



Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2022](#) >> [\[2022\] NZEmpC 184](#)

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Straayer v Employment Relations Authority [2022] NZEmpC 184 (17 October 2022)

Last Updated: 21 October 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

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

[\[2022\] NZEmpC 184](#)

EMPC 73/2022

IN THE MATTER OF	an application for a judicial review
AND IN THE MATTER	of an application to strike out proceedings
BETWEEN	ADRIAANUS WILFRED STRAAYER Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	WORKSAFE NEW ZEALAND Second Respondent

Hearing: 22 August 2022 (Heard at Wellington)
Appearances: Applicant in person
Appearance for the first respondent, excused by leave
G Cain and K Alexander, counsel for second respondent
Judgment: 17 October 2022

JUDGMENT OF JUDGE B A CORKILL

Background

[1] Mr Adriaanus Straayer is a former employee of WorkSafe New Zealand (WorkSafe) who raised personal grievances in the Employment Relations Authority, in the course of which two particular decisions were made prior to the convening of an investigation meeting.

ADRIAANUS WILFRED STRAAYER v EMPLOYMENT RELATIONS AUTHORITY [\[2022\] NZEmpC 184](#)

[17 October 2022]

[2] As a result, Mr Straayer brought a judicial review proceeding, alleging that in making the two decisions the Authority had breached the principles of natural justice.

[3] Then WorkSafe brought an application for strike-out of the proceeding.

[4] It was agreed that this application would be heard in two stages. This judgment concerns the first stage only. The first stage would require consideration of the application of [s 184\(1A\)](#) of the [Employment Relations Act 2000](#) (the Act); if it does apply, are the criteria it describes met?

[5] WorkSafe says that [s 194](#) is a gateway provision which then requires consideration of the requirements of [s 184\(1A\)](#), none of which are met.

[6] Mr Straayer asserts that, in the particular circumstances, [s 184\(1A\)](#) does not apply at all. He says that [s 184\(1\)](#) and [s 184\(2\)](#) provide a discrete means of judicial review that is separate from one initiated under [s 194](#).

[7] The following issues accordingly arise for resolution at the first stage are:

- (a) Which provisions of the Act govern Mr Straayer's application for judicial review: [s 194](#) or [s 184](#)?
- (b) Does [s 184\(1A\)](#) apply? If so, are its prerequisites met?
- (c) Should the application for judicial review be struck out?

[8] The second phase of the strike-out application will, if it proceeds, require consideration of a yet further question: should the proceeding be struck out because judicial review on the grounds of a breach of natural justice – the statutory ground relied on by Mr Straayer – is not available? I do not in this judgment need to make any comment about that assertion.

[9] The judicial review proceeding was brought by Mr Straayer on 4 March 2022. Although it is arguable that the relief sought in this proceeding may, if successful, have impacted on issues that were to be considered at an investigation meeting which was to take place in June 2022, urgency was not sought. Thus, the investigation meeting proceeded before the Court heard the application for strike out. WorkSafe did not argue, however, that this meant the judicial review proceeding was moot, and that it should be struck out for this reason.

The background in more detail

[10] The employment relationship problem between the parties has a long history. In September 2018, Mr Straayer raised a personal grievance against WorkSafe alleging that he had been unjustifiably disadvantaged, and that he had been unjustifiably dismissed.

[11] It is unnecessary to traverse the full extent of the procedural steps that then followed. It is, however, necessary to refer to some particular matters.

[12] In May 2021, the Authority issued a determination clarifying that certain of the alleged personal grievances had either been withdrawn or were not raised within 90 days and/or were matters that had arisen post-termination of employment which would not be investigated. That left some 13 personal grievances which the Authority said had been raised within 90 days and would be investigated.¹

[13] The Authority also indicated that the matter should then be set down for an investigation meeting. That meeting was scheduled to commence on 7 June 2022.

[14] Prior to the investigation, the Authority was asked to deal with two issues. It is necessary to trace the history of each. The first issue relates to disclosure.

[15] On 12 July 2019, Mr Straayer had sent to WorkSafe a list of documents for disclosure. Over time he asserted that the request related to documents within scope of the relationship problems before the Authority and that, despite multiple

¹ *Straayer v WorkSafe New Zealand* [2021] NZERA 202.

communications with lawyers acting for WorkSafe and with the Authority, Mr Straayer asserted there had not been proper compliance with his requests.

