IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 149
EMPC 49//2019

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
AND THE MATTER	of a preliminary issue
BETWEEN	BAY OF PLENTY DISTRICT HEALTH BOARD Plaintiff
AND	CULTURESAFE NEW ZEALAND LIMITED First Defendant
AND	ALLAN HALSE Second Defendant
AND	ANA SHAW Third Defendant

Hearing:	29 June 2020 (Heard at Auckland)
Appearances:	M Beech and T Carlisle, counsel for plaintiff C Sawyer, counsel for defendants
Judgment:	22 September 2020

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves a preliminary question as to the scope of the Employment Relations Authority's jurisdiction. This issue arises in the context of a removed proceeding in which the plaintiff seeks declarations that the defendants

obstructed, delayed or prejudiced a proceeding of the Employment Relations Authority by failing to comply with multiple directions which it made. On the basis of these allegations, the plaintiff seeks declarations and penalties under s 134A of the Employment Relations Act 2000 (the Act); and findings of contempt under s 196 of that Act.

[2] The Authority made a series of directions when it was dealing with a relationship problem brought by Ms Ana Shaw, represented by Mr Allan Halse, against the Bay of Plenty District Health Board (the DHB). Initially, the Authority directed Mr Halse not to contact senior personnel of the DHB about the case since it was represented by counsel; and then not to publish adverse comments about the DHB's position in the case. These directions were later extended to the entity through which Mr Halse operates, CultureSafe New Zealand Ltd (CultureSafe), and to Ms Shaw.

[3] The claims for declarations, penalties and contempt orders were filed initially in the Authority but were subsequently removed to the Court on 25 February 2019.[1] The defendants opposed liability for any of the orders sought, principally on the ground the Authority lacked jurisdiction to make the directions on which the plaintiff's claims are based.

[4] Initially, the proceeding was set down for hearing on all matters. However, the defendants then filed an application for a strikeout order which stated that the proceedings disclosed no reasonably arguable cause of action and were vexatious because the Authority did not possess the jurisdiction to make the directions it did. The plaintiff opposed that application. Submissions were then filed and addressed by counsel at a submissions-only hearing on 29 May 2020. In the course of that hearing, there was discussion as to the possibility of the Court considering the issues which the defendants wished to raise as a preliminary question, rather than the more limited focus which could be provided by a strikeout application.

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1 *Bay of Plenty District Health Board v CultureSafe New Zealand Ltd* [2019] NZERA 101 (Removal determination).

[5] The defendants then discontinued their application for a strikeout order, with the parties agreeing that the Court should determine the jurisdictional issues as preliminary questions, on the basis of an agreed summary of facts.

[6] The questions which were ultimately approved by the Court for consideration at a preliminary stage were:

a) What powers did the Authority have in relation to the making of the directions?

b) Were the directions made by the Authority in this case valid or enforceable?

c) What powers does the Court have to enforce directions of the Authority?

d) Are the directions made by the Authority, and referred to in this proceeding, enforceable by the Court?

[7] The agreed summary of facts focuses on the relevant events which led to the Authority making each direction. I emphasise that this judgment resolves jurisdictional issues only. At this stage, the Court is not required to make any findings as to whether any punitive declarations or orders should be made.

The facts

Background

[8] The issues in this case arise from a statement of problem filed by Ms Shaw in the Authority, in which she advanced disadvantage grievances founded on bullying and harassment allegations, that she had not been offered echocardiogram supervision or training, and that she had been unjustifiably dismissed.[2]

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[2] The claim for unjustified action was the subject of a leave application which was resolved in *Shaw v Bay of Plenty District Health Board* [2019] NZEmpC 121; that judgment outlines in more detail the circumstances on which Ms Shaw's claim is based.

[9] In March 2017, Mr Halse commenced his representation of Ms Shaw; he was and is the sole director and shareholder of CultureSafe.

First direction (23 May 2017)

[10] On 23 May 2017, Mr Beech, counsel for the DHB, filed a memorandum in the Authority which referred to direct communications Mr Halse had directed to the Chief Operating Officer of the DHB via LinkedIn, rather than via the lawyers representing it. It was asserted that Mr Halse's communications contained veiled threats that if the DHB did not engage in direct discussions with him with a view to settling the matter, he would go to the media and make critical comments about the DHB having bullied Ms Shaw, that it had made false allegations against her, and that it had then dismissed her. Reference was also made to criticisms contained in a post placed by Mr Halse on a CultureSafe Facebook page about the DHB.

[11] Mr Beech's memorandum went on to refer to the fact that statements made by a party in a proceeding, or their advocate, could amount to contempt of court or of a tribunal. The relevant test, he said, was whether the statement had, or was likely to have, an inhibiting effect on a litigant, and whether it went beyond that which was fair and temperate in the circumstances. He also submitted that the Authority had power under s 134A of the Act to make an order for penalties against any person who "obstructs" or "delays" an Authority investigation. It was submitted this power was broad enough to encompass conduct that amounted to contempt, particularly where it was designed to discourage or obstruct a litigant from seeking a proper determination from the Authority. It was submitted that Mr Halse's communications were contemptuous.

[12] On 23 May 2017, the Authority issued the first of the directions with which this judgment is concerned. It noted that Mr Beech had requested his memorandum be placed before an Authority Member urgently; Mr Halse had then told the Authority he was in a meeting until 1.00 pm that day and was not happy with Mr Beech's approach. The Authority recorded that no further communication had been received from Mr Halse. In view of the urgency, the Authority considered it appropriate to issue the direction.

[13] The Authority recorded it was very concerned that Mr Halse appeared to have approached the DHB directly about the issues between the parties when he was aware counsel was acting; the Authority was also concerned about the contents of posts he had made via LinkedIn and on Facebook while its investigation was being progressed. The Authority said it was extremely unhelpful to the Authority's investigation if the process and modes of communication between the parties were not respected. Both parties were entitled to a fair investigation.

[14] Then the Authority stated:[3]

> [14] While the DHB is represented by Counsel, Mr Halse is not to make contact with the DHB. Further, I will view very seriously any conduct which undermines the Authority's investigation in this matter.

Second direction (23 March 2018)

[15] On 13 February 2018, junior counsel for the DHB, Ms Goodspeed, filed a memorandum with regard to timetabling matters which were to be discussed at a telephone conference the next day. She said Mr Halse had again communicated directly with the DHB itself. Specific reference was made to two communications sent to the DHB's CEO, in which a reference had been made to Ms Shaw's matter, at a time when the DHB was plainly represented by lawyers for the purposes of her claim. Reference was also made to comments placed on the CultureSafe Facebook page.

[16] In a direction issued subsequently on 23 March 2018,[4] the Member said that at 1.15 am on the day of the scheduled telephone conference, the Authority had received a lengthy email from Ms Shaw's advocate, Mr Halse. That email, amongst other things, stated CultureSafe had been threatened by the DHB's lawyers, who Mr Halse said were aiding and abetting the commission of a criminal offence, namely the breaches by the DHB of its legal obligation to provide a safe working environment for all employees including Ms Shaw. Mr Halse had gone on to say that in light of the threatening behaviour by the lawyers, he would attend the telephone conference with witnesses and would be audiotaping it.

