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Editorial

Issue 4 Editorial

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The theme for Issue 4 of the Employment Law Bulletin is Human Rights. This is a topic with endless scope, and one that is not as well explored as it could be. As employment law practitioners, we would serve our clients and the law better if we considered the human rights framework more often; and as employers, colleagues and members of a profession, we all benefit from applying a human rights lens.

Keely Gage, Te Whānau-ā-Apanui and Ngāti Tūwharetoa, has written about her experience as a young a Māori wahine on the brink of entering the legal profession. Keely makes a powerful case about the value that diversity brings to not only our profession and practice, but also to our clients. She has some important points to make about tokenism, and some clear advice for Pākehā colleagues and employers.

Ella Tait and Greg Robins from the Office of Human Rights Proceedings write about legal issues relating to transgender and non-binary people. They explore some of the difficulties trans and non-binary people are facing, and the ways in which the current legal protections fall short. They call for legislative reform to ensure full protection under the law, and provide advice for employers about how to improve their workplaces for these people.

During the COVID-19 crisis, the potential risks to those with particular underlying health conditions, and to those over the age of 70, were made clear by public health officials. While the Human Rights Act 1993 provides guidance on how to manage situations where someone's medical condition increases the risk to them in the workplace, it is less clear how this would apply to someone whose age creates an increased risk. Helpfully, Megan Richards and Kate Allan have delved into this issue, laying out the law on age discrimination, and considering how it would apply within the context of COVID-19.

The Human Rights Act and the Employment Relations Act 2000 provide parallel processes for employees who have a claim based on discrimination (or sexual or racial harassment) in the workplace. Paul McBride and Emma Rose Luxton have compared these two processes, outlining the pros and cons of each. The factors they cover off are important considerations whenever an assessment is being made about which process to elect for a claim.

As this Issue is being prepared just as New Zealand readies itself to go to the polls, Michael Leggat has given us a round-up of the different employment and labour policies of the various political parties. As for which ones will be implemented, we will have to wait and see. After all, we have the 30-day rule back but are still waiting for a Fair Pay Agreement from 2017's election.

Our Q and A for this Issue is with Saunoamaali'i Karanina Sumeo, the Equal Employment Opportunities Commissioner. Karanina has led a fascinating life. She started out studying chemistry and developing box glue for meat exports, later shifting direction into social work, studying social policy and eventually completing her PhD. She grew up in a multi-generational, extended family setting in Vailima, Samoa, before experiencing the culture shock of immigrating to New Zealand as a 10-year-old, and learning English from *The Adventures of Tintin* comics. Saunoamaali'i Karanina Sumeo is an impressive woman with a strong sense of service to her communities and those of other marginalised groups. Her Q and A makes for inspiring reading.

Enjoy Issue 4, and please send your feedback to susan@dundasstreet.co.nz.

Articles

Māori underrepresentation in the legal profession

Keely Gage, Student, Victoria University of Wellington[1]

As a kid, it did not occur to me that I might be part of a "minority" group. I grew up in Rotorua and attended Western Heights High School. Māori comprise 40.1 per cent of Rotorua's population; by comparison, Māori make up 16.5 per cent of Aotearoa's population overall.[2] More than half of the Western Heights school roll is made up of Māori students. In my childhood community, Māori excellence was encouraged and celebrated. My school worked hard to incorporate and accommodate a range of learning styles and values. Throughout my school, I saw Māori in positions of leadership, both at the staff and student level.

The picture changed drastically as my peers and I completed year 13 and made decisions about our lives after high school. I finished high school with 308 classmates, of which 164 were Māori. I was one of 59 students from my school who went on to university, but only 13 of us were Māori.[3] Of that group of 13 Māori students, three of us intended to study, and eventually practice, law.[4] Several years later, writing this piece in my penultimate year of university, I am the only member of that small cohort who made it to the end, and who is set to become a practising lawyer after graduation.[5]

While those numbers are stark, they do not surprise me. The majority of my Māori high school peers never saw university, let alone law school, as a viable option. And why would they? Since Aotearoa was first colonised, the legal system has been, and remains, an incredible site of power, and tool of oppression. Before they had even finished school, many of my Māori peers would have had negative interactions with the justice system. These negative interactions are not limited to just the criminal law but reach all aspects of law and life; land law, health funding, welfare, Oranga Tamariki — the list is endless. You could pick at random any period of my life and it will be true that, during that time, I had more family members in prison than I had family members with university degrees. In fact, I am the first in my family to receive a tertiary education. Certainly, I will be the first lawyer.

Tuakana/Teina

Unfortunately, the lack of role models is only exacerbated in the legal profession. I am never surprised when I have to scroll through five, six, or even 10 pages of any given law firm's website until I find someone who is unapologetically Māori. If I find more than one, it is a safe bet I will be able to count them all on one hand. Those numbers dwindle even further up the food chain — partnerships tend to be dominated by older white men.

Data from the 2006 census showed that Māori were estimated to make up just 5.5 per cent of all legal professionals; that is, barristers, solicitors, judges, tribunal members and magistrates.[6] The Law Society keeps records of the ethnicity of lawyers who choose to disclose that information. Around 62 per cent of all lawyers chose to provide their ethnicity and of those 3.5 per cent said that they are Māori.[7]

It is hard to aspire to be something that you cannot see. With such low rates of representation, for me and my high school cohort, Māori legal professionals just were not something many of us could picture. Several years later, not much has changed. There is still disproportionately little

1. Te Whānau-ā-Apanui and Ngāti Tūwharetoa. Final year LLB/BA student at Victoria University of Wellington.
2. Statistics New Zealand "Rotorua District" <www.stats.govt.nz>; Statistics New Zealand "New Zealand's population reflects growing diversity" (23 September 2019) <www.stats.govt.nz>.
3. Information relating to breakdown of ethnicities and tertiary education provided by Education Counts New Zealand.
4. This information is given to the best of my knowledge and excludes any of my school cohort who may have, since leaving school, decided to pursue law.
5. A version of this article was originally written for an Ethics and Professional Responsibility course assignment in 2019. We were asked to write about an ethical issue facing the legal community in New Zealand, and I knew I needed to write about this.
6. New Zealand Law Society "Māori under-represented in legal profession" (23 September 2011) <www.lawsociety.org.nz>.
7. New Zealand Law Society, above.

representation for our people. For the minority of Māori who manage to overcome these barriers, and do break into the legal profession, the challenges are not over there. Even once within the profession, there is a lack of Māori mentors. I attended a panel discussion on equity in law and saw four incredible wāhine toa speak of their challenges in the legal profession.[8] Arti Chand was one of the speakers; she is an extremely accomplished practitioner with over 15 years' experience in the legal profession. Arti expressed one of the biggest barriers was the lack of mentorship: in her entire career she has never worked for a female partner let alone an Asian, Māori or Pasifika partner. For any new graduate, joining the legal profession is nerve-wracking, but this is even more so as a young Māori person. Many of my Pākehā peers have to look no further than their own family to find someone they can share experiences with, ask advice of, and gain institutional knowledge and connections from. They know someone who was, at some point, in their exact position.

It is an isolating feeling to know before you have even entered the workforce that, statistically speaking, the chances of working with, or for, someone *like you* are extremely low. Underrepresentation can cause anxiety for many Māori in the legal profession. Think of the headspace taken up by questions as simple as: "will my colleagues be able to pronounce my name?"; "will my employer understand that a tangi can happen over more than one day?"; or "will my workplace support Te Matatini as much as they support the Melbourne Cup races?".[9] The legal profession is a high stress environment already but the added layer of isolation due to underrepresentation can weigh heavily on Māori.

Te ao Māori

The Māori economy is estimated to be worth over $42 billion[10], and Māori make up over half of the entire New Zealand prison population.[11] There is a strong demand and need for legal professionals with experience and knowledge of te ao Māori. The legal sector has not been blind to this unique and emerging industry and has responded accordingly.

The same firms that make you feel like you are searching for a needle in the haystack to find a single brown face or a hanging pounamu or a proud declaration of whakapapa, also boast specialist Māori teams. How can a team specialise in Māori affairs and business with such a clear lack of Māori staff?

This is not to say that Pākehā cannot understand tikanga Māori or that the traditional Pākehā values engrained in the legal profession are not useful, because they are useful. However, te ao Māori offers another lens through which to view the world. It is another tool in the kete. Te ao Māori is about the interconnectedness of all living and non-living things. By definition, tangata whenua are an integral aspect of te ao Māori. The history and origins of New Zealand's common law system is that of New Zealand's Pākehā colonisers. To recognise that is not to diminish the positives of that system. But neither is it true that tikanga Māori is any lesser in value or coherence than the Eurocentric values that are baked into the very foundations of New Zealand's legal profession. New Zealand's legal system may have its roots in England, but its trunk, leaves and branches grow and fruit in contemporary Aotearoa. Today, Aotearoa's legal system needs to accommodate all members of Aotearoa's diverse population. For many Māori clients navigating their personal and business legal rights and obligations, effective legal representation depends on the availability of Māori practitioners conversant in tikanga.

Māori overrepresentation in the prison system is a pressing issue in New Zealand. The legal profession plays a central role in the operation of the criminal justice system. Our current criminal justice system is far removed from traditional Māori justice systems. Traditionally, Māori take a community-based approach to justice, focusing on restoring the mana of all parties, rather than stigmatising the offender.[12] An immediate overhaul of the criminal justice system or two parallel systems for Māori and Pākehā is unrealistic, but increased Māori representation and understanding of tikanga Māori in the legal profession could lead to better outcomes and rehabilitation of Māori offenders.

Lawyers have an ethical and legal obligation to act in the best interest of their clients, whether criminal or commercial.[13] More could be done for Māori interacting with the legal profession. Greater representation of Māori within the profession is a good place to start. Being able to relate to

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8. Marcia Rohario Murray, Willow-Jean Prime, Arti Chand, and Horiana Irwin-Easthope "Equity and Diversity Panel" (Victoria University Law Student's Society and The College of Law, held at Old Government Buildings, Victoria University of Wellington Panel speakers, 23 July 2019).
9. Te Matatini is the national Kapa Haka competition held every three years, and more broadly speaking it is a Māori performing arts festival. It's hard to encapsulate quite what Matatini means into a single footnote but I know I feel an immense amount of pride every time I watch Te Whānau-ā-Apanui perform. I make the comparison to the Melbourne Cup because many workplaces partake in sweepstakes, dress up and stream some of the races for the occasion while Te Matatini goes unnoticed. For more information, the following links are provided: Te Matatini, Kapa Haka Aotearoa <www.tematatini.co.nz>; and Manatū Taonga, Ministry for Culture & Heritage "Te Matatini Society Inc" <www.mch.govt.nz>.
10. Berl, "Māori economy 2020" (29 June 2020) <www.berl.co.nz>.
11. To reiterate, Māori make up 16.5 per cent of the entire population. Department of Corrections "Prison facts and statistics — March 2019" <www.corrections.govt.nz>.
12. Carwyn Jones *New treaty, new tradition: reconciling New Zealand and Māori law* (UBC Press, Vancouver, 2016) at 76.
13. Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.

your client and understand their background and view means you are better equipped to represent them and fulfill your obligations as a lawyer.

Ethic of care

Carol Gilligan's work on ethic of care focused on gender bias but resonates with Māori underrepresentation in many ways.[14] The ethic of care theory rests on the premise that though the law has traditionally tended to value and embody one dominant set of perspectives and assumptions, other voices, values and approaches can also be of tremendous value.[15] Gilligan drew on the work of social psychologist Lawrence Kohlberg, in which he had studied gender differences in the moral reasoning and moral development of male and female children. On the basis of his empirical study, Kohlberg concluded that boys were more morally sophisticated than girls.[16] Gilligan argued that his conclusion was based on gender-biased assumptions.

Reconceptualising Kohlberg's empirical studies, Gilligan observed that the boys studied had tended to analyse moral dilemmas using an "ethic of justice" approach, whereas the girls had been more likely to apply an "ethic of care" approach.[17] For Kohlberg, the ethic of justice lens was *the* archetypal indicator of moral reasoning; ethic of care reasoning, to him, simply looked like a failure to engage "properly" in ethic of justice problem solving. That is, ethic of care reasoning was invisible to him as a form of reasoning at all. Gilligan argued that, on the contrary, the girls approached the moral dilemmas posed to them in the study with no less moral sophistication than the boys had; they were applying a different lens.[18] One need not deny the value of ethic of justice reasoning in order to recognise the independent, but complementary, value of ethic of justice analysis. However, if one's concept of moral reasoning and value simply *is* ethic of justice, then it is all too easy to write off ethic of care reasoning as worthless or unsophisticated.

Ethic of justice is deeply entrenched in both legal education and scholarship and the legal profession. Ethic of justice involves deductive reasoning: taking abstract rules and principles and applying them to specific facts. What could be more fundamental to Western legal reasoning? This traditional mode of legal problem solving is individualistic by nature and encourages competition between individuals. Though Gilligan's focus was gender, ethic of care also resonates powerfully with te ao Māori concepts and values. Māori place a huge emphasis on relationships and how individuals may impact their wider communities.