[16] The matter reached a head in February 2022, when Mr Straayer sent an updated list of disclosure items to the Authority and to WorkSafe's lawyers, Dentons Kensington Swan (DKS).

[17] This resulted in an email being sent by the Authority on 15 February 2022, on behalf of Member O'Sullivan to whom the proceeding had recently been assigned, which stated:

In relation to your request for documents, the Member considers there will be sufficient evidence before the ERA at the investigation meeting to allow the ERA to make a determination. If, at any time it becomes apparent more evidence on any particular point is necessary in order to allow the ERA to properly investigate this matter, appropriate steps will be taken at the time to obtain such evidence.

[18] Mr Straayer requested a "formal written decision" so that he could then initiate a judicial review proceeding. The response from the Authority on 17 February 2022 was that the Authority's email two days earlier spoke for itself.

[19] These events form the basis of the first of the two issues raised in the judicial review application.

[20] The second issue relates to representation. Mr Straayer raised a concern as to whether WorkSafe had properly appointed its solicitors to act in this litigation under its internal delegations. He alleges that relevant managers at WorkSafe did not have authority to instruct DKS.

[21] The matter was discussed with Member MacKinnon, who was at the time dealing with the proceeding, at a telephone conference on 9 November 2021. She is recorded as having concluded:

I am satisfied DKS has been authorised to represent [WorkSafe] and that's the end of the matter as far as I'm concerned. I'm not putting out a determination, it's a finding I've made.

[22] The matter was discussed again at a further telephone conference on 31 January 2022, with Member O'Sullivan. Later, in an email sent by the Authority on 17 February 2022, the parties were told:

It [the Authority] has made its view regarding [WorkSafe's] representation clear. The timetable was set at the telephone conference on 11 February for the filing of evidence and the parties are expected to strictly adhere to this.

[23] These events form the basis for the second of the two issues raised in the judicial review application.

Principles relating to applications for strike-out

[24] The principles as to the striking out of pleadings are well settled. The Court has power to strike out all, or part of, a pleading:

- (a) If it discloses no reasonably arguable cause of action, is frivolous or vexatious, or is otherwise an abuse of the processes of the Court.²
- (b) Pleadings, whether or not admitted, are assumed to be true.³ The jurisdiction is exercised sparingly and only in clear cases.⁴

First issue: which provisions of the Act apply in an application for judicial review?

[25] As noted, the parties are at odds as to whether [s 194](#) of the Act is a gateway to any application for judicial review of a determination of the Authority, which is WorkSafe's position, or whether [s 184](#) provides an additional, and separate, avenue for bringing such an application, which is Mr Straayer's position.

[26] This issue is one of statutory interpretation. The meaning of an enactment must be ascertained from its text and in light of its purpose.⁵

² [Employment Court Regulations 2000](#), reg 6(2)(a)(ii); [High Court Rules 2016](#), r 15.1.

³ *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725, at [33].

⁴ *Watts & Hughes Construction Ltd v Buyzer (No 2)* [2019] NZEmpC 18 at [28] citing *Attorney-General v Prince & Gardner* [1997] NZCA 349; [1998] 1 NZLR 262 (CA) at 267.

⁵ [Interpretation Act 1999](#), s 5; [Legislation Act 2019](#), s 10(1).

[27] In determining purpose the Court may have regard to the immediate and general legislative context as well as a social, commercial, or other objective, of the enactment.⁶

[28] I begin with a focus on provisions in [pt 10](#) of the Act, which, amongst other things, establishes procedures relating to both the Court and the Authority.