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3 *Shaw v Bay of Plenty District Health Board* NZERA Auckland 5593008, 23 May 2017 (First Direction).

4 *Shaw v Bay of Plenty District Health Board* NZERA Auckland 5593008, 23 March 2018 (Second Direction).

[17] The Authority recorded that in the circumstances the telephone conference was unable to proceed. In its view, the correspondence sent by Mr Halse contained threats which amounted to conduct which may be considered as obstructing and delaying the Authority's investigation. That could result in the imposition of a penalty on him under s 134A of the Act.

[18] Later in the same document, which dealt with the deferred timetabling issues, the Authority referred to its previous direction of 23 May 2017 to the effect that Mr Halse was not to make contact with the DHB directly, and that any communications were to be made via its lawyers. Mr Halse was directed to comply with the earlier direction of the Authority.

[19] After referring to the subsequent contacts made with the DHB and the public comments he had placed on a Facebook page, the Authority again directed Mr Halse "not to make any public comment regarding the [DHB] and its staff on his Facebook page whilst the Authority's investigation is ongoing."[5]

[20] He was also warned that if he failed to comply with the Authority's directions in relation to its investigation, it would consider imposing a penalty under s 134A of the Act.

Third direction (5 October 2018)

[21] Further communications were then initiated by Mr Halse, CultureSafe and Ms Shaw between 3 April and 5 October 2018. These were before the Authority when it made its third direction.

[22] They included a further direct communication by Mr Halse to the Chair of the DHB; and to a number of posts placed on CultureSafe's Facebook page alleging a bullying culture at the DHB with direct reference to Ms Shaw's proceedings against that entity. It was also alleged that the Authority supports bullying.

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5 Second Direction, above n 4, at [18].

[23] Also before the Authority was a transcript of a broadcast Investigation article entitled "Investigation – suicides, sackings and stressed staff of Tauranga Hospital", which included details and discussion of Ms Shaw's allegations of bullying against the DHB, in connection with which she had been interviewed. The piece was published on 31 May 2018.

[24] This was followed by a Radio New Zealand broadcast which related to alleged bullying at the Tauranga Hospital; Ms Shaw and Mr Halse participated in the programme which was aired on 1 June 2018. Reference was made to Ms Shaw's claims.

[25] On 1 October 2018, shortly before the commencement of the investigation meeting, CultureSafe posted on its Facebook page a reference to the fact that Ms Shaw's case was about to be heard. Included was a link to the Investigation article of 31 May 2018.

[26] At the conclusion of the investigation meeting, the Authority issued a third direction to the effect that the matter between the parties should remain *sub judice* pending the Authority's determination, and that no public comments were to be made by the parties about the matter.

Fourth direction (3 December 2018)

[27] On 31 October 2018, CultureSafe posted on its Facebook page a direct reference to the investigation meeting, stating that it made "no sense that the [DHB] would publicly (at the ERA hearing) defend their bullying of [Ms Shaw]".

[28] On 5 November 2018, the DHB filed its closing submissions in the Authority; it included an application for a penalty award or costs uplift, having regard to the publications which had been made.

[29] On 26 November 2018, the DHB filed a memorandum which referred to a post which had appeared on the CultureSafe Facebook page on 9 November 2018; it stated the DHB would be prosecuted for failing to provide a safe working environment. The post included a link to the Investigation article of 31 May 2018.

[30] On the same day, Mr Halse emailed the Authority stating:

> ... CultureSafe NZ Ltd will not be taking that Facebook post down and gives notice that we may post [the letter from the DHB's lawyers] if it is not immediately withdrawn.

[31] On 28 November 2018, further adverse comments were posted on the CultureSafe Facebook page. Ms Shaw said the COO of the DHB had tried to intimidate and harass her at work. Mr Halse said that what Ms Shaw was saying was true, as had been confirmed by both of them at the recent Authority hearing when he said these matters were placed on the record.

[32] On 30 November 2018, the DHB filed an ex parte application for penalties, contempt orders and takedown orders against CultureSafe, Mr Halse and Ms Shaw. It was alleged that each were in breach of the directions made to that point by the Authority.

[33] The application was supported by a memorandum in which it was alleged, amongst other things, that there had been an intentional and flagrant disregard for the directions of the Authority, that the evidence of the breaches was clear, and that counsel understood they would not be disputed by CultureSafe.

[34] Although the application sought significant substantive orders, it was filed on an ex parte basis. It was submitted that the harm and undue hardship caused to the DHB and its employees caused by the posts outweighed the need for the application to proceed on notice. Counsel said it was necessary to send a strong signal to CultureSafe and Mr Halse. It was argued that putting the "other party" on notice may in fact result in an intensification of posts and cause further harm. Reference was made to s 173(4) of the Act, which relates to the making of ex parte orders by the Authority. It was submitted the subsection permitted the application to proceed without notice. However, if the application was to be notified, urgent directions and a telephone conference were requested.

[35] The Authority issued a notice of direction on 3 December 2018.[6] It recorded that the investigation meeting had been held, but the determination had yet to be issued. After referring to the ex parte application which had been filed by the DHB, the Authority stated it would be necessary for the DHB to issue a formal application against each of the parties against whom it sought orders and penalties, on notice.

[36] However, the Authority accepted an interim order should be made in the meantime under s 160(1)(f) of the Act as follows:[7]

a) Mr Halse was directed to comply with the three previous directions of the Authority which had been made against him, as was Ms Shaw.

b) Mr Halse was to take down from the CultureSafe website the Facebook posts which had commented on the DHB's position in respect of the Authority's current investigation into Ms Shaw's claims.

c) Ms Shaw was also directed to take down posts on her Facebook page, regarding the Authority's current investigation into her claims.

d) All directions were to be complied with immediately.

[37] Then the Authority directed service of the ex parte application on Ms Shaw, Mr Halse and CultureSafe. It also directed that the DHB issue a statement of problem about the concerns raised within seven days; a statement in reply to be filed and served by each respondent within a further seven days, following which there would be a telephone conference call.

Subsequent steps

[38] On 7 December 2018, the Authority released its determination, finding that Ms Shaw had not been unjustifiably dismissed by the DHB.[8]

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6 *Shaw v Bay of Plenty District Health Board* NZERA Auckland 5593008, 3 December 2018 (Fourth Direction).

7 The plaintiff pleaded in its statement of claim that this was a compliance order but there is no reference to s 137 in the Authority's direction.

8 *Shaw v Bay of Plenty District Health Board* [2018] NZERA Auckland 390.

[39] On 10 December 2018, the DHB filed a statement of problem seeking the same orders as described in its ex parte application. It cited CultureSafe, Mr Halse and Ms Shaw as respondents. They filed a statement in reply on 3 January 2019, denying liability.

