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Inside

Our inaugural employment law

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Contents

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EMPLOYMENT LAW

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Welcome to our inaugural **employment law** edition

Catherine Stewart

Kia ora tatou

As the convenor of our busy and vibrant Employment Law committee, I have great pleasure in seeing this special edition of *LawNews* highlight many important recent developments in our jurisdiction, with articles written by our committee members on nine areas of topical interest in employment law.

The past year has been busy for our committee. We have presented submissions to Parliament on the Fair Pay Agreements Bill and the Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Bill, consulted on modern slavery and worker exploitation policy development and engaged with the minister and MBIE on matters of pressing concern.

All the while, our members have remained at the forefront of the law by acting in novel and complex cases of public interest, which are often the subject of discussion (and sometimes vigorous debate!) at our meetings.

ADLS has also recently accepted an invitation to appear as one of several interveners in a test case before the Employment Court which will be probing whether the employment institutions' classically strict approach to non-publication orders remains suitably principled and fit-for-purpose.

Topics covered in this *LawNews* special edition range from "big picture" issues like the reintroduction of sector-based bargaining to the important and emerging role of tikanga in employment law.

Our members' articles also traverse the employment status of gig economy and religious community workers, the lines between the civil and employment jurisdiction and when out-of-work conduct becomes an employment issue, through to deep-dives on the issues surrounding the legislative developments in health and safety, worker exploitation and privacy.

We also take a look at the rise in restructures across New Zealand in recent times and the latest warning shot to employers about the need to account for their workers' extended availability – just as remote and flexible working continue to become a normal part of the fabric of modern post-covid era workplaces.

I hope you will enjoy sharing in these developments with us.

Right now is certainly an exciting time to be practising in employment law. ■

Catherine Stewart is an Auckland barrister and convenor of the ADLS Employment Law committee ■

EMPLOYMENT LAW

Why section 6 of the Employment Relations Act has become an 'extremely unruly horse'

The Employment Court is going down a pathway of focusing on vulnerability, control and choice/ability to choose as a basis for determining whether a contract of personal service exists, even in a context where there is no underlying contractual/legal relationship

John Hannan

This is shaping up to be a definitive year for one of the thorniest issues in employment law – whether ostensibly self-employed workers offering services through tech platform-based providers are employees of the platform provider or independent contractors.

In the most high-profile case, *Rasier Operations BV & Or's v E Tū & Anor* [2023] NZCA 216, the Court of Appeal has given leave to appeal a decision of Employment Court Chief Judge Christina Inglis that a group of Uber drivers were employees of the relevant Uber companies.

This and other recent judgments of Chief Judge Inglis have made significant changes to the established tests for distinguishing between employees and self-employed contractors and the definition of an "employee" in s 6 of the Employment Relations Act 2000.

The objectives of s 6 are to prevent exploitative misclassification. The section provides that an employee is any person employed by an employer to do work for hire or reward under a contract of service. There must be a contract of service, either express or implied/inferred.

In deciding whether a person is employed under a contract of service, the Employment Relations Authority (ERA) or Employment Court must determine "the real nature of the relationship between them".

In doing so, the decision-maker must "consider all relevant matters, including any matters that indicate the intention of the persons" and "is not to treat as a determining matter any statement by the persons that describes the nature of their relationship".

Section 6 of the Employment Relations Act was a remedial response to exploitative misclassifications of workers. Abusive employers who engage, say, cleaners or hospitality workers as self-employed contractors for regular work will be found to have engaged them as employees. Section 6 attacks attempts to misclassify workers.

The court has developed a new test for the application of s 6: 'vulnerability and/or lack of choice'

A new touchstone?

Chief Judge Inglis' decision in *E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192 (Uber 2) modifies the employee versus contractor criteria. It stands in stark contrast to a previous decision of Judge Joanna Holden in *Arachchige v Rasier New Zealand Limited* [2020] NZEmpC 230 (Uber 1) that an Uber driver was not an employee.

The Employment Court has also found that male Gloriavale inhabitants aged between six and 15 who were working in various income-generating activities of the Gloriavale community were employees, although whom the employer was has not yet been determined.

The court recently found that female Gloriavale inhabitants doing domestic work (cooking, cleaning and mending) were employees of an as-yet undetermined Gloriavale entity. They were said to be vulnerable and to have had no true choice and were thus employees.

The court has developed a new test for the application of s 6 – "vulnerability and/or lack of choice".

Section 6 is an unruly horse. The Employment Court and Supreme Court found in *Bryson v Three Foot Six Ltd* [2005] NZSC 34 that despite industry practice, movie industry contractors might be employees. That decision was adjusted by legislation. Since the Supreme Court's 2005 decision in *Bryson*, the law on worker status has not materially changed.

In Uber 2, the chief judge thought that working as Uber drivers did not require special expertise or skill, involved no financial risk and offered no opportunity to increase profit by any means beyond working longer hours. Drivers were not in business on their own account. The chief judge said the relationship was one of economic dependency. She refers to "the impact of the Uber business model and its operation on the drivers" and their "vulnerability".

The Uber documentation said the relationship was a contracting agreement. It entitled the drivers to use the Uber app and for Uber to collect the fare payable to the driver by the rider, deduct its "cut" and then pay the driver. The app set the fare. There were extensive provisions about service standards.

Continued on page 05

Continued from page 04

The chief judge said the documents did not accurately describe the relationship. The context of the relationship and how it operated in practice painted a different picture. There was a clear imbalance of bargaining power between the parties. She pointed to "the subordinate position of the plaintiff drivers" and referred to them as "subordinate vulnerable workers".

In Uber 1, Judge Holden found the driver was not an employee of any of the Uber entities.

The facts were essentially the same as in Uber 2. The documentation of the relationship between the drivers and Uber was not substantially different from Uber 2.

While the drivers were integral to the Uber business, Uber had little control over the way in which they operated. Arachchige was not directed or controlled by Uber beyond some matters that might be expected, given that he operated under the Uber brand. The agreement reflected the parties' intention and they acted in accordance with it.

Purposive interpretation and vulnerability

The key difference was the chief judge's emphasis on considerations of "vulnerability", coupled with her view of the social objectives of the Act.

In Uber 2, there is heavy emphasis on a purposive interpretation of s 6. Chief Judge Inglis spends a significant portion of the judgment discussing the thought that due to new forms of work and associated technology "work is… escaping labour law's grasp" and noting that the Act and the "minimum code" (Holidays Act 2003 etc) is social legislation, designed to be protective, to regulate the labour market and ensure the maintenance of minimum standards.

Crucially, she asserts that these provisions:

> *reflect a statutory recognition of vulnerability based on an inherent inequality of bargaining power, that certain workers are unable to adequately protect themselves by contract from being underpaid or not paid at all for their work, from being unfairly treated in their work and from being overworked.*

This emphasis on vulnerability is an expansion of the objectives stated in s 3 of the Act. Those objectives focus (inter alia) on building productive employment relationships, recognising the need for mutual obligations of trust and confidence and good faith behaviour, acknowledging the inherent inequality of power in employment relationships but also protecting the integrity of individual choice. The word "vulnerability" does not appear.

The chief judge accepts it is clear that Uber did not subjectively intend to enter into an employment relationship. But (differently from Judge Holden) she does not conclude the drivers did not intend an employment relationship.

Chief Judge Inglis points to the take-it-or-leave-it nature of the contracts and that they were dense and "riddled with legalese". She considered the drivers had no realistic opportunity to negotiate their terms and conditions and concluded that the way the Uber documentation was labelled did not accurately describe the relationship between the parties.

How can there be a contract of service when the identity of the employer party has not been determined?

Written documentation

This elides what is said in previous case law about the relevance of the terms of written documentation.

The written documentation is evidence of the parties' intentions. It is not conclusive evidence. But it is a "relevant matter" and a "matter that indicates the intention of the persons" which the court must consider.

A purposive interpretation of s 6 does not entitle the court to ignore it. There is no evidence in Uber 2 that the drivers did not understand the documentation or were at a disadvantage language-wise. Uber 2, compared with Uber 1 and other cases, is a significant extension. The focus on vulnerability as a touchstone of whether the parties can be said to have intended a contract of service, and of the real nature of the relationship and the focus on the "impact" of the Uber business model and its operation on the plaintiff drivers, are new.

Similarly, the focus on the purposive interpretation of s 6 as allowing or driving a holistic analysis of whether the totality of the situation can be viewed as exploitation of "vulnerable" workers is a different approach.

No named employer

"Vulnerability" was a key feature in *Courage v Attorney-General & Others* [2022] NZEmpC 77 (**Gloriavale 1**) and *Pilgrim and Ors v AG and Ors* [2023] NZEmpC 105 (**Gloriavale 2**).

