished jurisdictional from procedural questions in that they were said to concern whether the Authority had the power to do something and not how it goes about it.68

[76] The analysis is not assisted by describing the issue, as Mr O'Brien's submissions did, by asking whether the Authority was empowered to make a decision inconsistent with the principles of natural justice. Seeing a jurisdictional decision in a narrow sense indicates that the member's recusal decision, and her intention to consider the admissibility issue, are procedural matters.

[77] There are two decisions of the Court where natural justice considerations were discussed in the context of s 179(5). The first one was *Pacific Flight Catering Ltd v Service and Food Workers Union Nga Ringa Tota Inc* and the second was *Nisha v LSG Sky Chefs New Zealand Ltd*.69

[78] In *Pacific Flight Catering*, the Court was satisfied that a decision about the joinder of parties to the litigation gave rise to natural justice considerations and was therefore challengeable. In that case, the plaintiff argued that its challenge to the Authority's decision to join parties in an attempt to cure defective proceedings was a jurisdictional issue not a procedural one.70

67 *Anisminic,* above n31, at 171.The twosenses are also reflectedinss 184(2) and 193(2), see *Fechney*, above n 31; and *Parker v Silver Fern Farms Ltd* [2011] NZCA 564, [2012] 1 NZLR 256.

68 *Bird,* above n 18, at [20].

69. *Pacific Flight Catering Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2012] NZEmpC 61, [2012] ERNZ 134; and *Nisha,*

above n 13.

70 *Pacific Flight Catering Ltd,* above n 69, at [19].

[79] The Court considered that ss 179(5) and 188(4) must be interpreted and applied in light of s 157 of the Act.71 The Court was satisfied that, because the Act required the Authority to comply with the principles of natural justice, a challenge to a decision on the ground that the statutory requirement was breached was not prohibited by s 179(5). The Court held that the existence of an independent remedy of judicial review was insufficient.72 It was accepted that the Authority has a broad ability to determine its own procedure that is largely unreviewable but the need to uphold and enforce the fundamental obligation to comply with natural justice meant the challenge had to be heard on its merits.73

[80] The Court in *Nisha* took a contrary view. In that case the Court observed that natural justice was provided for in s 173, which indicated it was intended to be a procedural issue. The Court noted a submission that the usual remedy for allegations of bias is judicial review but that s 184(1A) precluded that remedy until there was a final determination from the Authority. The Court considered the restriction in s 184(1A) tended to support the argument that the object of the legislation is to stop intervention on grounds of natural justice, and even of bias, until after the Authority has completed its investigation.74

[81] I prefer the approach in *Nisha* given its analysis of s 173. Further, if parties are able to challenge determinations on the basis of an alleged breach of natural justice, that might have the unintended consequence of muting the effectiveness of s 179(5). It could be tempting to see otherwise mundane determinations designed to enable the Authority to investigate as, in effect, amounting to breaches of natural justice opening them up to challenge. One example, illustrated by this challenge, might be a ruling about the admissibility of evidence. A party disappointed with that ruling might be tempted to challenge it as wrong and in breach of natural justice, by undermining the right of that party to be heard. Taking such an approach to s 179(5) would run the risk of reducing it to being only a vestige of what was originally intended.

71 At [20].

72 At [26].

73 At [27]–[28].

74 *Nisha,* above n 13, at [38].

The Authority's decision will not have a substantive and irreversible impact

[82] That analysis raises the issue identified in *H v A Ltd*, about whether the Authority member's decision to not recuse herself could be said to have a substantive and irreversible effect such that it is not caught by s 179(5). Mr O'Brien's submitted that Parliament could not have intended to create a situation where the Authority member's decision was unchallengeable and could not be reviewed. He did not dispute Ms Bowen's right to challenge the final determination or the Court's ability to revisit and, if necessary, correct the Authority's decision on admissibility while hearing that challenge. His concern was that, while the admissibility issue might be corrected, the Court could never revisit the perceived wrong of an allegedly biased member making the decision in the first place. That would mean Ms Bowen would not be able to confront and overturn the recusal determination resulting in an irreversible injustice. To illustrate the point, he referred to some hypothetical examples of egregious behaviour that would not be able to be remedied.

[83] Mr O'Brien is correct that Ms Bowen is entitled to expect an investigation meeting to adhere to the principles of natural justice, including for any decision to be made by a member free from bias. He is also correct to say that the recusal decision could not be challenged if it is classified as procedural for the purposes of s 179(5). It would also not be susceptible to being reviewed given the limitations in s 184(2).

[84] However, that does not advance the debate very much about whether an inability to challenge the recusal decision would lead to a substantive and irreversible outcome.

[85] I am not persuaded by Mr O'Brien's submissions. The Act already does what he contemplates. There are sections of the Act that prevent any intervention either by way of challenge or review. The introduction to s 179(1) confers the right to file a challenge but excludes one from being filed for an oral determination under s 174A(1), or an oral indication of preliminary findings under s 174B(1).

[86] There are other sections that prevent challenges from an Authority determination aside from s 179(5). Section 179A(2) states that an Authority determination for the purposes of ss 50A to 50I or under s 50J may not be challenged

at all, with two narrow exceptions.75 Sections 50A to 50I deal with facilitated bargaining. Section 50J empowers the Authority to fix the terms and conditions of a collective agreement.

[87] I am not satisfied that the inability of Ms Bowen to challenge the Authority's determination would lead to a substantive

and irreversible impact on her such that it could be said s 179(5) does not apply.

Conclusion

[88] I have reached the conclusion that, for the purposes of s 179(5), Member Larmer's determination to not recuse herself is procedural rather than jurisdictional. Given that conclusion it is not necessary to consider the Supreme Court's judgment in *A (SC106/2015) v R*. Nor is it necessary to comment on the submissions questioning Ms Bowen's ability to seek relief relating to the allocation of this investigation or purporting to have the member disqualified from participating in any further steps in the investigation.

[89] The protests to jurisdiction and applications to dismiss the challenge are successful and the challenge is dismissed.

[90] Costs are reserved. If they cannot be agreed memoranda may be filed.

K G Smith Judge

Judgment signed at 2.15 pm on 29 November 2024

75 Employment Relations Act, ss 50C(1) and 50J(3).