[40] As noted earlier, the Authority issued a determination removing the claims brought by the DHB for penalty, contempt and takedown orders to the Court on 25 February 2019.[9]

Overview of parties' cases

[41] Mr Beech submitted in summary for the DHB:

a) The Authority has a broad jurisdiction to resolve employment relationship problems; in doing so, it directs its own processes. The ability to make the directions it did was expressly provided for under ss 160 and sch 2 of the Act, as well as reg 4 of the Employment Relations Authority Regulations 2000 (the Regulations).

b) The Authority accordingly acted within its jurisdiction when it made the four directions. They are therefore valid and enforceable. They had not been complied with, so the Court can now consider orders under s 134A to impose a penalty, or under s 196 which provides for the sentencing of contemptuous conduct in the Authority.

c) The claims for such relief were originally brought in the Authority; but these claims had been removed to the Court which now possessed the jurisdiction to make the orders sought.

d) In response to the defendants' case, the directions did not infringe the right to freedom of expression under the Bill of Rights Act 1990 (the Bill of Rights).[10] These rights are not absolute, and the Court must balance other rights, such as those pertaining to a fair trial.

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9 Removal determination, above n 1.
10 New Zealand Bill of Rights Act 1999, s 14.

[42] Ms Sawyer, counsel for the defendants, submitted in summary:

a) The Authority can only act in accordance with the powers bestowed on it by statute.

b) Those powers could not constrain the right of free speech under the Bill of Rights.

c) The Authority has been given specific, but limited, powers under ss 134A and 196 of the Act; these provisions were designed to permit the Authority to control its processes in particular respects at an investigation meeting, but not otherwise.

d) Each direction breached the right to freedom of expression or was not otherwise within jurisdiction.

e) A detailed analysis of the plaintiff's submissions was given to the effect that its arguments did not recognise sufficiently or at all the primary submissions made for the defendants. It was not accepted that the jurisdiction of the Authority is as broad as had been contended. The defendants' right to freedom of speech was a fundamental right which the Authority could not override. Accordingly, the Court could not now enforce the directions made by the Authority in these proceedings.

The role and jurisdiction of the Authority

[43] The Authority is a creature of statute, and one which does not possess an inherent jurisdiction.[11] For purposes of the present case, there must therefore be a strong focus on the applicable statutory provisions. Ms Sawyer submitted that the Authority could not do whatever it wants to do. I agree. It is trite that the Authority must stay within the confines of its statutory mandate.

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[11] *Secretary for Education v New Zealand Educational Institute Te Riu Roa Inc* [2013] NZCA 272, [2013] ERNZ 664 at 8 [*Secretary for Education v NZEI*]; *Axiom Rolle PRP Valuations Services Ltd v Kapadia* [2006] ERNZ 639 (EmpC) at [49]; *South Tranz Ltd v Strait Freight Ltd* [2007] ERNZ 704 (EmpC) at [20]; and *Dollar King Ltd v Jun* [2020] NZEmpC 91 at [7].

[44] The role of the Authority is set out in s 157(1) of the Act, which provides that it is:

> ... an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.

[45] The Authority has a wide substantive jurisdiction; it includes the ability to determine most of the rights of claim provided for under the Act as well as other employment legislation, and certain actions for breach of employment agreements. As s 161 confirms, it has the power to award remedies as specified under a wide range of employment-related statutes. But s 162 also provides it has most of the powers of the ordinary courts in relation to contracts, including the power to make orders which are available in those courts.

[46] An "employment relationship problem", as referred to in s 157, is an expansive concept. It includes a personal grievance, a dispute and any other problem relating to or arising out of an employment relationship. Such a problem is not confined to disputes between parties to an "employment relationship". As the Court of Appeal has confirmed, that is because the term has a more expansive application, including "a dispute and any other problem relating to or arising out of an employment relationship".[12] Subsequently, the same court clarified that in order for the Authority to have jurisdiction the employment relationship problem must "directly and essentially [concern] the employment relationship."[13]

[47] The Authority's procedural powers must be construed in light of the broad responsibilities it carries. These are provided for in several provisions. First I refer to s 160 of the Act, which is expressed as follows:

> ...
>
> (1) The Authority may, in investigating any matter,—
>
> (a) call for evidence and information from the parties or from any other person:

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12 *Secretary for Education v NZEI,* above n 11, at [21]; see also Employment Relations Act 2000, ss 4(2) and 5 definition of "employment relationship problem".

13 *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] 3 NZLR 618, [2015] ERNZ 37 at [95]; see also *FMV v TZB* [2019] NZCA 282, [2019] NZAR 1385 at [19].

(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) in the course of an investigation meeting, fully examine any witness:

(e) decide that an investigation meeting should not be in public or should not be open to certain persons:

(f) *follow whatever procedure the Authority considers appropriate.*

...

(Emphasis added)

[48] Then s 173, entitled "**Procedure**", sets out several procedural provisions; these are preceded by the important statement that the Authority must, in exercising its powers and performing its function, comply with the principles of natural justice and act in a manner that is reasonable having regard to its investigative role.

[49] Also relevant is reg 4 of the Regulations which provides:

4 Application

(1) These regulations are not to be strictly interpreted or applied, but are to be interpreted and applied in a way that best enables the Authority—

(a) to support successful employment relationships and the good faith obligations that underpin them; and

(b) to determine the substantial merits of any case, without regard to technicalities; and

(c) to deliver speedy, informal, and practical justice to the parties to any matter before it.

(2) *Subclause (1) does not limit the power of the Authority to give, in relation to any case before it, any directions that are necessary or expedient in the circumstances of the case.*

(Emphasis added)

[50] These provisions confirm that the Authority possesses broad and flexible procedural powers, all designed to ensure its processes are fair to both parties. This was recognised by the Court of Appeal soon after the enactment of this legislation in *Claydon v Attorney-General,* when it was confirmed, for example, that the Authority

had much wider powers in respect of its procedures by comparison with those of its predecessor, the Employment Tribunal.[14]

[51] In *David v Employment Relations Authority*, a full Court made a similar point in this passage.[15]

> ... It can be said with even greater force that the Authority is a specialist body with unusual powers which, in its exclusive jurisdiction, must be concerned primarily with fairness and is allowed to develop its own methods and processes in order to find just and equitable solutions in matters before it. It continues to follow that legal technicalities or analogy of rules will not always be helpful in achieving these objectives ...

[52] The Authority possesses significant court-like powers of enforcement of its processes.

[53] For example the Authority may award a penalty for obstructing or delaying an investigation.[16] This is to ensure that the Authority's ability to conduct a just and fair investigation, as it is required to do, is not undermined or impeded.[17] The provision does not state that the qualifying event must occur at an investigation meeting.

[54] It may issue compliance orders against parties and non-parties[18] requiring those persons to do any specified thing, or to cease a specified activity, where there has been non-compliance with any order, determination, direction or requirement made or given under the Act.[19] The use of that broad power may be considered where any person has not observed or complied with an order, determination, direction or requirement is given by the Authority, or a Member or Officer of the Authority.