Courage involved three former Gloriavale members who claimed that, between the age of six and 16, they were employees as opposed to volunteers at the Gloriavale community. All were male and worked progressively from "chores" as youngsters to much more extensive work in income-generating activities (honey, dairy etc) as they grew older.

For the six to 14-year-olds, there was no underlying contract or legal relationship of any kind. So this was not a classification case. The court had to bring a contract of service into being.

The Employment Court rejected an argument that because the work practices were the living expression of a religious set of beliefs that all things should be "held in common" and that all should contribute as they were able, they could not be characterised as being performed under a contract of service.

The key driver was the degree of extensive control, lack of choice and vulnerability the chief judge considered to be characteristic of the Gloriavale community.

She noted the Gloriavale belief that those who would not work should not be given anything to eat. Disobedience could result in attendance at a "shepherds' and servants' meeting", which could involve hours spent berating the person being reprimanded.

If people wished to leave the Gloriavale community, there

Continued on page 06

Continued from page 05

could be "shunning" where they were cut off from family members who remained. The chief judge refers to this in the context of the "controlling features of the way in which work was organised and the conditions under which it was performed". So control, here, refers not just to what happened in the workplace itself, but to the whole milieu of the community.

The chief judge sees this as contextually relevant to the assessment of employment status. She also rejects the submission that there is a presumption against the existence of an employment relationship when the parties' way of life, structures and work are deeply rooted in a set of religious beliefs.

The provision of food, necessities of life and the ability to participate in the community was a "reward" within s 6. The chief judge concludes that this is a "particularly vulnerable group of workers" and that s 6 should not be read as carving out this group. But who was the employer? The chief judge reserved making a declaration as to the identity of the employer/employers within the Gloriavale structure – that is, she did not identify their employer or employers.

It might be asked how there can be a finding that there is a contract of service when the identity of the employer party has not been determined.

Gloriavale 2

This is what has sometimes been called the "women's case". The key difference with Gloriavale 1 is that the plaintiffs are women who worked in the "teams" who cooked, cleaned, mended, did laundry and similar domestic tasks.

All this was obviously necessary to the ongoing functioning of the communal life of Gloriavale and in that sense supported the various commercial operations.

The chief judge found the women were employees. The question of the identity of employer was, as with the men's case, adjourned. This case will be the subject of intense analysis, beyond the scope of this article. Key features are as follows.

The court rejects the argument that there must be some sort of legal relationship, or at least some intention to enter into legal relations, before a contract of service can be found to exist. The chief judge concludes that under s 6, the court is required to assess the real nature of the relationship, having regard to a range of common law indicia (including any matters indicating the intention of the parties) to determine whether a contract of service is deemed to exist.

This is especially significant, given a specific finding by Chief Judge Inglis that it is "tolerably clear" that neither the plaintiffs nor the Gloriavale leadership thought themselves to be in an employment relationship. There is again a focus on a purposive approach to the application of s 6, given that status as an employee is a "gateway" to the minimum code.

There is an extended discussion of the impact of "lack of free choice" as a contextual factor driving a conclusion that the women were employees.

The chief judge accepts it is clear that Uber did not subjectively intend to enter into an employment relationship

After an extended examination of the evidence about how the Gloriavale community worked, the chief judge finds that the women were "close to the no-or-very little real choice end of the spectrum in terms of work". This was based on such things as the belief system of the community that all should work as they were able, that failing to comply with these beliefs put one "out of unity" with the community, the consequences of disobedience – ranging from public shaming to expulsion and shunning (in rare cases) and the belief that one would "go to hell" if not an obedient member of the community.

The lack of free choice is compared by the chief judge to some of the more extreme situations reported for migrant workers. The Employment Court is going down a pathway of focusing on vulnerability, control and choice/ability to choose as a basis for determining whether a contract of personal service exists, even in a context where there is no underlying contractual/legal relationship. The court considers that "the key point [is] that ascertaining the true nature of working relationships is not susceptible to conventional contractual analysis, and the task is not to be approached in that way".

Conclusion

Modern technologies are facilitating casualisation of work and the expansion of the "gig" economy, in turn resulting in new opportunities for exploitation and driving down the incomes of some workers.

But the recent decisions, in my view, are trying to get the existing legislation to do work it was never intended to do. If Uber driving or work in cult religious communities are exploitative social evils, different legislative solutions are required.

"Lack of choice" as a touchstone for determining the existence of an employment relationship is an extremely unruly horse. Not entirely facetiously, what of all closed religious orders? What of gangs? What of work by children on family farms?

A test of "lack of choice" wrestles with difficult philosophical and psychological issues about "agency" which I suggest are not the court's purview, at least in this context.

The court has reversed the process suggested nearly 150 years ago by Sir Henry Maine that progressive societies move from "status-based" relationships (tribe, marriage, caste, occupation and feudal roles) to relationships based on free association, or "contract".

In the court's view, the question of whether a person was capable of exercising agency in a work context is to be determined by the court, and (legal) status determined accordingly. This is apparently so even for adult drivers of vehicles who are capable of obtaining a passenger endorsement on their licence, in the case of the Uber drivers.

Tests of "vulnerability" and "lack of choice" for whether a contract of service should be called into existence – even where there is no existing legal relationship of any kind – are beyond what the drafters of s 6 contemplated. ■

John Hannan is a barrister at Bankside Chambers and a member of the ADLS Employment Law committee ■

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Getting restructuring and redundancy right

The redundancy consultation process has not changed significantly in recent years but in several cases employers have failed to get the basics right

Rosemary Wooders & Anna Codlin

The number of restructures and redundancies is increasing across New Zealand, with employers often citing economic conditions – including recession, the cost-of-living crisis and inflation – as a key justification.

But while the redundancy consultation process has not changed significantly in recent years, many employers are not getting the basics right. This includes failing to show a substantive reason to justify the restructure and failing to follow a fair and reasonable consultation process.

Haddad v New Zealand Steel Ltd [2023] NZEmpC 57 (*Haddad*) and the recent series of AUT cases (for example, *Tertiary Education Union v Vice Chancellor Auckland University of Technology* [2022] NZERA 676) are an apt reminder of the stringent procedural and good faith obligations applying to employers when carrying out a restructuring consultation process.

These cases also highlight some of the curly issues that can arise when employers make procedural errors during a restructuring consultation process.

This article focusses on:

- the importance of timing in restructuring exercises – in other words, when an employer must start consulting with affected employees about a restructuring proposal; and
- what to do when employers have left it too late to be able to meaningfully consult with affected employees.

Obligation to consult

Section 4(1A)(c) of the Employment Relations Act 2000 (Act) provides that as a matter of good faith, an employer proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more employees must provide access to information about the decision that is relevant to the continuation of the affected employees' employment and an opportunity to comment on that information before a decision is made.

This obligation to consult is triggered as soon as there is a "proposal". In short, a "proposal" is more than a mere idea or concept, but is not yet a final decision. A proposal must be sufficiently certain that it can be clearly articulated to affected employees, so those affected can provide informed feedback and comments on the proposal.

Consultation must always take place early enough so that the outcome is not predetermined; accordingly, the lowest legal risk approach is generally to consult at the earliest opportunity.

For example, in *Auckland City Council v Public Service Association* [2004] 2 NZLR 10 the Court of Appeal was required to consider what constituted a "proposal" for the purpose of determining when good faith obligations apply. In this case, the council resolved to urgently initiate a review of expenditure.

The Court of Appeal held that the review itself did not constitute a proposal; rather, a proposal crystallised once the council decided to adopt some of the recommendations from the review.

The obligation to consult may also be relevant before an employer makes a commercial decision. For example, if the outcome of a commercial decision (such as introducing a new technology) will inevitably have an adverse impact on employees, an employer should consult with affected employees before making such commercial decision. Failing to do so will likely give rise to a breach of s 4(1A)(c) of the Act.

The obligation to consult is triggered as soon as there is a "proposal"

Timing gone wrong

Haddad is a recent example of an employer falling into the consultation timing trap by failing to properly consult with affected employees before a decision was made. In *Haddad*, NZ Steel developed a two-stage change restructuring proposal:

- stage one was to establish the "target state" for NZ Steel's Information Services (IS) department; and
- stage two proposed to reconfigure the process-computing function by shifting certain roles into other teams and disestablishing Ra'ed Haddad's management role.

While both stages involved consultation with employees, Haddad and his team were consulted only after phase one had been confirmed (without any changes to same). The Employment Court held that NZ Steel's decision in stage one to restructure the IS department inevitably resulted in the disestablishment of Haddad's role. Therefore, Haddad had no

Continued on page 09

Continued from page 08

real ability to influence the decision to disestablish his position during the stage two consultation process.

The Employment Court noted that the only aspect of phase two that appeared to be open for discussion was where individual team members in process computing would move to, and the disestablishment of Haddad's role was a foregone conclusion.