[29] The provisions which relate to the jurisdiction of the Court are found in ss 186 to 199. Section 194 describes the Court's limited powers in respect of applications for review. The section relevantly provides:

194 Application for review

(1) If any person wishes to apply for review under the [Judicial Review Procedure Act 2016](#), or bring proceedings seeking a writ or order of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or injunction, in relation to the exercise, refusal to exercise, or proposed or purported exercise by—

- (a) the Authority; or
- (b) an officer of the Authority or the court; or
- (c) an employer, or that employer's representative; or
- (d) a union, or that union's representative; or

- (e) the Registrar of Unions; or
- (f) the Minister; or
- (g) the chief executive; or
- (h) any other person—

of a statutory power or statutory power of decision (as defined by [section 4](#) of the [Judicial Review Procedure Act 2016](#)) conferred by or under this Act or any of the provisions of [sections 17 to 21](#), [subpart 4 of Part 3](#), [Part 4](#), and [clauses 1 to 5](#) and [7 to 11](#) of Schedule 8 of the [Public Service Act 2020](#) or [subpart 4](#) of [Part 6](#) of the [Education and Training Act 2020](#), the provisions of subsections (2) to (4) of this section apply.

(2) Despite any other Act or rule of law, but subject to [section 184\(1A\)](#), the court has full and exclusive jurisdiction to hear and determine any application or proceedings of the type referred to in subsection (1) and

6. *Commerce Commission v Fonterra Co-operative Group Ltd* [\[2007\] NZSC 36](#), [\[2007\] 3 NZLR 767](#) at [\[22\]](#).

all such applications or proceedings must be made to or brought in the court.

(3) Where a right of appeal (which includes, for the purposes of this subsection, the right to make an election under [section 179](#)) is conferred on any person under this Act or the [Public Service Act 2020](#) or the [Education and Training Act 2020](#) in respect of any matter, that person may not make an application under subsection (1) in respect of that matter unless any appeal brought by that person in the exercise of that right of appeal has first been determined.

...

[30] The provisions which relate to the Authority are found in [ss 156](#) to [185](#). As to the review of Authority determinations, [s 184](#) provides:

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.

[31] For the purposes of this issue, Mr Cain, counsel for WorkSafe, submitted that the two sections must be read together. He said that in effect they form a cohesive code, given the text which was used as well as purpose and external factors such as statements made on enactment of the relevant provisions, and the legislative history.

[32] Mr Straayer submitted that an applicant for judicial review has two choices. Such a person may apply under [s 194](#), in which case the cross-reference in [s 194\(2\)](#) would require consideration of the factors outlined in [s 184\(1A\)](#).

[33] The second choice involves, he said, an applicant proceeding directly under [s 184\(1\)](#), where a claim may be made that the Authority lacked jurisdiction in the sense in which the term is described in [s 184\(2\)](#). This could include a claim that the Authority acted in bad faith as referred to in [s 184\(2\)\(c\)](#), which Mr Straayer says he relies on for the purposes of his judicial review application.

[34] Mr Straayer also submitted that no determinations on the disclosure and representation topics had been issued in any event, so [s 184\(1A\)](#) has no relevance.

Analysis: text

[35] I begin by considering the provisions of [s 194](#).

[36] [Section 194](#) applies to “any person” applying for review under the [Judicial Review Procedure Act 2016](#) (the JRPA), or who applies for other common law remedies.

[37] The ability to do so must relate to the exercise of “a statutory power or statutory power of decision” as defined in the JRPA, and as exercised by the Authority, or by six named persons, or by any other person.

[38] Subsection (2) makes it clear that this Court has “full and exclusive jurisdiction” to determine a proceeding described in subs (1), and that all such applications or proceedings must be made or brought in the Court. This is despite any other Act or rule of law, but it is subject to s 184(1A).

[39] It can be seen from these provisions that subs (2) is central to the judicial review regime. This is because, first, the section makes it clear that the Employment Court is the only Court which may judicially review certain statutory powers or statutory powers of decision. Second, the power authorising the Court to do so is described only in this section. No such statement appears in s 184 which, if a consistent approach was adopted, would be necessary if the Court was to possess jurisdiction to deal with an alternative type of judicial review as described in that section.

[40] The express cross-reference in s 194(2) to s 184(1A) confirms that the latter provision is intended to be a restriction of the power which originates in s 194.

[41] It would have made little sense to place a subsection within the body of s 184 which, on Mr Straayer’s submission, related only to an application for review under s 194.

[42] Turning to s 184, its language is inherently restrictive. Section 184(1) provides that “except” in cases of lack of jurisdiction, no review proceedings may be brought in relation to the Authority. The only instance where a review of an Authority determination may be initiated with regard to any matter before the Authority is where it suffers from a lack of jurisdiction as defined.

