IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 138
EMPC 68/2018

IN THE MATTER OF	an application for judicial review
BETWEEN	ROLAND JUSTIN CECIL SAMUELS Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	CAROLYN LANG Second Respondent
AND	GOURMET FOODS LIMITED Third Respondent

Hearing: 18 September 2018
(Heard at Auckland)

Appearances: G Bennett, advocate for applicant
No appearance for respondents
J Catran, counsel assisting the Court

Judgment: 21 November 2018

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Samuels appeared as Ms Lang's representative in her personal grievance claim against her employer (the third respondent) in the Employment Relations Authority. Ms Lang succeeded in the Authority and was awarded remedies and costs.[1] It is the way in which the Authority assessed costs which has prompted the proceedings now before the Court. Mr Samuels contends that the Authority committed reviewable errors, including breach of natural justice, in determining costs. Ms Lang has taken

[1] *Lang v Gourmet Foods Ltd* [2018] NZERA Auckland 37.

no active part in these proceedings; nor has Gourmet Foods Ltd. The Employment Relations Authority filed an appearance advising that it would abide the decision of the Employment Court (the Court), and did not wish to be heard. In these circumstances, counsel (Ms Catran) was appointed to assist the Court. I am grateful for her submissions.

[2] A number of issues were identified at an early stage, including as to whether the plaintiff had standing to bring the application for judicial review and, even if he did, whether s 184(1) of the Employment Relations Act 2000 (the Act) ("Restriction on review") and/or s 184(1A) prevented the application from advancing further. It was agreed that these questions could usefully be dealt with by way of preliminary issues. It is those issues which are the focus of this judgment. It is convenient to deal with the standing issue first.

Is the requirement for standing a hurdle?

[3] An applicant for judicial review must have standing. That requires a sufficient interest in the subject matter. I have concluded that Mr Samuels does have standing to pursue the application.

[4] The argument as to standing primarily focusses on the potential for reputational damage, arising out of the following part of the Authority's determination:

> [44] The [daily] tariff has been set to recognise that a variety of representatives appear in the Authority including qualified, registered professionals who are required to adhere to a professional code of conduct and unregulated advocates who have no such obligations. Ms Lang's representative is an unregulated advocate and as such does not have the expenses and obligations of his qualified and registered counterparts.

[5] Implicit in this statement is that Mr Samuels is unqualified (given that a distinction is drawn between him and his "qualified … counterparts"). This, it is said, has the potential to cause harm to his reputation and impact on his business interests and the business interests of other advocates who may fall within the same category of representative identified by the Authority Member. That is because potential clients will assume, reading the determination, that what I will call "category 3" representatives (unregulated advocates) have lower costs and should therefore be

charging less by way of fees, and are less qualified (or competent) to provide representation services in the Authority. Mr Samuels says that he was given no opportunity by the Authority Member to address her on the extent of his qualifications, or the appropriateness or otherwise of adopting a categorisation approach to costs based on the extent of a representative's perceived professional obligations and financial overheads.

[6] Mr Samuels was not a party to the original proceeding but that is not determinative. In *Ye v Minister of Immigration* the Court of Appeal emphasised that a generous approach to standing prevails, based on the constitutional principle that the courts must ensure that public bodies comply with the law.[2] And in *Re Erebus Royal Commission (No 2)* harm to third party reputation was found to confer standing to pursue an application for judicial review.[3] That was because the Commission's findings "… may greatly influence public and Government opinion and have a devastating effect on personal reputations …". The Court concluded that "… the Courts must be ready if necessary… to ensure [Commissions of Inquiry] keep within the limits of their lawful powers *and comply with any applicable rules of natural justice*".[4]

[7] While, as Ms Catran points out, the determination in this case has no precedential value and there is nothing to suggest that the approach advanced by the Authority Member in her determination is being more broadly picked up, that is likely to be of cold comfort to Mr Samuels. The determination is a publicly available document recording the Authority Member's conclusions as to Mr Samuels' qualifications and the extent to which the perceived lack of qualifications, professional oversight and overheads was relevant to the level of costs reasonably incurred by his client.

[8] I accept that Mr Samuels has a sufficiency of interest in the matter to which the application relates and has standing to pursue his application for judicial review.

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2 *Ye v Minister of Immigration* [2009] 2 NZLR 596 (CA) at [322]. See also *Kim v Prison Manager, Mount Eden Corrections Facility* [2012] NZSC 121, [2013] 2 NZLR 589 at [76], where it was said that "Judicial review is very liberally available under New Zealand procedural law."

