IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 54
EMPC 81/2019

IN THE MATTER OF	an application for judicial review
BETWEEN	GREGORY BENNETT Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	ANNA DAVIDSON Second Respondent
AND	GREAT BARRIER AIRLINES LIMITED Third Respondent
AND	THE ATTORNEY-GENERAL Fourth Respondent

Hearing:	11 November 2019 (Heard at Auckland)
Appearances:	G Bennett, applicant in person No appearance for first, second and third respondent V McCall for fourth respondent
Judgment:	30 April 2020

JUDGMENT OF JUDGE J C HOLDEN

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[1] Mr Bennett has brought a judicial review against a determination by the Employment Relations Authority (the Authority) in which the Authority ordered him to pay a penalty of $4,000 for obstructing and delaying an Authority investigation.[1]

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[1] *Davidson v Great Barrier Airlines Ltd* [2016] NZERA Auckland 403 (Member Arthur).

[2] The Authority abides the decision of the Court; neither Ms Davidson nor Great Barrier Airlines Limited (Great Barrier Airlines) (the original parties in the Authority) have participated in the Court proceeding.

[3] Because the issues posed by these proceedings are both serious and of general importance, the Attorney-General applied to be joined as a party, and Mr Bennett consented to that course. This led to the Attorney-General being joined as the fourth respondent and meant the Court had a contradictor.

Problems arose in the course of the Authority's investigation

[4] Mr Bennett operates a business that trades under the name of Abbey Employment Law Specialists. At the relevant time, his then wife, Ms Ryder, provided assistance to Mr Bennett.

[5] Ms Davidson brought a claim against Great Barrier Airlines for constructive dismissal and Mr Bennett represented her in the Authority.

[6] Mr Bennett lodged a statement of problem on Ms Davidson's behalf on 21 January 2016.

[7] The Authority made timetabling directions in March 2016. The investigation meeting was scheduled for 1 June 2016 and the parties' representatives were advised of that date.

[8] Mr Bennett failed to adhere to the timetable. He also failed to advise Ms Davidson of the timetabling directions or keep her appraised of the steps he had taken on her behalf.

[9] In May 2016, Ms Davidson heard from somebody she knew at Great Barrier Airlines that the investigation meeting had been scheduled for 1 June.

[10] When Ms Davidson raised that with Ms Ryder on 29 May 2016, Ms Ryder replied, incorrectly, that the date was wrong. Then, on 30 May, Ms Ryder sent an email to the Authority to request that the investigation meeting scheduled for 1 June

be adjourned. Although Great Barrier Airlines did not consent to the adjournment, the investigation meeting was postponed that day.

[11] Ms Davidson contacted the Authority on 31 May 2016 and, during the course of that conversation, it became apparent that Ms Davidson was unaware that a notice of an investigation meeting for 1 June had been issued.

[12] On 3 June 2016, the Authority support officer forwarded to Ms Davidson various documents that had passed between the Authority and Mr Bennett, including a witness statement that had been filed in Ms Davidson's name in April 2016. Ms Davidson replied later that day, advising the Authority that she had not seen her witness statement before it was lodged and that "some of the statement is incorrect".

[13] The investigation meeting ultimately was scheduled for 22 September 2016 and proceeded on that day. A determination was issued on 4 November 2016.[2]

[14] In its determination, the Authority reserved for further investigation and determination whether certain actions or omissions of Mr Bennett and Ms Ryder delayed or obstructed the Authority's investigation, without sufficient cause and rendered them liable to a penalty.[3]

[15] The Authority said there were three circumstances that may render Mr Bennett and Ms Ryder liable for a penalty under s 134A of the Act, on the Authority's own motion:[4]

(a) An apparent failure to advise Ms Davidson of the timetable directions and the date for the investigation meeting of 1 June 2016, which were set at the first case management conference on 11 March.

(b) The lodging of a witness statement, in the name of Ms Davidson, on 21 April 2016, which Ms Davidson subsequently said she had not seen or approved before it was lodged.

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2 *Davidson v Great Barrier Airlines Ltd* [2016] NZERA Auckland 362.
3 At [48].
4 At [50].

(c) Information given to Ms Davidson on 29 May that it was "incorrect" that an investigation meeting was to be held on 1 June.