[43] Headings can assist in ascertaining the meaning of legislation.⁷ The heading for s 194 reads “Application for review”. The heading for s 184 reads “Restriction on review”. These headings reinforce the conclusion that the two sections are to be read together – as is apparent from the internal language of each as already analysed.

[44] Finally, I note that, in the section of the Act which describes the Court’s exclusive jurisdiction, reference is made in s 187(1)(j) to the ability of the Court “to hear and determine any application for review of the type referred to in s 194”. No reference is made to a separate power of judicial review under s 184.

⁷ [Legislation Act 2019, s 10\(4\)](#).

Legislative history

[45] Section 194 can be traced back to s 105 of the [Employment Contracts Act 1991](#) and s 280 of the [Labour Relations Act 1987](#). In both instances, the language used is substantially similar to the present s 194, save for the references to the first instance body, the Arbitration Commission or the Employment Tribunal.

[46] When the Employment Relations Bill 2000 was introduced, the Select Committee noted an apparent inconsistency. It referred to the clause which was to become s 188(4) of the Act, which stated that it was not a function of the Court to advise or direct the Authority in relation to the exercise of its investigative role, powers or jurisdiction, or as to the procedure that it has followed, is following or is intending to follow.

[47] As there was a potential inconsistency between s 188(4) and s 194 which would bestow the power of judicial review on the Court, it was recommended that a new clause be introduced. The Select Committee made this recommendation to protect the Authority “*except* where it relates to fundamental jurisdictional error”.⁸ This provision became s 184. It would be parallel to s 193 which protected the Court from similar scrutiny except on the ground of lack of jurisdiction. These steps point to a limited option of judicial review.

[48] In 2001 and 2003, two decisions of the Court dealt with decisions made by the Authority prior to an investigation, by way of judicial review. The first was *David v Employment Relations Authority*, which related to a direction concerning

natural justice.⁹ The second was *Metargen v Employment Relations Authority*, which related to a direction requiring parties to provide to the Authority statements of questions or issues which they wished the Member to consider as to the questioning of witnesses at the investigation meeting.¹⁰

[49] In 2003, a Bill came before the House, proposing what was to become s 184(1A).¹¹ It is reasonably clear that this step was taken in response to *David* and

⁸ Emphasis added.

⁹ *David v Employment Relations Authority* [2001] NZEmpC 75; [2001] ERNZ 354 (EmpC).

¹⁰ *Metargem v Employment Relations Authority* [2003] NZEmpC 26; [2003] 2 ERNZ 186 (EmpC).

¹¹ Employment Relations Law Reform Bill 2003 (92-1).

Metargen, although there was no discussion in the Parliamentary materials of these decisions at the time.¹²

[50] The explanatory note of the Bill said:¹³

... Section 184 restricts judicial review of determinations orders or proceedings of the Authority to lack of jurisdiction (within a restricted definition) or as provided in section 179. The amendment [i.e. insertion of s 184(1A)] further restricts the right to take review proceedings in relation to any matter before the Authority ...

[51] It can be seen that this statement again referred to the restricted ability of the Court to undertake judicial review in the circumstances involving the criteria of s 184(1A).

[52] Finally, reference should be made to the JRPA, which also refers to s 184. Section 7 of that statute provides:

7. This Act subject to certain provisions of [Employment Relations Act 2000](#)

(1) This Act is subject to the provisions of the [Employment Relations Act 2000](#) relating to the jurisdiction of the Employment Court and High Court in respect of—

(a) applications for review; or

(b) proceedings for a writ or order of, or in the nature of, mandamus, prohibition, or certiorari; or

(c) proceedings for a declaration or injunction against any body constituted by, or any person acting under, the [Employment Relations Act 2000](#).

(2) In particular, this Act is subject to the following provisions of the [Employment Relations Act 2000](#):

(a) [section 184](#) (which restricts review proceedings being brought in respect of any matter before the Employment Relations Authority);

(b) [section 187\(1\)\(h\)](#), (i), (j), and (ka) (which confers on the Employment Court exclusive jurisdiction to hear and determine certain proceedings and applications):

¹² *Samuels v Employment Relations Authority* [2018] NZEmpC 138, [2018] ERNZ 406 at [26].

