**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2015] NZEmpC 201**
**EMPC 202/2015**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| AND IN THE MATTER | of an objection to the Court's jurisdiction |
| BETWEEN | DEBORAH OWEN<br>Plaintiff |
| AND | THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS<br>Defendant |

Hearing: 2 November 2015
(heard at Auckland)

Appearances: B Henry and A Dunlop, counsel for the plaintiff
T Sewell and J Dobson, counsel for the defendant

Judgment: 16 November 2015

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**JUDGMENT OF JUDGE B A CORKILL**

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## Introduction

[1] The Department of Corrections (the Department) has raised an objection as to jurisdiction. It is contended that s 179(5) of the Employment Relations Act 2000 (the Act) precludes the Court from hearing and determining a challenge brought by Ms Deborah Owen against a determination of the Employment Relations Authority (the Authority). The determination in question is a Member's minute dated 22 July 2015 in which the Authority Member declined to recuse herself.

[2] It is common ground between the parties that a minute issued by an Authority Member on this issue is a determination for the purposes of s 179 of the Act. I agree that this is a correct description of the Member's minute since it formally resolves an

important matter which had been the subject of submissions of counsel given on behalf of the parties.[1]

## Background to the issue

[3] This is the second occasion on which a challenge relating to matters which have occurred in the context of an investigation of Ms Owen's relationship problem has been brought to this Court; the Authority's investigation has yet to be completed.

[4] On the first occasion, the Court was required to consider whether the matter should be removed to this Court; Judge Perkins summarised the background of the proceeding, and since it is relevant to the issue I must consider it is convenient to set out his description of the history to that point:[2]

> [1] Ms Owen commenced proceedings in the Employment Relations Authority (the Authority). She filed a statement of problem in July 2012. She claimed to have been unjustifiably dismissed and unjustifiably disadvantaged in her employment.
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> [2] A four day investigation meeting commencing on 25 February 2014 in the Authority was prematurely adjourned after the first morning of hearing. This occurred as a result of Ms Owen representing herself and finding that she was unable to proceed further without assistance. The resumed investigation meeting was set to re-commence on 10 June 2014.
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> [3] Ms Owen then employed counsel to represent her. Her claim was reformulated and an amended statement of problem was filed with the Authority. Ms Owen sought an order for a removal to the Employment Court pursuant to s 178(2)(b) of the Employment Relations Act 2000 (the Act). The grounds for this application were that the case was of such a nature and of such urgency that it was in the public interest that the proceedings be immediately removed to the Court.
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> [4] In a determination dated 16 May 2014, the Authority declined to make an order removing the proceedings to the Court. In its determination, the Authority rejected the allegation as to any urgency required. It held that in any event the substantial delays, which had occurred to that point, were of Ms Owen's own making and as a result of her procrastination. It was noted that she had made "many changes of counsel" representing her. The Authority also rejected the argument that there were public interest factors, including Ms Owen's employment in a government department, which

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1 As to the definition of a "determination", see *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC) at [31]-[33] and *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 55, at [7]-[22].

2 *Owen v Chief Executive of the Department of Corrections* [2014] NZEmpC 215. (Footnotes omitted).

> would justify removal. The Authority reiterated its role as a tribunal of first instance, charged with investigating claims such as those of Ms Owen.
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> [5] Ms Owen filed a challenge against the determination in the Court. In addition she filed an application to the Court for special leave to remove the matter to the Court pursuant to s 178 of the Act.

[5] Later, Judge Perkins referred to an issue which had been raised as to whether there were any difficulties involved in the investigation continuing, given that evidence had been taken from some witnesses and that there had been a reformulation of the plaintiff's claims. He said this:[3]