[55] It also has the ability to deal with contempts in the face of the Authority as committed by any person. Such contempts include the wilful insulting of a Member or Officer of the Authority, the wilful interrupting or obstructing of proceedings of the Authority, or where any person misbehaves, or wilfully and without lawful excuse

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14 *Claydon v Attorney-General* [2002] 1 ERNZ 281 (CA) at [66] per McGrath J.
15 *David v Employment Relations Authority* [2001] ERNZ 354 (EmpC) at [66].
16 Employment Relations Act, s 134A.
17 *Ahuja v Labour Inspector, Ministry of Business, Innovation and Employment* [2018] NZEmpC 31 (2018) 15 NZELR 851 at [29].
18 Employment Relations Act, ss 137 and 138.
19 Section 137(1)(b).

disobeys an order or direction of the Authority in the course of an investigation meeting.[20]

[56] The Authority is left to get on with the processes which it has the statutory responsibility to undertake. This is evident, for example, from s 179(5) which provides that there is no right of challenge to the Court in relation to the procedure which the Authority has followed, is following, or is intending to follow. Also relevant is s 188(4) of the Act which provides that it is not the function of the Court to advise or direct the Authority in relation to the exercise of its investigative role, powers jurisdiction or procedure

[57] Ms Sawyer correctly submitted that the broad powers bestowed on the Authority emphasise the flexibility it possesses for problem-solving.[21] But she also argued that the Authority is akin to a "public mediation ... process"; this is not a proposition with which I agree.

[58] Section 143(f) states that the object of the provisions in pt 10 is to establish procedures and institutions – including the Authority – that:

> ... recognise that *judicial intervention* at the lowest level needs to be that of a specialist decision-making body *that is not inhibited by strict procedural requirements ...*
>
> (Emphasis added)

[59] Whilst the Authority is an investigative body, its proceedings enjoy the status and protections of "judicial proceedings".[22] Section 176 states that a Member of the Authority, in the performance of his or her duties under the Act, has and enjoys the same protection as a Justice of the Peace acting in his or her criminal jurisdiction, as provided in ss 4B–4F of the Justices of the Peace Act 1957 – protections which relate to judicial immunity in the performance of judicial functions and powers.[23] For the

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20 Employment Relations Act, s 196(1), now repealed. The new s 196 provides for the application of the Contempt of Court Act 2019 to proceedings of the Authority, which makes provision for the same behaviour: s 10.

21 Section 143(f).

22 Section 176(2).

23 This is a significant immunity: see *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [166].

purposes of s 176(2) of the Act, an Authority Member must be considered a judicial officer.

[60] This section also states that for the avoidance of doubt as to the privileges and immunities of Members of the Authority and of parties, representatives and witnesses in proceedings of the Authority, those proceedings are declared to be "judicial proceedings".

[61] Section 174, as originally enacted, stated that the Authority's determinations were to be made for the purposes of delivering speedy, informal and "practical justice" to the parties. That phrase was removed on 6 March 2015, when a suite of provisions was introduced to allow for oral determinations.[24] However, Parliament clearly intended this emphasis would be maintained, because it stated in the Explanatory Note to the Employment Relations Amendment Bill 2013 that the object of the various changes it introduced as to the issuing of determinations was to "support the Authority's objective of delivering speedy, informal and *practical justice*".[25]

[62] As the full Court observed in *David*, the Authority has some of the trappings of the Court[26] – in the provisions to which I have already referred, and as is evidenced by many of the procedural powers described in sch 2 of the Act.[27] In short, Parliament intended that it discharge judicial functions.

[63] Standing back, Parliament's intent in establishing the Authority was not to set up a public mediation service – mediation was provided for separately[28] – but to provide for an investigative body which possesses a wide range of procedural and substantive powers, some of which enable it to act judicially, and which may be enforced by the Authority if the circumstances so require by a range of methods.

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24 Employment Relations Amendment Act 2014, s 69.

25 Employment Relations Amendment Bill 2013 (105-1) (explanatory note) at 7 (emphasis added).

26 *David*, above n 15, at [62].

27 For example, the power to issue witness summonses, cl 5; the power to direct the holding of evidence at a distance where the Authority has all the powers and functions of a District Court Judge, cl 7; the power to take evidence on oath, cl 8; the power to prohibit publication, cl 10; and the power to award costs, cl 15.

28 Employment Relations Act, pt 10 "Institutions", ss 144–155.

Issue 1: the Authority's power to issue directions

[64] The Authority's ability to issue directions and the scope of these must be considered in the statutory context just described. It plainly has the ability to regulate its processes in a flexible way, ensuring that it complies with the principles of natural justice and acts in a manner that is reasonable.[29]

[65] That Parliament intended the Authority to be able to issue directions for these purposes cannot be doubted. It said so expressly in several instances.

[66] Section 137(1)(b) of the Act provides for the making of a compliance order by the Authority where a person has not observed or complied with any provision of "any order, *determination*, direction or requirement made or given under the Act by the Authority ...".[30]

[67] To similar effect were provisions relating to contempt, which included wilfully and without lawful excuse disobeying any "order or direction" of the Authority given in the course of an investigation meeting.[31]

[68] Finally, reg 4(2) of the Regulations also refers to the making of "directions that are necessary or expedient in the circumstances of a case."

Can directions be issued to bind a representative?

[69] For the purposes of the present proceeding, it is also necessary to consider whether directions can be issued to bind a representative, as well as a party.

[70] Parliament has taken some care in defining when a person may be represented, and by whom. Section 236 provides that where an employee has the right to do or take any action in the Authority, that employee may choose any other person to represent him or her for the purpose. The person purporting to represent the employee carries the responsibility of establishing that he or she is authorised to represent.[32]

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29 Employment Relations Act, s 173.
30 (Emphasis added).
31 Section 196 was amended as from 1 August 2020; certain provisions of the Contempt of Court Act 2019 apply to proceedings of the Authority.
32 Employment Relations Act, s 236(3).

[71] Clause 2 of sch 2 of the Act develops these requirements for the purposes of an Authority's investigation; it states that a party or person involved in a matter before the Authority, or called upon to appear before the Authority, may either appear personally, or be represented by an officer or member of a Union, by an agent, or by a barrister or solicitor.

[72] The range of persons who may represent a party under the Act is unusually broad, and wider than was the case in previous statutes.[33] Persons other than lawyers may represent. That Parliament has permitted such broad representation in respect of an employment relationship problem is an obvious acknowledgment that a litigant should have a range of options as to representation available to them, given the importance which may be attached to an employment relationship problem affecting that person. An unrepresented person is often a vulnerable one, who may be unfamiliar with the complexities and procedures of a judicial process; or who may be ill-equipped to do justice to their own cause.

[73] A party obtains advantages by being represented. Normally, the representative will have expertise which can be to the advantage of the otherwise unrepresented person. They may also obtain a measure of protection; for example, they can properly say that a direct communication to that person rather than to their representative is a breach of good faith.[34]

[74] The statutory mandate to represent a party in the Authority is a privilege which comes with both protections and responsibilities as far as the representative is concerned. The representative's role is not confined to whatever contractual

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[33] From 1925 to 1991, barristers and solicitors, whether acting under a power of attorney or not, could not appear before certain industrial bodies: see Industrial Conciliation and Arbitration Act 1925, s 47(3). This was then altered so that barristers and lawyers could appear before the Arbitration Commission, but only with the consent of all parties: Labour Relations Act 1987, s 274; otherwise persons could appear personally or via an agent. By then, there were no restrictions as to representation before the Labour Court: Labour Relations Act 1987, s 299. The United Kingdom Court of Appeal reviewed representation rights under the Employment Tribunals Act 1996, s 6(1) in *Bache v Essex County Council* [2002] IRLR 251 (UKCA), stating that previously a person appearing before an employment tribunal who was not counsel, solicitor, or a representative of a trade union or an employee's association could only appear by leave. This was the position from 1966 until 1971, when the leave requirement was repealed, leaving the right unqualified: see at [14]–[15] and [20] per Peter Gibson LJ. In these examples, legislatures have adopted various policy approaches to the issue of representation.