Gilligan noted that ethic of care approaches focus on a dispute or problems' wider context and emphasise the ongoing network of relationships.[19] Similar observations can be made from the te ao Māori worldview. Ethic of care, interpersonal skills and "soft skills" like listening to understand a client's perspective and needs can be valuable tools in the kete. Clients are humans. Meeting their legal needs involves not just logical reasoning, but may also involve acknowledging their emotions, recognising and fostering their relationships, and communicating effectively.

Core te ao Māori values such as manaakitanga and kaitiakitanga dovetail with Gilligan's ethic of care. These concepts and practices are also powerful tools in the kete of effective lawyers. Manaakitanga is about caring for and supporting others. Kaitiakitanga is about guardianship and protection. These aspects of te ao Māori complement traditional legal ideas about the role, duties and obligations of the legal practitioners. As lawyers, we must act in our clients' best interest. Whanaungatanga and whakapapa are also central to te ao Māori, they are about the relationships and each person's role in their whānau or wider community. It is the idea that people build connections through shared experiences and every person's action has an impact on those in their network.

Writing this article has given me an opportunity to reflect on the values my whānau and community has instilled in me. During this process of reflection, I have also thought about a criminal defence file I assisted with as a summer law clerk. The lawyer I was assisting was Pākehā and male. He is an extremely effective lawyer, and I liked working with him. He was a good supervisor and mentor. He was fact-focused and knew how the specific facts of a real case fit within the framework of the law. Our client had pleaded guilty and we were assisting with sentencing. I remember one conversation with this lawyer in which he told me:

> "We'll do our best, but he really deserves to go to jail anyway and that's not our fault."

My reply was:

> "But it's not just about him, he has a young family and his partner is about to have another baby, they all need him, both financially and emotionally."

Looking back now, I can see both the ethic of care and ethic of justice models at play, or a Pākehā and Māori worldview coming through in our opinions and focus. My supervising lawyer was taking an unimpeachably legal approach: his

14. Carol Gilligan *In a different voice: psychological theory and women's development* (Harvard University Press, Cambridge, 1993).
15. Leslie Bender "Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law Symposium — A Fair Hearing" (1990) 15 Vt L Rev 1 at 37.
16. Lawrence Kohlberg "The Development of Modes of thinking and Choices in Years 10 to 16" (PhD Thesis, University of Chicago, 1958); and Lawrence Kohlberg *The Psychology of Moral Development: The Nature and Validity of Moral Stages (Essays on Moral Development, Vol 2)* (Harper & Rowe, San Francisco, 1984).
17. Gilligan, above n 14.
18. Bender, above n 15, at 37.
19. Bender, above n 15, at 38.

focus was on the individual's actions and mental state at a particular point in time, and the legal consequences that flowed from that. My perspective was not so focused on just that one point in time in the past. I was looking into the future too and could see the ripple effects a custodial sentence would have on the client's whānau. Our different perspectives did not put us at odds but made us a better team. The strength of our team, and complementary skills, were reflected in our submissions, which were squarely situated within the traditional legal framework, while also incorporating social and contextual factors. Our submissions struck a balance between acknowledging our client needed to take responsibility for his crime, and considering the wider negative ramifications of any custodial sentence on his family and community. Any person's perspective is inevitably informed by their cumulative life experiences and history. My own perspective is informed by my set of experiences as a young Māori wahine; my colleague's perspective is informed by his life and experiences as a male Pākehā and a highly experienced and competent lawyer of longstanding. We comprised a relatively unusually diverse legal team for our client that day. And, this part is important: though as a senior and experienced lawyer, my colleague could easily have done otherwise, he really listened to me that day. In the course of writing this, I have spoken to him about this client and this interaction. He agreed with me that our distinct but complementary perspectives resulted in a better outcome for the client. I was not a token Māori that day, but I was an early-career practitioner with insights and perspectives that helped my team to give our client the best possible legal representation. Diversity is not about tokenism; it is about better outcomes for clients and practitioners alike.

Tokenism

Diversity has become a buzzword in not only the legal profession but also all workplaces and industries. It can be hard to differentiate between a genuine desire for inclusion and something more like shallow tokenism.

As a "minority hire", it can be hard not to question whether you have been genuinely selected for your talents and ability or if you just tick a box for the firm's image. I often find it hard to differentiate between tokenism and genuine inclusion myself. Despite not even finishing university yet I have already experienced that feeling of tokenism.

In a law firm photoshoot I was asked to remove my necklace because the top of the cord was just visible above my shirt. I was happy to oblige and went to take it off. As I moved to remove it, the pounamu that had been hidden underneath my shirt became visible, and they asked me to leave it, but leave it visible. This might strike a Pākehā reader as an innocuous, neutral, or even welcoming gesture: "don't be afraid to show your Māoriness!", but that was not how it felt to me. I immediately felt like I was the token Māori; what had been messy detail in a corporate photo when it was just a cord had, once comprehended as a pounamu, transformed into a handy symbol of workplace diversity. The more I thought about this seemingly insignificant interaction the more I thought about the role I had to play. Regardless of how it had come to be, I feel like I do have an obligation to show other Māori that there are so many career options available to them — law being one, even if it is something as small and simple as a necklace.

I have been sat down by mentors to discuss my future and been told that with my potential I could become a partner one day. There is really not much more you could want to hear as a young beginning lawyer. However, comments like these have quickly soured when followed by a "joke" about needing to replace the last Māori and female partner to ensure the partnership is sufficiently diverse. I understand that these kind of "jokes" are likely intended light-heartedly, rather than to undercut or negate any of the positive words that preceded them. However, that is the effect. I feel my sails puff up with the initial compliment — I feel seen, and valued, and can picture my promising career, and possible future as a partner one day. And then, the joke, which sucks the air right back out of those sails. To make a joke of the need for diversity does exactly that: it makes diversity seem like a joke. It makes "diverse" employees feel like a joke. And it is not a joke that we are in on.

I do not want to be held to a lower standard because I tick boxes or am good for a firm's image. I want to achieve because my Māoritanga is recognised as a legitimate form of decision-making and moral reasoning. I want to achieve because my Māoritanga enhances my capabilities as a legal professional.

Despite the self-doubt that tokenism, or suspected tokenism, can invoke, I try to think "hei aha!" if I get my foot in the door because of tokenism then I will show them why we need more Māori in the legal profession. I will stand tall and proud to show other Māori that there is a place for us in the legal profession if they choose it. I will keep the door open for others until my Māori peers are sought not out of tokenism but out of recognition of their true merit. This is merit they have right now.

And to Pākehā employers and colleagues, educate yourselves and be interested in your people simply because you are interested. Listen to who your staff are as whole people, with fully formed histories, perspectives and experiences. These perspectives are more than just diverse in some superficial or decorative sense. A team with a wide range of points of view will have fewer blind spots. It will be a stronger team. All of that is something that can bring meaningful value for clients, practitioners and firms alike.

Reflections and conclusion

While I do think the legal industry and law schools have a long way to go in terms of Māori representation, they have both played enormous roles in my personal journey of understanding my identity. Growing up in a predominately Māori community, I never noticed that our values or skills were dominant in Māori culture, and in fact, as I got older, I felt more connected to my Pākehā roots because I did not have Māori role models on the path I knew I wanted to take. Coming to university and moving into a very Eurocentric profession has reconnected me to my culture and identity, particularly through affirmative action programs.

In writing this piece, I reached out to fellow Māori law students and lawyers in an attempt to do such an important issue justice. Talking with them made me realise that we shared so many experiences. I know that my comparatively fair skin has afforded me many privileges and likely at times protected me from racist assumptions and stereotypes. Nonetheless, my fair skin has not shielded me from all racism. If someone like me can experience racism in the workplace, I am conscious of how much harder it must be for those of my friends who "look Māori".

I am extremely proud that I will not only be the first lawyer in my family, but I will be the first to graduate from tertiary education. I am encouraged by my Māori peers who have not only given me the mana to (just about) make it to the end of my degree but who have also encouraged me to embrace my whakapapa and my Māoritanga. Māoritanga is not lesser, it is a different way of thinking and it has a legitimate place in the legal profession with real benefits for those working both within and with the legal profession.

Acknowledgment

This article was originally written as an essay set by Dr Zoë Prebble for her 300-level ethics and professional responsibility course at Victoria University of Wellington in 2019. I have found that often there is not much scope at Law School to share, and be rewarded for, lived experiences. Zoë took the time to give me thoughtful and encouraging feedback. It may sound like an exaggeration but the opportunity to write this kind of piece and receive thoughtful feedback, where I really felt heard by a lecturer, transformed my Law School experience. Almost a full year later Zoë suggested my essay would be a good fit for this special issue of the Employment Law Bulletin, putting the editors and me in contact. I am grateful to her for her comments on my draft as I revised it for this publication.

I would also like to acknowledge my peers — from school through to university and Māori and Pākehā alike. For listening, for discussing, and for inspiring me. I am excited for what the future can be with you all at the helm.

Lastly, I would like to acknowledge and thank my own whānau and wider hapū for always supporting me in all my endeavours.

Gender identity issues in employment law

Ella Tait and Greg Robins, Senior Solicitors, The Office of Human Rights Proceedings

Transgender and non-binary people face significant levels of discrimination in the workplace. This article explores some of the human rights issues faced by trans and non-binary employees and suggests ways in which employment law practitioners can guide clients towards creating safer and more inclusive workplaces.

Some terminology might assist. "Transgender" (or "trans") refers to someone with a gender identity that does not accord with their sex or gender assigned at birth. Someone who is "non-binary" may (in addition) have a gender identity that does not accord with either male or female. These are two of the most common terms used by trans and non-binary people themselves, but many others exist.[1]

The authors are not trans or non-binary. We write from the perspective of human rights practitioners and cisgendered allies. Although this article sheds light on relevant employment law issues, there is no substitute for practitioners listening to the voices of trans and non-binary employees, clients and the community and learning from their lived experiences.

What are the issues?

The 2019 *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* report[2] (*Counting Ourselves*) examined the experiences of 1,178 trans and non-binary people living in New Zealand.

1. Other terms include whakawahine, tāhine, takatāpui, fa'afafine, gender diverse, genderqueer or agender. None of these terms should displace the identity used by the person themselves.
2. Jaimie Veale and others *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand* (Transgender Health Research Lab, University of Waikato: Hamilton NZ, 2019). See especially 86-92.

The report paints a stark picture of the disadvantages faced by the trans community, including in employment.

The employment rate of respondents was 67 per cent: slightly less than the national 72 per cent employment rate. The median income of trans and non-binary people is just $15,001–$20,000: well below the median income for the general population of $35,001–$40,000.

When asked about their past and present experiences in the workplace:

- 74 per cent reported that they did not disclose being trans or non-binary because of fear of discrimination;
- 29 per cent had delayed steps in gender transition because of worries about discrimination;
- 26 per cent had employers or co-workers share information about them that they should not have; and
- 19 per cent had quit a job because of how they were treated as a trans or non-binary person.

Not all experiences were negative. More than half of the participants had been treated fairly and with respect at work after disclosing that they were trans or non-binary, and more than three-quarters of respondents who had disclosed their gender identity described their colleagues as supportive.

However:[3]

> Around one in ten participants received worse pay or conditions than co-workers, were not allowed to use the bathroom that matched their gender, were denied promotion or were fired or forced to resign because they were trans or non-binary.

Coupled with this, trans and non-binary participants (unsurprisingly in light of the above statistics) reported much poorer mental health than the general population. Forty-four per cent of trans and non-binary participants reported "very high" psychological distress in the last four weeks, compared with only 2 per cent for the general population. As one survey participant described their experience:[4]

> I have had a lifetime of recurrent mental health crises and being bullied out of my job – usually the mental health crises are caused by the workplace bullying. This has left my general health picture rather poor. With all the chaos in my life … [I] don't have the stability to get on top of everyday health issues e.g. establish healthy eating, exercise, sleeping and relaxation routines. It's a perfect storm of vicious cycles. (Trans woman, adult)

Counting Ourselves makes it clear that many trans and non-binary employees work in unsafe and discriminatory workplaces, while many more fear that disclosing that they are trans or non-binary will result in discrimination. This should be unacceptable for employers and employees alike. From an employment law perspective, it shows that many employers are exposing themselves to substantial legal risk by failing to provide safe workplaces for trans and non-binary staff.

What can employees do about it?

Procedure

Generally, employees who have experienced discrimination have a choice of procedures between the Human Rights Act 1993 and the Employment Relations Act 2000.

The employment discrimination provisions under both Acts are similar, but there are some important differences. Firstly, the Human Rights Act protection extends to volunteers, contractors[5] and applicants for employment, whereas the protection under the Employment Relations Act is limited to situations where an employment relationship exists (as defined in s 6). Secondly, under the Human Rights Act, a discrimination claim can be taken against an individual acting or purporting to act on behalf of an employer as well as against the employer entity.[6] Thirdly, the protection in the Human Rights Act also prohibits discrimination by third party recruiters, whether acting for the employee or the employer.[7]

Other important differences between the processes under the two Acts include the absence of a strict time limit for raising a discrimination claim under the Human Rights Act[8], and the requirement to complain to the Human Rights Commission about discrimination before filing proceedings for breach of that Act.[9] Note, too, that the Human Rights Act contains protections against discrimination in *pre*-employment, described below.