NZ Steel could not produce any evidence that Haddad had a meaningful opportunity to provide feedback about the disestablishment of his role after phase one had been completed. This meant NZ Steel's consultation process was fundamentally flawed and it had failed to meet the obligations of good faith required by the Act.

Haddad was awarded reinstatement, reimbursement of the wages he had lost since his dismissal (approximately one year and four months, minus the payments he had already received) and $25,000 as compensation under s 123(1)(c)(i) of the Act.

Contractual consultation requirements

In addition to assessing when the obligation to consult is triggered, an employer must also consider any contractual requirements around the consultation processes.

The recent series of AUT cases is an apt reminder of the importance of checking contractual and policy requirements that may impact the timing of a restructuring process.

Many collective employment agreements, in particular, will prescribe a minimum timeline for consultation or precisely how far in advance of any consultation process an employer must notify relevant unions.

An employer could find him/herself in hot water if he/she has failed to first check for these types of provisions in any relevant collective employment agreements, individual employment agreements and policies, even if the employer has otherwise applied a best-practice consultation process.

In the AUT cases, the employer began a restructuring process with a view to secure significant financial savings. However, AUT failed to adhere to the specific contractual restructuring provisions in the relevant collective agreement prior to carrying out the restructure.

In particular, these provisions set out a sequence of essential steps to be taken where organisational change occurred (including post-consultation), identifying specific positions as surplus to requirement, and a process for voluntary severance arrangements.

The union sought compliance orders in the Employment Relations Authority, requiring AUT to put its restructure on hold pending compliance with the relevant provisions. The compliance orders were ultimately granted, then enforced by the Employment Court.

Pitfalls for employers

It is not uncommon for a New Zealand employer's overseas parent company to have already made a decision about the future of the New Zealand employer without consulting with affected New Zealand employees. In our experience, this often arises with Australasian companies, due to the different legal landscapes.

In Australia, there is no statutory duty of good faith, and consultation obligations largely arise from awards and enterprise agreements. These generally require consultation where an employer has decided to introduce major changes in production, programming, organisation, structure or technology that are likely to significantly affect employees.

This creates a major issue for Australasian employers where that decision also impacts New Zealand employees and that impact is considered as a secondary matter. Many Australasian employers may not understand (often until it is too late) that the obligation to consult with employees arises earlier in New Zealand and they cannot simply go through the motions when they have left it too late.

Too late?

If a decision has already been made to implement a change that will impact employees and any employee feedback could not feasibly change the outcome, then it would be misleading, and potentially a breach of good faith, for an employer to describe that change as a "proposal".

In these circumstances, unless there is some way in which the employer can genuinely unwind the decision and start afresh, he/she will be unable to eliminate a potential breach-of-good-faith claim.

In such circumstances, an employer would instead have to consult with affected employees on matters that have not been decided. For example, depending on what has been decided, it may be possible for the employer to genuinely and openly consult with affected employees about:

- the impact of the relevant decision (eg, how many and which positions are proposed to be disestablished);
- any proposed selection process for determining which employees will be made redundant or appointed to any new positions;
- the availability of redeployment opportunities and any other alternatives to redundancy the employer may not have considered; and
- termination arrangements and payments, including whether or not an employee will be required to work out his/her notice period and be given outplacement support or any other redundancy benefits.

If there has been a failure to consult on the business change itself, it would be prudent to consider whether the employer could obtain a release of any claims from affected employees by offering something more than the employee's contractual entitlements in relation to the termination of his/her employment. This should be recorded in a settlement agreement. ■

Rosemary Wooders and Anna Codlin are senior associates at Bell Gully. Wooders is a member of the ADLS Employment Law committee ■

Consultation must always take place early enough so that the outcome is not predetermined

EMPLOYMENT LAW

How the law around zero-hours contracts is evolving

Where an employer requires an employee to remain available for work outside his/her guaranteed and paid-for hours, the Act requires an availability provision to be included in the employment agreement

June Hardacre & Hannah King

Zero-hour employment agreements, where employees are required to remain available without any guarantee of work, became unlawful in 2016 with the introduction of availability provisions into New Zealand's legislative framework.

Since then, case law has evolved to help us understand the scope of these provisions and what has emerged is a willingness by the Employment Court to hold employers to account. Following the 2022 judgment of *Stewart v AFFCO New Zealand Limited* [2022] NZEmpC 200, it is clear that availability provisions may now have more bite.

The Employment Relations Amendment Act 2016 introduced a suite of changes to the Employment Relations Act 2000 (the Act) targeting unfair employment practices. These changes included the insertion of ss 67D–67F into the Act, which introduced the concept of availability provisions and established protections around their use.

The Act defines an availability provision as a provision in an employment agreement under which:

- the employee's performance of work is conditional on the employer making work available to the employee; and
- the employee is required to accept any work the employer makes available.

Where an employer requires an employee to remain available for work outside his/her guaranteed and paid-for hours, the Act requires an availability provision to be included in the employment agreement. These provisions must meet the requirements of s 67D in order to be enforceable on the employee. An employer must:

- have a genuine reason based on reasonable grounds for an availability provision;
- ensure the employment agreement provides for guaranteed hours of work among agreed hours of work, with the availability provision relating to a period for which the employee is required to be available in addition to those guaranteed hours; and
- provide reasonable compensation to the employee for making him/herself available to work outside the guaranteed hours.

Employers would be wise to review their existing agreements for compliance and to subject any arrangements relating to availability, overtime or on-call requirements to careful scrutiny

While a significant driver for the introduction of the availability provision sections was concern about zero-hour employment agreements, the application of the legislation has a wider reach.

The case law

The court's first opportunity to consider the application of s 67D was the case of *Fraser v McDonald's Restaurants (NZ) Limited* [2017] NZEmpC 95.

The employment agreement in question set out a complex scheme for employees to indicate their availability and to determine hours of work. The full court held that the clause in question did not amount to an availability provision and observed that wording in the employment agreement stating an employee could be "requested to work hours in addition to [your] work schedule" did not mean the employee was required to work those additional hours. Employees could be asked but not compelled, and this was supported by the evidence.

The court in *McDonald's* observed that the employees' claim for reimbursement of availability compensation appeared to be an attempt to have the court fix compensation. To do that would be to fix terms and conditions of employment which was outside its jurisdiction.

This meant the court's ability to calculate and provide reimbursement of availability compensation as a remedy under s 123(1)(c) for any personal grievance established was restricted where the employment agreement did not provide for compensation.

Several years later, a full court was convened once again on an availability provision case.

In *Postal Workers Union of Aotearoa Inc v New Zealand Post Limited* [2019] NZEmpC 47, the court confirmed that the reach of availability provisions was not limited to zero-hour practices: it extended further, including to overtime practices.

Continued on page 11

Continued from page 10

The clause in question required employees to accept overtime hours when required if New Zealand Post made that work available on days when they were rostered to work.

The court made a declaration that the clause was an availability provision. The clause did not comply with the requirement to provide reasonable compensation for availability and employees were entitled to refuse to perform work in addition to their guaranteed hours on rostered days.

Late last year, another opportunity arose for the court to develop the jurisprudence on availability provisions in *Stewart v AFFCO New Zealand Limited*, including commentary about reasonable compensation.

In this case, James Stewart succeeded in establishing that he was unjustifiably disadvantaged by the inclusion of a non-compliant availability provision in his employment agreement.

The clause in question stated the employee might be required to work extra hours, including on weekends. Stewart felt he had little choice but to make himself available and AFFCO did nothing to dissuade him from that view.

The employment agreement Stewart signed did not provide for availability compensation but AFFCO later made an offer to pay availability compensation in the form of a 1.25% loading, which Stewart rejected as being "woefully inadequate". A personal grievance for unjustified disadvantage arose because AFFCO gave no consideration to Stewart for keeping himself available to take on additional hours.

While the court adjourned the issue of remedies to give the parties an opportunity to resolve this between themselves, it made observations about the correct approach to calculating remedies.

It referred to the court's statement in *McDonald's*, that setting reasonable compensation under s 67D would amount to fixing the terms of employment. However, it found that the court could consider a *quantum meruit* claim for compensation; that is, a claim for the reasonable value of, or reasonable remuneration for, services performed.

Compensation assessed on a *quantum meruit* basis would amount to a benefit under s 123(1)(c)(ii) of the Act for which the court could properly direct payment.

The future

Recent years have seen numerous changes to the Act. Employers would be wise to review their existing agreements for compliance and to subject any arrangements relating to availability, overtime or on-call requirements to careful scrutiny.

No longer can employers rely on defending a claim for reimbursement of reasonable compensation for availability by taking the position that there is no jurisdiction, with such an award being tantamount to fixing terms of employment.

Nor can an employer rely on an argument that it is not requiring an employee to be available where there is a cultural expectation that he/she be available to work.