> [16] Counsel for Ms Owen have pointed to the fact that since the first investigation meeting was adjourned after one half day, Ms Owen's claims have been reformulated and in addition there will be injustice to Ms Owen if the investigation continued on the basis that the witnesses, who have already given evidence, are not recalled. I am mindful in dealing with this submission that it is not the function of the Court to advise the Authority in relation to the exercise of its investigative role. Nevertheless, I do not accept the inference of counsel for Ms Owen that in the present circumstances, having refused an order for removal to the Court, the Authority would simply proceed with the matter without the recall of witnesses to give evidence enabling them to be cross-examined while counsel for Ms Owen is present. The Authority is not a court of record. The evidence given so far would therefore not be available to counsel. While the Authority Member has not mentioned this point specifically in her determination, I am certain that Ms Owen and her counsel will be afforded the right to have the witnesses recalled and the investigation started afresh so that counsel can consider cross-examination as appropriate. The fact that part of the claim has been reformulated would lead to this conclusion as a matter of common sense. This issue is not grounds for exercising the discretion to order removal. I am quite sure that such a process was already in contemplation by the Authority Member when the removal was declined. I am assuming in saying this, counsel for the defendant will be afforded the same right to cross-examine Ms Owen's witnesses.

[6] Judge Perkins concluded that when all factors in the case were considered, removal was not appropriate. Accordingly, on 18 November 2014 the challenge was dismissed and the ancillary application was declined. It was suggested that the parties should therefore contact the Authority so that the investigation "may continue".[4]

[7] On 27 November 2014, the Member who had been charged with the responsibility of conducting the investigation to that point convened a case

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3 *Owen v Chief Executive of the Department of Corrections*, above n 2.

4 At [19].

management conference call with counsel. No objection was raised as to her continued involvement in the investigation.

[8] Directions to advance the matter were given, which included a timetable for the filing and serving of witness statements, and the setting down of a five-day investigation meeting which was scheduled to commence on 27 July 2015.

[9] A further telephone conference was held on 14 July 2015. In the minute which was issued subsequently, the Member advised counsel that although she would not need to re-question witnesses on the evidence already provided; cross-examination and re-examination of witnesses could proceed as usual.

[10] In the course of the telephone conference, counsel for the Department, Ms Sewell, stated that a witness who had already been questioned at the first investigation meeting, Ms B, was now terminally ill.[5]

[11] On 20 July 2015, Mr Henry, counsel for Ms Owen, sought an order that the Authority "appoint another [A]uthority [M]ember to start the investigation afresh". The application stated that this followed the teleconference of 14 July 2015 when the Authority Member had said she would be continuing with the investigation which had commenced on 25 February 2014. It was submitted that this was necessary because Judge Perkins when considering the issue of removal had stated that he was sure Ms Owen and her counsel would be afforded the right to have witnesses recalled and the investigation started afresh so that cross-examination could be considered as was appropriate. Mr Henry submitted that continuing the investigation with the same Authority Member would not afford Ms Owen her right to a de novo hearing, and was contrary to "the direction" of Judge Perkins, as well as Ms Owen's rights to natural justice.

[12] In her memorandum in response, Ms Sewell pointed out that Judge Perkins had made it clear that he intended that the investigation would "continue"; and had not stated that the investigation meeting should be a "hearing de novo before a new Authority Member". Ms Sewell went on to note that the application was being made

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5 I have anonymised the name of the witness due to her serious illness.

only one week prior to the investigation meeting, and that witnesses had been organised to attend the investigation meeting which had been scheduled since November 2014.

[13] It was then that the Member issued her minute that is the subject of this challenge. She recited the recent procedural history, and then considered the question of whether she should recuse herself and have the matter reassigned to another Authority Member. After referring to the leading decision on disqualification, that of *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*, the Member said:[6]

