IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 224
EMPC 276/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MEDINA TRADING LIMITED T/A HOTEL DEBRETT Plaintiff
AND	SCARLET HUNTER Defendant

Hearing: On the papers

Appearances: R Towner, counsel for plaintiff
S Mitchell KC, counsel for defendant

Judgment: 7 December 2023

PRELIMINARY JUDGMENT OF JUDGE KATHRYN BECK

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[1] This decision resolves a dispute between the parties as to the proper nature and scope of the challenge which is being pursued and, in particular, considers whether a de novo challenge can be issued against only part of a determination.

[2] On 17 July 2023, the Authority issued a determination in respect of a number of personal grievances raised by the defendant, Ms Hunter, against the plaintiff, Medina Trading Ltd.[1]

[3] Mr Towner, on behalf of the plaintiff, challenged the determination on 11 August 2023. The statement of claim included the following paragraph:

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1 *Hunter v Medina Trading Ltd (t/a Hotel Debrett)* [2023] NZERA 374 (Member Fuiava).

> The plaintiff seeks a full hearing of the entire matter (a hearing de novo), except in relation to the Authority's determinations in paragraphs [36] and [40] that the defendant had not been racially or sexually harassed (which determinations are not being challenged).

[4] Mr Mitchell, on behalf of Ms Hunter, filed a statement of defence on 11 September 2023. The statement of defence indicated that Ms Hunter was seeking to pursue her claim that she was unjustifiably disadvantaged by means of racial and sexual harassment.

[5] Mr Towner then filed an amended statement of claim in which he sought to exclude a number of additional paragraphs of the Authority's determination from the challenge. However, the amended statement of claim continued to state that the plaintiff was seeking "a full hearing of the entire matter (a hearing de novo) except in relation to the excluded issues".

[6] A number of the issues which Mr Towner sought to exclude from the challenge were issues raised by Ms Hunter's statement of defence, including the racial and sexual harassment claims and a claim for compensation under s 67D of the Employment Relations Act 2000 (the Act).

Issues

[7] The parties seek directions as to whether the challenge ought to be restricted to the issues outlined in the plaintiff's statement of claim. To resolve the dispute, it is necessary to consider:

(a) What is the nature of a de novo challenge?

(b) If a de novo challenge can be filed against part of a determination only, should elements of the statement of defence be struck out?

(c) If a de novo challenge can only be filed against entire determinations, should the challenge be re-categorised as a non-de novo challenge?

Submissions

[8] Mr Towner submits that whether a plaintiff elects a de novo or non-de novo hearing is a separate issue from whether it elects to challenge all or only part of a determination. Further, he submits that a party can elect to have a full hearing limited to the part or parts of the determination which it is challenging. He relies on Form 1 of the Employment Court Regulations 2000 and also on the decision of Chief Judge Goddard in *Pacific Plastic Recyclers Ltd v Foo.*[2] Finally, he notes that decisions which have concluded that a de novo hearing reopens the entire matter considered in the Authority's determination are not binding.

[9] Mr Mitchell submits that a de novo challenge to a determination of the Authority results in all of the issues being heard by the Court and that it is not possible to narrow or limit the issues in the statement of claim.

[10] He relies on *Vice-Chancellor of University of Otago v ASG*, *Goodman Fielder New Zealand Ltd v Ali,* and *Xtreme Dining t/a Think Steel v Dewar*.[3] He also submits that *Foo* is an old decision which has been effectively superseded by more recent authorities. Ultimately, he submits that if a plaintiff wishes to challenge only part of a determination, a non-de novo challenge ought to have been filed.

Legal principles

[11] Section 10(1) of the Legislation Act 2019 states: "The meaning of legislation must be ascertained from its text and in the light of its purpose and its context."

[12] The parties disagree over the meaning of s 179 of the Act:

> **179 Challenges to determinations of Authority**
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> (1) A party to a matter before the Authority who is dissatisfied with a written determination of the Authority under section 174A(2), 174B(2), 174C(3), or 174D(2) (or any part of that determination) may elect to have the matter heard by the court.
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> …

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2 *Pacific Plastic Recyclers Ltd v Foo* [2002] 2 ERNZ 75 (EmpC).