[16] By minute dated 16 November 2016, issued separately from the determination, Member Arthur addressed the proposed investigation into whether a penalty under s 134A of the Act should be imposed on Mr Bennett and Ms Ryder. That minute advised Mr Bennett that he could be heard on the penalty matter, on the papers or in person, before the determination on that issue was made.

[17] Mr Bennett attended the investigation meeting that included the issue of penalties in person on 8 December 2016, with the determination that is the subject of this application for judicial review being issued the following day.[5]

[18] Mr Bennett's key submission before the Authority was that a penalty was not warranted because any failures on his part were as a result of his ill-health, which he says was as a result of burnout.

[19] The Authority determined:[6]

(a) The delay and obstruction did not arise solely from Mr Bennett's ill-health.

(b) Mr Bennett's capacity was not so impaired by illness that he could not attend to other matters.

(c) The omissions to attending to the demands of the Authority's investigation of Ms Davidson's application were "not so rare a feature" of Mr Bennett's practice that they could only be explained by illness.

(d) There were a number of omissions that occurred over several months.

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5 Above n 1.
6 At [26]-[31].

[20] Mr Bennett was ordered to pay $4,000 as a penalty under s 134A of the Act for obstructing an Authority investigation, with $2,000 to be paid to Great Barrier Airlines and $2,000 to Ms Davidson.

The Authority may award penalties against a person

[21] The section that allows the Authority to award penalties for obstructing or delaying an Authority investigation is s 134A:

> **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—
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> (a) of its own motion; or
>
> (b) on the application of any party to the investigation.

[22] The matters the Authority is required to take into account when considering ordering a penalty against a person are set out in s 133A:

> **133A Matters Authority and court to have regard to in determining amount of penalty**
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> In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—
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> (a) the object stated in section 3; and
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> (b) the nature and extent of the breach or involvement in the breach; and
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> (c) whether the breach was intentional, inadvertent, or negligent; and
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> (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
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> (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or

> restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
>
> (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
>
> (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[23] Thus, penalties may be imposed under s 134A on a non-party, where that person, without sufficient cause, obstructs or delays an Authority investigation. There are two elements that must be satisfied, first, there must have been a delay or obstruction of the Authority's investigation. Second, that delay or obstruction must have occurred "without sufficient cause". It is not in dispute that the Authority's investigation was delayed or obstructed by the actions of Mr Bennett, the issue in this judicial review proceeding is the finding that the delay or obstruction was without sufficient cause.

Mr Bennett applies to review the Authority's determination

[24] The stated basis of Mr Bennett's claim for judicial review is that, in finding that the delay or obstruction was without sufficient cause, the Authority failed to:

(a) consider Mr Bennett's mental health that was caused by extreme burn-out and chronic depression as sufficient cause and relied upon other aspects of other cases to justify the imposition of the penalty;

(b) follow the law when determining the issue of whether Mr Bennett obstructed the Authority from holding the investigation meeting;

(c) apply natural justice in this matter.

[25] Mr Bennett distils two issues:

(a) Did the Authority, in exercising its powers and performing its functions have to comply with the principles of natural justice?

(b) Was the failure of the Authority Member to seek medical evidence as to the fitness of Mr Bennett critical?

[26] Mr Bennett filed an affidavit in which he gives evidence about his history of burnout and depression, in particular in 2015 and 2016, including around the time the Authority was to have its investigation meeting for this matter, on 1 June 2016.

[27] The affidavit records that, on 25 May 2016, there was a meeting with Mr Crichton, who, at that time, was the Chief of the Authority. It also includes comment on the process then followed by Member Arthur, and on his determinations.

[28] Mr Bennett's principal points are:

(a) the Authority ignored his mental health issues, which were affecting his wellbeing;

(b) the Authority ought to have spoken to Mr Bennett's general practitioner (and failed to do so);

(c) the Authority ought to have advised him of what the determination was to say, and given him an opportunity to comment before the determination was finalised.

(d) a different Authority Member ought to have heard the matter, given Member Arthur had elected to "bring a claim" for breach of s 134A of the Act, effectively becoming a party.

[29] He also raises issues as to the relevant date of the alleged obstruction, and burden of evidence.

[30] Mr Bennett seeks:

(a) a judicial review of the determination of the Authority;[7]

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[7] Presumably seeking an order setting aside the Authority's determination.

(b) an order that the Authority breached his rights under the New Zealand Bill of Rights Act 1990;

(c) damages of $20,000.

[31] In summary, the Attorney-General submits:

(a) Mr Bennett is only able to bring judicial review proceedings as to matters of natural justice.

