IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 264
5465447

	BETWEEN	PUNA CHAMBERS INC Applicant
	AND	TANIA CHRISTENSEN Respondent

Member of Authority:	Eleanor Robinson
Representatives:	David Hayes, Counsel for Applicant Scott McKenna, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions received:	14 June 2014 from Applicant 11 June 2014 from Respondent
Determination:	26 June 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination addresses the preliminary issue of whether the Authority has jurisdiction to hear an application to set aside the Authority's determination in *Christensen v Puna Chambers Inc* [2013] NZERA Auckland 470.

[2] The Applicant, Puna Chambers Inc, seeks to have the determination set aside on the basis that it alleges that the Respondent, Ms Tania Christensen, gave fraudulent evidence during the course of the Authority's investigation.

[3] The Applicant submits that there is no legislative authority for the Authority to hear the application.

Issues

[4] The issue for determination is whether or not the Authority should set aside its determination *Christensen v Puna Chambers Inc* [2013] NZERA Auckland 470 on the alleged

grounds that the Respondent gave fraudulent evidence during the course of the Authority's investigation.

Brief Background Facts

[5] On 10 October 2013 the Authority held an Investigation Meeting into Ms Christensen's claim that she had been unjustifiably dismissed by Puna Chambers Inc. Puna Chambers Inc chose not to attend the Investigation Meeting despite having had due notification, and did not therefore cross-examine Ms Christensen on her evidence which was consequently undisputed. Puna Chambers Inc also did not make closing submissions in the matter.

[6] The resulting determination *Christensen v Puna Chambers Inc* [2013] NZERA Auckland 470 was issued on 11 October 2013. The parties had 28 days in which to elect to challenge the determination to the Employment Court pursuant to s 179 of the Employment Relations Act 2000 (the Act).

[7] No challenge in respect of that determination was made to the Employment Court within the 28 days statutory time limit pursuant to s 179 of the Act 2000.

[8] The Applicant filed a Statement of Problem with the Authority on 3 June 2014 seeking to have that determination set aside.

Determination

[9] The Authority was created by statute. The Act sets out at s 173 the procedure the Authority must follow in exercising its powers.

[10] Parties have the statutory right to challenge determinations issued by the Authority. The procedure to be followed in electing to challenge a determination, or part of a determination, of the Authority is set out at s 179 of the Act which states:

> *(1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the court.*
>
> *(2) A challenge under this section must be made in the prescribed manner within 28 days after the date that the matter was determined by the Authority.*

[11] I find that this is the only means provided in the Act for challenging a determination of the Authority and having it set aside, other than by a challenge to the Authority's jurisdiction to hear the matter pursuant to s 184(1) of the Act which states:

> *(1) Except on the grounds 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 into question in any court.*

[12] Whilst a determination of the Authority may be the subject of a Judicial Review, this can only be initiated providing the requirements of s 184(1A)(b) of the Act have been met. In particular s 184(1A)(b) of the Act stipulates that Judicial Review is only available: "*if … the party initiating the review proceedings has challenged the determination under s 179;* "

[13] Accordingly I find that there are only three means of challenging a determination of the Authority in accordance with the statutory requirements: (i) by means of a challenge to the Employment Court, (ii) by means of a challenge on the ground of a lack of jurisdiction or (iii) by means of an application for Judicial Review.

[14] In the case of the first means, being a challenge to the Employment Court pursuant to s 179 of the Act, I find that the Applicant is time barred since it was not made within the statutory time limit set out in s 179(2) of the Act of 28 days after the date of the determination.

[15] In the case of the second means, being set aside on the basis that the Authority lacked jurisdiction pursuant to s 184(1) of the Act, this has not been alleged by the Applicant.

[16] In the case of the third means, being of Judicial Review, I find that this depends upon a challenge to the Employment Court having first been made in accordance with s179 of the Act, and that does not apply in this case.

[17] The Applicant having thus failed to elect to make a challenge within the requisite statutory time frame, I find that it cannot now elect to do so.

[18] The Authority may set aside a determination at its discretion pursuant to clause 4, schedule 2, of the Act which states:

> ***4 Reopening of investigation***
>
> *(1) The Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.*

[19] The Applicant submits that the Authority should set aside the determination *Christensen v Puna Chambers Inc* [2013] NZERA Auckland 470 on the grounds of fraudulent evidence, and as such it requires a fresh proceeding rather than a continuation of the old proceeding by way of challenge.

[20] In support of this submission the Applicant applies the High Court case *O'Hagan v Waitomo Adventures Limited*[1] as authority for its application for a new proceeding with the Authority Member who held the investigation into the original matter in circumstances in which the first determination was obtained by fraud.

[21] I observe that *O'Hagan v Waitomo Adventures Limited* was a case in which Mr O'Hagan sought a declaration from the High Court that a judgment the defendant had obtained against him in the Employment Court had been obtained by fraud. The judge in that case had found that the High Court had no jurisdiction to hear a proceeding within the exclusive jurisdiction of the Employment Court and therefore it should be referred back to the Employment Court.

[22] I find it pertinent to the current application for set aside that the judgment of the Employment Court in that case had arisen as a result of a challenge to a determination of the Authority pursuant to s 179 of the Act.

[23] Having considered *O'Hagan v Waitomo Adventures Limited* I am not persuaded that I should exercise my discretion to set aside the determination *Christensen v Puna Chambers Inc* [2013] NZERA Auckland 470 and order the investigation to be reopened in circumstances in which the statutory regime has made provision for challenges to the determination of the Authority.

[24] In this respect I consider it significant that the statutory regime provides for an election to have the matter heard by the Employment Court to either take the form of a challenge to part of the determination pursuant to s 179(3)(a), or to seek: "*a full hearing of the entire matter (… a* ***hearing de novo)"*** pursuant to s 179(3)(b)**.**

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[25] The statutory regime thus permits a party to have a full hearing of the matter to which the Authority determination relates, and provides ample opportunity within the 28 days statutory time frame for so doing.

[26] In circumstances in which the Applicant chose not to pursue the steps provided by the statutory regime and elect to challenge the determination *Christensen v Puna Chambers Inc* [2013] NZERA Auckland 470, I determine that the determination *Christensen v Puna Chambers Inc* [2013] NZERA Auckland 470 is not to be set aside.

Costs

[27] Costs are reserved. The Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority