



this proceeding is confined to the subsequent decision in the May 2022 minute.

[7] EmploySure considers Mr Morris and Ms Allen to be crucial witnesses because they made decisions about restructuring the business that resulted in Mr McDermott's dismissal. They no longer work for the company but remain prepared to give evidence. They are not, however, willing to travel to New Zealand and that was the reason the Authority relied on to grant EmploySure's application.

[8] The Authority's minute was an about turn. Before the intervention of COVID, and before Mr Morris and Ms Allen changed employment, the Authority stated a preference for all witnesses to attend the investigation meeting in person.<sup>2</sup>

[9] By the time the minute was written the Authority member considered his hands were "tied" by these changed circumstances.<sup>3</sup>

1 *McDermott v EmploySure Ltd* NZERA Auckland 3109492, 19 May 2022.

2 At [4].

3 At [6].

[10] In granting EmploySure's application the Authority considered there might be some difficulties assessing credibility where evidence was given by AVL but recognised they were not insurmountable.<sup>4</sup>

### **The application for review**

[11] Mr McDermott sought an order that the Authority's minute be quashed and that he be granted "the right" to see the witnesses in person in New Zealand at the investigation meeting.

[12] The grounds of the application were that the Authority's minute breached:

- (a) rights to natural justice;
- (b) s 27 of the New Zealand Bill of Rights Act 1990 (NZBORA);
- (c) [s 157](#) of the [Employment Relations Act 2000](#) (the Act); and
- (d) s 36 of the Health and Safety at Work Act 2015.

[13] This list of alleged breaches was followed in the statement of claim by a catch- all pleading that "other legislation" was breached. Mr Halse's submissions did not mention any other legislation.

[14] The first three grounds of the application deal with natural justice. Mr Halse did not mention any other aspects of s 27 of the NZBORA, or s 157 of the Act, that might be engaged by the application.

### **Judicial review**

[15] The Court may hear applications to review Authority decisions.<sup>5</sup> There are restrictions on this jurisdiction contained in [s 184](#) of the [Employment Relations Act 2000](#) (the Act):

4 At [6].

5 [Employment Relations Act 2000](#), [ss 194\(1\)–\(2\)](#).

### **184 Restriction on review**

(1) Except on the ground of lack of jurisdiction or as provided in [section 179](#), no determination, order, or proceedings of the Authority are removable to any court by way of certiorari or otherwise, or are liable to be challenged, appealed against, reviewed, quashed, or called in question in any court.

(1A) No review proceedings under [section 194](#) may be initiated in relation to any matter before the Authority unless—

- (a) the Authority has issued a determination under [section 174A\(2\)](#), [174B\(2\)](#), [174C\(3\)](#), or [174D\(2\)](#) (as the case may be) on all matters relating to the subject of the review application between the parties to the matter; and
- (b) (if applicable) the party initiating the review proceedings has challenged the determination under [section 179](#); and
- (c) the court has made a decision on the challenge under [section 183](#).

(2) For the purposes of subsection (1), the Authority suffers from lack of jurisdiction only where,—

- (a) in the narrow and original sense of the term jurisdiction, it has no entitlement to enter upon the inquiry in question; or
- (b) the determination or order is outside the classes of determinations or orders which the Authority is authorised to make; or
- (c) the Authority acts in bad faith.

[16] To place into context the grounds of this application and the submissions it is appropriate to briefly mention relevant aspects of the Authority's jurisdiction.

### **The Authority's jurisdiction**

[17] The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally.<sup>6</sup> It is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making determinations according to the substantial merits of the case without regard to technicalities.<sup>7</sup>

[18] [Section 160\(1\)](#) provides the Authority with extensive powers. It may:

<sup>6</sup> [Section 161\(1\)](#).

<sup>7</sup> [Section 157\(1\)](#).

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

### **Analysis**

[19] Mr Halse's written submissions in advance of the hearing sought to set aside the Authority's minute by questioning the appropriateness of granting an application to allow evidence by AVL where credibility is to be tested. The submissions applied to all of the grounds of the application without differentiating between them.

[20] At the hearing Mr Halse departed from his written submissions and argued that:

- (a) The case was not really about whether the Authority can order the use of AVL, but whether an overseas company can conduct all its business outside New Zealand's employment jurisdiction.
- (b) AVL can be used in certain circumstances such as during the COVID pandemic but a case-by-case assessment was required.

(c) The minute was not the right decision for the Authority to reach and, in any event, Mr McDermott wanted it revisited because circumstances have changed.

- (d) The decision to allow the use of AVL breached natural justice because Mr McDermott would not be able to be present to see EmploySURE's witnesses give evidence in person.

[21] Mr Halse's concession, that the case was not about the Authority's ability to allow the use of AVL, was inevitable given the Authority's power to follow any procedure it considers appropriate.<sup>8</sup> The minute was procedural because it dealt with how evidence would be received during the investigation meeting.

[22] The concession had the possibly unintended effect of undermining the grounds of the application. Once the Authority's jurisdiction was established it became difficult to see how exercising that jurisdiction could give rise to a breach unless some other feature was present.