Under the choice of procedures provisions in both Acts, the "point of no return" is the commencement of proceedings in either the Tribunal or the Authority.[10] Up to that point, employees can make use of the dispute resolution procedures offered under either or both Acts. To preserve

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3. At 89.
4. At 41.
5. The definition of "employer" under the Human Rights Act 1993 extends to someone who engages an independent contractor or an unpaid worker. It also includes "the person for whom work is done by contract workers under a contract between that person and the person who supplies those contract workers." This could presumably either be a client who has engaged a firm of contractors to provide services, or the head-contractor in a sub-contracting arrangement.
6. Human Rights Act 1993, s 22(1).
7. Section 22(2).
8. The Commission may decline to take action on any complaint if the complainant has delayed for 12 months or more: s 80(2).
9. Section 92B(1). See *Peters v Wellington Combined Shuttles (Application by Defendant that Jurisdiction be Declined)* [2013] NZHRRT 21.
10. Refer to Employment Relations Act 2000, s 112 and Human Rights Act, s 79A.

employees' options so far as possible, practitioners should encourage employees to raise a personal grievance within 90 days, even if the employee initially opts to pursue a discrimination complaint under the Human Rights Act.

Nature of the protection

Taking a discrimination claim on the basis of gender is not straightforward for trans and non-binary people because "gender identity" is not an explicitly prohibited ground of discrimination under either Act.[11]

Instead, trans and non-binary workers will in most cases need to rely on "sex" as the relevant ground of discrimination. Since 2006, the Crown has accepted that this ground is broad enough to afford protection to trans people (though the opinion is silent as to people with non-binary or other gender identities).[12] To date, this issue has not been tested in either the Employment Relations Authority or the Human Rights Review Tribunal.

Until a test case is taken, or the law is reformed, pursuing a personal grievance for unjustified disadvantage and/or unjustified dismissal will remain a safer route for many – relying only on the need to establish unjustified actions, rather than the need to prove that those actions amounted to discrimination. Alternatively, an employee may have grounds to pursue a claim for sexual harassment if the workplace conduct involves offensive comments of a "sexual nature", such as comments about their sex characteristics.[13] Employers can also be liable for sexual harassment committed by others, including customers and employees.[14]

However, a recent landmark judgment for trans rights in America has clearly demonstrated that "sex" as a prohibited ground of discrimination can protect trans employees. In *Bostock v Clayton County*, the Supreme Court of the United States affirmed that the right to freedom from discrimination on the basis of sex (contained in Title VII of the Civil Rights Act of 1964) protected trans employees from dismissal on the basis of their gender identity.[15]

The majority reasoned that:[16]

> An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

The authors consider that this reasoning can be applied equally to the interpretation of the sex discrimination protections contained in the Human Rights Act and Employment Relations Act. The New Zealand statutes and Title VII protect against discrimination only on enumerated grounds, including "sex", which is defined to include pregnancy and childbirth but little else. The majority of the Supreme Court in *Bostock* was clear that the protections exist, notwithstanding that narrow definition or the fact that Title VII was not intended to include gender identity when drafted.[17] The same should apply to the New Zealand legislation, especially as the judiciary is obliged to afford human rights legislation a "fair, large and liberal interpretation, rather than a literal or technical one".[18] We look forward to the opportunity to take a suitable test case on this issue.

What do employers need to do differently?

There are a number of simple steps that employers can take to improve the workplace for trans and non-binary staff.

Upskill themselves

OUTLine's "Trans and non-Binary Inclusive Workplaces: A Guide for Employers and Employees" is an excellent starting point and includes links to many more detailed resources.[19]

The *Counting Ourselves* report is a helpful and easy-to-read resource. Practitioners should also consider the Human Rights Commission's excellent *PRISM* report[20], which reviews the contemporary legal and human rights issues faced by the rainbow community, including trans and non-binary people.

Avoid unnecessary inquiries about a person's sex or gender

Employers should be cautious about application processes or employment practices that require people to disclose their sex or gender identity. This is because:

- There are very few industries in which sex- or gender-specific employment will be permissible under the

11. Refer to Employment Relations Act, s 105 and Human Rights Act, s 21.
12. Letter from Cheryl Gwyn *Acting Solicitor-General to Attorney-General regarding Human Rights (Gender Identity) Amendment Bill* (2 August 2006).
13. See by analogy *AB v El Centro Ltd* ERA AA109/10, 10 March 2010, in which the Authority found offensive language about a person's sexuality fell within sexual harassment.
14. Employment Relations Act, s 117 and Human Rights Act, s 68.
15. *Bostock v Clayton County* 590 US ____ (2020).
16. At 2.
17. At 2.
18. *Coburn v Human Rights Commission* [1994] 3 NZLR 323 (HC) at 333.
19. OUTLine "Trans and non-Binary Inclusive Workplaces: A Guide for Employers and Employees" (2 February 2020) <https://outline.org.nz/workplace/>.
20. Human Rights Commission *PRISM: Human rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand — A report with recommendations* (June 2020).

Human Rights Act. An example might be the provision of counselling on sexual matters or the prevention of violence.[21] That being the case, asking about an applicant's or employee's sex or gender may raise suspicions that the employer intends to unlawfully discriminate.

- An application form which requires a person's sex or gender could itself be the basis of a discrimination claim[22] unless steps are taken to ensure it will have no bearing on the application. Care should be taken when asking for documentation because trans people can be especially vulnerable to pre-employment discrimination if any required documentation, including references, transcripts or work history discloses their transgender status.[23]
- Under the Privacy Act 1993, information privacy principle 1 prevents employers from collecting any personal information unless it is collected for a lawful purpose *and* such collection is necessary for that purpose. That obligation exists before and during an employment relationship.

If it is truly necessary to collect the data, best practice is to include a free-text field to allow the person to write in their own gender. If that is not possible, at least provide a non-binary option. Employers should be prepared to provide very compelling reasons why the data is required.

Set clear workplace expectations

Practitioners should ensure that clients have appropriate bullying, sexual harassment and discrimination policies in place. In addition to being sensible workplace procedure, these policies are likely to be crucial for an employer's defence to a claim of sexual harassment by a third party.[24] Policies should be developed in consultation with staff, expressly record the rights of trans and non-binary employees to freedom from discrimination in the workplace, and contain appropriate procedures for reporting such conduct and for responding to it.

Employers should ensure staff receive ongoing training regarding their rights and obligations under these policies, and the importance of diversity in the workplace. Employers should also offer confidential and anonymous support to employees, such as an Employee Assistance Programme.

Support trans and non-binary staff

If a trans or non-binary employee discloses their status, employers should ask what they can do to better support them. Simple steps like learning an employee's correct pronouns (and new name if applicable) and ensuring that these are used consistently and respectfully in the workplace are important.

Avoid imposing gender-based choices on employees

Ensure that trans and non-binary staff are supported to freely choose whichever bathroom, and uniform option (in uniformed workplaces), they feel most comfortable using. Provide unisex options if possible.

Legislative reform

While there are strong arguments that the prohibited ground of "sex" discrimination also protects trans and non-binary people, we firmly believe that the Human Rights Act and the Employment Relations Act should be amended to include gender identity as a separate prohibited ground of discrimination. This will help to set clear societal expectations that trans and non-binary people have the same rights as others to freedom from discrimination. Further, trans and non-binary employees should not have to rely on interpretation arguments to enforce their rights. Amendment will provide a clear pathway for trans and gender non-binary workers to seek justice when their rights are infringed, without fear of being tripped up by statutory interpretation arguments along the way.

This is encapsulated in the Human Rights Commission's *PRISM* report:[25]

> While the Commission has interpreted the Human Rights Act to include discrimination on the basis of gender identity under the ground of sex discrimination since at least 2005, trans people have made it clear that they do not feel protected by the Commission's position. Amending s21(1)(a) of the Act to also include gender identity, gender expression, and sex characteristics under the ground of sex was raised at every public hui the Commission hosted for SOGIESC-diverse people in 2018, and continues to be raised in other fora. The need to amend the Act has been identified by the Minister of Justice in his speech before the United Nations. Amendment of this legislation was recommended by the Committee on the Elimination of Discrimination against Women in July 2018. Further, it was also the subject of two recommendations to the New Zealand government through the 2019 UPR cycle.

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21. Human Rights Act, s 27(4). See generally ss 26–28 and 97.
22. Human Rights Act, s 23.
23. Human Rights Commission, above n 20, at 57.
24. Note s 117(4) of the Employment Relations Act requires "whatever steps are practicable to prevent any repetition of such a request or of such behaviour" after a complaint is notified and investigated; s 68(3) of the Human Rights Act provides a defence if the employer has taken "*reasonably* practicable" steps. It is not known whether there is a difference between "practicable" and "reasonably practicable". In proceedings under the Human Rights Act, the defence is available only if those steps were in place before the harassment occurred; under the Employment Relations Act, the employer is liable for harassment by others only after the harassment has occurred, a complaint has been made and no steps to prevent repetition have been taken.
25. At 14–15.

Other protections would also be welcome. The "hate speech" provisions in the Human Rights Act[26] should be updated to include express protection against harmful speech based on sexual orientation, gender identity, gender expression and sex characteristics. In Canada, criminal hate speech laws exist in respect of comments on sex (gender), sexual orientation, gender expression and gender identity. New South Wales and the ACT have criminal hate speech laws for the protected characteristics of sexual orientation, gender identity and intersex status.[27]

The Ministry of Justice has undertaken some work to reform the Act in both respects but, as noted, it appears to have stalled. At the time of writing, no plans for amendment have been released. Given the ease with which irresponsible and hateful commentary can be published online, and the discrimination faced by the trans and non-binary community, this project should be given urgency.

Age discrimination under COVID-19: is there a defence?

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During the COVID-19 pandemic, employers had to implement a number of measures to ensure the safety of their employees. For many employers, this also involved considering whether different or more restrictive measures were needed to protect certain employees who were more vulnerable to COVID-19 due to their age. Various competing obligations under the Government's COVID-19 directives, the Health and Safety at Work Act 2015 (HSWA), the Human Rights Act 1993 (HRA) and the Employment Relations Act 2000 (ERA) placed these employers in a difficult situation. In effect, these employers were required to balance their health and safety obligations against their express obligation not to discriminate against employees based on their age. In seeking to balance these obligations, many employers have sought advice on whether measures aimed at protecting more vulnerable staff amount to unlawful age discrimination. Unfortunately, the answers to these questions have often been unclear, and claims against employers for age discrimination during and post the COVID-19 lockdown may well arise. This article provides a high-level overview of the restrictions under the Government's COVID-19 Alert Level system, a summary of New Zealand's legislative age discrimination framework and considers potential defences employers could raise in relation to COVID-19 age discrimination claims. While there appears to be some arguable defences available under New Zealand's age discrimination legislation, there is still significant uncertainty regarding whether any such claims (and defences) are likely to succeed.

Government directives for personal movement and workplaces under COVID-19

During the peak of the COVID-19 pandemic in New Zealand in March, April and May 2020, the Government implemented a four stage Alert Level system. Under each Alert Level, the Government issued directives to the public under a variety of instruments including Health Act Orders and orders under the new COVID-19 Public Health Response Act 2020 (Government COVID-19 directives).

Under the Alert Level system, the Government imposed varying levels of restriction on the personal movements of the public, with the restrictions easing as Alert Levels were lowered.[1] Under Alert Level 4, people were instructed to stay home other than for essential personal movements.[2] In Alert Level 3 people were instructed to stay home but could access a slightly greater level of services (such as non contact takeaways).[3] People could leave home in a safe way under Alert Level 2,[4] and there are no restrictions on personal movement under Alert Level 1.

26. Section 61. See also the Harmful Digital Communications Act 2015, which is directed to harmful comments made online.
27. Human Rights Commission *Kōrero Whakamauāhara: Hate Speech* (December 2019) at 43.
1. New Zealand Government "New Zealand COVID-19 Alert Levels" (5 June 2020) Unite against COVID-19 <https://covid19.govt.nz>.
2. Health Act 1956 Order (3 April 2020), s 70(1)(f) [Health Act Order].
3. Health Act (COVID-19 Alert Level 3) Order 2020.
4. Covid-19 Public Health Response (Alert Level 2) Order 2020.

Early in the COVID-19 pandemic, it was identified (including by the World Health Organization) that, although all age groups are at risk of contracting COVID-19, people over the age of 60 or with compromised immune systems face significant risk of developing severe illness due to COVID-19.[5] In light of this, the Government also issued a directive shortly before entering Alert Level 4, asking that people over 70 years of age, or with compromised immunity or underlying respiratory conditions, stay at home as much as they can.[6] This directive imposed tighter restrictions on those over 70 or with compromised immune systems than applied to the general public under Alert Level 4. These restrictions were relaxed slightly under Alert Level 3. Under both Alert Levels 3 and 4, these people were encouraged to take additional precautions when leaving their homes.

The Government also placed varying levels of restriction on whether workplaces could open under each Alert Level, though these restrictions were set out in varying levels of detail under the relevant Health Act Orders for Alert Levels 3 and 4 and the COVID-19 Public Health Response (Alert Level 2) Order.[7] In general people were required or recommended to work from home unless it was not possible. In summary, under Alert Level 4, only essential services workplaces could open provided that the workers could not work from home and the workplace could operate safely. Under Alert Level 3, workplaces could open if the workers could not work from home, customers were not allowed on premises, businesses operated contactless trade with customers, and the workplaces could operate safely. Businesses could open under Alert Level 2 provided they could operate safely.