Perhaps the ripple effect of ongoing conversations globally about work/life balance (including recent debates about the EU Working Time Directive) and questions about the future of work have heightened concern from employees about the reach of work into their personal lives and an increase in claims questioning overtime and availability arrangements.

Employers must ensure their availability provisions are compliant and fit-for-purpose or beware of their bite. ■

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Are we ready for tikanga-based dispute resolution?

Representatives should be courageous to acknowledge that without the relevant knowledge of tikanga Māori, they may face constraints in adequately serving the needs of Māori in a tikanga dispute resolution process

Shelley Kopu

As Alice Anderson and Riki Donnelly stated in their paper *A Representation in Contemporary Aotearoa; Adapting the Approach:*

> *it has been 20 years since the Employment Court indicated that employees should not have to plead for their cultural identity to be recognised in employment processes. Whether this is properly implemented and enforced in practice as a legal obligation is questionable, and the responsibility for this largely sits with us as representatives. In short, we must do better.*

Tikanga-based dispute resolution processes are being more widely traversed within the employment jurisdiction. However, an understanding as to what such a process entails or the responsibility of representatives within that process remains uncertain.

Representing clients in a tikanga-based dispute process requires in the first instance an understanding of Māori societal structures and tikanga values.

Māori social structures are underpinned by whakapapa which is an integral part of our identity. With a focus on relationships being key to our societal structure, any form of dispute carries with it a ripple effect that cascades through the collective.

Therefore, resolution of disputes requires both a focus on the rebalance within relationships and an acknowledgement of collective responsibility.

Joseph Williams J in his paper *He Aha Te Tikanga Māori* explored the commonly held concept of law on the one hand and values on the other. Conversely, tikanga Māori does not differentiate between law and values.

Rather, as Justice Williams states, it is these values which provide the primary guide to behaviour and not necessarily any "rules" which may be derived from them. He noted those values as generally being:

> *Whaungatanga, the centrality of relationships to Māori life; Mana – the importance of spirituality sanctioned authority and the limits on Māori leadership; Utu, the principle of balance and reciprocity including the accompanying values of aroha and manaakitanga requiring respect, empathy and generosity; Kaitiakitanga, the obligation of stewardship and protection of one's own; Tapu, respect for the spiritual character of all things.*

To effectively explore a tikanga-based dispute resolution process, it is necessary to first develop and practice a tikanga-focussed approach. Tikanga is not an add-on to an existing structure, but rather serves as the core of that structure.

Tikanga is not an add-on to an existing structure, but rather serves as the core of that structure

I appreciate that in exploring a tikanga-based dispute resolution process, many representatives are seeking an understanding of "process". Unfortunately, this is often translated to karakia at the commencement and conclusion of an existing process, with the balance of such process failing to reflect tikanga in any form.

Therefore, representatives need to undo the thinking that tikanga dispute resolution processes attach to what is currently in place. That requires a considerable shift as to how representatives are viewing the inclusion of Māori and Māori ways more generally.

Te Kawehau Hoskins and Alison Jones in their paper *Indigenous Inclusion and Indigenising the University* discuss two approaches to broadly integrating Māori ways.

The first is indigenous inclusion, focussing on equity and inclusion with the intent being to include Māori who have been "left out and left behind". The second, indigenisation, shifts the focus to the normalisation of Māori ways of being and knowing.

This latter approach moves us towards a more relational way of doing things based in whakapapa (history, place and relationships) and social justice. It is not about making "space" for

Continued on page 13

Continued from page 12

Māori but the encapsulation of Māori.

Employment Court Chief Judge Christina Inglis, in her paper *A privileged position – the important role played by representatives in the employment dispute resolution*, states:

> *I think it is fair to say that in Aotearoa 2021 all representatives can be expected to bring cultural competence to their work … The potential role for tikanga Māori in the resolution of employment matters has not, I suggest, received the attention it deserves. Yet.*

The process of becoming culturally competent in the service of Māori can come with challenges, some examples being:

- Tikanga processes are ultimately consensus-driven. Consequently an adversarial or positional stance has little place in a tikanga framework, which can be a challenging proposition for some.
- It can be problematic for representatives to seek out their understanding of tikanga as it pertains to their client at the time and/or only take direction as to tikanga from their client. That is no different than taking "instructions", as opposed to understanding the intricate framework which tikanga is.
- A representative's duties of cultural competency are not discharged through the client's understanding. Rather, it is the representative's responsibility to build the knowledge of those it represents which in the case of Māori includes tikanga.
- Although tikanga resolution processes are now spoken about more widely, it is often considered only at the time of mediation, rather than part of the overarching strategy. That is not to undermine a legal position, but at times the representative's language or approach pre-mediation can cause such an impact that there is a process of "undoing" the harm caused in order to enable a tikanga-based approach to resolution.

Representatives should be courageous to acknowledge that without the relevant knowledge of tikanga Māori, they may face constraints in adequately serving the needs of Māori in a tikanga dispute resolution process.

Serving Māori may require the need to engage appropriately with assistance, including engaging with tikanga experts where appropriate. Importantly, it requires the awareness to understand what one does not know.

In conclusion, I refer again to Chief Judge Inglis who says:

> *Representatives are in a privileged position, often guiding very distressed people through an unfamiliar maze. With privilege comes responsibility – baseline competencies and principles being key.*

I leave you with two wero:

- As put to the Employment Lawyers Conference in 2020, to adequately serve the needs of Māori, including inclusion of tikanga-based dispute resolution processes, representatives must first understand the needs of Māori. This includes being culturally competent to assist Māori. Consequently, to build a culturally competent legal framework that embraces a tikanga-based dispute resolution process, representatives must commit to a journey of discovery of tikanga for themselves.
- Tikanga-based dispute resolution does not start in the mediation room; rather, from the very first exchange. Tikanga should not be viewed as a bolt-on to be exercised when the parties seek to resolve their dispute within a mediated process, but rather a purposeful approach from the commencement of a dispute. ■

Shelley Kopu is the director of Shelley Kopu Law and a member of the ADLS Employment Law committee ■

When **poor behaviour outside work** can get you fired

It is important to distinguish between actions that bring the individual into his or her own personal disrepute and how they impact on the employer's reputation

William Fussey

Now more than ever, the boundaries between a person's working life and personal life are blurred.

The ubiquitous smartphone enables employees to be connected to their work 24 hours a day, with many work phones and laptops doubling as personal devices. The increasing prevalence of remote working can blur the distinction between personal and work lives even further.

Yet, the uneasy boundary between work and personal life is not new. If an employee has dinner with a work colleague, runs into their supervisor in a nightclub or sends messages to a supplier late into the night, the intersection between a person's working life and their private affairs can become fraught and tangled.

Those examples at least retain a clear link to the employee's job. But what about a situation without such direct connection? Can the employee do as he or she pleases without consequences? Can they post a personal political opinion on Twitter? What happens when an employee is accused of a crime?

Although navigating the boundary between work and personal lives can be difficult, key considerations emerge from case law. If there is a connection to the employee's work and the employee's actions could cause damage to the employer, be contrary to the employer's values, and/or attract unwanted publicity, disciplinary action may be justified.

Employers should bear in mind that employees are entitled to personal lives and the protection of their personal information and will likely be affronted by employers passing judgment on their personal affairs. Employers should carefully consider the facts and the context before commencing a disciplinary process.

Employers should carefully consider the facts and the context before commencing a disciplinary process

The case law

The leading case about employee behaviour outside work is *Smith v Christchurch Press Company Ltd* [2001] 1 NZLR 407. The Court of Appeal held:

> *there must be a clear relationship between the conduct and the employment. It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper discharge of the employee's duties; because it impacts upon the employer's obligations to other employees; or for any other reason it undermines the trust and confidence necessary between employer and employee*

In other words, employee actions that occur outside the workplace and/or their working hours can be subject to disciplinary action if those actions reasonably undermine the trust and confidence in the employment relationship.

In *Smith v Christchurch Press*, an employee's actions toward his colleague in his own home during their lunch break at work were justifiably found to amount to serious misconduct.

When it comes to a complaint about outside-of-work conduct, the employer should first determine whether a link exists between the conduct and the employment. If it does, the next question is whether that conduct could bring the employer into disrepute or if for any other reason it erodes the trust and confidence in the employment relationship.

Hallwright v Forsyth Barr Limited [2013] NZEmpC 202

Guy Hallwright was a senior investment analyst who was convicted of causing grievous bodily harm with reckless disregard, following a highly publicised road rage incident in which he drove over another motorist while taking his daughter to an appointment.

Forsyth Barr dismissed Hallwright in a decision which the Employment Court found to be justifiable. Hallwright's actions had given rise to extensive media coverage which consistently referred to him as an investment analyst or senior employee of Forsyth Barr. His conduct and the consequent prominent media attention were damaging to Forsyth Barr's reputation, seriously eroding the public's confidence in the company. It was therefore reasonable to conclude that Hallwright had brought Forsyth Barr into disrepute.