¹³ At [29] (emphasis added).

(c) [section 194A](#) (which provides that review proceedings in relation to an employment relationship problem may not be brought in either the Employment Court or the High Court):

(d) [section 213](#) (which confers on the Court of Appeal exclusive jurisdiction in relation to the review of any proceedings before the Employment Court).

[53] [Section 7\(1\)](#) outlines the extent of the Employment Court's power to deal with applications for review, or for proceedings for certain administrative orders. The language used reflects that of [s 194\(1\)](#) of the Act. [Section 7\(2\)](#) then refers to [s 184](#) of the Act, stating that it "restricts review proceedings" brought in respect of any matter before the Employment Relations Authority.

[54] It is reasonable to conclude that [s 7](#) of the JRPA was intended to reflect the Court's judicial review regime as described in [ss 194](#) and [184](#) as amended.

Relevant case law and purpose

[55] In *Keys v Flight Centre (NZ) Ltd*, a full Court noted that [s 184](#) is a privative provision in the sense that Parliament had sought to restrict the availability of a party to obtain procedural intervention in a case.¹⁴ Later, the same Court said that the scheme or philosophy of the section is that, except on grounds of lack of jurisdiction in the narrow sense or by way of challenge, there can be no review of the Authority or its determinations.¹⁵

[56] Next, I refer to the subsequent dicta of the Court of Appeal in *Employment Relations Authority v Rawlings*.¹⁶

[57] There the Court found that the Act provides for the Employment Court to supervise the Authority “... either by challenge under [s 179](#) or by way of review under [s 194](#)”.¹⁷

14 *Keys v Flight Centre (NZ) Ltd* [\[2005\] NZEmpC 59](#); [\[2005\] ERNZ 471 \(EmpC\)](#) at [\[23\]](#).

15 At [\[48\]](#).

16 *Employment Relations Authority v Rawlings* [\[2008\] NZCA 15](#), [\[2008\] ERNZ 26](#).

17 At [\[23\]](#).

[58] The Court went on to consider two provisions that indicated the general policy of the Act was against such supervision being exercised in relation to procedural rulings.

[59] The first was the restriction on the right of challenge in respect of a procedural matter under [s 179\(5\)](#). The second was [s 184\(1A\)](#), the intention of which was also to prevent a challenge or review process leading to disruption of unfinished Authority investigations.¹⁸

[60] The Court of Appeal held that once the investigation was over and the determination had been made, there was no reason for limiting the challenge and review jurisdictions of the Employment Court.

[61] Later, the Court commented on the correlation between [s 184\(1A\)](#) and [s 184\(1\)](#). After observing that the new subsection was not “entirely felicitously drafted”, it said that to make sense of the subsection, it was necessary to recognise that the phrase “any matter before the Authority” in [s 184\(1A\)](#) had, in substance, the same meaning as the rather different words which appear in [s 184\(1\)](#), “determination, order or proceedings of the Authority”.

[62] The Court also held that the phrase “any matter before the Authority” did not mean “any matter which is currently before the Authority” but, rather, “any matter which is or has been before the Authority”.

[63] Construed in this way, the Court concluded the purpose of the subsection was clear. It was to prevent review proceedings being filed until the Authority was quit of the case and any rights of challenge had been exercised. It held that in virtually every case, the challenge procedure, except where it proceeds de novo, could be expected to tidy up the sort of problems which might otherwise have warranted a review.¹⁹

[64] The Court also observed that reading [ss 194\(3\)](#) and [184\(1A\)](#) together:²⁰

18 At [\[26\]](#).

19 At [\[34\]](#)–[\[36\]](#).

20 At [\[38\]](#).

... makes it clear that the right of challenge provided for under [s 179\(1\)](#) is the preferred method of challenging decisions of the Authority. In other words, if there is a right of challenge, review proceedings are excluded unless or until the right of challenge has been exercised.

[65] In summary, the Court of Appeal plainly proceeded on the basis that [s 184](#) contained restrictions on the Court’s [s 194](#) ability to judicially review the Authority, unless the Authority had issued a substantive determination in respect of which a right of challenge existed, and which had been exercised. Only then could a judicial review proceeding be initiated.