[34] See *New Zealand Public Service Assoc Te Pukenga Here Tikanga Mahi v Commissioner and Chief Executive Inland Revenue Department Te Tari Taake* [2017] NZEmpC 164, [2017] ERNZ 913.

arrangements might exist between the representative and his or her client, as Ms Sawyer appeared to suggest.

[75] The fundamental privilege held by any representative is the right of audience granted by the Act: this is the right to appear and advance the claim or defence of the represented party, within the applicable rules.

[76] As already mentioned, s 176(2) of the Act bestows privileges and immunities on representatives, amongst others, by declaring that proceedings before the Authority are judicial proceedings. This is a significant protection. Thus, for example, the representative has an absolute privilege for the purposes of any proceeding brought under the Defamation Act 1992, in respect of anything said, written or done.[35] The privilege, however, is confined to that statute and does not mean a representative is necessarily protected from other processes, such as professional discipline, or the various relevant offences which apply to all persons including representatives under the Crimes Act 1961.[36]

[77] A further protection is found in cl 3 of sch 2 of the Act, which provides that where any party to any matter before the Authority is represented by a person other than a barrister or solicitor, any communications between that person in relation to those proceedings are as privileged as they would be if that person had been a barrister and solicitor.

[78] Turning to responsibilities, a representative must be able to establish that they have the authority to act as such; that is because the representative has the capacity to bind the party being represented.[37]

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35 Defamation Act 1992, s 14(1). See discussion as to the scope of the privilege in *Creser v Tourist Hotel Corp of New Zealand* (1989) 2 NZELC 97.151 (CA); *Anderson v The Employment Tribunal* [1992] 1 ERNZ 500 (EmpC); and *Davis v Bank of New Zealand* [2004] 2 ERNZ 511 (EmpC) [*Davis v BNZ*].

36 Crimes Act 1961, ss 101 (bribery of judicial officers), 133 (fabrication of evidence), 116 (conspiracy to obstruct, prevent, pervert or defeat the course of justice), and 117 (corrupting juries and witnesses).

37 *Adams v Alliance Textiles (NZ) Ltd* [1992] 1 ERNZ 982 (EmpC), Chief Judge Goddard referring to the corresponding provision in the Employment Contracts Act 1991, s 59(3).

[79] Next, the representative must comply with procedural rules and directions of the Authority, if issued within jurisdiction, and whether or not those rules or directions refer to a party only or to a representative. Such a conclusion must necessarily to be reached, because when enacting a provision such as s 160(1)(f), Parliament could not have intended the dysfunctional alternative of a representative being able to flout or disobey the requirements of the Act or directions of the Authority on the ground that the Authority does not have the ability to bind a representative in respect of its processes. The same is true of reg 4(2). In part, these conclusions are reinforced by s 134A of the Act, which provides that every person is liable to a penalty who without sufficient cause obstructs or delays and Authority's investigation.

[80] A Practice Note issued by the Chief of the Authority in relation to the conduct of representatives, on 30 April 2019 emphasised the obligation to comply with timetables or other orders issued by the Authority.[38] It states that where representatives fail in that duty, a penalty may be imposed personally under s 134A of the Act, if the Authority is satisfied the representative has obstructed or delayed the investigation. These requirements are consistent with the statutory provisions I have reviewed.

[81] Where the conduct of a representative is relevant to the Authority's obligation to the fair discharge of its statutory responsibilities, I am satisfied a direction may be issued in respect of that person.

[82] It is convenient to deal now with the related submission made by Ms Sawyer. She argued that where, for example, a non-publication order was made under cl 10 of sch 2, a person who was an "agent" under s 236 would not be bound by it; she said the law of agency governed the representatives' responsibilities and obligations, not the statute.

[83] Clause 10(1) is expressed in broad terms. The Authority may order that certain details are "not to be published". As noted by the Court of Appeal in *ASG v Hayne*,

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[38] Chief Member James Crichton "Practice Note 3 – Conduct of Representatives in the Employment Relations Authority" (30 April 2019) Employment Relations Authority <www.era.govt.nz>.

the ordinary meaning of "publication" is flexible,[39] and includes "publication to the world at large, or putting material 'in a public arena'."[40]

[84] As explained by the Supreme Court in *Erceg v Erceg*, it is well established that in certain circumstances the general rule of open justice may be departed from.[41] There, the Court stated, in relation to a civil proceeding, that the "interests of justice [may] require a departure from the usual principle of open justice."[42]

[85] In the case of the Authority, the exception to open justice has been expressly provided for in cl 10. Given the undoubted significance of the power, it would be absurd to conclude that all persons were intended by Parliament to be bound by such an order, but not representatives.[43]

Conclusion on Issue 1

[86] In short, I am satisfied the Authority has the broad jurisdiction to issue directions for the purposes of ensuring the fair conduct of proceedings before it; and that such directions can be issued against any person representing a party.

Second issue: were the directions made in this proceeding valid?

First direction

[87] Consideration of the first direction arose because Mr Halse, in the various communications directed to the COO of the DHB, said Ms Shaw had been dismissed because she had been bullied; that false allegations had been made against her; and that unless the matter was settled, there would be an adverse media story which would "kill all your good 'culture' work". This resulted in the DHB lawyer writing to Mr Halse requesting him to desist from such communications with the COO, which

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39 *ASG v Hayne* [2016] NZCA 203, [2016] 3 NZLR 289 at [42].

40 At [43] (citations omitted); aff'd [2017] NZSC 59, [2017] 1 NZLR 777, [2017] ERNZ 208 at [72], also with reference to the ordinary meaning of "publication" as "the action of making publicly known; public notification or announcement; promulgation": *Oxford English Dictionary* (online ed, Oxford University Press, Oxford) at [1(a)].

41 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [3].

42 At [21].

43 For discussion of the appropriate threshold in the Authority see *Davis v BNZ* above n 35; and *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38.

contained "a direct threat". It was also noted that defamatory statements had been made on Facebook.

[88] Mr Halse then sent a further communication to the COO criticising him for having referred his earlier communication to the DHB lawyer, and said this would more likely give rise to Ms Shaw's story becoming prominent in the media.

[89] The first direction required Mr Halse not to make contact with the DHB while it was represented by counsel.

[90] Ms Sawyer argued that the direction was invalid because it fell foul of the right to free speech.

[91] Section 14 of the Bill of Rights states:

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[92] The right to express ideas, including critical or unpopular opinions, is of course basic to our democratic system.[44] It is well established that the section is to be interpreted broadly.[45]

[93] A direction not to contact or communicate with an individual potentially circumscribes that right.