A v Chief Executive Child Youth and Family [2011] NZERA Wellington 125

A senior manager of Child Youth and Family (CYF) was witnessed slapping his son across the mouth after a club squash match. Complaints were made to the police and to CYF.

The Employment Relations Authority determined that A's dismissal was justified. Although the incident

Continued on page 15

Continued from page 14

was not reported in the media, was witnessed by very few people and his employment and actions were not widely known, A was nevertheless still considered to have brought CYF into disrepute.

Furthermore, A's actions were inconsistent with CYF values of protection and care of vulnerable children. Had limited public awareness prevented a finding that A had brought CYF into disrepute, it is therefore likely the dismissal would still have been justified on the basis that A's actions were incompatible with the discharge of his duties.

Whether an employee's actions are incompatible with his or her role will always depend on context. For example, a retail assistant publicly expressing a mainstream political opinion is unlikely to justifiably attract disciplinary action, in contrast to a government employee acting in the same way.

Scott v Department of Corrections [2022] NZERA 508

In a more recent example, Corrections Officer Yael Scott posted a TikTok video in her uniform. She was holding up handcuffs, mouthing the words "ima take your man if I want to", and the post included hashtags: #thoselooksthough, #relaxgirlsitsmyjob, #happyinarelationship, and #fyp. Text above the video read "when partners come to see the men". The video was reported to Corrections by fellow employees and a member of the public whose partner was in prison.

Corrections investigated Scott's TikTok account and came across other another video where she was mouthing: *"I'm a savage, chock im, shoot im, stab im...what? That's how it goes"*. Despite not being in uniform, she was considered identifiable as a Corrections officer because of the context of the other videos on her account.

Scott's dismissal was justified. The posts displayed careless and unsafe behaviour, putting herself and others at risk. As the Employment Relations Authority commented:

> *given her position and role with male prisoners in a custodial environment, it is not an unreasonable expectation that videos with sexually suggestive content and conveying words associated with violence, even if intended to be light-hearted, are not created by employees and made available to others*

Furthermore, Scott's posts created a significant risk of damage to Corrections' reputation, whether they were viewed by the wider public or a narrower group of friends. Proof of reputational damage was not necessary; instead, the potential for such damage was sufficient. This was also the case in *Hallwright*, where the court noted that even if there had not been any evidence of damage to Forsyth Barr, the mere potential for damage through the incident's publicity was enough to justify serious misconduct.

Can an employee post a personal political opinion on Twitter?

Mussen v New Zealand Clerical Workers Union [1991] 3 ERNZ 368

When it comes to assessing the risk of reputational damage, publicity or even widespread knowledge may not necessarily be required.

In *Mussen v New Zealand Clerical Workers Union*, referred to affirmatively by *Hallwright v Forsyth Barr*, a union employee was dismissed for being present while others spray-painted a political message on a retailer's wall. Despite no evidence of damage to the union employer's reputation, and a suppression order which considerably reduced public awareness of the union's connection to the incident, the court nevertheless held that the employer had been brought into disrepute "because people will and do talk".

Wikaira v The Chief Executive of the Department of Corrections [2016] NZEmpC

Not all inappropriate outside-work behaviour can justify dismissal, even where it is of a potentially criminal nature. Iona Wikaira was trying to serve a trespass notice on her stepfather, only for him to reverse his car rapidly off the property, brushing her leg in the process. Wikaira, incensed, struck his windscreen, causing it to crack. She was charged with wilful damage, pleaded guilty and was given a discharge without conviction.

The court indicated that being charged with a crime in the District Court does not automatically bring the employer into disrepute. The charges against Wikaira did not arise out of her duties as a Corrections officer; nor could they be said to be incompatible with her employment duties. Rather, this was a minor infraction of the law unconnected with Wikaira's occupational status. She had been unjustifiably dismissed.

The court set out a test for determining whether an employee's outside-of-work behaviour has brought the employer into disrepute:

> *whether a neutral, objective, fair-minded and independent observer, apprised appropriately of the relevant circumstances, could have considered the relevant actions to have brought, or to be a reasonable risk of bringing, the employer into disrepute*

In making such an assessment, it is important to distinguish between actions that bring the individual into his or her own personal disrepute and how they impact on the employer's reputation. In many instances, an individual's poor personal behaviour should not affect how their employer is perceived.

Privacy considerations

Before undertaking a disciplinary process for an employee's outside-of-work behaviour, an employer should be wary of impinging on the employee's privacy. While a procedurally fair process may not specifically require an employer to comply with all of the obligations under the Privacy Act 2020, employees do have the ability to take privacy claims directly to the Privacy Commissioner. Privacy considerations could also influence a perception of whether the employer's actions were fair and reasonable in the circumstances.

Employers would be well-advised to consider whether they have acquired personal information legitimately and to use or disclose such personal information only if it is directly related to the purposes for which it was obtained. ■

William Fussey is an associate at Anderson Lloyd and a member of the ADLS Employment Law committee ■

Privacy Act 2020: A shield or a sword for employees?

A recurring issue for employers is how the request provisions of the Act are being used by some employees during disciplinary and investigation processes

Helen Pryde

It has been just shy of three years since the Privacy Act 2020 (Act) came into force, replacing the 1993 legislation of the same name.

The Act provides for, amongst other things, enhanced obligations and consequences for employers dealing with information requests and privacy breaches more generally.

A recurring issue for employers is how the request provisions of the Act are being used by some employees during disciplinary and investigation processes. The effect of this approach, whether intended or not, is often frustration and delay. We examine this issue and ways to mitigate risk.

What's required?

Broadly speaking, the Act governs the collection, storage, use, disclosure and access to and correction of personal information by agencies through various information privacy principles (IPPs) and sections of the Act. The key terms are of course "personal information" and "agency"', which are defined as:

Personal information: Information about an identifiable individual, being a natural person (not a corporate) that is alive.

Agency: Any person (including an individual, corporation, body corporate or unincorporated body), that collects or holds personal information. Notably, this can include overseas people who are carrying on business in New Zealand.

The two terms are intentionally broad. Really, any information that directly identifies, or identifies by reasonable inference, an individual is considered personal information. Any party that has collected or holds that information is considered an agency.

Another article could feasibly be written on the requirements of the IPPs and the Act as to collection, storage, use, disclosure and correction of personal information. For the purposes of this article, however, we focus on how the Act governs access to personal information. To summarise:

- Any person can make a request for personal information from an agency;
- Once a request is made, the agency must respond as soon as reasonably practicable, but no later than 20 working days;
- "Responding" to the request is letting the requestor know whether the agency will grant or refuse access (or in some cases neither confirm nor deny that the information is held);
- If the agency decides to refuse access for whatever reason, it must tell the requestor on what grounds it is making that decision and inform them that they can complain to the Privacy Commissioner; and
- If the agency needs more time to respond to a request, it must (within the 20-working-day period) inform the requestor of the period of extension, the reasons why and of their right to complain to the Privacy Commissioner.

Using the Act as a sword

The reason for providing a pathway for individuals to access their personal information is sound. The information is about them and they should have access equal to the agency that holds it.

While most individuals will utilise the access pathway for genuine reasons that are consistent with the purposes of the Act, there are instances where requests are made for other motives.

The most common example occurs during an employer-run investigation or disciplinary process. During that process, the employee who is the subject of the investigation or process may request information under the Act, often about matters that have nothing to do with the process the employer is running. Concurrent to making the request, the employee may refuse to engage in the employer's process until he/she has received the requested information.

The above approach puts the employer in a difficult position – whether it continues the process (and deals with the information request separately) or halts the process until it has met the employee's demand. Related to this question, other risks can often be front-of-mind for employers:

Continued on page 17

Continued from page 16

- If they proceed without first addressing the request, are any resulting decisions (termination, for example) potentially unjustified?
- Will halting the process and providing the requested information simply lead to more information requests and more delay from the employee?
- If information is provided, is there potentially something in there that is problematic and may assist the employee in raising a personal grievance?
- Is the potential scope of information so wide that it would take weeks to comply with?

The effect of such a request is disarray and often delay. It shifts the focus from being solely on the employee to the employer as well. The prescriptive nature of the Act can often trip employers up when faced with this issue.

An employee who is the subject of an investigation may request information under the Act, often about matters that have nothing to do with the process the employer is running

When things go wrong

If an individual has a privacy complaint, their first avenue for redress is through the Office of the Privacy Commissioner (OPC). The OPC may investigate the complaint in accordance with natural justice principles and make a determination on the substance of the complaint.

It may also refer the complaint to the Director of Human Rights Proceedings to litigate the issue. Further, the OPC can issue an access direction to the agency, requiring it to comply with an information request (this power was not provided for under the 1993 legislation).