As mentioned, under Alert Levels 2, 3 and 4, workplaces could only open if they could "operate safely". "Operating safely" required the workplace to comply with the relevant Alert Level settings, meet the appropriate public health requirements for their workplace and workers (such as ensuring physical distancing and implementing contact tracing), and fulfil all other health and safety obligations (including the employer's obligations as a person conducting a business or undertaking (PCBU) under the HSWA).

Under the HSWA, PCBUs have the primary responsibility for the health and safety of workers and others influenced by its work. PCBUs must ensure, so far as is reasonably practicable, that the health and safety of workers and others is not put at risk from work carried out as part of the conduct of the business or undertaking.[8] This means that risks arising from work must be eliminated, or minimised, so far as reasonably practicable. In order to determine what is reasonably practicable, a PCBU must first consider what is possible in the circumstances to ensure health and safety. It must then consider which of these possible actions is reasonable to do in the circumstances.

Under Alert Levels 2, 3 and 4, people at higher-risk of severe illness from COVID-19, including those over the age of 70 and those with underlying medical conditions, were allowed to work in the usual workplace if they could not work from home and it was discussed and agreed with their employer that they could do so safely.[9] If it was not safe for these employees to work, the employer and employee needed to agree what leave and pay arrangements would apply.

The Minister for Seniors, Hon Tracey Martin, clarified at the shift into Alert Level 3 that:[10]

> Over-70s and other higher-risk groups have the same rights as everyone else to go to work, to exercise and to access essential services like supermarkets and banks. It's just that we're asking them to be especially careful.

The Minister noted that, in any case, "No workplaces should be operating unless they are safely managing COVID risks, so there is no reason to exclude workers on the basis of age or disability."

The details and practical implications of these Government directives and guidelines were often unclear as the country moved down the Alert Level system. In light of these Government restrictions on personal movements and workplaces, employers were required to consider whether they were allowed to operate, and what measures they needed to put in place to keep their employees and other workers safe. In particular, employers may have been required to give special consideration to whether additional, or different, measures needed to be implemented in relation to employees that are more vulnerable to COVID-19 due to their age. Measures that employers implemented included increased physical distancing or protective equipment, but in some cases may have included restricting whether employees of a certain age were allowed to return to the workplace, or carry out their full duties, if it appeared unsafe for them to do so under the relevant Alert Level.

However, employees subject to these age-based measures may claim age discrimination if they perceive the measures to be unfair and unjustified by the age-related increased risk of severe COVID-19 illness.

New Zealand's age discrimination legal framework

In general, if a person is over the age of 16 and suitably qualified for a job, an employer cannot discriminate against

5. World Health Organisation Western Pacific "COVID-19: vulnerable and high risk groups" <www.who.int>.
6. This directive was issued by Prime Minister Ardern on 21 March 2020 and was documented on the government COVID-19 website during Alert Level 4. Right Honourable Jacinda Ardern "Nation steps up to COVID-19 Alert Level 2" (press release, 21 March 2020).
7. Health Act Order (25 March 2020), s 70(1)(m); Health Act (COVID-19 Alert Level 3) Order; and Covid-19 Public Health Response (Alert Level 2) Order.
8. Health and Safety at Work Act 2015, s 36.
9. New Zealand Government "Guidance at Alert Level 3 for people at risk of severe illness because of age and/or existing and underlying health conditions" https://covid19.govt.nz>.
10. Right Honourable Tracey Martin "Level 3 guidance for Seniors available" (press release, 26 April 2020).

the person based on their age. This prohibition applies in relation to recruitment and selection for a role, pay, conditions of employment, training, promotion and the termination of employment. There are several exceptions to the prohibition on age discrimination in employment, but these are clearly defined in both the HRA and ERA.[11]

Both the HRA and the ERA prohibit discrimination in employment on the ground of age. The provisions in relation to age discrimination in employment in both Acts are largely parallel, but not identical. The main distinction between the two Acts is that the HRA also applies to discrimination against prospective employees in hiring practices, whereas the ERA only applies to discrimination against employees already in employment relationships.

The definition of age as a prohibited ground of discrimination has a lower limit of 16 years.[12] There was originally an upper age limit of 65 but this was removed from the HRA in 1999, thereby making compulsory retirement ages unlawful in New Zealand.

Employees can pursue claims for age discrimination in employment by either raising a personal grievance in the Employment Relations Authority under s 103 of the ERA for breach of s 104(1), or by making a complaint to the Human Rights Commission for a breach of s 22(1) of the HRA. An employee must decide which procedure to use early on in the process and cannot pursue a claim under both processes.

The key case regarding age discrimination in New Zealand is *Air New Zealand Ltd v McAlister*.[13] This case concerned a claim by Mr McAlister, a pilot-in-command and flight instructor, that Air New Zealand had unlawfully discriminated against him in his employment on the grounds of age. At the time, the United States Federal Aviation Administration (FAA) imposed a rule prohibiting pilots 60 years or older from holding the position of pilot-in-command. Air New Zealand demoted Mr McAlister when he turned 60 because a substantial part of his duties involved flying in the United States airspace, which was prohibited under the FAA rule.

The Supreme Court ultimately decided that although Air New Zealand's actions were in breach of the prohibition on age discrimination under the ERA, there was a defence under s 30 of the HRA as age was shown to be a genuine occupational qualification for the role. The Supreme Court remitted the case to the Employment Court to decide whether Air New Zealand, nevertheless, had fulfilled the requirement under s 35 of the HRA to show that it was reasonably unable to adjust its activities to accommodate the restriction placed on Mr McAlister by the FAA rule.

The Supreme Court in *McAlister* provided a detailed explanation of the prohibitions on age discrimination in employment contained in the ERA and HRA, including the subtle differences between the provisions which had led to conflicting approaches taken in the Employment Court and Court of Appeal.[14]

ERA, s 104(1)

The ERA prohibits age discrimination in employment under s 104(1). In summary:[15]

- Section 104(1)(a) prevents inequality in terms and conditions of employment by reasons of age when the employee is compared with employees with the same qualifications and experience.
- Section 104(1)(b) prevents dismissal or detriment to employees (including anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction), when other employees employed on work of the same description would not be dismissed or subjected to such detriment. In effect, this section ensures equality of treatment among those employed in similar work where there is no question of qualification.
- Section 104(1)(c) prohibits termination of employment by reason of age, therefore making compulsory retirement ages unlawful.

HRA, s 22(1)

The HRA contains similar, but not identical, prohibitions on age discrimination in employment under s 22(1). In summary:[16]

- Section 22(1)(a) prohibits refusing or omitting to employ applicants on work for which they are qualified of a description that is available.
- Section 22(1)(b) prohibits offering a qualified applicant or employee work on less favourable terms and conditions than are made available to those of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description. In other words, it affects the ability to offer diminished terms for work for which the employee is qualified.
- Section 22(1)(c) prohibits terminating the employment of an employee or subjecting an employee to any detriment in circumstances where others employed on work of the same description would not be terminated or subjected to detriment.
- Section 22(1)(d) prohibits retiring a qualified employee or requiring or causing them to retire or resign.

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11. Human Rights Act 1993, ss 24–35; Employment Relations Act 2000, s 106(1).
12. Human Rights Act, s 21(1)(i).
13. *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153.
14. At [22]–[32].
15. At [26].
16. At [30].

Section 30 — Genuine Occupational Qualification Exception

Section 30(1) of the HRA provides an exception to certain breaches of the prohibition on age discrimination in employment where the employer can show that age is a genuine occupational qualification for that position or employment, whether for reasons of safety or for any other reason. Section 30 is expressly incorporated as an exception to discrimination under the ERA in s 106(1)(h).

The Supreme Court in *McAlister* clarified that this exception applies to some, but not all, forms of age discrimination in employment under the ERA and HRA. In particular, the defence applies to s 104(1)(a) and 104(1)(c) of the ERA, and s 22(1)(a) and 22(1)(d) of the HRA, but does not apply to s 104(1)(b) or s 22(1)(b) or 22(1)(c).[17] This is clear on the wording of the provisions, but the Employment Court and Court of Appeal had differing view on whether it was intended and logical for the genuine occupational qualification defence to apply to some but not all forms of age discrimination.

The Employment Court in *McAlister* set out the requirements for the genuine occupational qualification exception:[18]

(a) the policy relied on was genuinely imposed in good faith and in the belief that it was necessary for the performance of the position;

(b) objectively viewed, the age limit was a necessary qualification for the position; and

(c) any age qualification was for safety or any other reason that is genuine and related to the occupation.

Section 35 — General qualification on exceptions

However, s 35 of the HRA places a general qualification on the exceptions to discrimination, including the genuine occupational qualified exception provided by s 30 of the HRA and s 106(1)(g) of the ERA. The s 35 general qualification means that an employer cannot rely on the genuine occupational qualification exception if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.

In practice, this means that even if age is a genuine occupational qualification for a role, the employer must show that it was not reasonably able to adjust its activities so that the duties of the employee subject to discrimination could be performed by someone else. An employer must satisfy both ss 30 and 35 of the HRA in order to have a defence to actions that would otherwise be discrimination under certain sections of the ERA and HRA.

HRA, s 21B — Acts or omissions authorised or required by an enactment or otherwise by law

In addition to several specific exceptions to age discrimination in employment, s 21B of the HRA provides an overarching defence that an act or omission is not unlawful discrimination under the HRA if that act or omission "is authorised or required by an enactment or otherwise by law".[19] In other words, the HRA should be read in conjunction with other legislation and if another enactment authorises or requires different treatment based on age, this would prevail over the HRA prohibition on discrimination.

It is notable that the ERA does not include an equivalent to s 21B. It is unclear whether the exclusion of this overriding exception from the ERA was a mere oversight or an intentional decision. Nothing in legislative history of the ERA discusses this exclusion, but it appears to be at odds with the general desire for conformity between the ERA and HRA in relation to discrimination in employment and the exceptions to it.[20]

Possible defences to COVID-19 age discrimination claims

Despite the Government restrictions on personal movements and workplaces, and the various measures implemented to support employment throughout the COVID-19 pandemic such as the Wage Subsidy, the employment laws of New Zealand remained in full force and unaltered under the Alert Level system. This created confusion when the measures that employers were required to implement, in line with Government restrictions and other legal obligations such as under the HSWA, seemed to conflict with New Zealand employment law. This resulted in several areas of legal uncertainty in relation to employment during the COVID-19 pandemic that are likely to be subject to claims and clarified by the Courts in the following months. One of these areas of legal uncertainty is whether measures taken to protect employees that are more vulnerable to COVID-19 due to their age amount to unlawful age discrimination.

While it is arguable that acts or omissions by employers that treated older employees differently on the basis of their age-related vulnerability to COVID-19 constitute unlawful age discrimination under both the HRA and the ERA, there also appears to be an arguable defence to age discrimination under s 21B of the HRA.

Section 30 — Genuine Occupational Qualification

The s 30 genuine occupational qualification exception appears unlikely to justify measures implemented due to COVID-19 that would otherwise amount to age discrimination. Although age has been identified as a factor increasing vulnerability

17. At [25].
18. *McAlister v Air New Zealand Ltd* (2006) 4 NZELR 78 at [116].
19. Human Rights Act, s 21B.
20. (8 August 2000) 586 NZPD 29.

to COVID-19, it seems unlikely that this increased vulnerability would make age (such as being under 70) an objectively necessary qualification for a position when an age limit was not necessary before COVID-19. It is also likely to be difficult to argue an objectively necessary age limit given the uncertainty in the early stages of the COVID-19 pandemic surrounding the health impacts and transmission of COVID-19, and the length and severity of the global pandemic. Even if the age limit was shown to be a genuine occupational qualification under COVID-19, in order to rely on this exception, an employer would also need to show under s 35 of the HRA that it could not, reasonably, have adjusted its activities so that another employee could carry out those duties to allow the employee to work safely.

Section 21B — acts authorised or required by an enactment or otherwise by law

An argument based on s 21B of the HRA appears to be more likely to successfully defend a claim of age discrimination due to measures implemented by employers during the COVID-19 pandemic. It is arguable that if an employer implemented measures to comply with the Government's COVID-19 directives and the employers health and safety obligations under the HSWA, these acts or omissions are implicitly "authorised or required by an enactment or otherwise by law" and therefore do not amount to unlawful discrimination under s 21B of the HRA.

As noted, under Alert Levels 2, 3 and 4, workplaces were only allowed to open if they could "operate safely". Therefore, in order to rely on s 21B, the employer would need to show that the potentially discriminatory measures were required in order to "operate safely" in accordance with the Government's COVID-19 Alert Level settings, public health requirements, and the employers health and safety requirements. This means that the s 21B defence is likely to be arguable only in a limited set of circumstances in which the nature of the work and workplace meant that the measures that the employer implemented to "operate safely" and keep other employees safe, were not sufficient to adequately minimise the risk to employees that are more vulnerable to COVID-19 due to their age, and this required the potentially discriminatory measures.