[94] However, the right to freedom of speech is not absolute.[46] The right must be considered in light of the applicable operational provisions of the Bill of Rights. There are two such provisions to which reference should be made.

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44 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [114]–[115] per McGrath J, and [181] and [240] per Thomas J.

45 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

46 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at 156 per McGrath and William Young JJ.

[95] First, I refer to s 5 of the Bill of Rights, which states:[47]

> **5 Justified limitations**
>
> Subject to section 4 the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[96] In the present circumstances, there are two sources of law which are potentially relevant considering whether there are reasonable limits prescribed by law.

[97] The first arises from the Bill of Rights itself. Section 27 guarantees the right to the observance of the principles of natural justice.

[98] The second is to the same effect; it is found in s 157(2)(a) of the Act which states the Authority is required to comply with the principles of natural justice.[48]

[99] It is well established that although the principles of natural justice may vary in particular circumstances, the concept undoubtedly encompasses the right to a fair hearing.[49]

[100] Central to a party's right to a fair hearing is that he or she should not be prejudiced because they are exercising that right. Accordingly, improper pressure may not be placed on a litigant by another party because that litigant is exercising its constitutional right to bring or defend a proceeding.

[101] In *Solicitor-General v Smith*, the High Court found there are two aspects to improper pressure on litigants.[50] The first is any direct contact with a party which has an inhibiting effect on that person if it is more than bona fide private persuasion, and consists of statements that are neither fair, reasonable or moderate, and which amount to interference with the right to seek impartial adjudication.[51]

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47 Adopting the steps in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR at [92]; and see *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [95].

48 Employment Relations Act, s 157(2)(a).

49 *David*, above n 15, at [73]. See also Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington , 2014) at [25.1].

50 *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC) at [45] and [55].

51 An example of the problems which may arise from intimidatory statements on litigants is found in *Ho v Chief of Defence Force* [2005] ERNZ 93 at Appendix B.

[102] The second relates to public statements. In *Duff v Communicado Ltd*, Blanchard J formulated the applicable test in these terms:[52]

> A public statement about civil litigation currently before a Court will be in contempt of Court if:
>
> a. it goes beyond fair and temperate comment; and
>
> b. either,
>
> i. when viewed objectively, it can be seen to have a real likelihood of inhibiting a litigant of average robustness from availing itself of its constitutional right to have the case determined by the Court; or
>
> ii. it is actually intended by the maker of the statement to have that inhibiting effect on a litigant.
>
> This test is primarily objective, focusing on the *probable tendency* of the publication rather than its actual effect; but it encompasses the unfair and intemperate comment of someone who has set out to inhibit a litigant regardless of whether the comment actually succeeds in doing so. A weak litigant needs protection against unfair publicity deliberately intended to undermine its position.

[103] The rationale for these observations is that litigants should not in any way be dissuaded from having their disputes determined in court. This includes litigants in a particular case, as well as those who may be potential litigants. All citizens should have unhindered access to judicial bodies for determination of disputes as to their legal rights and liabilities.[53]

[104] In my view, the same applies to a dispute being determined by a body such as the Authority, given the particular responsibilities and powers which Parliament has bestowed on it.

[105] In summary, the right to freedom of expression must be subject to such reasonable limits as are prescribed by the right to natural justice. That right is affirmed in the Bill of Rights itself, and in the Act. This is a fair trial issue which is demonstrably justified in a free and democratic society.

[106] The second operational provision of the Bill of Rights which may be considered is s 6, which states:

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52 *Duff v Communicado Ltd* [1996] 2 NZLR 89 (HC) at 98 (emphasis original).

53 *Attorney-General v Times Newspapers Ltd* [1974] AC 273 (HL) at 310 per Lord Diplock; and see *Sidebotham v Capital Coast Health Ltd* WEC 53/94, 7 October 1994 at 2.

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[107] In *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc*, the Court of Appeal confirmed that this provision is not engaged where there is no initial finding that Parliament's intended meaning of a provision in another statute is inconsistent with a relevant right or freedom.[54]

[108] In my view, there is no material inconsistency between the procedural provisions of the Act on the one hand, and the rights and freedoms of the Bill of Rights on the other, such as would engage s 6 of the Bill of Rights. Both statutes require adherence to the obligations of natural justice.

[109] Turning to the application of these principles to the facts giving rise to the first direction, I am satisfied that the threats made by Mr Halse in the communications placed before the Authority were an attempt to coerce the DHB into settling Ms Shaw's claim without it being heard by the Authority. They constituted improper threats of adverse publicity. That threat was directed at the DHB as an opposing party, so as to circumvent the protection offered by its lawyers. It was an attempt to obtain an unfair advantage.

[110] In these circumstances, the Authority possessed the jurisdiction to make the first direction, so as to ensure the investigation of Ms Shaw's relationship problem would proceed fairly and without improper pressure on the opposing party. The direction was valid.

Second direction

[111] Consideration of a second direction arose because of what was regarded as continued misbehaviour by Mr Halse as a representative. This included continuing to contact senior executives of the DHB directly about issues in the case when it was represented; posting statements that there had been workplace bullying of Ms Shaw;

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[54] *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437, [2014] ERNZ 90 at [214].

and making assertions that the DHB lawyers had breached their code of ethics by aiding and abetting a criminal offence with regard to the bullying of Ms Shaw. I note the final assertion was completely unsupported by any evidence from Mr Halse.

[112] The Authority stated that correspondence addressed to it about these issues had contained threats which could be considered as obstructing and delaying the Authority's investigation. The Authority also said there were concerns about Mr Halse's ongoing behaviour towards the DHB, and his conduct in the public arena. In light of these matters, it made the second direction.

[113] The first point raised for the defendants as to the validity of the second direction focuses on s 137(1)(b) of the Act. However, I am not persuaded that the Authority intended to make a compliance order under that provision, since there was no statement to the effect it was doing so. The direction which was made was a procedural one, albeit an important one, in an existing proceeding.

[114] As explained earlier, the Authority has the power to issue any directions that are necessary or expedient in the circumstances of the case; [55] and in doing so it may issue directions that bind a representative if need be. It may issue directions that are necessary to maintain the integrity of the Authority's process, and to ensure a fair investigation is able to be conducted.[56] In my view, the Authority was plainly proceeding on the basis of these obligations; it therefore acted within its jurisdiction when making this aspect of the second direction.

[115] That all said, the Authority could have proceeded under s 137. The issue under consideration by the Authority fell within the expansive definition of "employment relationship problem" as defined in s 157. In my view, the conduct of a representative may relate to or arise out of "an employment relationship".[57] In such a case there was potentially, jurisdiction to consider making a compliance order under s 137, although in doing so it would be necessary to have regard to s 138(2) if the position of a non-party was under consideration.

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55 Employment Relations Act, ss 160(1)(f) and 173; and Employment Relations Authority Regulations 2000, reg 4(2).

56 As discussed at [43]–[63] above.

57 *Secretary for Education v NZEI*, above n 11, at [21].

[116] It was submitted that the next part of the direction, relating to public comment about the DHB and its staff, whilst the investigation was ongoing, infringes the Bill of Rights. For the analysis and reasons already given,[58] I disagree. The Authority could legitimately balance the right to freedom of expression and the right to natural justice. Accordingly, it had jurisdiction to make this aspect of the direction.