While the OPC is unable to make orders as to financial remedies, it is by no means toothless. It can, however, take several months for the OPC to conclude its investigation.

Once the OPC process has been exhausted, the individual can then litigate through the Human Rights Review Tribunal (HRRT). This too can be a long process. Unlike the OPC, the HRRT can award financial remedies for:

- Pecuniary damages, based on tangible loss and expense causally related to the breach.
- Loss of benefit, which need not be monetary but must be a benefit that was expected but for the breach.
- Humiliation, loss of dignity and injury to feelings, being entirely intangible. In a similar way to the employment jurisdiction, damages under this head are banded

The HRRT can also compel an agency to take action, restrain an agency from taking any action, order an agency to apologise and impose penalties (for example, a penalty for failing to comply with an access direction). This is non-exhaustive, but indicative of the wide powers afforded to the HRRT.

The short point is that a failure to address an information request, or fulfil a request, in accordance with the Act is an easily made mistake that carries comparable risk for employers. An information request that may seem just a frustrating detour can develop into lengthy litigation, costing a business legal fees, remedies, and executive time.

Mitigating risk

The most important way to mitigate risk is to take care when recording information, be that in emails, texts, notes or anything else written.

The guiding principle is that any information about an individual is accessible. There are, however, limited exceptions to that principle. For example, if information is genuinely evaluative and is provided in confidence, it may be withheld.

In dealing with a request for information during an employer-run process, there is no "correct" approach. Employers can, however, make the issue easier for themselves:

- If the request concerns information that ought to be provided to the employee to enable him/her to participate in the process, then that information should be provided before the process continues. For example, an employee being disciplined should already have information relevant to the allegations.
- If the request concerns information irrelevant to the process, then it is permissible to continue the process and deal with the request in accordance with the Act.
- Most requests will contain a mix of the above two categories. Employers can therefore elect to separate the categories and deal with them as set out above. It is advisable, and consistent with good faith obligations, to tell the employee why the request is being handled this way.

Approaching the request as above will assist where the request is broad and covers a wide range of information. Most requested information will not be relevant to the employer-run process, so separating that aspect of the request early is essential.

Separation, however, ensures only that the employer can proceed with the process. It does not mean the employer is absolved from actually addressing the request.

An employer can extend the timeframe for responding to a request. There is no absolute limit to how long an extension can be, but use common sense. When considering an extension, it is useful to factor in the amount of information sourced, the potential storage areas for that information and the internal resources to collate and review information.

If it is likely that a long extension is necessary, it is reasonable to write to the employee and offer the opportunity to refine the request. If the employee is keen to obtain the information sooner, he/she will be motivated to make their request more specific.

Finally, employers need to be mindful of what they give employees in response to a request. Any information that concerns other individuals may be withheld or redacted to avoid unwarranted disclosure of someone else's personal information. Any privileged or commercially sensitive information may also need to be withheld. ■

Helen Pryde is a senior associate at Duncan Cotterill and a member of the ADLS Employment Law committee ■

Navigating jurisdictional issues: *FMV v TZB* two years on

If a dispute can be framed as an employment relationship problem under s 161 of the Employment Relations Act, then it must be brought in the Employment Relations Authority rather than the courts of general jurisdiction

Rebecca White

August 2023 marks two years since the Supreme Court clarified the parameters of the exclusive jurisdiction of the Employment Relations Authority (ERA) in *FMV v TZB* [2021] NZSC 102 (*FMV*).

Despite representing a significant shift of boundaries for the specialist employment jurisdiction, the judgment is clear that there will still be cases of "jurisdictional uncertainty at the margins". Some of those marginal issues have since been resolved as *FMV* has been applied by the lower courts (see John Rooney and Sara-Jane Lloyd *Update on the FMV v TZB case* [2023] ELB 37 for a summary of recent decisions).

This article sets out the key takeaways from the *FMV* decision and attempts to identify some factors to consider when deciding where to file a claim that sits "at the margins".

Supreme Court decision

The primary issue in *FMV* was whether the employee (FMV) could bring a claim in tort against her former employer (TZB). Alongside proceedings in the ERA, FMV had filed a tort claim in the High Court, alleging that TZB had failed to provide a safe system of work, thereby breaching a duty not to cause her harm. Both the High Court and Court of Appeal held that FMV's claims fell squarely within the exclusive jurisdiction of the ERA. FMV appealed.

In its decision, the Supreme Court considered the interpretation of s 161(1) of the Employment Relations Act 2000 (Act), which prescribes the ERA's exclusive jurisdiction. The court's analysis recast the parameters of that jurisdiction, holding that if a dispute can be framed as an "employment relationship problem" under s 161(1)(a)–(qd) of the Act, then it must be brought in the ERA.

The Supreme Court held that whether something is an "employment relationship problem" requires an assessment of all the facts of the matter, but if a controversy arises during the course of an employment relationship and in a work context, then it will be an employment relationship problem (and within the ERA's exclusive jurisdiction). This will be the case even if a cause of action in tort is available on the facts of the dispute: if it can, the matter must be framed as an employment relationship problem under s 161(1)(a)–(qd).

Previously, it was open to a party, in some circumstances, to plead these claims in tort and issue proceedings in in the courts of general jurisdiction. For example, it was not uncommon for employer claims alleging conspiracy by unlawful means to be brought in the High Court against a former employee and his/her new employer for breaches of post-employment obligations.

The decision in *FMV* confirms, significantly, that the employment institutions have exclusive jurisdiction over a far broader range of disputes than was previously understood, including post-employment problems. This includes claims arising out of a settlement agreement that has not been

Continued on page 19

Continued from page 18

countersigned by an authorised mediator under s 149 of the Act, restraints of trade and cases of employee theft.

Cases 'at the margins'

In recasting the ERA's jurisdiction, new areas of uncertainty have inevitably arisen. Two years on, many remain. William Young J, in a separate judgment endorsed by the majority in its judgment, at [184] anticipated several situations where jurisdictional issues may arise, including:

- overlapping statutes;
- disputes involving employees of intelligence and security agencies;
- claims under the Privacy Act 2020;
- disputes involving company law issues; and
- disputes in which one of the parties is not the employer or employee.

William Young J noted that it would be possible (via legislative change) to assign these types of cases to the ERA by default, and for it to have the power to remove to the appropriate body cases involving particularly difficult issues.

Such an approach (and there is no suggestion that the legislature is taking steps towards this) could go some way towards resolving the current difficulties faced by representatives in framing claims at the margins.

On the other hand, it could also add a layer of complexity for litigants in a jurisdiction that is intended to facilitate resolution of issues at a low level and where many are self-represented or represented by lay advocates. Filing in the wrong jurisdiction can have devastating consequences for a party. If a claim is held to fall under the exclusive jurisdiction of the ERA but is not initially pursued in that forum, by the time a decision to that effect is handed down, a party may be time-barred from starting over in the ERA. In such cases, the High Court has confirmed that it is not possible for the parties to submit to its jurisdiction (see *Fuji Xerox New Zealand Ltd v Whittaker* [2021] NZHC 1469).

Where to file?

Drawing these points together, what is the best approach in a "marginal" case? The court in *FMV* was clear that a factual assessment is required, but there will inevitably be borderline cases. One such borderline case might be where, during the course of his/her employment and during work hours, an employee breaches obligations owed to the employer by diverting business opportunities to a competitor of the employer, at the behest of that competitor.

Assuming the employer wishes to take action against both the (likely now former) employee and the competitor, is this a case where split proceedings are required in the ERA (against the employee) and in the courts of general jurisdiction (in tort, against the competitor)?

Or does the ERA have jurisdiction to hear and determine a claim against the competitor too, given the "controversy" (the diversion of business opportunities by an employee during work hours) conceivably arose during the course of an employment relationship and in a work context?

Without attempting to set out any sort of checklist or to provide a definitive answer to the example above, the considerations in marginal cases will include:

- Even if the issue does not fall neatly into one of the categories in s 161(1)(a)-(qd) of the Act, the categories are inexhaustive. Does the controversy nevertheless arise during the course of an employment relationship and in a work context?
- Are (or were) all parties to the dispute in an employment relationship? If not, does the broad definition of "employment relationship problem" encompass the matters in dispute?
- Even if the employment relationship has come to an end, are there ongoing obligations, deriving from that relationship and the way in which it came to an end, that are in issue?

In a truly marginal case, the answers to these questions are unlikely to be straightforward. A careful consideration of the facts and existing post-*FMV* case law may not be conclusive. In such circumstances, seeking a preliminary determination as to jurisdiction would seem appropriate.

Rebecca White is a senior associate at LangtonHudsonButcher and a member of the ADLS Employment Law committee

The decision confirms that the employment institutions have exclusive jurisdiction over a far broader range of disputes than was previously understood

How fair pay agreements work

In potential impact, the legislation is similar in scope to the historic compulsory arbitration system created by the Industrial Conciliation and Arbitration Act 1894

Simon Lapthorne

One of the most recent and significant changes in employment law has been the introduction of the Fair Pay Agreements Act 2022 (FPAA) which came into force on 1 December 2022.