(b) In order for a penalty to be imposed under s 134A of the Act, there must be two elements satisfied:

(i) a delay or obstruction of the Authority's investigation;

(ii) that the delay or obstruction occurred "without sufficient cause".

(c) The Authority must act in accordance with natural justice.[8]

(d) In the present context, natural justice has two rules:[9]

(i) the decision must be based on evidence (the first rule);

(ii) a party who may be adversely affected by the decision must be provided with the opportunity to be heard (the second rule).

(e) Here, it was not shown that the Authority had pre-determined the matter.

(f) Mr Bennett always was able to call his doctor as a witness; in any event, the Authority assumed that Mr Bennett was suffering ill-health.

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8 Employment Relations Act 2000, ss 157(2)(a) and 173(1)(a).

9 *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662 (PC) at 671.

(g) The issue therefore is the *weight* the Authority gave Mr Bennett's ill-health, which is a matter for the decision-maker.

(h) The Authority was *required* to consider Mr Bennett's previous conduct.[10]

(i) There was no requirement on the Authority to put the draft findings to Mr Bennett.

(j) The two rules are satisfied:

(i) there was sufficient evidence upon which the Authority could base its decision;

(ii) Mr Bennett had an opportunity to be heard.

(k) In any event, damages ought not be granted.

The starting point is s 184

[32] In considering Mr Bennett's application for judicial review, the starting point is s 184 of the Act:

> **184 Restriction on review**
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> (1) Except on the ground of lack of jurisdiction or as provided in section 179, no determination, order, or proceedings of the Authority are removable to any court by way of certiorari or otherwise, or are liable to be challenged, appealed against, reviewed, quashed, or called in question in any court.
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> (1A) No review proceedings under section 194 may be initiated in relation to any matter before the Authority unless—
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> (a) the Authority has issued a determination under section 174A(2), 174B(2), 174C(3), or 174D(2) (as the case may be) on all matters relating to the subject of the review application between the parties to the matter; and

[10] Employment Relations Act 2000, s 133A(g).

(b) (if applicable) the party initiating the review proceedings has challenged the determination under section 179; and

(c) the court has made a decision on the challenge under section 183.

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

(a) in the narrow and original sense of the term jurisdiction, it has no entitlement to enter upon the inquiry in question; or

(b) the determination or order is outside the classes of determinations or orders which the Authority is authorised to make; or

(c) the Authority acts in bad faith.

Is the determination open to review?

[33] The first issue that arises is whether the Authority's determination is amenable to review at all. The Court considered amenity to review in some detail in *Samuels v Employment Relations Authority*, a recent judgment of Chief Judge Inglis.[11] As identified in that judgment, the ability to take judicial review proceedings is narrow. None of the categories identified in s 184(2) apply in this case. Nevertheless, again as discussed in *Samuels*, s 184(1) does not prevent an application for judicial review on the grounds of breach of natural justice by the Authority.[12]

[34] An application for judicial review could be mounted for a claim of breach of natural justice, but that is the sole ground that might be available to Mr Bennett.

Could Mr Bennett have challenged the determination?

[35] The next potential hurdle for Mr Bennett is s 184(1A)(b) and (c). Mr Bennett has not challenged the Authority's determination, and, it follows, there is no Court decision on a challenge. The Attorney-General did not dispute Mr Bennett's ability to apply for judicial review, basing that on *Samuels*, in which the Chief Judge found that the qualifier in s 184(1A)(b) "(if applicable)" applied to Mr Samuels (a representative

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11 *Samuels v Employment Relations Authority* [2018] NZEmpC 138, [2018] ERNZ 406.
12 At [24]-[36].

of one of the parties) because he had no right to challenge the determination to which he took issue.

[36] The situation here is somewhat different. In *Samuels*, the determination Mr Samuels sought to challenge set the costs to which Ms Lang, the party Mr Samuels was representing in the Authority, was entitled. In the present proceedings, although Mr Bennett was not a named party, the relevant order was directed to him personally. Indeed, as noted, part of the penalty that Mr Bennett was ordered to pay was to be made to his client, Ms Davidson.

[37] It seems the Authority Member considered that Mr Bennett had a right to challenge the determination at issue here.[13] But did he?

[38] Section 179(1) allows only a "party to a matter before the Authority" to challenge a determination. Here, the named parties in the determination at issue are (1) Anna Davidson and (2) Great Barrier Airlines; Mr Bennett is not named as a party.