[117] It was also submitted that the warning given to the effect that failure to comply with the Authority's directions could lead to consideration of a penalty under s 134A of the Act had no legal basis, because there was no plausible connection between the exercise by Mr Halse of his rights of free expression, and any claimed obstruction or delay.

[118] Section 134A is expressed in broad terms. It states:

> **134A Penalty for obstructing or delaying Authority investigation**
>
> (1) Every person is liable to a penalty under this Act who, without sufficient cause, obstructs or delays an Authority investigation, including failing to attend as a party before an Authority investigation (if required).
>
> (2) The power to award a penalty under subsection (1) may be exercised by the Authority—
>
> (a) of its own motion; or
>
> (b) on the application of any party to the investigation.

[119] The power to impose a penalty is in respect of "every person", and is not confined, for instance, to a party only.

[120] It is open to the Authority to consider whether non-compliance with a direction could, without sufficient cause, lead to obstruction or delay of its investigation.

[121] The Authority accordingly had jurisdiction to consider that there was a link between the actions of Mr Halse as representative of a party to a relationship problem on the one hand, and the investigation into that problem on the other, and that his actions potentially fell within s 134A. The giving of a warning as to that possibility was a reasonable step to take in the circumstances and was within the Authority's procedural powers.

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[58] See [90]–[108] above.

[122] In summary, there was jurisdiction for the Authority to make each of the statements it did when issuing the second direction.

Third direction

[123] I infer that consideration of the third direction, as made at the conclusion of the investigation meeting, arose because of the multiple public comments which had been made about Ms Shaw's case from 3 April to 1 October 2018. These included many Facebook posts and radio interviews, in which strong adverse comments were made about alleged bullying behaviour by DHB towards Ms Shaw and others. These statements were made by Mr Halse and Ms Shaw, both orally and on Facebook pages.

[124] They were made notwithstanding the two previous directions of the Authority, which had clearly spelt out a requirement not to make such comments while the Authority's investigation into Ms Shaw's allegations was progressing.

[125] In the Authority's notice of direction of 3 December 2018, the Authority referred to the fact that at the close of the its investigation meeting there was a direction "that the matter between the parties remains *sub judice* pending the Authority's determination and that no public comments were to be made in respect of it by the parties."

[126] The agreed summary of facts states that the defendants were unaware of the Member making this statement. There is no evidence that a formal direction was issued to the parties on this topic. Equally, there is no evidence that Ms Shaw and Mr Halse were not present when the direction was made; significantly, the Authority does not state they were absent at the time. Given the statement made in the direction of 3 December 2018, I proceed on the basis that an oral statement to this effect was indeed made in the presence of the parties.

[127] Ms Sawyer submitted that a direction purporting to restrict free expression about Ms Shaw's case generally is not available in New Zealand law; and that there is no power to suppress discussion or reporting of proceedings in the Authority.

[128] There is of course a power to make non-publication orders, as contained in cl 10 of sch 2 of the Act. However, the evidence before the Court does not suggest the order was made under that provision. The order was not couched as a non-publication order subject to a condition.

[129] The *sub judice* rule is one that is often invoked with regard to prejudicial comment made in the media before or during a hearing, and has its origins in the criminal law of contempt.[59] The rule, which is of long standing, is to protect the integrity of the hearing process.[60]

[130] In this case, the direction made by the Authority was at the conclusion of the investigation meeting, when it can be assumed the question of improper pressure on witnesses was no longer in issue.

[131] Rather, the concern must have related to the possibility of unfair criticisms of the DHB about aspects of Ms Shaw's case being made, before the determination was issued; or because it was perceived there was a risk of deliberate attempts to influence the Authority itself.

[132] I comment briefly as to each such possibility.

[133] The material before the Authority as to the plethora of public statements which had been made were plainly beyond what is fair and temperate. I infer the Authority was concerned that a continuation of such public comments was inherently unfair during the period following the investigation meeting and until the determination was issued, because the DHB could not responsibly respond to those criticisms about its treatment of Ms Shaw, when it was those very matters that the Authority was in the course of resolving.

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59 For its application in civil proceedings, see Hon Justice Ellis *Laws of New Zealand* Contempt of Court (online ed) at [23]; and Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at [9.5.10].

60 See generally *Duff v Communicado Ltd*, above n 52; and *Cheer*, above n 59, at [9.3]. For developments in Australia and the United Kingdom, see respectively *Porter v R ex parte Yee* (1926) 37 CLR 432 (HCA); and *Attorney-General v Sport Newspapers Ltd* [1991] 1 WLR 1194 (QB).

[134] A second factor could potentially relate to the possibility of pressure on the Authority itself. The authorities confirm that the making of public statements intended to influence a judicial body are improper if they carry a real risk of influencing that body, or if the perception of such pressure might undermine public confidence that cases will be determined without extraneous influences.[61] From the material before the Court, it does not appear that the Authority was concerned about its own position despite the unwarranted criticisms which had been made to the effect that the Authority supports bullying. The issue of public confidence, however, was live.

[135] The making of the *sub judice* direction of course constrained the free speech rights possessed by each of the defendants; but as already explained, the Authority was permitted to balance that right against fair trial considerations. The Authority possessed the jurisdiction to issue the third direction.

Fourth direction

[136] Consideration of a fourth direction arose after the investigation meeting, and before the Authority's determination had been issued.

[137] On 26 November 2018, the DHB filed a memorandum attaching further Facebook posts which had been placed on the CultureSafe Facebook page, which repeated intemperate criticisms of the DHB and its lawyers. However, there was no express reference to Ms Shaw or to her case.

[138] The DHB requested that a penalty be imposed, as had been claimed in the closing submissions of the DHB on 5 November 2018.

[139] On the same day, Mr Halse emailed the Authority stating that CultureSafe would not be taking the Facebook post down, stating that correspondence from the DHB's lawyers would be posted if it was not immediately withdrawn.

[140] Two days later, CultureSafe posted on its Facebook page a further statement alleging a bullying culture at the DHB. Comments were added by Ms Shaw and

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61 *Solicitor-General v Smith*, above n 50, at 557–558.

CultureSafe staff to an allegation that the COO of the DHB was intimidating and harassing her.

[141] On 30 November 2018, the DHB filed an ex parte application for penalties against CultureSafe, Mr Halse and Ms Shaw, alleging they were in breach of the Authority's previous directions.

[142] This was the background to the fourth direction. Several criticisms were made by Ms Sawyer in respect of it. However, before considering these a broad consideration of the jurisdiction basis for that direction is necessary.

[143] As explained earlier, ex parte orders were sought against a party and two non-parties.

[144] In a brief passage of the DHB's memorandum in support, reference was made to s 173 of the Act which provides:

> **173 Procedure**
>
> (1) The Authority, in exercising its powers and performing its functions, must—
>
> (a) comply with the principles of natural justice; and
>
> (b) act in a manner that is reasonable, having regard to its investigative role.
>
> (2) The Authority may exercise its powers under section 160 in the absence of 1 or more of the parties.
>
> (3) However, if the Authority acts under subsection (2), the Authority must provide an absent party with—
>
> (a) any material it receives that is relevant to the case of the absent party; and
>
> (b) an opportunity to comment on the material before the Authority takes it into account.
>
> (4) To avoid doubt, subsections (2) and (3) do not limit the powers of the Authority to make *ex parte* orders (except a freezing order or search order as provided for in the High Court Rules 2016).
>
> ...