[66] Given the policy objectives as explained by the Court of Appeal, it would make little sense to conclude that having enacted these restrictions, an alternative path for judicial review would nonetheless be available that was devoid of any restrictions whatsoever.

Conclusion on issue one

[67] Each of the factors I have reviewed point strongly to the conclusion that [ss 194](#) and [184](#) are to be read together; that the Court’s jurisdiction to judicially review is bestowed by [ss 187](#) and [194](#) and not by [s 184](#); and that the cross-reference to [s](#)

[184\(1A\)](#) in [s 194\(2\)](#), and the headings to both sections along with the other considerations to which I have referred, confirm that the two sections are to be read together.

[68] In short, as WorkSafe has submitted, [s 194](#) is the gateway provision, and there is no second option via [s 184](#) alone.

Issue two: Does [s 184\(1A\)](#) apply to Mr Straayer's application for review?

[69] For the purposes of the second issue, it was argued for WorkSafe that upon a proper construction of [s 184\(1A\)](#), the decisions made by the Authority amounted to "determinations", but they did not satisfy the expanded definition of that term in [s 184\(1A\)](#); nor were the other prerequisites for bringing a judicial review claim met.

[70] Mr Straayer submitted that WorkSafe was adopting an unduly broad interpretation of the language used in the subsection. Moreover, the effect of WorkSafe's interpretation would mean that judicial review was simply not available

until after a substantive determination was issued, which would create an undue fetter on the right to seek judicial review.

Is there a qualifying determination under [s 184\(1A\)\(a\)](#)?

[71] It is first necessary to consider the fact that under the subsection no review proceeding may be initiated in relation to any matter before the Authority unless it has first issued a determination "on all matters relating to the subject of the review application between the parties to the matter".

[72] As noted, Mr Cain argued that the type of determination referred to in [s 184\(1A\)\(a\)](#) is substantive in nature, being one that relates to "all matters relating to the subject of the review application between the parties to the matter."

[73] He said that [s 184\(1A\)](#) as originally enacted referred to "final determinations" in all such matters, but that this language was substituted in 2014 by specific references to [s 174A\(2\)](#), [174B\(2\)](#), [174C\(3\)](#) and [174D\(2\)](#).²¹ When dealing with the proposed amendment, the Select Committee stated that the rationale was to ensure that where an oral determination, or an oral indication of preliminary findings was made, these could not be challenged or reviewed by the Court. As had originally been the position, parties would simply have to wait for the written determination before considering a review.²²

[74] In short, parliamentary intention when adopting the 2014 amendments was to maintain the requirement of certainty and finality by requiring the person seeking the review to wait until a written determination had been issued on all matters relating to the subject of the review application.

[75] It is apparent that the original intention would be maintained: nothing further was necessary to achieve finality of a question before it would be appropriate to proceed with a judicial review.²³

²¹ [Employment Relations Amendment Act 2014, s 72](#).

²² Employment Relations Amendment Bill 2013 (105–2) (select committee report) at 14.

²³ *Keys v Flight Centre (NZ) Ltd*, above n 14, at [49].

[76] Next, it is necessary to compare the language used with regard to a determination in [s 184\(1A\)](#) with the language used about a determination in [s 179](#). The latter states that a challenge may elect to bring a challenge by a party if "dissatisfied with a written determination of the Authority ...". As noted, in [s 184\(1A\)\(a\)](#), the determination must be "on all matters relating to the subject of the review application between the parties to the matter."

[77] The distinction between the two sections must be regarded as deliberate. Section 184(1A) requires that the determination be about "all matters" relating to the subject of the review application.

[78] Such a conclusion is supported by the purpose alluded to earlier, that the power of review is available only if the Authority is quit of the case.²⁴

[79] I do not consider this results in an undue fetter on the right to seek judicial review. Parliament has made a policy decision as to the role of the Authority on the one hand, and the role of the Court on the other. As explained by the Court of Appeal in *Rawlings*, once the Authority has concluded its investigation, a party can proceed with a challenge, or if the criteria are made out, a judicial review application.