The FPAA provides a platform for bargaining between employers and unions across entire industries or occupations for Fair Pay Agreements (FPAs). Once agreed, FPAs would mandate minimum terms of employment applicable to all those in a given industry or occupation.

FPA bargaining is to be undertaken by unions and employer associations. Once negotiations have concluded, the FPA must be ratified by employers and employees. Once ratified, the terms of the FPA apply to all participants in that industry (employees and employers alike) regardless of their level of participation in the FPA bargaining. FPAs also apply for longer terms than collective agreements as they are expected to last between three and five years.

The process

Before discussing the FPA bargaining process, it is important to address some of the overarching obligations which need to be adhered to in bargaining. These include:

- **Representation of Māori:** each bargaining side must use its best endeavours to ensure Māori employees and employers are represented in the process. This includes getting feedback from Māori and considering whether each bargaining side should include a person who represents the interests of Māori.
- **Duty to act in good faith towards each other:** parties are expected to maintain productive relationships. They are expected to be responsive and communicative and should not mislead or deceive the other either directly or indirectly. Parties to the bargaining on the same side also owe a duty of good faith to each other.

The FPAA has the potential to remake employment relations in New Zealand

- **Standard compulsory terms:** an FPA must include certain mandatory terms, including setting out what work is covered by the FPA, standard hours, minimum pay rates, training and development, leave and the duration of the FPA.

Initiation

An FPA bargaining process is initiated by a union when it has satisfied one of the two initiation tests and then applies to the Chief Executive of the Ministry for Business, Innovation and Employment (MBIE). There are two tests:

- **The representation test:** if the union can demonstrate that initiation is supported by 1,000 employees who would be covered by the proposed FPA or at least 10% of all employees who would be covered by the proposed FPA.
- **The public interest test:** where MBIE is satisfied that employees of a particular industry are receiving low pay and have little bargaining power at work or have a lack-of-pay profession or long or unsocial hours or contractual uncertainty.

As part of the first step, it is the union's responsibility to ensure that coverage of the FPA (ie, the type of work the agreement applies to) is described in adequate detail so employers and employees can determine whether they are captured by the FPA process.

Formation of bargaining sides

Once MBIE approves the union's application, a notice must be issued within five working days, notifying that bargaining has been initiated.

An employer has the obligation to identify its employees covered by the FPA and notify any unions with covered members who are employed by the employer that an FPA process has been initiated.

An employer also must (within 30 working days) provide employees with written formal statements addressing the provision of the employees' contact details to the initiating union. The employer must allow 20 working days for employees to advise that they do not want their contact details to be given to the union.

The employer bargaining side could be an employer association or a specified state employer. An employer

Continued on page 21

Continued from page 20

association must be legally formed as an incorporated society and must apply to MBIE for approval to join the bargaining. More than one employer association can form the employer bargaining side.

Both bargaining sides will need to agree an "inter-party side agreement" about the bargaining and appoint a lead advocate/spokesperson.

Bargaining

The bargaining process will likely be similar to how standard enterprise bargaining for collective agreements occurs under the Employment Relations Act.

The parties must discuss the objectives of the proposed FPA, health and safety requirements, arrangements about flexible working and redundancy. Bargaining also includes consideration of and response to proposals made by the other side, providing requested information as well as responding to claims made.

Should a dispute arise during the bargaining process, the parties can use mediation services or bargaining support services to help resolve the issue.

Lockouts and strikes are not lawful during the FPA process in relation to FPA bargaining.

Finalising the FPA and ratification

Once the bargaining process has concluded, the agreed FPA must be submitted to the Employment Relations Authority for assessment with the minimum requirements of the FPA and other employment legislation.

The ERA also assesses whether the FPA overlaps in coverage with any other FPA. If there is such an overlap, the ERA will determine which agreement offers the better terms. It then requires the lesser FPA to be amended to remove the overlap so employees would be covered by the better terms.

Once the ERA has approved the agreement, the bargaining sides must arrange for a ratification vote. If the vote is in favour of ratification (both the covered employees and covered employers approve), then the agreement is verified by MBIE.

If, however, during the first ratification vote, the agreement is not ratified, the FPA parties are sent back to the bargaining table. If the re-negotiated FPA is not ratified the second time around, then either of the bargaining parties can apply to the ERA for it to fix the terms of the FPA.

FPA dashboard

After the enactment of the FPAA, MBIE launched an FPA dashboard with the latest information about proposed FPAs and how they are progressing. The dashboard provides information about the bargaining parties, links to public submissions, publications and any other relevant information, including decisions.

Lockouts and strikes are not lawful during the FPA process in relation to FPA bargaining

Current applications

There are six approved applications with one more (waterside workers) awaiting approval. The dashboard records that three other applications were made but withdrawn. The six current applications have been initiated by the following sectors:

- **Hospitality industry:** the coverage for this application is for all employees who provide services in accommodation, cafes, restaurants, takeaway food services, pubs, taverns, bars, clubs (hospitality), event catering companies, casino operations and motion picture exhibitions. This application was initiated via satisfaction of the representation test of 1,000 or more employees approving.
- **Grocery supermarket industry:** the coverage for this application is for those occupations engaged in retailing groceries, such as employees who fill up shelves, checkout operators, office cashiers, store people and butchers. This application was initiated via satisfaction of the representation test of 1,000 or more employees approving.
- **Security officers and guards:** the coverage applies to employees who patrol property, watch for irregularities (such as fire hazards, malfunctions or lights left on), issue security passes, monitor alarms, detect/investigate theft or maintain order. This application was initiated via the representation test.
- **Commercial cleaners:** coverage is proposed to apply to anyone who cleans offices, residential complexes, hospitals, schools, motels, industrial working areas, industrial machines, construction sites and any other commercial premises. The application was also initiated via satisfying the representation test.
- **Early childhood education:** the coverage applies to pre-primary school education. This application was initiated via satisfying the representation test.
- **Inter-urban, rural, and urban bus transport:** coverage includes occupations within the bus transport industry which involves mainly carrying passengers on public roads on a passenger service vehicle across inter-urban, rural and urban regular routes and regular schedules, including to and from schools. This application is the only one currently at the bargaining stage.

Conclusion

The FPAA is one of the largest changes in New Zealand employment law in recent decades. In potential impact, the legislation is similar in scope to the historic compulsory arbitration system created by the Industrial Conciliation and Arbitration Act 1894.

Under that system, the Arbitration Court could make binding decisions on awards which set down minimum pay rates and conditions for all employees in a specified industry.

It is still too early to comment reliably on the FPAA's effectiveness, but it is clear that in its possible reach, the legislation has the potential to remake employment relations in New Zealand.

Simon Lapthorne is a partner at Kiely Thompson Caisley and a member of the ADLS Employment Law committee

Getting up to speed with recent employment legislation changes

All new employment agreements entered into after 13 June 2023 must specifically reference the 12 months within which an employee can raise a personal grievance for sexual harassment

Jodi Sharman & Matthew Morrissey

We have already seen a flurry of employment legislation developments this year. With the mid-year point just passed, we look at the changes and what is on the horizon for the rest of 2023.

Sexual harassment

The Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Act 2023 came into force on 13 June 2023. The Act extends the time available to raise a personal grievance for sexual harassment from 90 days to 12 months. This significant change aims to improve the personal grievance process for a victim of sexual harassment by allowing more time to decide whether to raise a personal grievance in what can be a challenging situation.

All new employment agreements entered into after 13 June 2023 must specifically reference the 12 months within which an employee can raise a personal grievance for sexual harassment. The requirement to specify 90 days for other types of personal grievances continues to apply. Employers do not need to update existing employment agreements but the new 12-month timeframe will apply.

New theft by employer Bill

The Crimes (Theft by Employer) Amendment Bill proposes to amend the Crimes Act 1961 to specify that an employer commits theft if it intentionally does not pay an employee money owed under an employment agreement (eg, wages or salary) or otherwise required by law (eg, holiday pay).

The proposed new offence is designed to give a clear direction to employees that they have the right to be paid what they are owed and to streamline existing processes. The Bill provides that upon conviction, for an individual, the maximum penalty is one year's imprisonment, a fine of $5,000 or both. For any other employer, such as a company, the maximum penalty is a fine of $30,000.

Protection for migrants

The Worker Protection (Migrant and Other Employees) Bill received Royal Assent on 6 July 2023 and will come into force on 6 January 2024. The omnibus Act amends the Immigration Act 2009, the Employment Relations Act 2000 and the Companies Act 1993. It aims to improve compliance by expanding the powers of the labour inspectorate and Immigration New Zealand and by supporting greater collaboration between the two regulators to deter employers from exploiting migrant workers. The Act strengthens current offences and penalties for exploitation, introduces three new Immigration Act infringement offences and amends the Companies Act to allow the court to disqualify directors where there has been exploitation or trafficking.