3 *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618 (CA).

4 At 653 (emphasis added).

Is s 184 a hurdle?

[9] Section 184 provides:

> **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.
>
> (1A) No review proceedings under section 194 may be initiated in relation to any matter before the Authority unless—
>
> (a) the Authority has issued a determination under section 174A(2), 174B(2), 174C(3), or 174D(2) (as the case may be) on all matters relating to the subject of the review application between the parties to the matter; and
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> (b) (if applicable) the party initiating the review proceedings has challenged the determination under section 179; and
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> (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.

[10] Section 184(1) comprises what is commonly referred to as an ouster clause. On its face, it presents a significant hurdle to Mr Samuels' application for judicial review. The extent to which the hurdle might be navigable needs to be assessed having regard to the provision viewed in context, relevant caselaw (including the way in which ouster clauses have been approached by the courts) and the way in which similar provisions have been interpreted.

[11] The starting point is *Padfield v Minister of Agriculture, Fisheries and Food*, which confirmed that there is no such thing as an unfettered discretion, that a statutory power must be exercised for its proper purpose, and that it is for the Court to determine where the parameters lie.[5] Ouster clauses can be seen as a Parliamentary attempt to displace this fundamental rule. If the Court cannot review the use of the power, then

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5 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).

it effectively becomes unfettered, provided no other methods of challenge or appeal against it exist.[6]

[12] *Anisminic Ltd v Foreign Compensation Commission* was decided a year after *Padfield*.[7] In *Anisminic* the applicable clause provided that "[t]he determination by the commission of any application made to them under this Act shall not be called in question in any court of law".[8] The House of Lords held that the clause could not be called in aid to protect decisions that are "nullities", such as where a decision maker makes an error of law by asking the wrong question, applying the wrong test, misconstruing its powers, making a decision it has no power to make, taking account of irrelevant considerations, or departing from the rules of natural justice.[9] In a nutshell, there was a presumption that Parliament could not have intended a statutory clause to protect invalid decisions.

[13] *Anisminic*'s applicability in New Zealand was confirmed in *Bulk Gas Users Group v Attorney-General*.[10] *Bulk Gas* dealt with the ouster clause in s 96 of the Commerce Act 1975. This clause had a similar (but with some important differences, which I return to later) formulation to s 184 of the Employment Relations Act. It provided:

> Proceedings of the Secretary under this Part of this Act shall not be held bad for want of form. Except on the ground of lack of jurisdiction, no order, approval, proceeding, or decision of the Secretary under this Part of the Act shall be liable to be challenged, reviewed, quashed, or called in question in any Court, but there shall be a right of appeal to the Commission in accordance with section 99 of this Act.

[14] The Court of Appeal applied *Anisminic*, finding that the errors of law made by the decision maker in that case were reviewable. This was because any error of law amounted to a "lack of jurisdiction" as it was not within the decision maker's jurisdiction to decide the question of law conclusively. To decide the question wrongly was beyond the decision maker's jurisdiction. While acknowledging that Parliament

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6 See *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.
7 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
8 Foreign Compensation Act 1950 (UK) 14 Geo VI, s 4(4).
9 *Anisminic Ltd*, above n 7, at 171-172, 208-210.
10 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

may intend to allow a decision maker to make errors of law, there is a very strong presumption against such a conclusion.[11]

[15] The first case involving an application for judicial review of the Employment Relations Authority was *David v Employment Relations Authority*.[12] There, the Authority refused to allow cross-examination of a witness, and the employee sought to review this on the grounds of a breach of natural justice. A full Court of the Employment Court allowed the review, finding that:

> [29] Both as a matter of developed common law jurisprudence of which Parliament must have been aware when enacting this section, and as a matter of statutory interpretation, this provision cannot protect determinations of the Authority from review if it is shown that the determination is tainted by a breach of one of the principles of natural justice.

[16] An application for leave to appeal was advanced by the Attorney-General against the Employment Court's judgment and was granted by the Court of Appeal.[13] The appeal was abandoned when amending legislation was introduced, providing that compliance with the principles of natural justice did not require the Authority to allow cross-examination but it could, itself, in its absolute discretion, permit cross-examination.[14]

[17] *David* is one of two cases which deal with the availability of judicial review for breach of natural justice in the Authority (as opposed to the Employment Court). *Metargem v Employment Relations Authority*,[15] which I return to, is the other. *David* is authority for the proposition that judicial review of the Authority is available on the grounds of breach of natural justice, despite the ouster clause in s 184. Unsurprisingly, Mr Samuels relies on *David* in support of his application.