[39] The Employment Relations Act 2000 does not provide a definition of the word "party" in a general sense; nor do the Employment Court Regulations 2000 or the Employment Authority Regulations 2000. The High Court Rules 2016 defines "party" as "any person who is a plaintiff or a defendant or a person added to a proceeding".[14]

[40] As a person directly affected by the issues being considered by the Authority, and a person whose presence in the investigation meeting may be necessary to reach a finding and settle all questions involved in the proceeding, Mr Bennett could have been added as a party by the Authority. As a person whose rights would be directly affected by an order that may be made, he probably should have been.[15]

[41] The difficulty is that he was not added as a party, which leads to the rather unsatisfactory (and, it appears, unintended) situation that he was not able to challenge

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13 *Davidson v Great Barrier Airlines Ltd* [2016] NZERA Auckland 409 at [30], being a determination seeking non-publication orders but again in which Mr Bennett, although the person affected by the determination, was not a named party.

14 High Court Rules, r 1.3.

15 *Pegang Mining Co Ltd v Choong Sam* (1969) 2 MLJ 52 (PC); *Mainzeal Corporation Ltd v Contractors Bonding Ltd* (1989) 2 PRNZ 47 (HC) at 50-51.

the determination. Given the limited grounds available for applications for judicial review, there would seem to be a lacuna in the legislation; there is no reason in principle why people who were not original parties but against whom penalties are ordered should be precluded from challenging such a finding, regardless of whether the Authority joins them as a party.

[42] However, as the law stands, as he was not a party to the determination, Mr Bennett could not challenge it, and so, for the reasons explained in *Samuels*, he is not precluded from applying for judicial review by s 189(1A).

Key issues are those identified by the Attorney-General

[43] The leading case on what constitutes natural justice when dealing with an investigation is that cited by the Attorney-General, the *Erebus* decision of the Privy Council. The Privy Council said that the rules of natural justice when dealing with the exercise of an investigative jurisdiction can be reduced to two: the first rule is that the person making a finding in the exercise of such a jurisdiction must base his or her decision upon evidence that has some probative value; the second rule is that he or she must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests may be adversely affected by it, may wish to place before the investigator, or would have so wished if that person had been aware of the risk of the finding being made.[16]

[44] What is required by the first rule is that the decision to make the finding must be based upon *some* material that tends logically to support the existence of facts consistent with the finding and that the disclosed reasoning, supportive of the finding, is not logically self-contradictory. The second rule requires that any person who would be adversely affected by a finding should not be left in the dark as to the risk of the finding being made, and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him or her from making the finding, even though it cannot be predicted that it would inevitably have had that result.

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16 *Re Erebus Royal Commission*, above n 9, at 671.

[45] While different issues may arise in the context of an investigation of a problem or matter raised by an applicant, here the determination of the Authority arose out of an own motion investigation. The rules identified in *Erebus* are applicable.

There was evidence supporting the Authority's findings

[46] Member Arthur accepted that Mr Bennett was suffering from ill-health. He simply did not accept that to be a sufficient cause for Mr Bennett delaying or obstructing the Authority's investigation.

[47] As noted above, the Authority Member gave reasons for his conclusion that the delay and obstruction was without sufficient cause.[17]

[48] There was evidence before the Authority that supported each of its findings. The actions being taken by Mr Bennett in other cases were on the record; the omissions in the case before it were not in dispute; he had previously been found by the Authority to have engaged in similar conduct, as recorded in other determinations of the Authority.[18]

[49] Therefore, while Mr Bennett is unhappy that, notwithstanding his ill-health, the Authority did not conclude there was sufficient cause for his delays and obstruction, there was the required evidential basis for Member Arthur's conclusion.

The process allowed Mr Bennett to respond

[50] Member Arthur advised Mr Bennett that he could be heard on the penalty matter, on the papers or in person, before the determination on that issue was made. Mr Bennett could have instructed a representative to make submissions on his behalf, including to appear at an investigation meeting. Mr Bennett elected to appear, in person, at an investigation meeting.

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17 *Davidson*, above n 1, at [26]-[31], noted above at [19].

18 *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 289; *McCormick v Compass Communications Ltd* [2015] NZERA Auckland 293.