Rapid-fire round-up

- **Restraints of Trade:** The Employment Relations (Restraint of Trade) Amendment Bill has had its first reading and will be considered by the Education and Workforce select committee. The Bill aims to prohibit the use of restraint-of-trade clauses in employment agreements for lower income employees. It would also require an employer to pay the ex-employee during the restraint period.
- **Health and Safety Representatives and Committees:** The Health and Safety at Work (Health and Safety Representatives and Committees) Amendment Act 2023 received Royal Assent on 12 June 2023. The Act seeks to reduce work-related harm by increasing access to health and safety representatives and committees by removing the prior thresholds that excluded smaller PCBUs (persons conducting a business or undertaking).
- **Shared Parental Leave:** The Parental Leave and Employment Protection (Shared Leave) Amendment Bill was drawn as a member's Bill failed at its first reading and is now at an end.
- **KiwiSaver:** The Employment Relations (Protection for Kiwisaver Members) Amendment Bill 2023 was introduced in June 2023. The Bill seeks to restore prior protections. It proposes to amend the Employment Relations Act 2000 to include a personal grievance if the employee's employment has been adversely affected because the employee is a member of a KiwiSaver scheme or a complying superannuation fund. While the amendments do not propose to prohibit a total remuneration approach, they would allow an employee to bring a claim where the employee's total remuneration (which includes the employer's KiwiSaver contributions) is the same as an employee who has opted out of KiwSaver.
- **Prohibited grounds of discrimination:** The Human Rights (Prohibition of Discrimination on Grounds of Gender Identity or Expression, and Variations of Sex Characteristics) Amendment Bill was drawn as a member's Bill in August 2023. It seeks to include gender identity or expression and variations of sex characteristics as prohibited grounds of discrimination under the Human Rights Act 1993. The Bill would also enable employees to bring personal grievance claims where they have experienced that type of discrimination in their employment
- And finally, there is no Bill yet for the proposed new Holidays Act, public consultation on the legal definition of a contractor has been delayed, the income insurance scheme has been shelved and parental leave payments have gone up. From mid-2024, the government will also provide for KiwiSaver contribution of 3%!

Jodi Sharman is a partner and Matthew Morrissey is a solicitor at Hesketh Henry. Sharman is a member of the ADLS Employment Law committee

ADLS Events

Featured events
Connecting New Zealand lawyers

East Auckland Lawyers' Lunch

Wednesday 23 August
12.30pm – 2pm
Goode Brothers,
Shop 36/588 Chapel Road,
East Tāmaki,
Auckland

Learn more

Hawke's Bay Lawyers' Lunch

Wednesday 20 September
12.30pm – 2pm
Lone Star
Corner Marine Parade & Emerson Street, Napier

Learn more

Christchurch After 5

Thursday 19 October
5.30pm – 7.30pm
Botanic,
126 Oxford Terrace,
Christchurch Central City
Sponsored by MAS

Learn more

Hamilton After 5

Wednesday 8 November
5.30pm – 7.30pm
Gothenburg Restaurant,
17 Grantham Street,
Hamilton Central

Learn more

Upcoming

Soon to be added:

Aug | Funding the future (newly suited lawyers)
Sep | Tips and tricks for junior lawyers moving in-house
Oct | Wellington after 5

Photo: urbazon /Getty Images

Book Here

events@adls.org.nz adls.org.nz

FEATURED CPD

FINAL NOTICE

Lawyering for 21st century relationships

GENERAL PRACTICE
ALL LEVELS
WEBINAR

Webinar 1.25 hours
Monday 14 August
12pm – 1.15pm
Price from $100 + GST
Presenters Mary Joy Simpson, partner, Hesketh Henry and Nura Taefi, barrister, Shortland Chambers

▶ This webinar will dig deeper into *Sutton v Bell* and *Mead v Paul*: their circumstances, the landmark judgments and what the ramifications might be for the way lawyers give advice.

FIND OUT MORE

FINAL NOTICE

Much ado about AI

AI
ALL LEVELS
WEBINAR

Webinar 1.5 CPD hours
Tuesday 15 August
12.30pm – 2pm
Price from $110 + GST
Presenters Steven Moe; Philip McHugh; Hilary Walton; Avneet Biln and ChatGPT
Chair Lloyd Gallagher, managing partner, Gallagher & Co

▶ Artificial Intelligence (or AI) is everywhere – in the media, on your devices and in your office – even if you're not aware of it.
Have you embraced AI – but not considered its downsides – or shunned it, without appreciating its advantages? This webinar covers the benefits and risks AI poses for the legal profession and what it might mean for our future.

FIND OUT MORE

FINAL NOTICE

Become an accounting-savvy lawyer

ALL AREAS
ALL LEVELS
WEBINAR

Webinar 2 CPD hours
Thursday 17 August
4pm – 6.15pm
Price from $140 + GST
Presenters Shane Hussey, director and principal, Hussey & Co and Sian Heppleston, analyst, Hussey & Co

▶ This webinar provides an introduction to reading financial statements, understanding accounting principles and, most importantly, understanding the story that the financial statements tell.

FIND OUT MORE

Mastering motivation workshop

DEVELOPMENT
ALL LEVELS
WORKSHOP

Workshop 3 CPD hours
Tuesday 22 August
9am – 12:15pm
Price from $350 + GST
Facilitator Tony Gardner, managing director, Archetype Leadership

In this three-hour workshop, you will discover the secrets of motivating yourself and those around you.

FIND OUT MORE

Mastering the Criminal Procedure Act

CRIMINAL
ALL LEVELS
SEMINAR

Webinar 1.5 CPD hours
Wednesday 23 August
5.15pm – 6.45pm
Presenters Samira Taghavi, barrister and practice manager, Active Legal Solutions; Trevor Ng, deputy registrar, Auckland District Court; Kristy Li, Crown prosecutor, Meredith Connell and Jerry Jiang, police prosecutor

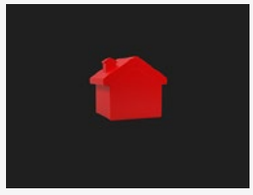
This webinar will focus on the nuances of the Criminal Procedure Act 2011 with a comprehensive overview of the different stages involved.

Chair Judge Belinda Sellars KC

FIND OUT MORE

Death and relationship property

PROPERTY
ALL LEVELS
WEBINAR



Webinar 2 CPD hours
Thursday 24 August
4pm – 6pm
Price from $140 + GST
Presenter Ross Knight, barrister, Old South British Chambers
Chair Stuart Cummings, barrister, Surrey Chambers

Attend this webinar to gain valuable insights into the death provisions under Part 8 of the Property (Relationships) Act and an understanding of trends and likely reforms.

FIND OUT MORE

Offices Available

Following some barristers retiring, we have three offices of varying sizes available for rent.

The Chambers share a refurbished floor (with separate areas) with Hussey & Co., a boutique forensic and general accounting firm. There are shared meeting rooms (a formal boardroom with video conferencing facilities and a less formal meeting room), and communal entrance and client waiting area.

Telephones, internet connection, printing and secretarial services also available and some furniture available.

Cost depends on office size and range from $150 – $300 per week plus gst. No long-term commitment required.

Photographs of the Chambers can be viewed at www.hco.co.nz/gallery.

Contact: Shane Hussey for further details, Shane@hco.co.nz
09 300 5481

WILL INQUIRIES

Please refer to deeds clerk. Please check your records and advise ADLS if you hold a will or testamentary disposition for any of the following people. If you do not reply within three weeks it will be assumed you do not hold or have never held such a document.

***LawNews*: The no-hassle way to source missing wills for $80.50 (GST Included)**

reception@adls.org.nz ADLS, PO Box 58, Shortland Street, DX CP24001, Auckland 1140 Fax: (09) 309 3726 Ph: (09) 303 5270

CUNIS
David Hilson

- Late of 11 Arcus Street, Raumanga
- Single
- Retired
- Aged 79 / Died 12'06'23

JAMIESON/WESTON
Nicola Jayne

- Late of Remuera, Auckland
- Aged 58 / Died 22'07'23

KARSTENS
Jason Neil

- Late of Pakuranga, Auckland
- Aged 50 / Died 16'07'23

MARY
Matthieu Nicolas David

- Late of 8 Berkeley Close, Rangiora
- Aged 44 / Died 29'06'23

NAKAYAMA
Yusuke

- Late of Hyogo, Japan
- Single
- Self-employed
- Aged 35 / Died 25'08'22

TUINUKUAFE
Irene Christina

- Late of 2 Leo Street, Glen Eden, Auckland
- Retired
- Aged 80 / Died 23'06'23