> [13] I consider that a fair-minded lay observer reasonably informed of the relevant circumstances would not apprehend bias in the suggestion that witnesses, whose witness statements have not altered since the first investigation meeting took place, *be reminded of the questions put to them and their responses on that occasion with an opportunity to alter or amend that evidence, particularly as the investigative nature of the Authority's role encompasses the right of the parties to cross-examination and re-examination. Such a suggestion would not have the effect of leading me to decide the case other than on its legal and factual merits.*
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> [14] However whilst I find it was open to me to have proceeded as suggested pursuant to s 173 of the Employment Relations Act 2000 (the Act), prior to this application being made I had reached the view that, having read the revised witness statement of Ms Owen which has been significantly amended, and also amended witnesses statements on the part of other witnesses, lines of questioning had been prompted which require me to have all the witnesses to revisit their evidence.
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> [15] In considering this application I further consider the timing relevant in that it has been made less than one week prior to the Investigation Meeting, despite more timely opportunities having existed for presenting it, and at a time when the parties have already made arrangements for their own and the witnesses attendance.
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> [16] It is the role of the Authority to: "deliver speedy, informal, and practical justice to the parties to the matter before it" pursuant to regulation 4(1)(c) of the Regulations of the Act. In this case, assigning the matter which is ready to proceed on Monday to another Authority Member will mean it will be unlikely to be heard until 2016. This does not accord with the deliverance of 'speedy' justice.
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> [17] For the above reasons, I see no basis in principle arising from the ground presented by the Applicant for recusing myself from the investigation in this case.

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6 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] 1 NZLR 76 (SC).

> [18] I also decline to exercise any discretion I might have to step aside from this case of my own volition.
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> (Emphasis added)

[14] Ms Owen's challenge was brought immediately, which meant that the investigation meeting could not proceed on the dates for which it had been scheduled.

[15] On 28 August 2015, the Department filed its objection as to jurisdiction stating that the plaintiff's challenge was precluded by s 179(5) of the Act because:

a) It directly concerned a determination of procedure by the Authority; and

b) The effect of the Authority Member's decision not to recuse herself could be remedied by a challenge to her determination in due course, if the plaintiff was not satisfied with that determination.

## The amended pleadings

[16] The present application requires an accurate understanding of the issues which the parties have raised in their respective pleadings, to which I shall now refer.

[17] A memorandum of counsel was filed for Ms Owen on 28 March 2014; this document appears to have been regarded as an amended statement of problem. It outlines the chronology of events which is now the focus of Ms Owen's claim against the Department. Ms Owen's claims are described in this way:

a) Unjustified disadvantage on the grounds of sexual harassment and/or assault, it being asserted that the Department cultivated an environment in which "sexual harassment and/or general harassment could continue unrestricted".

b) Unjustified disadvantage: it is alleged the Department failed to discipline a person who repeatedly harassed Ms Owen despite a

complaint being made, thus creating and fostering an unsafe work environment.

c) Unjustified disadvantage: it is alleged the Department cultivated an unsafe environment by mismanagement of the issues raised by Ms Owen and its own processes. It is asserted that the Department thereby allowed and/or caused Ms Owen to suffer intimidation and bullying; that it belittled Ms Owen's concerns and complaints by failing to address them adequately; that it mishandled certain health and safety issues; and that there were issues arising from the Department having refused her resignation without undertaking any lawful process which those circumstances required.

d) Unjustified dismissal/disadvantage: it is alleged that the circumstances were such that Ms Owen was unable to continue in her employment with the Department.

[18] For its part, the Department pleads in an amended statement of reply of 12 May 2014 that there are aspects of the claim which were not raised previously and were raised out of time. It alleges that it acted as a good employer, in good faith and in a fair and reasonable manner towards Ms Owen. In particular it is pleaded that the Department:

a) Supported Ms Owen's return to work after a number of absences.

b) Reviewed her caseload to ensure it was not unduly high, unreasonable or unmanageable.

c) Carefully considered and addressed all of her issues and concerns as she raised them, meeting with her and providing her with information with regard to its actions.

d) Provided a safe workplace for Ms Owen, including enquiries as to her wellbeing and by offering her support.

e) Moved her physical location and changed her reporting requirements as the need to do so arose.

f) Accepted and processed her resignation, after numerous attempts to address her concerns.

[19] The Department also counter-claimed on the basis of an alleged over-payment due to the fact that Ms Owen was paid while on leave without pay.