3 *Goodman Fielder New Zealand Ltd v Ali* [2003] 2 ERNZ 65 (EmpC); *Vice-Chancellor of University of Otago v ASG* [2014] NZEmpC 113, [2014] ERNZ 701; and *Xtreme Dining Ltd, (t/a Think Steel) v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628.

(3) The election must—

(a) specify the determination, or the part of the determination, to which the election relates; and

(b) state whether or not the party making the election is seeking a full hearing of the entire matter (in this Part referred to as a hearing de novo).

(4) If the party making the election is not seeking a hearing de novo, the election must specify, in addition to the matters specified in subsection (3),—

(a) any error of law or fact alleged by that party; and

(b) any question of law or fact to be resolved; and

(c) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the court and the other parties of the issues involved; and

(d) the relief sought.

Analysis

[13] Section 179(3) is the provision which is primarily in dispute. Section 179(3)(a) refers to specifying whether a challenge relates to the whole or part of a determination, and s 179(3)(b) refers to stating whether a full hearing is sought of the entire matter.

[14] The proper interpretation of these provisions has been considered in a number of decisions. In *Pacific Plastic Recyclers Ltd v Foo,* Chief Judge Goddard noted:[4]

> [18] I accept that the provisions of the Employment Relations Act 2000 and of the regulations made under it relating to the way in which determinations of the Employment Relations Authority can be challenged are not as clear as they could have been.

[15] He went on to find that:[5]

> [19] It is clear that s 179 of the Employment Relations Act 2000 makes an important distinction between a full hearing of the entire matter, also called a hearing de novo, and something less than that. However, *the section also contemplates that a party wishing to invoke the assistance of the Court in either way may be dissatisfied, not with the whole of the determination, but only with a part of it and is entitled to limit the challenge to that part.* That is why a dissatisfied party is required to specify whether that party challenges the whole determination or a part of it and which part. This view is reinforced by the terms of the prescribed form of statement of claim, form 1 to the regulations, which requires the plaintiff to say whether the election relates to

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4 *Pacific Plastic Recyclers Ltd v Foo*, above n 2.

5 This extract was cited by *Slight v Boise New Zealand Ltd* EmpC Auckland AC9/05, 9 March 2005; and *Prins v Tirohanga Rural Estates Ltd* EmpC Auckland AC21/06, 3 April 2006. See also *Pacific Plastic Recyclers Ltd v Foo*, above n 2, at [12] and [13].

> the whole of the determination or "the following part of that determination, namely" followed by the instruction to "specify the part of the determination to which this election relates". Then para 7 of the same form requires the plaintiff to chose between seeking a full hearing of the entire matter and not seeking a full hearing of the entire matter but seeking a hearing only in relation to certain issues involved in the matter (which then have to be specified in the way required by s 179(4) of the Employment Relations Act 2000). So it is open to a plaintiff to limit his, her, or its challenge as he, she, or it sees fit. That conclusion is not in conflict with s 182 which provides that, where the election states that the person making it is seeking a hearing de novo, the hearing held pursuant to that election is to be a hearing de novo (with certain exceptions) because the expression "pursuant to that election" must be taken to relate back to the contemplation of the Legislature that the election may challenge only a part of the determination. *It follows that it is not open to a defendant to insist that the hearing be widened beyond the scope for it chosen by the plaintiff. The defendant's remedy is to file, in time, a separate challenge and to specify a different part of the determination (or the whole of it) as the subject of the challenge*. It is unfortunate and clumsy that this cannot be done by way of reply to the original challenge but it cannot. …
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> (emphasis added)

[16] However, there is an alternative line of authorities which has taken a different approach. In *Cliff v Air New Zealand Ltd,* Judge Colgan held:[6]

> [7] The election that challengers must make under s 179(3) refers not so much to the nature of the presentation of the case in Court but, rather, to the extent to which the decision under appeal is challenged. *An election by the challenger "seeking a full hearing of the entire matter (… a hearing de novo)" indicates that all matters that were before the Authority will be at issue on the challenge. What has become known colloquially as a "non-de novo challenge" (because of the absence of reference to this in s 179) is a narrower form of appeal in the sense that it identifies some but not all of the determination that is under appeal.* That is exemplified by s 179(4) which requires a party not seeking a hearing de novo to specify what it says are errors of law or fact in the Authority's determination and other particulars as to the issues to enable the Court to conduct a restricted and more focused hearing of the appeal. But the election does not dictate the way in which the appeal will be heard.