The employer would also need to show that the potentially discriminatory measures constituted reasonably practicable steps taken in order to ensure the health and safety of employees with age-related COVID-19 vulnerabilities, and thereby fulfil the employer's obligations under the HSWA. What amounts to reasonably practicable steps is likely to be determined with reference to the Government directives, and what actions other employers in the same industry had taken.

The employer should therefore be able to show that the measures were based on a principled analysis of the health and safety risks posed by COVID-19 and were not arbitrary or grounded in discriminatory justifications.

In addition, employees at greater risk to COVID-19 due to their age were allowed to return to the usual workplace during Alert Levels 2, 3 and 4, if they could not work from home, provided that it was agreed with their employer that they could do so safely. In order to rely on the s 21B defence, employers would also need to show that they could not agree to a way in which these vulnerable employees could safely return to the usual workplace work, such as by carrying out different duties or implementing additional hygiene measures.

A further legal difficulty with arguing a defence under s 21B is that, as noted, the ERA does not explicitly incorporate s 21B of the HRA or an equivalent section. It is unclear whether this exclusion was intentional or parliamentary oversight. The implication is that it is unclear whether an employer could argue a s 21B defence to a claim for age discrimination under the ERA, or whether this defence would only be available to a claim under the HRA.

It is therefore foreseeable that an employer could use s 21B to defend a claim for age discrimination based on measures it implemented during COVID-19 to keep vulnerable employees safe. However, that defence is only likely to succeed in a specific set of circumstances in which the employer can show that the potentially discriminatory measures were implicitly authorised or required by the Government's COVID-19 directives and HSWA requirements to keep employees safe. This currently untested legal issue is one we may see arise in claims in the near future and, due to the lack of clarity, is an area to watch keenly.

ERA and HRRT – some comparisons

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Attracted, or even seduced, by higher awards, a party might look to lodge a claim in the Human Rights Review Tribunal (HRRT) rather than the Employment Relations Authority (ERA).

Where jurisdictions overlap (claims for discrimination/harassment in employment, and to a lesser extent privacy), which is the preferred forum?

HRRT awards far exceed ERA awards in similar cases. Given choice of forum, does one follow the money?

That was certainly the landscape in 2015 after the HRRT's $168,000 award in *Hammond v Credit Union Baywide*.[1] Only a year later, a $120,000 award was made[2] resulting from harassment during employment and breach of the surrounding settlement. That seemingly confirmed the appeal of the HRRT.

Speed was historically a substantial factor. That has changed, but to what extent?

Larger financial awards are not, however, the full story: their frequency and extent in the HRRT is not guaranteed; each case is fact dependent. There are other advantages and differences to be weighed. This article addresses some of those.

Subject matter of overlap

The limited area in which a claim can be brought, in either the HRRT or the ERA, is discrimination in employment based on sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinions, employment status, family status and sexual orientation.[3]

While the HRRT has exclusive jurisdiction to entertain claims under the Privacy Act 1993, cases in which that Act is considered and "indirectly" enforced in the ERA or Employment Court are also relatively common.[4]

Both ERA and the HRRT also have jurisdiction to consider the humiliation, loss of dignity, and injury to the feelings of a successful claimant. The wording of s 123(1)(c) of the Employment Relations Act 2000 equates with s 92M(1)(b) and (c) of the Human Rights Act 1993 and s 88(1)(b) and (c) of the Privacy Act.

To prevent any element of double dipping, s 79A of the Human Rights Act and s 112 of the Employment Relations Act require that once an employee has either made a complaint to the Human Rights Commission or filed a Statement of Problem in the ERA, they are barred from "changing horses"; the election as to jurisdiction is irrevocable.[5] That bar exists "in relation to the subject matter of complaint". Those are words of broad scope.[6] It is not merely the form of complaint but its substance. Issues of abuse of process might also arise if the subject matter of the second proceeding *could have been* addressed in the first. That may be avoided by taking, for instance, a claim against the employer in the ERA and against a wrongdoer individual in the HRRT.

Access and speed

In both jurisdictions, early resolution is prioritised, preferred and encouraged. Parties are put on notice of issues before filing proceedings. In the case of a personal grievance, the 90-day and three-year requirements apply.[7] In the HRRT the limitation period is governed by the Limitation Act 2010 (hence ordinarily six years).[8] Older claims can then be made in the HRRT rather than in the ERA.

Both also potentially engage mediation processes (the Human Rights Commission ordinarily refers parties to this forum; the ERA invariably will, unless parties have already attended).

In respect of Privacy Complaints, the Privacy Commissioner will investigate the complaint and in the words of the

1. *Hammond v Credit Union Baywide* [2015] NZHRRT 6.
2. *MacGregor v Craig* [2016] NZHRRT 6.
3. Human Rights Act 1993, s 21 and Employment Relations Act 2000, s 105.
4. See for example: *Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 37; *Campbell v Commissioner of Salford School* [2015] NZEmpC 122; *Waste Management NZ Ltd v Jones* [2020] NZEmpC 73; *Elisara v Allianz New Zealand Ltd* [2019] NZEmpC 123.
5. For example, *Handy v New Zealand Fire Service Commission (Strike-Out Application)* [2018] NZHRRT 27.
6. *Conference of the Methodist Church of New Zealand v Gray* [1996] 2 NZLR 554 (CA).
7. Employment Relations Act 2000, s 114.
8. Limitation Act 2010, s 11.

Commission: "The Privacy Act gives us the power, under s 76, to call a compulsory conference of the parties, in order to try to resolve the dispute."[9] How that occurs is case dependent.

After alternative dispute resolution (ADR) steps, a certificate of investigation will be issued and (absent resolution) HRRT proceedings can then be filed. In effect, these steps create some filter process. The applicable commissioner (Human Rights or Privacy[10]) must first investigate the claim. Specialist intervention at an early stage will no doubt assist parties in identifying key issues and claims, perhaps giving crucial early indications as to whether a claim is likely to be successful. While useful, as a timely exercise, it adds significant delays to placing a matter before the HRRT.

There is no equivalent "filter" in the ERA. Historically, such a filter did exist, including through union involvement.[11] Mediation is however a practical filter, with only about 20 per cent of cases advancing beyond mediation.

Broadly speaking, the process for each body is the same:

1) application filed (statement of problem — ERA; lodging of claim — HRRT);
2) directions conference/timetabling of matter for hearing or investigation;
3) hearing/investigation; and
4) issue of determination/decision.

When assessing speed, in recent years the ERA has been overall faster than the HRRT, sometimes by years. The ERA seeks to issue determinations after hearing within three months[12] and "without regard to technicalities".[13] Interestingly, the HRRT also has a similar provision.[14] It does not, however, have any stated time limit for issue of decisions.

Consider *Hammond*, where the salient events occurred in 2014, and the decision was issued two years later in 2016. As at 2019, delays from events to HRRT decision ranged from about three to seven years. As other examples:

Case [15]	Salient events	Hearing	Decision
[2019]NZHRRT 55	February 2015	26 and 27 March 2016	19 December 2019
[2019]NZHRRT 13	1 May 2012 and 7 October 2012	October 2014–February 2015	12 March 2019
[2019]NZHRRT 6	October 2015	September 2018	22 January 2019
[2020]NZHRRT 24	In or around end 2014/start 2015	December 2016 and July 2017	6 July 2020
[2020]NZHRRT 22	Mid 2015	March 2018	5 June 2020

Until 2018, the HRRT could only sit with the Chair presiding, which meant that only one panel could sit at any time. In 2018, the Human Rights Act was amended to allow Deputy Chairs of the HRRT to preside at hearings. With the appointment of five new Deputy Chairs in May 2019, wait times have substantially reduced.

Conversely, and whether attributed to COVID-19 or other administrative or resourcing issues (given significant delays existing even before COVID-19), wait times in the ERA have substantially increased. Determinations reserved for a year or more are not uncommon. Radio NZ has recently reported[16] from first full day of level 4 lockdown (March 25) to 28 July 2020, 160 cases were resolved. Over the same period last year, 265 were resolved. The Ministry of Business, Innovation and Employment (MBIE) told Radio NZ it had organised a "priority waiting list" to address the backlog.[17]

Delays and limitation periods are a factor to weigh.

Procedure: what rules apply?

As statutory bodies, each of the ERA and HRRT only has the powers vested by statute. While at a surface level those powers are similar, the mode of operation differs markedly.

Subject to natural justice and compliance with law,[18] there is almost complete discretion on the part of the ERA member in respect of *how* they undertake their function; each ERA member operates differently. What can be said is that usually the ERA leads questioning about what the member is interested in or sees as important. That can lead to different focus, or indeed disconnect, from what the parties see as their particular "problem".[19] The parties then question witnesses about what they see as the "real" issues. Hearing ("investigation") time can become extended as a result.

Conversely the HRRT Chair has powers to direct how matters proceed. The formality, and regular application or

9. Office of the Privacy Commissioner *Procedures Manual: Dispute Resolution and Investigations* (May 2019) at 49.
10. Similar also for the Health and Disability Commissioner (although outside the scope of this article).
11. For example, Industrial Relations Act 1973, s 117(3A) and Labour Relations Act 1987, s 218.
12. Employment Relations Act, s 174C: a provision ordinarily honoured in its breach with a small minority of all ERA determinations being issued within that time.
13. Employment Relations Act, s 157.
14. Human Rights Act, s 105.
15. *Director of Human Rights Proceedings v Katui Early Childhood Learning Centre Ltd* [2019] NZHRRT 55; *Director of Human Rights Proceedings v Slater* [2019] NZHRRT 13; *Godfrey v Harvey* [2019] NZHRRT 6; *Green v EIT* [2020] NZHRRT 24; *O'Hagan v Police* [2020] NZHRRT 22.
16. Harry Lock "Employment Relations Authority facing cases backlog" (Morning Report: 29 July 2020).
17. Above.
18. And limited other mandatory requirements: for example, Employment Relations Act, ss 157, 160(2A), and 173.
19. The Authority's statutory mandate.

recourse to the High Court Rules, is noted.[20] As a result, the HRRT's process is more highly structured and predictable than the ERA. A conventional order of hearing results and a greater level of formality applies. The proceedings are adversarial in form but the investigative approach is emphasised by the extent of the HRRT's questioning of witnesses. The course of hearing is more predictable and frequently shorter (so more cost effective). However, there may be trade-offs in additional cost by reason of procedural requirements (for example, discovery). Those may be compared:

ERA	HRRT
Hearings are before the member.	Hearings are before the panel (two members and either the Chairperson or Deputy — and in complex matters, both).
Public hearing, unless specifically directed otherwise.	Public hearing, unless specifically directed otherwise.
Power to call for evidence.	Power to call for evidence.
May consider such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.	May call for and take account of any relevant evidence whether or not it would be admissible in a court of law, but subject to that, is bound by the Evidence Act 2006.
Oral determination wherever possible (decision can be reserved). Decisions must be in writing and show the ERA's reasons for the decision, including relevant findings of fact, explanations and findings on relevant issues of law, and conclusions on matters or issues it considers require determination in order to dispose of the matter.	Decisions must be in writing and show the HRRT's reasons for the decision, including relevant findings of fact, explanations and findings on relevant issues of law, and conclusions on matters or issues it considers require determination in order to dispose of the matter.
Matter may be removed to the Employment Court or a question of law stated for Employment Court.	May remove proceedings to High Court or may state a case for the opinion of the High Court on any question of law arising in any proceedings before the HRRT.
Must act according to the substantial merits of the case, without regard to technicalities. In exercising its powers and functions, must act in accordance with the principles of natural justice, not act inconsistently with the law or employment agreements.	Must act according to the substantial merits of the case, without regard to technicalities. In exercising its powers and functions, must act in accordance with the principles of natural justice in a manner that is fair and reasonable (equity and good conscience).
Not recorded.	Hearings are invariably recorded/transcribed for purpose of appeals.
No power to order discovery[21] but power to call for evidence to similar effect.	HRRT will order discovery in terms of High Court Rules.[22]
Party dissatisfied with the decision of the ERA may challenge (appeal) to Employment Court, then to the Court of Appeal with leave on point of law.	Appeal of decision of HRRT to High Court, and with leave on point of law to Court of Appeal.

Financial awards

There is no statutory limit on financial awards in the ERA. Section 92Q of the Human Rights Act restricts monetary awards to $350,000 (the same as the District Court). Theoretically, awards of the ERA could outstrip those of the HRRT. This does not happen in practice.

The Employment Court has indicated that emotional harm compensation will rarely exceed $40,000, and even then, only in cases of high-level loss or damage. Though not prescribed by statute, the Employment Court (note: not the ERA) has pivoted towards a "banding" approach, broadly being:

- band 1 involving low-level loss/damage;
- band 2 involving mid-range loss/damage; and
- band 3 involving high-level loss/damage.

As to quantum, in 2018 case *Richora Group Ltd v Cheng*,[23] Chief Judge Inglis approached the three bands across the spectrum of cases as $0–$10,000 (band 1); $10,000–$40,000 (band 2); and over $40,000 (band 3).

Turning to the HRRT, there is no apparent distinction in emotional harm awards made under the Human Rights Act compared to those under the Privacy Act. For present purposes, those are treated the same.