[80] Here, Mr Straayer wished to review the conclusions reached about disclosure and representation issues for an upcoming investigation.

[81] When Mr Straayer filed his application for review, a substantive determination had not been issued. This means that the first hurdle of [s 184\(1A\)](#), which is a mandatory requirement for review, cannot be cleared.

Alternatively, are the criteria of s 184(1A)(b) and (c) met?

[82] In case it is subsequently held that my conclusion as to s 184(1A)(a) is wrong, I deal with the remaining hurdles as set out in s 184(1A)(b) and (c). If applicable, did Mr Straayer initiate a challenge under s 179, and if so, has the Court made a decision with regard to any such challenge?

24 *Rawlings*, above n 16, at [36].

[83] As already noted, s 179 allows for challenges in respect of a determination of the Authority, or part of a determination. The reference to such an outcome is not as broad as is found in s 184(1A).

[84] It is well established that for the purposes of s 179, what a “determination” is to be interpreted broadly. The way in which a document from the Authority is described is not determinative of that question.²⁵

[85] Thus, if a document recording a conclusion of the Authority resolves a contested application, it may well amount to being a determination. Substance rather than form is what matters.²⁶ The term encompasses not just the matters on which the Authority relied in disposing of proceedings but also the entirety of the employment relationship problem before it.²⁷

[86] There is no doubt that the two impugned conclusions resolved contested issues which had been raised by Mr Straayer. Although a formal determination in the format described in s 174E of the Act was not produced, in substance the Authority resolved contested issues that were before it.

[87] The next and related question, however, is whether these decisions would have fallen foul of s 179(5) had a challenge been brought, on the basis that they related to matters of procedure.

[88] Again the general principles are well known. Authority proceedings are not to be interrupted by challenges at a predetermination stage.²⁸ The policy reasons for this are to increase speedy and non-legalistic decision making to keep costs down and avoid delays. Access to justice considerations are dealt with in the right of challenge once the Authority has made a final determination on the matter before it.²⁹

[89] However, the Court must have regard to the effect of the determination in light of the policy objectives. It can consider determinations that have an irreversible and

25 *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 55, [2013] ERNZ 460 at [22].

26 At [21].

27 At [18].

28 *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [17].

29 At [23].

substantive effect. But it is not enough that an order has an impact on the parties. Any decision will have some impact on parties.³⁰

[90] Also relevant is the point that if there are elements of procedure, but there are also substantive consequences, a challenge may not be precluded by the subsection.³¹

[91] In my view it is arguable for strike-out purposes that both the disclosure decision and the representation decision could have an “irreversible and substantive effect” on Mr Straayer’s rights. If Mr Straayer was correct in asserting that disclosure was incomplete, or that WorkSafe had not instructed the lawyers that said they represented that organisation, both these issues could have impacted on his ability to present his case at the investigation meeting.

[92] In short, there may well have been a justiciable challenge under s 179 of the Act. However, such a challenge was not brought, and no decision with regard to such a challenge was made by the Court. Rather, Mr Straayer chose to initiate his application for judicial review.

[93] The criteria of s 184(1A)(2)(b) and (c) are therefore not established.

Result as to strike out application

[94] In summary, I have concluded that Mr Straayer’s review could only be brought pursuant to s 194 and that no independent option for review exists under s 184.

[95] Mr Straayer’s review must therefore be regarded as having been brought under s 194, and, because of the effect of s

194(2) the criteria of s 184(1A) must be met.

[96] Those criteria are not satisfied because there has not been a determination of the particular kind which is described in the subsection; alternatively, the criteria as to the bringing and resolution of a challenge are not satisfied.

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

31 *Morgan*, above n 25, at [58].

[97] It follows no reasonably arguable cause of action arises from Mr Straayer's statement of claim. The legal hurdles are insurmountable.

[98] Accordingly, the proceeding must be struck out, and I so order.

[99] I reserve costs which should be discussed directly between the parties in the first instance. My provisional view is that these should be resolved on a Category 2, Band B basis under the Court's Guideline Scale as to Costs.³² If agreement cannot be reached, a suitable application is to be brought within 21 days, with a response given in a like period thereafter.

B A Corkill Judge

Judgment signed at 11.45 am on 17 October 2022

32. "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.