[17] Judge Colgan's statement in *Cliff* has been frequently relied on in subsequent decisions.[7] However, it must be acknowledged that some of those decisions were

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6 *Cliff v Air New Zealand Ltd* [2005] ERNZ 1 (EmpC) (emphasis added).

7 See *Saipe v Waitakere Enterprise Trust Board* EmpC Auckland AC40/06, 25 July 2006 at [23]; *Vice-Chancellor of University of Otago v ASG,* above n 3, at [9]; *Robinson v Pacific Seals New Zealand Ltd* [2015] NZEmpC 84, [2015] ERNZ 720 at [23]; *Nathan v Broadspectrum (New Zealand) Ltd* [2016] NZEmpC 135, [2016] ERNZ 760 at [44]; *Xtreme Dining Ltd, (t/a Think Steel) v* Dewar, above n 3, at fn 8; and *Pyne v Invacare New Zealand Ltd* [2023] NZEmpC 33, [2023] ERNZ 98 at [20].

addressing the nature of non-de novo hearings, rather than the issue of whether a de novo hearing can be narrowed to focus on only part of a determination.

[18] On the other hand, parties have often sought to challenge, on a de novo basis, only parts of determinations. In *Goodman Fielder New Zealand Ltd v Ali,* Judge Colgan considered a situation where both parties had sought to challenge parts of the determination. The employer's statement of claim indicated that it wished to challenge parts of the determination on a de novo basis.[8] However, Judge Colgan indicated that there was an "inherent contradiction" in the statement of claim because a hearing de novo is defined as "a full hearing of the entire matter".[9] He considered that the challenge was in fact a non-de novo challenge.[10] However, as a result of how the parties had approached the matter, he considered, by consent, that the most appropriate approach would be for the entire matter to be heard afresh by way of de novo challenge.[11]

[19] In *Vice-Chancellor of University of Otago v ASG,* Chief Judge Colgan dealt with a claim where the plaintiff sought to file a de novo challenge to only part of a determination:[12]

> [13] I have concluded that the Vice-Chancellor's categorisation of her challenge as being both limited to the Authority's conclusion that she disadvantaged ASG unjustifiably by giving him a final warning and, at the same time, electing a hearing de novo, was confusing and erroneous. As the cases show, if the Vice-Chancellor's intention had been to reserve to herself the ability to call evidence on the issue challenged, it was unnecessary and inappropriate to do so by describing the election as one of a hearing de novo. It is circular and tortuous to say, as the Vice-Chancellor does, that the "entire matter" referred to in s 179(3)(b) is the "entire matter" of the limited challenge to only part of the Authority's determination. I interpret the phrase "the entire matter" in s 179(3)(b) to be the entirety of the "matter" referred to in s 179(1) which is the employment relationship problem that was posed for the Authority to resolve in its determination.
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> [14] It follows that the Vice-Chancellor's challenge is other than one by hearing de novo (a "non-de novo challenge") and ought to have been so described, consistently, in her statement of claim.

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8 *Goodman Fielder New Zealand Ltd v Ali*, above n 3, at [3]–[4].
9 At [5].
10 At [6].
11 At [16].
12 *Vice-Chancellor of University of Otago v ASG,* above n 3.

[20] Chief Judge Colgan went on to find that both parties' non-de novo challenges together covered all the issues and therefore directed, pursuant to s 182(3) of the Act, that the matter be heard as a de novo challenge.[13]

[21] In *Xtreme Dining Ltd, (t/a Think Steel) v Dewar,* the full Court made the following observation:[14]

> [13] The effect of s 179(3)(b) of the Act is that a hearing de novo relates to a full hearing of the entire matter which was the subject of the challenged determination. It is not possible to seek a hearing de novo for a part-only of that determination, as was sought by Think Steel. Accordingly, in the initial timetabling minute, Chief Judge Colgan directed that the hearing would proceed by way of a non de novo challenge to remedies.

[22] It is not clear whether the full Court received argument on this point given that Chief Judge Colgan had already resolved the issue by way of a minute; however, it is clear that the full Court was in agreement that: "It is not possible to seek a hearing de novo for a part-only of that determination". Additionally, it is noteworthy that Chief Judge Colgan directed that a purported de novo challenge proceed by way of a non-de novo challenge to remedies.