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11 At 136.

12 *David v Employment Relations Authority* [2001] ERNZ 354 (EmpC).

13 *Attorney-General v David* [2002] 1 NZLR 501, [2001] ERNZ 291 (CA).

14 See Employment Relations (Validation of Union Registration and Other Matters) Amendment Act 2001, s 10, which modified Employment Relations Act 2000, s 157. This was repealed on 1 April 2011, and the present s 157(3) substituted. See too Rosemary Monaghan and Robin Arthur "Deciding disputes by investigation rather than adversarial methods: The experience of the New Zealand Employment Relations Authority" (2009) 19 JJA 108.

15 *Metargem v Employment Relations Authority* [2003] 2 ERNZ 186 (EmpC).

[18] Ms Catran, however, drew attention to reservations expressed by the Court of Appeal as to the correctness of *David*, in *Parker v Silver Fern Farms Ltd*.[16] She submitted that the Court should approach the application of s 184 in the present case consistently with the Court of Appeal's approach to s 193, rather than the full Court's approach. It is necessary to analyse what the Court of Appeal actually said, and the conclusions it reached in relation to the availability of judicial review, to assess the strength of that submission.

[19] *Parker v Silver Fern Farms Ltd* involved a judicial review of the Employment Court to be heard at the Court of Appeal, thus applying s 193, not s 184. The two sections are worded almost identically, the only difference being the lack of an equivalent to s 184(1A) in s 193. The Court of Appeal upheld the ouster clause in s 193, not allowing judicial review of the Employment Court on the ground of breach of natural justice.

[20] The Court of Appeal drew attention to three particular points arising in relation to the full Court's judgment in *David*. The three points are:[17]

> [50] First, [*David*] was concerned with a different section of the Act with a different history. The relationship between the Employment Relations Authority and the Employment Court is not on all fours with the relationship between the Employment Court and this Court. Whether the Employment Court was correct in the context in which it was operating is best left to a case where the jurisdiction of the Employment Court is in issue.
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> [51] Secondly, in so far as the Court relied on *Bulk Gas Users Group v Attorney-General*, the decision is in error. Contrary to what the Employment Court said at [30] of its decision, *Bulk Gas* was not concerned with "a statutory provision similar to s 184(1)". The privative provision in issue in *Bulk Gas* did not have the restricted meaning of "lack of jurisdiction" which is to be found in both s 193(2) and s 184(2) of the ERA. Nor was *Bulk Gas* concerned with the rules of natural justice.
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> [52] Thirdly, the Employment Court misstated what this Court had held in *New Zealand Rail*. It said that this Court had "made clear that the [privative provision] would not have prevailed in the presence of a breach of natural justice". We do not consider, with respect, the Court made that "clear". On the contrary, it refrained from comment on it.

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16 *Parker v Silver Fern Farms Ltd* [2011] NZCA 564, [2011] ERNZ 419.

17 Footnotes omitted.

[21] As to the first point, the Court of Appeal was simply observing that the logic supporting not allowing judicial review in *Parker* does not necessarily have to apply to a *David* scenario (namely an application for judicial review for breach of natural justice in the Court (*Parker,* s 193) as opposed to the Authority (*David,* s 184)). The Court of Appeal did not overrule *David*. In this regard, the Court acknowledged that ss 184 and 193 have different legislative histories, and that it was not necessary to reach a concluded view on the correctness of the full Court's approach.[18] As the Court of Appeal pointed out, the reason for the ouster clause in s 193 is to ensure that the employment law jurisdiction is kept as separate as possible from the ordinary common law courts, which have historically failed to recognise that an employment relationship is something beyond a simple contractual interpretation exercise.[19] This rationale does not apply in relation to s 184, the purpose of which is to ensure that matters are concluded at the Authority before any higher court exercises its jurisdiction.

[22] The second point made by the Court of Appeal related to the Employment Court's reliance on *Bulk Gas*: that reliance on *Bulk Gas* was wrong because the privative clause in that case was worded differently to the one in s 184 and because that case did not concern a breach of natural justice. I deal with each point in turn.

[23] The reasoning in *Bulk Gas* involved using an expanded definition of "jurisdictional error", by way of reference to *Anisminic*. The privative clause in that case did not include a definition of jurisdictional error. This contrasts to s 184, which explicitly defines what "lack of jurisdiction" means in s 184(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
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> (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.