[145] Subsections 173(2) and (3) stipulate that although the Authority may exercise its powers in the absence of one or more parties, if it chooses to do so it must provide an absent party with relevant materials. Section 173(4), however, states that for the

avoidance of doubt, these provisions do not limit the powers of the Authority to make ex parte orders. This procedure may be appropriate, for instance, when the Authority is required to consider whether an interim injunction should be issued against a party without notice in exceptional circumstances.

[146] As can be seen, the section deals with the presence or otherwise of "parties". It does not refer to non-parties. The DHB was now requesting substantive relief against two non-parties, Mr Halse and CultureSafe.

[147] The Authority recognised this problem, because it directed that a proceeding should be filed citing not only Ms Shaw, but also Mr Halse and CultureSafe as respondents. This was to be done under a tight timetable, with interim orders to be made in an attempt to curtail further breaches of the earlier directions, and to require the taking down of Facebook posts on the CultureSafe website.

[148] In my view, there is an issue as to whether it was appropriate to make any interim orders in the particular circumstances, without Ms Shaw, Mr Halse and CultureSafe being offered the opportunity of being heard first.

[149] It is worth noting the position which could have applied if the alternate option of applying for compliance orders in respect of the earlier directions had been adopted. Were such an application to have been made in the existing proceedings, Mr Halse and CultureSafe would have been non-parties. Section 138(2) of the Act would have required the Authority to provide such a person with an opportunity to appear and be represented before it.[62]

[150] The DHB's new claims effectively sought compliance. In all the circumstances, I consider that any request for orders, urgent or otherwise, should have proceeded on notice.

[151] Faced with the application which was in fact brought by the DHB, it would have been preferable to direct very urgent service of the application on all the affected persons, and to provide them with the opportunity of being heard promptly. Had this

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62 Employment Relations Act 2000, s138(2).

step been taken, the Authority would have had jurisdiction to make urgent directions under s 161(1)(f), or urgent compliance orders under s 137(2) of the Act.

[152] I conclude that the fourth direction should not have been made, notwithstanding the difficult circumstances which the Authority was required to consider. It is regrettable that the DHB did not when seeking substantive orders issue fresh proceedings against each of Ms Shaw, Mr Halse and CultureSafe in the first instance.

[153] It is therefore not necessary to consider the various further points made by Ms Sawyer as to the validity of the fourth direction, save for some brief observations as to the Authority's power to make takedown orders, since there was controversary between counsel as to the Authority's ability to do this.

[154] Ms Sawyer submitted that there was no such thing as a takedown order; Mr Beech argued that this can occur under the broad powers discussed earlier. He said that cl 10(2) of sch 2 of the Act allowed for a takedown order to be made as a condition of a non-publication order.

[155] A takedown order requires the removal of existing materials from searchable online platforms, being materials which persons other than the party who posted them can view on line.[63]

[156] Both counsel referred to a similar situation which the Authority faced in *Currie v Bay of Plenty Sexual Assault Support Services Trust*.[64] In that instance, the Authority had determined a preliminary matter on behalf of the applicant, to the effect she had not raised personal grievance claims based on allegations of bullying within the timeframe imposed by the Act. The case proceeded to an investigation of a constructive dismissal claim only, not based on the bullying allegation.[65] In that particular context, the Authority found that although s 160(1)(f) provides wide powers as to how the Authority may conduct its investigation, the use of that power to require

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63 See *Lyttelton v R* [2015] NZCA 279, [2016] 2 NZLR 21 at [1].
64 *Currie v Bay of Plenty Sexual Assault Support Services Trust* [2019] NZERA 106.
65 At [1]–[2].

the taking down of published material about bullying, which was no longer "a matter" relevant to the Authority's investigation, was beyond the scope of the provision. The Authority's finding in that determination was unsurprising in the circumstances before it. The finding does not assist in the present case.

[157] The power in s 160(1)(f) can extend to enable the Authority to act effectively on matters before it, to prevent abuses of its processes, and to uphold the administration of justice within its jurisdiction. For those purposes, the subsection can be utilised to make a takedown order.

[158] A further option is to consider such an order as an aspect of a compliance order, under s 137(2) of the Act, as was directed by the Court in *ALA v ITE*.[66]

[159] As noted, Mr Beech submitted that a takedown order could be made as a condition of a non-publication order under cl 10(1) of sch 2 of the Act. A takedown order in that context would, if made, need to be attached to a non-publication order that was confined to any evidence given, pleadings filed, or the name of any party or witness or other person.

Issues 3 and 4: the powers of the Court to enforce directions of the Authority

[160] Issues 3 and 4 overlap, and it is convenient to deal with them together.

[161] Mr Beech clarified that the DHB was not applying to the Court for enforcement of the directions the Authority made against the defendants. Rather, it is seeking penalties against them under s 134A, and orders under s 196 of the Act.

[162] The applications made by the DHB were removed by the Authority to the Court.

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66 *ALA v ITE* [2017] NZEmpC 109 at [20]–[22].

[163] The Act provides for removal in s 178. The consequence of such an order is that the Court stands in the shoes of the Authority to, in effect, exercise its originating jurisdiction.

[164] Section 187(e) confirms that the Court has the exclusive jurisdiction to hear and determine matters removed into it under s 178.

[165] Ms Sawyer argued that s 187(b) confines the Court's consideration of an action for the recovery of penalties to situation where there is a provision which provides for the penalty to be recovered in the Court. She submitted that s 134A, as relied on by the DHB, is a provision that relates to the Authority and not to the Court.

[166] However, this issue is resolved by considering s 133 of the Act. It states that the Authority has full and exclusive jurisdiction to deal with all actions for the recovery of penalties under the Act for any breach of an employment agreement, or breach of any provision of the Act for which a penalty in the Authority is provided in the particular provision. However, s 133(2) states that the foregoing provision is subject to ss 177 and 178, which allow for the referral or removal of certain matters to the Employment Court.

[167] In short, a removed application for a penalty under s 134A is within the Court's jurisdiction.

[168] These issues do not arise in respect of the second statutory provision relied on, s 196 of the Act in its unamended form.[67]

[169] It is premature to consider at this preliminary stage whether orders should in fact be made under s 134A and/or s 196 of the Act. I will need to receive submissions from counsel as to their application at the next stage of the process.

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[67] See above at footnote 20.

Conclusion

[170] The Authority had jurisdiction to make directions one, two and three, but not direction four.

[171] The Court has jurisdiction to consider whether orders under s 134A and/or s 196 of the Act should be made.

[172] The Registrar is to arrange a telephone conference with counsel to set a date for the making of appropriate directions for the hearing of those issues.

[173] Costs are reserved.

B A Corkill
Judge

Judgment signed at 3.00 pm on 22 September 2020