[23] Finally, in *MGK Homes Ltd v Yoon,* Judge Holden considered a situation where the plaintiff sought to bring a de novo challenge on "all findings against the Plaintiff in the Employment Relations Authority".[15] Relying on *Xtreme Dining Ltd,* she held:

> [22] The distinction in the Act between de novo and non-de novo challenges is clear cut; either all matters in the determination are being challenged before the Court – a de novo challenge – or they are not, in which case the challenge is non-de novo. It is not possible for a challenge to be de novo for part-only of a determination.
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> [23] Accordingly, the challenge is properly classified as a non-de novo challenge.
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> (footnotes omitted)

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13 At [15]–[17].

14 *Xtreme Dining Ltd, (t/a Think Steel) v Dewar*, above n 3; see also *Nath v Advance International Cleaning Systems (NZ) Ltd* [2017] NZEmpC 101 at [9].

15 *MGK Homes Ltd v Yoon* [2023] NZEmpC 22 at [18].

[24] Judge Holden then directed that the plaintiff file an amended statement of claim and indicated that if the defendant wished to file a cross-challenge it would have to file a challenge out of time.[16]

[25] As can be seen from the cases set out above, there were historically two competing approaches to s 179.

[26] The first approach is set out in *Foo.* The case proposes that when issuing a challenge, the plaintiff must follow a two-step process consisting of first specifying the determination or part of the determination to which the election applies followed by specifying whether a full hearing of the entire matter is sought. When the plaintiff seeks a full hearing of the entire matter, the entire matter must be taken to be the entire matter to which the election specifically applies; otherwise there would be no point in imposing the requirement to specify the part of the determination to which the election applies.[17]

[27] The second and more recent approach can be derived from *Ali, Cliff, ASG,* and *Xtreme Dining Ltd.* Those cases propose that if a de novo challenge is sought, that means that all matters before the Authority will be at issue in the challenge. They also propose that it is not possible to seek a hearing de novo in respect of only part of a determination.

[28] The second approach is supported by a well attested line of authorities and has been approved by a full Court. However, the analysis in *Foo* has never been explicitly assessed by these authorities, so it may be of assistance to do so now.[18] This is necessary because, as Chief Judge Goddard noted in *Foo,* the drafting of s 179 is not as clear as it could have been.[19]

[29] Section 179(3) of the Act has two limbs describing what must be done by an election to challenge a determination of the Authority. The first limb provides that it must "specify the determination, or the part of the determination, to which the election

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16 At [24]–[27].
17 See *Pacific Plastic Recyclers Ltd v Foo,* above n 2, at [12], [13], and [19].
18 But see *Vice-Chancellor of University of Otago v ASG*, above n 3, at [13].
19 *Pacific Plastic Recyclers Ltd v Foo,* above n 2, at [18].

relates" whereas the second limb provides that it must "state whether or not the party making the election is seeking a full hearing of the entire matter (… referred to as a hearing de novo)".

[30] The words of the first limb are clear. The plaintiff must choose whether a challenge is being pursued in relation to all or part of the Authority's determination. However, the second limb is less clear because it refers to "a full hearing of the entire matter". No definition is provided for the words "the entire matter", which is unfortunate because those words are central to the dispute. If "the entire matter" is only the issues raised by the plaintiff in its statement of claim, then the approach in *Foo* would be correct. On the other hand, if the entire matter refers to the substance of the matter which was before the Authority, then the approach in *Cliff* and *Xtreme Dining Ltd* will be correct.

[31] In *Bourne v Real Journeys Ltd*, the Court held:[20]

> [13] The nature and scope of de novo hearings was dealt with authoritatively by a full Court in *Abernethy v Dynea New Zealand (No 1)*[21] The statutory focus is on the "matter" which was before the Authority. The "entire matter" referred to in s 179(3)(b) includes any aspect of the employment relationship problem between the parties investigated by the Authority. Thus, in a de novo hearing, the Court may hear and decide matters which were not actually determined by the Authority, provided they were part of the Authority's investigation.