## Relevant legal principles

[20] Section 179 of the Act provides for challenges to determinations of the Authority. Where a party to a matter before the Court is dissatisfied with a written determination of the Authority, that party may elect to have the matter heard by the Court. This, however, is subject to the provisions of s 179(5) which provides that a right to challenge 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
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> (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
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> (b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

[21] These provisions have been considered on several occasions. In *Employment Relations Authority v Rawlings* the Court of Appeal stated:[7]

> We are satisfied that s 179(5) and 184(1A) are intended to prevent challenge or review processes disrupting unfinished Authority investigations. But once the investigation is over and a determination has been made, there is no reason for limiting the challenge and review jurisdictions of the Employment Court. If the procedure adopted by the Authority has had a decisive influence on result (eg by refusing an adjournment and proceeding in the absence of a witness), the affected party, in the course of questioning that result, will be entitled to put in issue that procedure.

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

[22] More recently this Court considered the issue in *H v A Limited*,[8] where there was an issue as to whether there could be a challenge to a refusal to grant a non-publication order. After discussing previous decisions, the full Court said:[9]

> [23] It is clear that the policy intent underlying s 179(5) is to enable the Authority to settle matters coming before it at the appropriate level, with as little judicial intervention during the investigative process as possible. A balance is struck between the policy imperatives underlying the reforms and access to justice considerations in the retention of the right of challenge or review once the Authority has made a final determination on the matter before it.
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> [24] We do not, however, consider that s 179(5) is to be construed as wholly ousting access to the Court at an interlocutory stage. This would be the effect of adopting the defendant's approach in the present case. Instead, the Court must have regard to the effect of the Authority's determination in light of the policy objectives set out above.
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> [25] While not impacting on (and, in particular, delaying) the substantive outcome of a proceeding, a refusal to grant a non-publication order may well cause significant and irreversible damage – not only to the applicant but also affected non-parties. Although an ability to challenge the refusal of a non-publication order at an interlocutory stage may disrupt unfinished Authority business, in the sense identified by the Court of Appeal in *Rawlings*, its distinguishing characteristic is that it is not the sort of determination that can subsequently be remedied on a challenge or by way of review. The horse will have well and truly bolted by that stage.
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> [26] A refusal to make a non-publication order does not fall within s 179(5), not because such an order directly impacts on a party's rights or obligations but rather because the denial of such an order has an irreversible and substantive effect. It cannot have been Parliament's intention that a litigant in the plaintiff's shoes would have such an important issue (non-publication) determined at first and last instance by the Authority, with no recourse to the Court to review the Authority's refusal.
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> [27] 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.
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> [28] Accordingly, a determination of the Authority will be amenable to challenge where it has a substantive effect, which cannot otherwise be remedied on a challenge or by way of review.

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8 *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38.

9 (Footnotes omitted).

[23] In summary, the Court must have regard to the effect of the Authority's determination in light of the policy objectives of the Act. A determination of the Authority will be amenable to challenge where it has a substantive effect which could not subsequently be remedied on a challenge or by way of review. Where s 179(5) operates, it defers a party's right of a challenge, but it does not deny access to the Court. At this stage, however, if the challenge was found to be statute-barred it would have to be dismissed.

## Submissions

[24] In his submissions for Ms Owen, Mr Henry stated in summary:

a) An investigation by the Authority is the first and formal stage of resolution of a relationship problem; Ms Owen's right to a proper inquiry by the Authority has been compromised by the circumstances which have arisen and her right to a fair hearing has been breached.

b) The Authority Member stated on 14 July 2015 that she intended to rely on notes she had made at the initial investigation meeting, including notes of the defendant's main witness who is now terminally ill. Counsel would be unable to view the notes taken by the Authority Member, as the Authority is not a court of record. Nor could Ms B be cross-examined. This was a significant issue because Ms Owen's claim has been amended. The evidence originally given by the Department's witness was not given on the basis of that amended claim.

c) It was submitted that the investigation meeting could no longer be conducted properly. The case had gone off the rails at the first investigation meeting and had stayed off them; consequently the first step in the Authority's process was a "nullity".

d) Counsel submitted that the determination of the Authority Member not to recuse herself has a substantive effect as Ms Owen is being denied her fundamental right to due process and a proper inquiry. Accordingly

the test in *H v A Limited* was met and the challenge was not statute-barred by s 179(5) of the Act.[10]