The infamous "cake case" (*Hammond*), emphasised the yawning chasm between what *could* have been ordered in the ERA and what *was* awarded in the HRRT. Briefly, a former employee was subject to treatment from her employer that the HRRT referred to as "shameful". For the damage to her privacy, the former employee was awarded $98,000 in compensation for humiliation, loss of dignity and injury to feelings,[24] plus damages, amounting to over $168,000 in total.

20. For instance as to discovery, and striking out.
21. See *New Zealand Baking Trades IUOW (Industrial Union of Workers) v Foodtown Supermarkets Ltd* [1992] 3 ERNZ 305 (EmpC).
22. See *Deeming v Whangarei District Council* [2015] NZHRRT 37. See also *Hood v American Express International (NZ) Inc* [2015] NZHRRT 1 at [5]-[10] and *Boyce v Westpac New Zealand Ltd (Non-Party Discovery)* [2015] NZHRRT 31 at [9].
23. *Richora Group Ltd v Cheng* [2018] NZEmpC 113.
24. Privacy Act 1993, s 66.

An even larger emotional harm award was made in *MacGregor v Craig*.[25] The HRRT found against Mr Craig, and awarded Ms MacGregor $120,000 for humiliation, loss of dignity and injury to feelings. In contrast, the highest equivalent award made since the passing of the Employment Relations Act is $50,000;[26] half that awarded to Ms MacGregor.

A recent case involving breach of an Accident Compensation Corporation (ACC) claimant's right to access his file (which had been destroyed by ACC in the ordinary course) resulted in an award of $50,000 for interference with his privacy.[27]

The real monetary value of awards of the ERA has been raised by practitioners as far back as 2014. At the 2014 Employment Law Conference, a paper presented by Kathryn Beck[28] and Hamish Kynaston noted that compensatory awards made by the Court have remained at stagnant levels for the last 20 years, despite the inflationary effect which might otherwise have been expected to increase them.

In 2015, the Court expressed sympathy with the view that the quantum of compensatory awards had fallen woefully behind in both the ERA and the Employment Court.[29]

There have been modest increases since. The 2016 MBIE statistics for awards for injury to feelings indicated $15,000 or greater awards only 13 times; most awards were $10,000-$10,999. Equivalent 2019 data showed 51 awards of $15,000 or more.

Clearly, though, these are still far from the largest HRRT awards.

Chief Judge Inglis and Liz Coats made the point at the 2016 Employment Law Conference in their paper "Compensation for Non-Monetary Loss — Fickle or Flexible?" that harmonising the awards across jurisdictions is desirable (and looked further to other areas of law that consider non-pecuniary loss).[30]

The impact of the new Privacy Act 2020 (and broader remedies including fines for breach of that Act) may also come into play here.

Costs as a barrier?

Legal cost is often raised as an access to justice issue. However, as raised by Peter Churchman QC[31] (at the 2016 NZLS Employment Law Conference), "any suggestion that lawyers should do more work for less or free seems unrealistic".

Seemingly to address any access to justice issue that could arise, the HRRT is disinclined to order costs against a plaintiff, even where entirely unsuccessful, and having put the defendant to substantial costs. In doing so, the HRRT appears intent on accessibility to hear case complaints (note that despite the above, a tariff is set on costs at $3,750). Consider Louisa Wall's case:[32]

> There is also the principle of access to justice as recognised in *Andrews* at [57]. It is a principle of some significance in the costs context. It is particularly important that the Tribunal recognise that the risk of having to pay the legal costs of the opposing side (or a contribution to those costs) if one loses and the uncertainty at the outset of the proceedings as to how large those costs will be are likely to be a barrier to the bringing of proceedings, or at the very least, to have a significant chilling effect.

No costs award was made in this case (which featured an allegedly racist cartoon), despite the successful defendants seeking $45,000 as a contribution to their actual costs, amounting to a significant $155,839.89.

The HRRT's discretion to award costs remains largely unfettered.[33] The HRRT considers that it should not, by awarding or withholding costs, discourage self-represented litigants from bringing or defending proceedings. Conversely, it ordinarily awards costs against an unsuccessful defendant.

A counter argument is that *defendants* also have human and other legitimate rights, including to not have the powers of the state used against them (save for appropriate cases) and to be adequately compensated as to costs where that occurs. Access to "justice" properly cuts both ways.

Contrast that to the ERA where (despite recent suggestions of moving to a "no costs" regime[34]) costs generally follow the event (the daily tariff being $4,500).

That the Director of Human Rights may elect to represent a complainant, funded by the taxpayer, is an additional element completely absent from the ERA regime. That can go further to make the HRRT a more favoured forum.

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25. *MacGregor v Craig*, above n 2. The proceedings were, in form, about breach of the previous confidential settlement of the complaint to the Human Rights Commission about the underlying sexual harassment complaint.
26. *Waugh v Commissioner of Police* [2004] 1 ERNZ 450 (EmpC).
27. *Vivash v Accident Compensation Corp* [2020] NZHRRT 16.
28. As she then was. Kathryn Beck and Hamish Kynaston "Remedies" (paper presented to New Zealand Law Society 10th Employment Law Conference, October 2014).
29. *Hall v Dionex Pty Ltd* [2015] NZEmpC 29.
30. Christina Inglis and Liz Coats "Compensation for Non-Monetary Loss — Fickle or Flexible?" (paper presented to New Zealand Law Society Employment Law Conference, October 2016).
31. As he then was.
32. *Wall v Fairfax New Zealand Ltd (Costs)* [2017] NZHRRT 28 at [9].
33. *Herron v Spiers Group Ltd* (2008) 8 HRNZ 669 (HC) at [14].
34. See Helen Winkelmann "Access to Justice — Who needs lawyers?" (2014) 13 Otago LR 229; or more recently Forrest Miller "Barriers to participation in employment litigation: what might make a difference and would it work?" (paper presented to AUT and Victoria University Symposium, Wellington, 22 May 2019).

For completeness, there are occasions when the HRRT does award costs against an unsuccessful and unreasonable plaintiff.[35]

Remedies?

There may be a broader range of remedies for a dismissed employee in the ERA. Reinstatement is a specified remedy. Section 123(1)(c) of the Employment Relations Act is non-exhaustive in its scope; compensation (money) may be available for other losses.

Conversely reinstatement is not specified as a remedy in the HRRT. The HRRT can order "any other relief [it] thinks fit"[36] and it is arguable whether that might allow reinstatement or specific performance.

It may be possible to bring separate complaints before each of the HRRT and ERA,[37] maximising benefits of each. However, that kind of strategy would involve significant duplication and higher costs, as well as dancing along, or around, the lines of jurisdictional election.[38]

Summary

Different answers for the same case, depending on choice of jurisdiction, is far from ideal. Where there is a specialist and exclusive[39] employment jurisdiction, incentivising claims to be brought elsewhere, by markedly different outcomes, is questionable as a matter of policy. Consistency of outcome is clearly desirable, as is speedy resolution. If parallel structures are to remain, then alignment (whether by legislation or practice) is appropriate. Until then, careful weighing of the pros and cons, so as to understand and inform elections, is required.

Employment relations policies in a Covid-dominated election

Michael Leggat, Barrister and Solicitor, Wellington

With the Government's management of the Covid-19 crisis, opposition parties' alternatives, and each political party's plans for managing the economy over the next three years-or-so front and central, one wonders what other policy areas might gain traction in the run-up to the General Election on October 17.

Even the staple battleground areas of housing, health (aside from Covid) and education seem to be attracting little debate at the time of writing. It appears unlikely that employment relations (or workplace relations as it seems increasingly to be known) will feature prominently in the Election. Of course, wage subsidies and other support for employers and plans for training and for growing the economy to create jobs are and will remain very prominent. But, as yet, little has been said about changes in employment relations policy or developments under existing legislation.

Both National and Labour are promising detailed policy on workplace relations during the campaign. Still, for the purposes of this article, some helpful information is available from party websites and some of the party spokespersons have been helpful in responding to specific questions.

The last three years

The Labour Party's workplace relations policy at the 2017 General Election promised many specific changes to legislation — some to be implemented within its first 100 days in office, with a second tier to be introduced within its first 12 months — as well as "investigating" other measures.[1]

35. See *Alex Kapiarumala v New Zealand Catholic Bishops Conference (Costs)* [2018] NZHRRT 24; and *Apostolakis v Attorney-General No 3 (Costs)* [2019] NZHRRT 11.
36. Human Rights Act 1993, s 92I(3)(h).
37. See *Hendry v Transportation Auckland Corp Ltd* [2019] NZERA 525 where Mr Hendry was successful in the HRRT in respect of a privacy breach and latterly successful in the ERA in respect of an unjustified disadvantage claim.
38. Human Rights Act, s 79A and Employment Relations Act, s 112.
39. Employment Relations Act, s 161(1).
1. Michael Leggat "Employment relations at the polls: a look at the parties' policies in the run-up to the 2017 General Election" [2017] ELB 80.

By the end of 2018, the Employment Relations Amendment Act 2014, making multiple amendments to the Employment Relations Act 2000, had been enacted.[2] In many cases the changes simply reversed amendments made by the previous National-led government relating to matters such as union access to the workplace, multi-employer collective bargaining, the so-called 30-day rule for new employees, specified pay deductions for partial strike action, small employer exemptions from Pt 6A, rest and meal breaks, reinstatement as the "primary" remedy for unjustifiable dismissal and trial periods. The last-mentioned change was, of course, only partially effected, with New Zealand First securing continued availability of trial period provisions for employers of fewer than 20 employees.

But Labour also said in 2017 that, within its first 12 months, it would introduce "statutory support" and rights for "dependent contractors", including the right to organise and bargain collectively. And it said it would explore (without specifying any policy outcome) consultation on improving minimum redundancy protection for workers and measures that might improve job security for people in "precarious forms of employment" such as labour hire, casual, seasonal, contracted or sub-contracted workers.

But the biggest challenge always seemed likely to be, and has proved to be, fair pay agreements (FPAs). Very few specifics of this policy were provided going into the 2017 Election. Last year the Fair Pay Agreement Working Group reported back with a number of recommendations for a potential framework, some of which were only majority recommendations.[3] It is widely assumed that New Zealand First has also thwarted progress with FPAs, and both Labour and the Greens have confirmed this to be the case. However, even if New Zealand First is not part of the next government, there still seems much to be done before legislation could be introduced.

This term has also seen the Employment Relations (Triangular Employment) Amendment Bill 2018 of Kieran McAnulty enacted and come into force.

Labour Party

While he only became Minister for Workplace Relations and Safety in July, Andrew Little has a lengthy and deep background in employment relations as a union lawyer and national secretary.

Labour pulls no punches in saying that, while its ambition was to get FPA legislation into the House before the 2020 election, it became clear that the Government would not have sufficient support in the House to pass the legislation. But it maintains FPAs are still needed and says it will keep working towards achieving them.

On its promise to introduce statutory support and rights for dependent contractors, Labour points to the triangular employment relationships amendment which it says will assist workers employed through labour hire agencies and says it has commenced policy work on better protection for "dependent contractors". Some readers will remember that support for such contractors was a major issue under the Employment Relations Bill 2000, from which the newly-elected Clark Labour Government retreated. Desire to provide some protection to that sector is raised from time to time, but change seems as challenging as ever.

On its promised minimum protection for those made redundant, Labour says it has worked with partners on future of work issues and remains committed to measures that will assist a just transition. It hints that there may be more specifics in its manifesto.

Asked if it was no longer dependent on New Zealand First to pass legislation, a Labour-led government would remove the right of small employers to employ on 90-day trial periods, the Party responded that it was not able to discuss components of possible post-election coalition discussions.

Green Party

The Greens' website includes in its complete Party policy a full "Workforce Policy" including what it terms its vision, key principles and specific policy points.[4] Sitting within that, is the Party's election policy for workplace rights, which it says reflects the Party's priorities for negotiation after the election. It acknowledges that not every policy point in its broader policy is a priority for the election. Some simply reflect the Party's philosophical perspective and long-term goals, rather than specific changes to be progressed during the next term.

The Greens say they will progress FPA legislation, adding that it is no secret that competing priorities among the three parties in the current government has prevented consensus being found to date. The Party endorses having a body empowered to impose binding FPAs in line with the Council of Trade Unions' *Framework for Fairness*.[5]

Like Labour, the Greens say it will improve redundancy processes. But it goes further and wants to provide a minimum of one month's full pay for people made redundant. It says it would be "open" to a government rebate for smaller employers.

The Greens say it would "restore" the right to strike for social and political reasons and to demonstrate solidarity with other industrial action.

Working people would be in for enhanced leave entitlements under Green's policy. Its vision includes a commitment to 10 days of employer-funded sick leave (which,

2. Michael Leggat "Discussed at some length in Employment Relations Amendment Bill 2018 ... some parts new, quite a bit old" [2018] ELB 24.
3. See *Employment Law Bulletin* [2019] ELB No 2.
4. Greens "Workforce Policy" <www.greens.org.nz>.
5. New Zealand Council of Trade Unions Fair Pay Agreements — A Framework for Fairness (October 2019).

reportedly, some business leaders see as inevitable[6]), a progressive shift to five weeks' annual leave, and an additional public holiday between Queen's Birthday and Labour Day, with *Matariki* targeted.