[23] Mr Halse did not adequately explain what feature was relied on that could give rise to a breach. He attempted an explanation by referring to EmploySURE's management being in Australia, which was the purpose of his otherwise enigmatic comment about an overseas company being outside New Zealand's jurisdiction. The location of EmploySURE's management

was not relevant to considering if the Authority's minute interfered with Mr McDermott's rights.

[24] The second attempted explanation was that EmploySURE's decision makers had not met Mr McDermott in person before his dismissal and that the minute would deprive him of an opportunity to see and hear them in person at the investigation. This explanation did not assist because it failed to show how the principles of natural justice would be breached by allowing the Authority to hear evidence that would not otherwise be given.

#### 8 [Section 160\(1\)\(f\)](#).

[25] The second explanation may have been linked to concerns raised in Mr Halse's written submissions about assessing credibility where evidence is given by AVL. Before the hearing he was referred to decisions of the Supreme Court and High Court on the subject and invited to comment about them.<sup>9</sup> Mr Halse made no attempt to argue that the discussions in those cases, about the assessment of evidence and use of AVL, should not apply to the Authority. Any such argument would not have succeeded. AVL is a well-recognised tool in reasonably common usage in New Zealand courts without giving rise to the concerns Mr Halse raised.

[26] What should not be lost sight of is that the Authority was presented with a practical problem and adopted a pragmatic but reasonably common solution to it. If Mr McDermott's application was granted the consequence would be to compromise EmploySURE's case; a situation Mr Halse acknowledged. Such an outcome would be inconsistent with the Authority's statutory role and would not be in the interests of justice.

[27] The principles of natural justice, NZBORA and the Act, will not be breached merely because the Authority granted an application for evidence to be given by AVL. Section 36 of the Health and Safety at Work Act is plainly irrelevant and need not be analysed.

[28] It follows that Mr McDermott's application cannot succeed on the grounds relied on, but it also faced other major hurdles. In enacting s 184, Parliament provided a narrow scope for judicial review. To be successful Mr McDermott needed to establish that the Authority acted outside its jurisdiction or that the determination was beyond the class of orders that could be made.

[29] As already discussed, the Authority's minute was within its jurisdiction to make procedural orders, as allowed by s 160(1)(f). That means s 184(2) was not engaged and the application would fail on that basis.

<sup>9</sup> See *Taniwha v R* [\[2016\] NZSC 121](#), [\[2017\] 1 NZLR 116](#); and *Burden v Debonaire Furniture Ltd*

[\[2017\] NZHC 1553](#).

[30] Another difficulty confronting the application, identified by Ms Laphorne, was the restriction on judicial review in s 184(1A). Under that section judicial review is not available unless all matters relating to the subject of the application between the parties have been determined.

[31] Ms Laphorne relied on the Court of Appeal's decision in *Employment Relations Authority v Rawlings* to support her argument that the section is a barrier to Mr McDermott.<sup>10</sup> In that case the Court held that s 184(1A) prevented review proceedings being filed until the Authority was "quit of the case and any rights of challenge have been exercised".<sup>11</sup> Her point was that the Authority is not "quit of the case" because it has not even got to the start of an investigation meeting which has been delayed by this application. I agree that s 184(1A) is a bar to the application succeeding.

[32] There was a further difficulty. In this application Mr McDermott wanted to establish that the Authority did not make the right decision to allow EmploySURE's application. Viewed in this way the application was really an attempt to run a de facto challenge. While Mr Halse did not accept that characterisation there is no other realistic way to interpret it. Seeking a different outcome because the decision was considered to be wrong, and by inviting consideration of changed circumstances, has all the hallmarks of a challenge and not judicial review.<sup>12</sup>

[33] A challenge was not available to Mr McDermott. Section 179(5) precludes one being pursued about the procedure the Authority has followed, is following or intends to follow. Section 179(5) cannot be circumvented by presenting a desire to achieve a different outcome as if it was about a lack of jurisdiction.

[34] There is one matter Mr Halse addressed in his written submissions but did not mention at the hearing. The minute was criticised because it did not contain directions on practical matters such as the suitability of the venue from which witnesses will give evidence or ensuring that they are free from potential interference by other persons.

<sup>10</sup> *Employment Relations Authority v Rawlings* [\[2008\] NZCA 15](#), [\[2008\] ERNZ 26](#) at [\[36\]](#).

<sup>11</sup> At [\[36\]](#).

12. Challenges made under s 179(1) may seek a full hearing of the matter before the Authority and evidence may be called that was not considered by the Authority.

Those are procedural matters that do not call into question the Authority's ability to make a decision to allow the use of AVL. If

necessary, the Authority is able to address them by issuing further directions.

## **Conclusion**

[35] The application for judicial review is unsuccessful and it is dismissed.

## **Costs**

[36] Employsure is entitled to costs from this application. If agreement is unable to be reached, the company may file submissions within 15 working days. Mr McDermott may respond within a further 15 working days. All submissions are to be less than ten pages.

K G Smith Judge

Judgment signed at 3.50 pm on 31 August 2022

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