[25] The submissions made by Ms Sewell for the Department were, in summary, as follows:

a) The Authority Member's decision not to recuse herself is a matter of procedure. It is one which does not have a substantive effect.

b) At the heart of the challenge brought by Ms Owen were issues of evidence. In *Austin v Yoobee Limited*, the Court was required to consider evidential matters – on that occasion the issue related to the admissibility of evidence.[11] The Court stated that if the challenger was ultimately dissatisfied by the Authority's substantive determination, the matter of concern relating to admissibility of evidence could be reargued at that point. Ms Sewell argued that the position was similar in the present case.

c) On the question regarding the Authority Member's notes of the evidence given by witnesses, the Department would have no objection to those being made available to the parties. Furthermore, there were options for dealing with the evidence of Ms B, such as her being interviewed by telephone, or by her addressing questions put to her in writing. Her evidence would in the circumstances need to be considered under the Authority's equity and good conscience provision.[12] The Department was now in the position of potentially relying on evidence given by Ms B on affidavit; the fact that formal cross-examination of her at the investigation meeting was no longer possible was more likely to prejudice the Department's case rather than that of Ms Owen. This would also have been the case if it had been determined that a different Authority Member should undertake the investigation.

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10 *H v A Ltd*, above n 8.
11 *Austin v Yoobee Ltd* [2014] NZEmpC 105.
12 Employment Relations Act 2000, s 160(2).

d) Accordingly, the best way forward to resolve Ms Owen's relationship problem would be for the Authority Member who had commenced investigating her claims to continue doing so. The decision not to recuse could not be said to have created significant and irreversible damage. The horse had not bolted. Ms Owen's right of challenge to the Authority's substantive determination could be undertaken in due course, if need be.

## Discussion

[26] I deal first with the issue which appears to have arisen regarding Judge Perkins' observations when dealing with the removal application.[13]

[27] First he emphasised that "it is not the function of the Court to advise the Authority in relation to the exercise of its investigative role". Contrary to Mr Henry's submission, no "directions" were issued, and the remarks made by the Court should not be understood as such.

[28] Secondly, reference should be made to the Judge's observation that the process was "already in contemplation … when the removal was declined"; he also referred to the fact that the investigation would "continue". These comments do not suggest that it was considered that a new investigation should be commenced.

[29] Third, the reference to the right to have witnesses recalled so that the investigation would thereby be "started afresh" was to make the point that it was likely that further questioning would be offered in respect of those witnesses who had previously given evidence before the claim was reformulated. That does not suggest a new investigation.

[30] Finally, the Judge made no comment to the effect that consideration should be given to a new Member being appointed to deal with the investigation.

[31] It is next necessary to say a little more regarding the matters that were discussed by counsel with the Member at the telephone conference on 14 July 2015. The Member recorded in her subsequent minute that whilst she "noted that it was

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13 *Owen v Chief Executive of the Department of Corrections*, above n 2, at [16].

unlikely that she would need to re-question witnesses on the evidence already provided … cross-examination and re-examination of the witnesses would proceed as is usual".

[32] As I mentioned earlier, Ms B's circumstances and evidence were also discussed, although counsel are not agreed as to what was said on that topic.

[33] Mr Henry stated that his notes of the telephone conference recorded that the Member told counsel that at the initial investigation meeting Ms B had said that after Ms Owen had referred to a complaint of sexual harassment at a particular meeting, Ms Owen had said she did not want anything further done about it, and the matter was left there; the Member gave this indication on the basis of her notes of the first investigation meeting.

[34] Ms Sewell said this conversation proceeded on the basis that the Member was investigating issues on a sequential basis, so that some issues had not been dealt with when the first investigation meeting was adjourned, although it appears the issue relating to the complaint had. Mr Henry, who was not present at the initial investigation meeting, was unable to confirm that this was the case. No doubt this particular issue could be clarified.