National Party

National's spokesperson on Workplace Relations and Safety, Dan Bidois, was only elected to Parliament in 2018 following the Northcote by-election. He was immediately pronounced as associate spokesperson and in July 2019 became the Party's spokesperson in this area.

National's election policy is due shortly, but it has assisted with some detail. It stresses flexibility and promoting workplace policy with a particular focus on making employment law easier for small businesses to understand.

Dan Bidois says National would reverse the 2018 amendments set out above — it seems *in toto*.

National does not support fair pay agreements, believing they will increase costs for businesses and reduce job creation.

Act Party

Enquiries to the Act Party had not resulted in any response at the time of writing. However, its Policies section on its website contains some interesting excerpts.[7]

Its policy for small and medium business growth includes reintroducing 90-day trial periods for all new employment relationships (ie, not limited to employers of fewer than 20).

Its policy refers to the "Employment Act (1994)" and laments that small businesses find the personal grievance process cumbersome, costly and open to misuse by some employees. Act says it will shorten the personal grievance process and ensure that easily understood information on personal grievance responsibilities and processes under that Act is readily available to SMEs.

An interesting feature of Act's welfare policy would be the introduction of employment insurance under which 0.55 per cent of tax paid by an employee will be ring-fenced and be available to the employee on loss of employment. The policy, Act says, would be fairer because workers would receive in proportion to what they pay in and it would remove the stigma of collecting a benefit following loss of work "through no fault of their own" (which implies it would only be available for no-fault dismissals such as redundancy).

New Zealand First

New Zealand First's website contains no policy on employment relations, and enquiries of the Party had not met with any response at the time of writing.

Concluding thoughts

More detailed policies are promised by the two major parties in the run-up to the election. It can be expected that any parties' workplace relations policies will be presented in the context of being the best policies for economic growth and the betterment of the "Team of five million" as part of an overall response to Covid-19. It is suggested FPAs, minimum wage adjustments and residual health and safety at work issues are the most likely topics to gain traction in election debates.

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6. Rob Stock "Increasing sick leave to 10 days a year a matter of 'when, not if' employers say" (20 August 2020) Stuff <www.stuff.co.nz>.
7. Act "Policies" <www.act.org.nz>.

Q and A

Saunoamaali'i Karanina Sumeo

Tell us about your childhood in Samoa, and making the transition to living in New Zealand at a young age?

I grew up in a multi-generational, multi-household, extended family setting on our land in Vailima, Samoa. Our land was at the foot of Mt Vaea with a running stream on one border; a stream where we played and washed when the water supply was turned off. Collectively we grew crops, raised animals, prepared meals and ate. The few in paid-work paid for everyone. We had home births, built our own homes, buried kin on our land and went to church (where I learned Roman numerals and how to sew). Education — formal, cultural, and spiritual were all valued. Teachers, preachers and a journalist were a part of my family. Success, presentation and good relations with others (va) were expected. This formed my idea of aiga (family), self-reliance, identity, responsibility, duty and belonging. We bartered with neighbours. No TV just one phone. Radio was our main source of connection beyond the village.

As a child, adjusting to New Zealand was a spiritual-cultural-physical-psychological journey. We did not know the names of our neighbours, nor exchanged food or invited each other to eat. Fewer cousins. From running in bushes, the stream and gathering food on the mountainside, to living in a fenced space with neighbouring houses within arm's reach. The upside was my discovery of peaches — I actually saw a fruit on a tree and ate it — it was on the neighbour's property, but I thought it was okay. I discovered a thing called a washing machine, oven, a place called "playground", and we had our own TV. My childhood was spent learning English, adjusting, navigating.

Can you tell us about your title, Saunoamaali'i and its meaning?

The name translates to talking with chiefs. It comes from my maternal grandmother's village and her people. My aunties and uncles asked me to take it and assume the associated customary duties and leadership responsibilities to the aiga on my grandmother's behalf, even though I live overseas. My grandmother raised me until she died. I was the only female among the 50 odd relatives from Samoa and around the world bestowed a title by the village.

The significance is multifold. The titles forever tie descendants to the village and branches of their aiga who live there, and through services (tautua). For those who live outside Samoa like me, service often takes the form of remittances to support family and village projects. In foreign lands, Samoans refer to titleholders by their chiefly title to honour and respect our customary connections, elders, language, identity, leadership, and to connect as Samoans. In simply voicing the name we acknowledge and bring our past, present and future into the room.

You first obtained a degree in chemistry from Auckland University before going on to get a masters and PhD. What steered your direction of study?

While working as an industrial chemist, I came across an article about a toddler who died as a result of child abuse. I had never heard of "child abuse" or "social work" before. It changed my life. I left science and studied social work the next year. I transitioned from dealing in formulas, chemicals and numbers to learning how to have conversations about feminism, institutional racism, human rights, colonisation, systemic oppression and children's rights. I developed a deep sense of duty for social injustice.

Later while working as a social worker, it became clear to me that there would never be enough ambulances. Similarly, love and forgiveness on their own would never stop abuse, exploitation, manipulation and social injustice. I then started a Master's degree in social policy. My thesis looked at statutory and customary ways used to address child abuse in Samoa. I developed a healthy critique of culture, law, religion and the state through that journey.

The idea of the PhD came while I was doing some work for an international women's organisation on the impact of the global financial crisis and on Pacific women, and women's rights to land. Through that journey, I was fortunate to have been exposed to great thinkers from business, civil society, local government and the public sector. Seeing local problems at a global level provides an alternative connection and an alternative perspective. Inequality, political oppression, poverty, indigenous rights, family violence, racism and environmental issues are everywhere.

My science background helped provide a systematic approach to hypothesising, research, critique, and writing. My studies, of course, inform the way I engage with different issues, communities and their interests, how I review "evidence" and from whose perspective, my critique of policy and legislation, and who and how they are developed. Asking the right question at the right time to the right person is useful.

What impact have you seen your success — both academically and in your career — have on those you influence, both here and in Samoa?

My contribution to influencing any positive change has always been alongside a social cause or movement with others; be it in child protection, youth offending, gender equality, rainbow community interests or addressing bias and discrimination in employment. Raising averages is never enough.

I always try to use my skills and influence to carve spaces in dominant discourses and decision-making tables for marginalised voices. Constantly translating and reinterpreting between those with power and those with less to help influence service delivery, policy design and decisions to better serve those already behind and to whom we have a duty to do better.

I contributed to the creation of "Vaaifetu", a practice guide for statutory social work intervention with Pacific families in New Zealand. This generated interest from organisations outside New Zealand who had Pacific people using their services. I advocated successfully to add "gender diverse" as an option into personal details for children and their support people who came to the notice of New Zealand's child protection system. This was achieved before any other state department did it. The Human Rights Commission's campaign to end pay secrecy and close the ethnic pay gap (much bigger than the gender pay gap) has led to women of colour approaching me to say that as a result, they too found the courage to ask for pay rises. Fronting up on mainstream TV and radio stations on the need to protect the employment rights and safety of workers deemed "essential" yet paid at the minimum wage during the COVID-19 crisis prompted new approaches to me as a commissioner.

You are now the Equal Employment Opportunities Commissioner at the Human Rights Commission. What challenges attracted you to the role?

The sense of duty for social justice was what attracted me to the EEO role. I felt my personal and professional journey could help the Commission to get closer to some communities that were not known to call on the Commission but were not exactly "living the dream" so to speak.

At the time, New Zealand was said to have a "rock star" economy, but I lived in a neighbourhood that lived another life. Unemployment rates for Māori, Pacific and youth were much higher, and the underutilisation rates, especially for Māori and Pacific, were close to 20 per cent. Child poverty was an embarrassment for a country that prides itself on fairness, equality, dignity, safety and humanity.

As a mother, Pacific person, migrant and someone who has benefitted from opportunities others did not have, I believed in the Commission's purpose and wanted to do my bit.

You have previously held positions in Oranga Tamariki, Ministry of Social Development, Ministry of Pacific Island Affairs, Tertiary Education Commission and the Auckland District Health Board. How has your experience in these positions shaped and influenced you in your role as Equal Employment Opportunities Commissioner?

All my experiences, mistakes, opportunities and learning influence my conduct and the way I see the world as EEO Commissioner and as a leader. My life as a state social worker really toughed me up mentally and spiritually. When I thought humans could not get any lower in terms of abuse and exploitation of a child or another person, someone set a new low. Abusive messages from keyboard warriors face an amour. My work on the oncology wards, seeing lives change unexpectedly through loss and grief made me value time differently, especially family time. I consider issues systemically, through policy, law, different eyes and evidence. I search for allies who believe and act in the service of others and are not afraid to be unpopular.

What more would you like to see happen to address the disparities that negatively affect disadvantaged groups, whether they are Māori, Pasifika, women, those with disabilities or the rainbow community?

There are a number of changes I would like to see to address disparities that negatively affect disadvantaged groups. Some of the key ones include:

- The government spends billions of taxpayer money every year on projects and services that create jobs in the community. Introducing targets for job opportunities for those most disadvantaged will help businesses, unions and government work together to lift people out of poverty.
- End pay discrimination. Publicise salary scales for jobs and pay gaps based on gender and race in the private and public sectors. This will help people negotiate pay, seek promotion and identify and address discrimination that affects wages.
- Free education for children, including kaupapa Māori, until they turn five. It would remove the financial hurdle for caregivers, who are disproportionately women, to be more engaged in paid work, tertiary study, or training.
- Establish fair pay agreements that set standards across industries to ensure fair pay, safety, training, and give vulnerable workers a voice.
- Too many workers on the minimum wage are living in poverty because it is not enough to provide for basic needs, such as food, housing, water, power, health

and education. The living wage will help people earning the least to have a decent standard of living, better support their families, and to fully participate in society.

- Establish a safe and trusted process to deal with sexual harassment so people can live free from violence and discrimination.
- New Zealand should enact laws to eliminate modern slavery and exploitation in the workplace.
- The government should finalise the national strategy to prevent and reduce domestic violence and sexual violence, establishing a victim and whānau-centric approach, and ensuring inclusive and accessible services. This should include both prevention and response to support victims of violence and those at risk of violence.

The Human Rights Commission often deals with difficult, important and high-profile issues. What are you seeing that gives you hope for a future free from discrimination?

The Human Rights Commission has been doing incredible work for decades now and I'm truly privileged to be able to advocate for change and see that come to fruition with policy and legislative changes. That just reaffirms our crucial role in working closely with community stakeholders, policymakers and the government. Recent changes and events that the Commission has been closely involved with and, as a result, have seen changes are:

- *Amendments to the Equal Pay Act* to improve the process of raising and progressing pay equity claims.[1] This is a milestone towards gender equality in New Zealand. The Commission has been working alongside unions, employers, worker groups and the government to ensure equal pay for work of equal value. I am disappointed though that a pay transparency mechanism wasn't included as we had hoped for but we are advocating that the government still introduce pay transparency in some way or form soon, and we have evidence-based research now to show why it's needed.
- *The announcement by Ministry of Business, Innovation and Employment (MBIE) to address migrant exploitation* through the *Temporary Migrant Worker Exploitation Review*.[2] The Commission has been working closely with MBIE, employers, unions and workers in this space to ensure better protection for temporary and seasonal workers.
- *The Crimes (Definition of Female Genital Mutilation) Amendment Bill unanimously passed into law* banning an extreme form of discrimination and violence against women and girls.[3] I'm particularly proud of this legislation because it has come through the work of the Ethnic Minority Women's Rights Alliance of Aotearoa, a group co-chaired by the Human Rights Commission and Commonwealth Women Parliamentarians.
- *Just outcome in the prosecution and sentencing of a perpetrator of human trafficking* sending a strong message to labour recruiters, employers, contractors and labour-hire companies that exploitation would not be tolerated.[4] Through our business and human rights advisory group, which involves many large New Zealand businesses, we are helping businesses realise the importance of the UN Guiding Principles and to keep track of their supply chains.

I am also particularly pleased to see a change following the events of COVID-19 where more people are discussing the ethnic pay gap like Global Women and the need for pay transparency like the Public Service Association are doing.[5] We're glad that we are actively empowering our stakeholders to advocate on human rights issues and help us push for change.

You have recently published a new report from the Human Rights Commission on pay transparency. What did the Report reveal and why is this such an important issue?

The *Opinions and Experiences of Unequal Pay and Pay Transparency* report was based on a survey of over 2,300 people.[6] The research revealed that many respondents reported being paid less for doing the exact same job as another person. Age, gender, as well as ethnicity, race, colour or national origin were frequently provided as reasons for being paid less.