[24] *Parker* suggests that the s 184(2) definition of "lack of jurisdiction" means that *Bulk Gas* is inapplicable. That is, the expanded definition used by the Court of Appeal

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18 At [48]-[50].

19 See also *AFFCO New Zealand Ltd v Employment Court* [2017] NZCA 123, [2017] 3 NZLR 603 at [39].

in *Bulk Gas* cannot apply to s 184, as s 184 defines it more narrowly. As *Bulk Gas* makes plain, there is a presumption that Parliament does not intend to make invalid decisions unreviewable. This presumption is rebuttable where the wording of a provision is very clear. Because s 184 is very clear, the presumption is rebutted. However, the position becomes somewhat murkier if Parliament's intention (as to whether judicial review should be available on the grounds of natural justice) is considered, having regard to subsequent amendments to the Act. These amendments followed *Metargem v Employment Relations Authority*,[20] which itself followed on the heels of *David* and which casts light on the interpretative exercise.

[25] Like *David*, *Metargem* involved an application for judicial review against the Authority in relation to an alleged breach of natural justice. The Employment Court applied *David* and allowed the application, finding that natural justice was an available ground for judicial review. Shortly after the Employment Court's judgment in *Metargem* was delivered, Parliament amended s 184. Section 184(1A) was enacted by the Employment Relations Amendment Act (No 2) 2004. It provides that:

> (1A) No review proceedings under section 194 may be initiated in relation to any matter before the Authority unless—
>
> (a) the Authority has issued a determination under section 174A(2), 174B(2), 174C(3), or 174D(2) (as the case may be) on all matters relating to the subject of the review application between the parties to the matter; and
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> (b) (if applicable) the party initiating the review proceedings has challenged the determination under section 179; and
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> (c) the court has made a decision on the challenge under section 183.

[26] It is tolerably clear that s 184(1A) was a response to *David* and *Metargem*, although there appears to be no discussion of the proposed amendment in the Parliamentary materials at the relevant time. As will be evident, the new provision created additional requirements before a judicial review could be initiated: to wait until after the Authority had actually made its determination; to file a challenge against the determination in the Court; and for the Court to make a decision on that challenge. It is revealing that, in responding to *David* and *Metargem*, Parliament did *not* take the opportunity to make it plain that natural justice was unavailable as a ground for judicial

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[20] *Metargem*, above n 15.

review. Two further points about the legislative scheme can be noted. Section 157(2)(a) makes it crystal clear that the Authority *must* comply with the principles of natural justice,[21] and the statute allows for challenges, but when a challenge is unavailable, the only remaining avenue would be judicial review.

[27] The Authority is not a court. It is an investigative body. Its unique design is geared towards the non-technical, cost effective and speedier disposition of employment cases at first instance. All of this is supported by s 184(1A)(a), which prevents judicial review until after the Authority has given its determination, not during the investigation.[22] The other components of s 184(1A) (namely (b) and (c)) are to similar effect. Section 184(1A) can accordingly be seen as effectively reversing the decision in *David*, because the judicial review in that case was applied for *before* the Authority had completed its investigation. The statutory purpose underlying the amendment appears to have been designed to ensure that the process remained streamlined.

[28] While s 184(1) (along with s 184(2)) is clearly worded, and more strongly worded than the ouster clause in *Bulk Gas*,[23] when read in context, I am not satisfied that it displaces the strong presumption against a Parliamentary intention to exclude judicial review on the grounds of natural justice. The Parliamentary response to s 184(1) failing in the Employment Court – not once but twice (in *David* and then *Metargem*) – was not to strengthen it. Rather, s 184(1A) was inserted to guard against incursions into the Court disrupting unfinished Authority investigations.[24]

[29] The second point made in *Parker* in terms of the Employment Court's reliance on *Bulk Gas* was that *Bulk Gas* did not discuss natural justice at all, instead focusing squarely on errors of law. I note that *Anisminic*[25] referred to the possibility of natural

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21 See also s 173(1)(a); *AFFCO* above n 19 at [39].

22 See too s 143(fa).

23 As the Court of Appeal observed in *Parker* in relation to the wording of s 194.

24 See the Court of Appeal's discussion in *Employment Relations Authority v Rawlings* [2008] NZCA 15, [2008] ERNZ 26 at [26], and the acknowledgment (at [33]) that s 184(1A) is "not entirely felicitously drafted." Note also that the Court in *Rawlings* referred (at [40]) to s 184 proceeding "on the basis that review can only proceed on the ground of lack of jurisdiction", although the focus on that case was on the scope of s 184(1A) rather than s 184(1).