[35] The concerns raised for Ms Owen focus on the evidence which Ms B gave at the initial investigation meeting. I must consider the difficulties occasioned by the fact that Ms B, it appears, will not be available to attend an investigation meeting in person, and whether this has now created problems which are so significant that the Authority Member should have recused herself; and that her decision not to do so is one having substantive effect. This is a question where the practical realities of the situation which has arisen need to be assessed in a commonsense way.

[36] I first consider the notes which the Member took at the initial investigation meeting. From the information provided to the Court it is apparent that the Member has already informed counsel of her record as to what Ms B said at the first investigation meeting. Could further steps be taken on this issue? Ms Sewell said that she would have no objection to the Member's notes being made available to the

parties. Whilst acknowledging it is not the role of the Court to advise or direct the Authority in relation to the procedure it is intending to follow,[14] it is evident that this issue could be addressed in a formal and constructive fashion, so that the parties are accurately informed of the evidence provided by Ms B to the Member. There are practical options which could be taken to achieve this objective which the parties could no doubt raise with the Member, such as a minute being provided to the parties which records the evidence which was previously given. These are matters which could be readily resolved.

[37] Next, I turn to the issues relating to Ms B's ability to participate in the investigation. There are a number of relevant factors:

a) Although Ms B is very ill, there is a prospect that she could attend the investigation meeting by telephone or could provide written responses to questions, if the Authority considered this to be appropriate.

b) The Court is advised that a transcript was made of a particular meeting where the issues of sexual harassment were discussed. However, I have no evidence as to its adequacy. That said, other persons were also present, so that a proper understanding as to what occurred may be able to be provided by others.

c) Mr Henry submitted that he wished to put questions to Ms B regarding the adequacy of her response to the complaint laid by Ms Owen to Ms B, and should be able to do so as a matter of natural justice. Such issues may be able to be explored as already indicated, but even if they could not, the adequacy of any response made on behalf of the Department to Ms Owen's complaint would be a matter of assessment for the Authority having regard to all the available evidence. If the Authority chooses to do so, it could weigh Ms B's evidence one way or the other if it transpires that there are limitations on her ability to provide further evidence.

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[14] Section 188(4).

d) One of the objects of the part of the Act which establishes the Authority is that problem-solving needs to be flexible, and that relationships are to be resolved by establishing facts according to the substantial merits of a case without regard to technicalities; in doing so the Authority must comply with the principles of natural justice which at its heart requires it to adhere to fair process: what is fair in a particular case depends on the relevant context.[15] For the reasons I have discussed earlier, it cannot be concluded that fair process has not been or will not be followed.

[38] At issue is the means by which evidence should be dealt with at a hearing which is yet to take place. Whilst there are some difficulties, it would be premature to conclude that they are incapable of being remedied, or that the initial investigation meeting is a nullity, or that Ms Owen's right to a fair hearing is now compromised. I do not consider that significant and irreversible damage has occurred.

[39] The effect of ss 179 and 182 of the Act is that a person who is dissatisfied with a determination may elect to have the matter heard by the Court on a de novo basis. If ultimately a challenge were to be brought against the Authority's determination and if the Court were to accept that a significant procedural problem had arisen at first instance, a remedy would be available because the case would be reheard. Consequently, to use the language adopted by the full Court in *H v A Limited*, it cannot be concluded that the horse has bolted.

[40] I find that the Authority Member's decision not to recuse herself was not a decision having substantive effect in the particular circumstances; the Member's decision was a matter of procedure.

[41] I uphold the Department's objection under s 179(5) of the Act. Because the challenge is statute-barred, it would be an abuse of process to hear it. The challenge is dismissed.

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[15] See, for example, *Metargem v Employment Relations Au*thority [2003] 2 ERNZ 186 (EmpC) at [58]; Philip Joseph *Constitutional and Administrative Law in New Zealand*, 4th ed, Brookers, Wellington at 25.1.

[42] I reserve costs. I take the same course as was adopted by Judge Perkins when this matter was previously before the Court. Any issues as to costs may be raised with the Court after the issues before the Authority have been finally determined.

B A Corkill
Judge

Judgment signed at 3.00 pm on 16 November 2015