The secrecy of pay in workplaces is one of the barriers that has enabled gender and ethnic pay gaps to persist. The Human Rights Commission in collaboration with partners is advocating for pay transparency including publicly available information on remuneration for jobs, steps for progression and public reporting by large employers of gender and ethnic pay gaps. The hope is that this will help in

1. Debrin Foxcroft "Act paves way for entire industries to get a pay rise" *Stuff* (24 July 2020) <www.stuff.co.nz>.
2. Ministry of Business, Innovation and Employment *Temporary Migrant Worker Exploitation Review: A summary of changes* (August 2020).
3. Andrea Vance "MPs reach across the House to ban female genital mutilation" *Stuff* (29 July 2020) <www.stuff.co.nz>.
4. Guardian Staff "Samoan chief who enslaved villagers sentenced to 11 years in New Zealand" *The Guardian* (27 July 2020) <www.theguardian.com>.
5. Global Women "Closing the Ethnic Pay Gap" (Webinar Series, 22 June 2020) https://youtu.be/cdbc7OHsCmA; Public Service Association "In the interests of openness — What pay transparency in the public and community sector might look like" (paper presented to the CLEW 2020 Seminar Series, Wellington, 11 August 2020).
6. Research New Zealand *Opinions and Experiences of Unequal Pay and Pay Transparency* (Human Rights Commission, June 2020).

achieving equal employment opportunities, gender and racial equality, and the pursuit of a dignified life for all.

Tell us something that most people do not know about you.

I was born in Sāmoa, in the village of Vailima. My parents weren't together, so I was raised by my mum and her family, and I remain close to them. I was brought to New Zealand by my grandparents when I was 10 years old and attended Richmond Road Primary in Ponsonby, then Auckland Girls' Grammar.

I used Tintin comics to teach myself English. You had the pictures, and then you had the captions. So that's how I learned how to speak English. I'm very thankful to Mrs Watkins for making me a librarian while everybody else was playing outside.

Then to Auckland University, where my first degree was in chemistry. I developed a glue for boxes to export meat and was approached after a shipment of meat was ruined because the boxes (using a competitor's glue) fell apart in the container freezer en route to the destination.

Later, I did a master's degree and then a PhD. It was on land and empowerment of urban women, fa'afafine and fakaleitī in Sāmoa and Tonga.

Case Comments

Cowan v IDEA Services Ltd

[2020] NZCA 239

Introduction

This Court of Appeal decision concerning leave to appeal addresses the standard of proof imposed on an employer when carrying out a disciplinary investigation. It comments on the role of the flexible standard of proof in employment matters as first articulated in *Honda New Zealand Ltd v New Zealand Boilmakers etc Union*.[1] The decision of the Court of Appeal endorses an earlier obiter statement made by the same Court in *Whanganui College Board of Trustees v Lewis*.[2]

Facts

Ms Cowan was employed by IDEA Services Ltd (IDEA Services) as a support worker for people with intellectual disabilities (service users). In Ms Cowan's care were Mr M and Mr C. Mr M alleged that Ms Cowan slapped Mr C.

IDEA Services carried out an investigation of this allegation. Specific factors IDEA Services took into account included:[3]

- Mr C's behaviour after the alleged incident occurred;
- Mr C's behaviour generally;
- Mr M's behaviour after he made the allegation;
- Mr M's behaviour generally;
- other staff members' interactions with Mr C and Mr M after the event;
- Ms Cowan's usual behaviour with service users, particularly when situations became tense;
- Ms Cowan's general relationship with Mr C and Mr M; and
- Mr C and Mr M's general relationship.

Taking into account all the factors detailed above, IDEA Services made a preliminary finding that, on the balance of probabilities, Ms Cowan hit a vulnerable person with disabilities. It found that this incident was part of a pattern of behaviour, communication and conduct Ms Cowan had when interacting with service users. IDEA Services advised that this fell short of its expectations for her conduct and that termination of her employment was being considered. After giving Ms Cowan an opportunity to respond to the preliminary decision, IDEA Services terminated her employment.[4]

Ms Cowan brought an unsuccessful claim to the Employment Relations Authority for unjustified dismissal. She then brought a de novo challenge to the Authority's decision in the Employment Court.

Employment Court

The Employment Court held that Ms Cowan's dismissal was justified. Judge Corkill extrapolated several principles from the leading dicta related to the interpretation of s 103A of the Employment Relations Act 2000 (the Act).

Judge Corkill stated the following about the burden of proof:[5]

- Regarding the standard of proof, a distinction must be drawn between the inquiry the Court makes and the inquiry of the employer. The ascertainment of facts on which an employer forms a belief that an

1. *Honda New Zealand Ltd v New Zealand Boilmakers etc Union* [1991] 1 NZLR 392 (CA).
2. *Whanganui College Board of Trustees v Lewis* (2000) 1 NZELR 439 (CA).
3. *Cowan v IDEA Services Ltd* [2020] NZCA 239 at [9].
4. At [13]–[15].
5. At [18], citing *Cowan v IDEA Services Ltd* [2019] NZEmpC 172, (2019) 17 NZELR 160.

employee has engaged in serious misconduct is not the same as proving to a court that the dismissal is justified. The first does not involve a standard of proof; the second does.

- In ascertaining the facts, the employer may be presented with conflicting accounts. He or she, acting reasonably, will be entitled to accept some in preference to others. This does not call for the application of any standard of proof.
- When required to prove that dismissal was justified, the employer will need to show that both the course taken to ascertain the facts and the determination that those facts warranted dismissal were reasonable. That must be shown on the balance of probabilities flexibly applied according to the gravity of the matter (the dismissal) in the circumstances.

Leave to appeal

Ms Cowan unsuccessfully sought leave to appeal the Employment Court's decision under s 214(2) of the Act. The central query on appeal was what standard of proof is to be imposed on employers when they conduct their own investigations into serious misconduct.

Ms Cowan submitted that *Honda* and *Airline Stewards and Hostesses of New Zealand Industrial Union of Workers v Air New Zealand Ltd*[6] provided authority for the following two propositions of law:[7]

1. An employer is required to apply the civil standard of proof to its consideration of whether serious misconduct has occurred.
2. The employer must apply the standard of proof flexibly so that, the more serious the allegation, the more compelling the evidence required.

Ms Cowan argued that, because the assault allegation against her was serious, the evidence that was required to prove this must be strong. Consequently, Ms Cowan submitted that Judge Corkill had erred in his finding that a dismissal for serious misconduct, made on the basis of vague gossip and innuendo, inadequate questioning and a peculiar re-enactment of the incident, was justified.[8]

The Court of Appeal held that *Honda* and *Airline Stewards* were irrelevant to the application of s 103A. Both cases were decided under the Labour Relations Act 1987, which did not incorporate the reasonableness test that is now set out in s 103A of the Act.

Further, the Supreme Court in *Z v Dental Complaints Assessment Committee*[9] rejected the assertion that the more serious the misconduct, the higher the burden of proof required. The Court flagged that the flexible burden of proof was not a legal proposition.

The Court of Appeal affirmed the obiter statement of the Court in *Whanganui College Board of Trustees v Lewis* that it was not usual to impose the application of a legal standard of proof on the decisions of a litigant.[10] The standard of reasonableness, as set out in s 103A, is what governs the actions of the employer. There must be a distinction between the employer's inquiry and the Court's inquiry of misconduct, otherwise it appears that an employer's reasonable view is being overridden by the views of the Court. This is counter to the purpose of s 103A as the language of the section imports that a range of responses are anticipated from an employer.

Comment

This case helpfully provides a definitive answer as to the place of the flexible burden of proof in employment law. It ties the interpretation of proof back to the reasonableness standard to enforce a consistent conceptual interpretation for justification. The case is of significance as it is now plain that the applicable standard in employment investigations is reasonableness alone. It is evident that imposing on the employer adherence to the legal standard of proof is superfluous given the standard that has been set down in s 103A.

Grace Courtney, Solicitor, Bell & Co

Dollar King Ltd v Jun

[2020] NZEmpC 91

Introduction

This decision of the Employment Court clarifies the jurisdiction of the Employment Relations Authority to impose an own-motion penalty on an employer party found to have breached the Holidays Act 2003 (the Holidays Act). The circumstances where the Authority is empowered to impose an own-motion penalty are both limited and tightly prescribed by the Employment Relations Act 2000 (the Act).

Background

In the Authority decision, Mr Jun claimed that he did not receive his minimum entitlements for working on public holidays. He requested the Authority to impose a penalty on Dollar King for the breach. The payment for public holidays was resolved between the parties and withdrawn at the beginning of the investigation meeting.[1]

The Authority found that Dollar King was not paying for public holidays in accordance with the Holidays Act and

6. *Airline Stewards and Hostesses of New Zealand Industrial Union of Workers v Air New Zealand Ltd* [1990] 3 NZLR 549 (CA).
7. *Cowan*, above n 3, at [30].
8. At [31].
9. *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.
10. *Cowan*, above n 3, at [39], citing *Whanganui College Board of Trustees v Lewis*, above n 2.
1. *Jun v Dollar King Ltd* [2019] NZERA 722 at [119].

that Dollar King acknowledged this failure when Mr Jun began raising questions about his entitlements.[2] The Authority held that "such a failure constitutes a breach of the Holidays Act and a penalty is appropriate in these circumstances".[3]

In assessing the appropriate penalty, the Authority further noted that:[4]

> ... after Mr Jun legitimately sought clarification as to his entitlement, Dollar King embarked on a process which, for all intents and purposes was designed to stop Mr Jun from seeking answers to his questions.

Dollar King was ordered to pay to the Authority a penalty of $2,000, of which $1,500 would be paid to Mr Jun.[5]

Dollar King challenged the imposition of the penalty in the Employment Court on the grounds that:[6]

- the penalty had not been sought by the defendant employee Mr Jun; and
- there was no claim for breach of the Holidays Act before the Authority at the time it came to investigate the defendant's grievances.

Employment Court

The Court held that other than in the limited circumstances specified by the Act, the Authority does not have the power to impose an own-motion penalty.[7] These circumstances "do not include a penalty for breach of the Holidays Act, absent an application by the affected party or the Labour Inspector".[8]

Chief Judge Inglis noted that the Authority, as a creature of statute, must act within the four corners of the Act.[9] "Whether something falls within the permissible boundary lines requires consideration of the relevant statutory provisions, including the underlying objectives of the legislation."[10]

Section 161(1)(m)(iii) of the Act provides the Authority with exclusive jurisdiction to make determinations about employment relationships generally, including actions for the recovery of penalties under s 76 of the Holidays Act.[11]

However, s 76(1) states that actions for the recovery of penalties (under the Act) may only be brought by the affected employee or the Labour Inspector. The Court found that "a plain reading of s 161(1)(m)(iii) excludes the imposition of an own-motion penalty by the Authority".[12]

The Court examined five references in the Act to the Authority being able to act on its own motion and found that none relate to a breach of the Holidays Act.[13]

Parliament expressly provided for the imposition of own-motion penalties under s 134A of the Act but limited that power to circumstances where a person unnecessarily obstructed or delayed the Authority's processes.[14] The Court held that this "tells strongly against a broader power to impose an own-motion penalty for other-non-specified-breaches".[15]

Counsel raised two other potential sources of an own-motion penalty, namely s 160(3) of the Act and the Authority's equity and good conscience jurisdiction, though the Court was not persuaded.[16]

The Court held that:[17]

> ... given that s 76 is both more recent and more specific, the general power to recast, [within s 160(3)], cannot be read as providing an alternative route [for the Authority to impose an own-motion penalty].

In addressing the second of counsel's potential sources, the Court held that the Authority cannot do anything in equity and good conscience that would be inconsistent with the Act and "the Act does not empower the Authority to impose penalties of its own motion except in limited circumstances".[18]

Furthermore, the Court noted that s 173(1)(a) of the Act states that "in exercising its powers and performing its functions, the Authority must comply with the principles of natural justice".[19]

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2. At [120].
3. At [120].
4. At [122].
5. At [126].
6. *Dollar King Ltd v Jun* [2020] NZEmpC 91 at [2].
7. At [5].
8. At [5].
9. At [7].
10. At [7].
11. At [11].
12. At [11].
13. At [12].
14. At [13].
15. At [13].
16. At [15].
17. At [17] (footnote omitted).
18. At [18].
19. At [19].

Accordingly, the Court held that:[20]

> ... it [cannot] be consistent with either equity or good conscience to impose a penalty on a party without first identifying the issue and giving them [the] opportunity to be heard.

Further difficulties arose from the process which appeared to be followed by the Authority in that the penalty was imposed despite the Authority acknowledging that Mr Jun withdrew his claim under the Holidays Act. A minute issued by the Authority prior to the investigation meeting did not mention a penalty action as an issue for determination.[21]

The Court held that "imposing a penalty without hearing from the affected party constitutes an error of law"[22] and accordingly, the Court ordered that the determination insofar as it imposes a penalty on Dollar King must be set aside.[23]

Comment from the author

As noted by the Court, the Authority is still a relatively new model of dispute resolution with a wide ambit to investigate and resolve employment relationship problems "without regard to technicalities"[24] and with a view to "promote good faith behaviour".[25] Combined with the somewhat flexible approach that the Authority is empowered to take in order to resolve employment matters promptly, fairly and cost effectively, it is easy to see how an issue such as this might arise. However, as a "creature of statute" the Authority must still operate within the confines of its empowering legislation. Accordingly, the Court has provided important elucidation around the boundaries of the Authority's jurisdiction to impose an own-motion penalty, notwithstanding its factual findings as to whether a penalty is deserved in all the circumstances.

Dan Brown, Solicitor, Bell & Co

20. At [18].
21. At [19].
22. At [19].
23. At [20].
24. Employment Relations Act 2000, s 157(1).
25. Section 157(2)(b).

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