[51] Section 133A gave Mr Bennett a framework within which he could expect the Authority to consider an appropriate penalty. That section should have informed the submissions he made to the Authority. The matters in that section that are particularly relevant here are:

(a) the nature and extent of the breach or involvement in the breach;[19]

(b) whether the breach was intentional, inadvertent or negligent;[20]

(c) the circumstances in which the breach, or involvement in the breach, took place, and whether the person in breach, or the person involved in the breach, has previously been found by the Authority or the Court in proceedings under the Act to have engaged in any similar conduct.[21]

[52] As noted, Mr Bennett's submissions focussed on his health issues. He could have called his doctor as a witness but did not do so. In any event, the absence of Mr Bennett's doctor did not disadvantage him as the Authority accepted that Mr Bennett was unwell. The findings it made were against that background.

[53] One of Mr Bennett's complaints before the Court was that a different Authority member ought to have heard his case because Member Arthur had proposed the investigation into whether a penalty should be imposed on Mr Bennett. However, the Act empowers the Authority to award a penalty of its own motion.[22] I agree with the submission of the Attorney-General – this must contemplate that the member dealing with a matter is the appropriate person to consider whether to impose a penalty, as that member is best placed to assess whether a person has obstructed or delayed the investigation. Raising the issue for investigation does not amount to bias or pre-determination; indeed, it is a requirement of natural justice that, where a member is considering a penalty, this is raised with the person who may be required to pay the penalty so that the person may respond. That is what Member Arthur did here.

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19 Employment Relations Act 2000, s 133A(b).
20 Employment Relations Act 2000, s 133A(c).
21 Employment Relations Act 2000, s 133A(g).
22 Employment Relations Act 2000, s 134A(2)(a).

[54] Mr Bennett's other key complaint was that the Authority did not advise him it would be using findings in other cases in determining the matter. But, not only was that required by s 133A(g), the determination indicates that there was an exchange at the investigation meeting about whether the type of omissions was indeed a rare feature of his practice.[23]

[55] In summary then, Mr Bennett knew the matters that the Authority would be considering and had the opportunity to address those matters before it. The Authority accepted that Mr Bennett was suffering from ill-health but found that did not excuse his conduct. That finding is unsurprising. As the Authority noted, representatives in employment law matters have a considerable responsibility to the people or businesses they represent. If representatives find they cannot properly represent their clients, they should advise their clients of the true state of affairs and help them find assistance elsewhere.[24] As the Authority also points out, Mr Bennett ought to have taken the proper steps that could be expected from someone trading as an "employment law specialist" to advise the Authority of his difficulty and to make proper arrangements for someone else to deal with Ms Davidson's application.[25] As demonstrated by s 134A of the Act, people acting on matters in the Authority have obligations to it to facilitate rather than obstruct proceedings. Similar expectations would apply in the Court.

[56] Mr Bennett's application for judicial review therefore fails.

Mr Bennett would not have received damages

[57] If he had succeeded, Mr Bennett would not have been awarded damages.

[58] Although there is not a total jurisdictional bar to damages being awarded in judicial review proceedings, the Courts are slow to do so, particularly where, as here, the claim is for breach of the right to natural justice.[26] This is not a case where there

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23 At [28].
24 At [26].
25 At [26].
26 *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 (CA) at [56]-[57], citing *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 449 and *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA).

is no other effective remedy, or where human dignity or personal integrity or the integrity of property are engaged, or where the breach is of such constitutional significance and seriousness that it would shock the public conscience and justify damages being paid out of the public purse.[27]

[59] Further, while the decision under review was a determination of the Authority, and not a Court decision, when considering the privileges and immunities of members of the Authority, Authority investigations are considered judicial proceedings.[28] The principle of judicial immunity therefore applies. That principle recognises that allowing compensation claims for judicial breaches of the New Zealand Bill of Rights Act would be injurious to judicial independence.

[60] Accordingly, Mr Bennett would have been limited to non-financial remedies.

Costs are reserved

[61] If the Attorney-General seeks costs and they cannot be agreed, he is to file and serve a memorandum within 14 days of the date of this judgment. Mr Bennett then has 14 days in which to file and serve his memorandum in response and the Attorney-General has seven days thereafter to file and serve any memorandum in reply.

J C Holden
Judge

Judgment signed at 3.30 pm on 30 April 2020

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27 *McKean v Attorney-General* [2009] NZCA 553 (CA) at [21].
28 Employment Relations Act 2000, s 176.