25 Which was referred to by the Court of Appeal in *Bulk Gas Users Group*, above n 10.

justice as a ground of review existing when there is an ouster clause.[26] Other cases have said the same thing since.[27]

[30] The third point identified by the Court of Appeal in relation to the analysis in *David* relates to what *New Zealand Rail Ltd v Employment Court* said about whether natural justice is a ground of review.[28] In *David* the Employment Court made the following observations:[29]

> [33] Does s 184(2) make a difference? While this emphasises the general rule that decisions are not to be reviewed except for want of jurisdiction, it does not confer jurisdiction on the Authority to act in breach of the principles of natural justice. Since privative provisions are strictly construed, we feel bound to hold that, whatever may be the effect of s 184(2), it does not preclude our consideration of an application for review based on the premise that the Authority's orders are invalid. To preclude it, the subsection would have needed to say in so many words or by necessary implication that determinations of the Authority were immune from review even if they flouted the principles of natural justice. We do not take s 184(2) to imply that and it certainly does not say so. This conclusion is confirmed by the judgment of the Court of Appeal in *NZ Rail Ltd v Employment Court* [1995] 1 ERNZ 603; [1995] 3 NZLR 179 which considered the identical privative clause in an earlier Act in relation to this Court where at p 607; p 182 it is made clear that the clause would not have prevailed in the presence of a breach of natural justice.

[31] The relevant passage in *New Zealand Rail* follows:[30]

> In the present case it is not contended that the claims made by the workers were not properly before Judge Castle or that his conclusions and declarations were outside the classes of decisions and orders which he was authorised to make. There is of course no suggestion of bad faith. *Nor is there any suggestion of a breach of natural justice: as to that kind of issue it is unnecessary to say anything*.

[32] As the Court of Appeal in *Parker* observed, there is no clear statement in *New Zealand Rail* as to whether the decision would have prevailed if there was a breach of natural justice. Rather, the Court said that "it is unnecessary to say anything" on that issue.

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26 *Anisminic Ltd*, above n 7, at 153.

27 See for example *Martin v Attorney-General* HC Christchurch AS370/83, 12 February 1986 at 8; *National Hydatids Council v Ward* HC Tauranga M55/88, 7 June 1989 at 1; *Malcolm v Thompson* HC Wellington A412/85, 12 June 1986 at 14. See generally Josh Pemberton "The Judicial Approach to Privative Provisions in New Zealand" [2015] NZ L Rev 617 at 626-627.

28 *New Zealand Rail Ltd v Employment Court* [1995] 1 ERNZ 603 (CA) at 607 (emphasis added).

29 *David*, above n 12.

30 *New Zealand Rail Ltd*, above n 28, at 607.

[33] However, the Court in *David* (in citing *New Zealand Rail*) referred to four matters which could have invalidated the decision but, in the case before it, did not. Those four points were that: "claims made by the workers were not properly before Judge Castle"; "his conclusions and declarations were outside the classes of decisions and orders which he was authorised to make"; "bad faith"; and "breach of natural justice". As will be apparent, the first three reflect the factors listed in s 184(2). The fact that breach of natural justice was grouped with them may suggest that Judge Castle might (if it had been necessary) have concluded that a breach of natural justice was an available ground of review.

[34] While the Court of Appeal raised a number of issues with the approach adopted by the Court in *David*, as Ms Catran submits, what it did not do was exclude natural justice as a ground of review in relation to a decision by the Employment Relations Authority. Rather, the Court of Appeal expressly "left it open". If s 184(1) was interpreted literally, it would not be open at all. And while the Court of Appeal was critical of the Employment Court's reasoning in *David*, it did not criticise the ultimate conclusion reached in that case.

[35] Finally, Mr Bennett submitted that regard should be had to the New Zealand Bill of Rights Act 1990 when interpreting s 184 of the Act. I understood there to be two related components to this part of the argument – that categorising different representatives for costs quantification purposes based on qualifications is not within the Authority's jurisdiction, in the narrow and original sense; and that s 184 should be "read down" having regard to the rights recognised in the Bill of Rights Act (including the right to natural justice and freedom of association). I do not consider it necessary to reach a concluded view on these matters. The point is that s 184, when read in context and in light of the usual presumption applying to ouster clauses, does not exclude judicial review based on an alleged breach of natural justice by the Authority. Such an interpretation is not, in my view, unnecessarily strained and sits comfortably with the Bill of Rights Act.[31]

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[31] Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 28, "… traditional orthodoxy … that all Acts should be construed consistently with the Bill of Rights Act where possible…".