[32] The Court made similar observations in *Vice-Chancellor of University of Otago v ASG*.[22] The approach adopted by these authorities to the word "matter" is consistent with the way the word is used throughout pt 10 of the Act.[23] Therefore, I conclude that the words "the entire matter" in s 179(3)(b) of the Act refer to the entirety of the matter that was before the Authority, rather than the entirety of the issues being selectively challenged by the plaintiff. If the entire matter refers to the entire matter that was before the Authority, then a de novo challenge cannot be limited to parts of a determination – it necessarily involves the entire determination.

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20 *Bourne v Real Journeys Ltd* [2011] NZEmpC 120, [2011] ERNZ 375.

21 *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC).

22 *Vice-Chancellor of University of Otago v ASG,* above n 3, at [13]; see also the discussion relating to the word "matter" in s 179(1) of the Employment Relations Act 2000 in Simon Schofield *Mazengarb's Employment Law* (online ed, LexisNexis) at [ERA179.6A].

23 See generally ss 159, 160, and 178.

[33] Mr Towner submits that this approach construes s 179(3)(a) as being subject to s 179(3)(b). However, that is not necessary. The requirement in s 179(3)(a) can be understood in a number of ways. First, it could merely be a procedural requirement that the plaintiff specify which written determination of the Authority it is seeking to challenge. This would ensure that the Court is able to clearly identify the subject matter of the challenge. The reference to "the part of the determination" would then only apply where a non-de novo challenge is being pursued.

[34] Secondly, or perhaps additionally, s 179(3)(a) could be understood as setting out the matters which the plaintiff wishes to pursue in its challenge. Where the Court is asked to resolve a de novo challenge, it essentially has a "clean slate". The parties are free to argue the same issues that were before the Authority, but they are not required to argue every single issue determined by the Authority.[24] Thus, a plaintiff complying with s 179(3)(a) in the context of a de novo challenge will give the Court some insight into what issues will be pursued. Once again, this relates to the subject matter of the challenge – it does nothing to limit the potential issues for the Court to determine. Nor does it constrain the issues that the defendant may wish to pursue.[25]

[35] Ultimately, s 179(3)(a) relates to what is being challenged, and ss 179(3)(b) and 179(4) relate to how the challenge will be pursued. Section 179(3)(b) provides for challenges to entire matters, and s 179(4) provides for challenges to specific parts of a determination.[26] Therefore, a de novo challenge cannot be issued against only part of a determination.

Next steps

[36] The cases outlined above indicate that where a plaintiff purports to limit the scope of a de novo challenge, that challenge is properly classified as a non-de novo challenge.[27]

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24 See *Sefo v Sealord Shellfish Ltd* [2007] ERNZ 680 (EmpC) at [32].

25 See *Abernethy v Dynea New Zealand Ltd*, above n 21, at [40]–[41].

26 This analysis also resolves Mr Towner's submission that Form 1 of the Employment Court Regulations 2000 becomes repetitive under the approach adopted in this case.

27 *Goodman Fielder New Zealand Ltd v* Ali, above n 3, at [6]; *Vice-Chancellor of University of Otago v ASG,* above n 3, at [14]; *Xtreme Dining Ltd, (t/a Think Steel) v Dewar*, above n 3, at [13]; and *MGK Homes Ltd v Yoon*, above n 15, at [23].

[37] Accordingly, given the limitations set out by the plaintiff, I find in this case that the challenge is a non-de novo challenge.

[38] This, however, is prejudicial to Ms Hunter's position. She has acted under the impression that a de novo challenge was filed opening up all issues. She has therefore not filed her own challenge and is now out of time to do so.[28] If she wishes to challenge elements of the Authority's determination that are not challenged by the plaintiff, she must now seek leave to do so. In light of what has occurred thus far, an application for leave would likely have some merit if brought promptly.

[39] Additionally, because the challenge is properly classified as non-de novo challenge, the statement of claim is not compliant with s 179(4). Therefore, the defendant is to file an amended statement of claim within 14 days of the date of this judgment.

[40] Once an amended statement of claim has been filed, directions can be made, and steps taken by Ms Hunter, about the nature and scope of the hearing.

[41] Alternatively, if the parties wish for the matter to be heard as a de novo challenge, the Court can make directions permitting that under s 182(3) of the Act, but the entire matter will then be before the Court.

Costs

[42] Costs are reserved. In the event the parties are unable to agree on costs, Ms Hunter will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the plaintiff having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 4.30 pm on 7 December 2023

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[28] However, she has clearly articulated which issues would be subject to challenge by her.