[36] I conclude that s 184(1) does not prevent an application for judicial review on the ground of breach of natural justice by the Employment Relations Authority.

Is s 184(1A) a hurdle?

[37] I have already discussed s 184(1A) in relation to its passage into law and its underlying purpose. A residual issue arises as to whether it prevents Mr Samuels from seeking judicial review in this case. Three hurdles must be cleared: s 184(1A)(a), (b) and (c).

[38] Clearly, Mr Samuels passes the subs (1A)(a) hurdle, as the Authority has issued a determination in this case, specifically under s 174A(2), a written version of an oral determination.

[39] Subsections (1A)(b) and (c) are more complicated. There has not been a challenge to the Authority's determination, and the Court has not (for obvious reasons) made a decision on that (non-existent) challenge. The issue revolves around whether the "(if applicable)" qualifier in (b) means that it does not matter. Does the "if applicable" qualifier apply only to (b), or also to (c)?

[40] It seems to me that the qualifier, while only appearing at the beginning of (b) must logically apply equally to (b) and (c). Both are interrelated, with the one following the other - (b) requires that a s 179 challenge has been pursued and (c) requires that the s 179 challenge has been determined. Absent satisfaction of (b), (c) would never apply. That is because the Court cannot make a decision on a challenge that has never been filed.

[41] Ms Catran referred me to the full Court's judgment in *Keys v Flight Centre (NZ) Ltd.*[32] There the Court concluded that the "if applicable" qualifier applies only if the decision of the Authority is entirely unchallengeable. This presents difficulties for Mr Samuels. That is because the Authority's determination in the present case *was* challengeable. The problem is that the person who could have challenged it (Ms Lang)

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[32] *Keys v Flight Centre (NZ) Ltd* [2005] ERNZ 471 (EmpC) at [49].

did not want to; Mr Samuels (her representative and non-party) does want to challenge it.

[42] The Court in *Keys* was concerned with a procedural decision of the Authority falling under s 179(5).[33] That is not the issue which arises in the present case. I think it unlikely that the Court had in mind a situation such as this when making the observations it did about challenge rights and reviewability. The reality is that the determination is unchallengeable by the person who wishes to pursue an application for judicial review. In this regard, the requirement in s 184(1A)(b) is not that *somebody* challenges the determination; it is that *the party initiating the review proceedings* challenges it. It seems to me that where the party initiating the review proceedings cannot challenge the determination, the threshold requirement of a challenge must be inapplicable. To interpret the proviso literally would, in my view, lead to an absurd result.

[43] Some support for this conclusion might be said to emerge from *Employment Relations Authority v Rawlings*. There the Court of Appeal observed that:[34]

> [35] In s 184(1A)(b), the words "if applicable" mean that the requirement to challenge the determination applies only if there is a right to issue challenge proceedings.
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> [36] When construed in this way, the purpose of the subsection is clear. It is to prevent review proceedings being filed until the Authority is quit of the case and any rights of challenge have been exercised. In virtually every case, the challenge procedure (especially where it proceeds de novo) can be expected to tidy up the sort of problems which might otherwise have warranted review.
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> …
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> [38] Reading ss 194(3) and 184(1A) together makes it clear that the right of challenge provided for under s 179(1) is the preferred method of challenging decisions of the Authority. In other words, if there is a right of challenge, review proceedings are excluded unless or until the right of challenge has been exercised.

[44] Accordingly, I read the proviso in s 184(1A)(b) as requiring a person initiating review proceedings to challenge the determination *if* a right of challenge can be

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33 At [50].
34 *Rawlings*, above n 24.

exercised by that person. Such an interpretation is not unduly strained and is to be preferred over a literal interpretation.[35]

[45] It follows that since Mr Samuels cannot challenge the determination, (b) is inapplicable. Therefore, (c) is also inapplicable. Since (a) is satisfied, s 184(1A) does not bar Mr Samuels from initiating judicial review.

Conclusion

[46] Mr Samuels has standing to pursue an application for judicial review in this case. His proceeding is not barred by the ouster clause in s 184, and nor is s 184(1A) an impediment to pursuing the application.

[47] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 4.15 pm on 21 November 2018

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[35] See Carter, above n 31, at 344.