Employment Relations Authority
TE RATONGA AHUMANA TAIMAHI

Determination Digest of the Employment Relations Authority marking Twenty-five years

New Zealand Government
Te Kāwanatanga o Aotearoa

Employment Relations Authority
TE RATONGA AHUMANA TAIMAHI

More information

Information, examples and answers to your questions about the topics covered here can be found on our website: **www.era.govt.nz**.

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July 2026

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Foreword by the founding Chief and current Chief

To acknowledge our twenty-fifth anniversary,[1] the Employment Relations Authority Te Ratonga Ahumana Taimahi (Authority) has published this determination digest to showcase twenty-five determinations issued over the twenty-five years between 2000 and 2025.

The twenty-five determinations presented here are not simply a snapshot of the over 22,000 determinations issued by the Authority since 2000. They represent the Authority's purpose, powers, procedure and jurisdiction in the resolution of employment relationship problems without regard to technicalities and our contribution to constructive and lawful employment relations in New Zealand.

The determinations also reflect changes in the labour market over time and the centrality of the Authority in this dynamic particularly around the concepts of "work", good faith, employee classification, migrant exploitation, workplace bullying and accessorial liability. And, more generally, operating at the cutting edge of a new and evolving jurisdiction.

In addition, the selected determinations can fairly be seen as an expression of the mahi of the Members and staff who have worked within the Authority over these 25 years and without whose dedication and commitment to the institution this would not have been possible. On behalf of all Chiefs of the Authority, we thank Members and staff for their service.

This determination digest is published for the purposes of general information. It is not, and should not be treated as, legal advice. In accordance with the principles of open justice, the Authority has published the determinations from which these summaries derive on our website.[2]

Alastair Dumbleton
Founding Chief of the Authority

Dr Andrew Dallas
Chief of the Authority

July 2026

[1] Officially observed on 2 October 2025.
[2] Determinations database <https://determinations.era.govt.nz/determinations>.

About the Authority

Role and purpose

The Authority was established under the Employment Relations Act 2000 (the Act). The Authority is an investigative tribunal that resolves employment relationship problems by establishing the facts and making determinations according to the substantial merits of the case, without regard to technicalities.

General functions

While the Act places considerable emphasis on the primacy of mediation, to promote dispute resolution at the lowest possible level, it also recognises there will be some matters that will require adjudicative intervention by the Authority. This conceptualisation has been recognised by New Zealand's senior courts — the Court of Appeal[3] and the Supreme Court.[4] The New Zealand Law Commission has observed the Employment Mediation Service and the Authority form "part of an integrated dispute resolution process".[5]

The role of the Authority is to assist employers and employees (and their representatives) to achieve and maintain successful employment relationships including by resolving problems that arise.

As part of these functions, Members of the Authority usually sit alone investigating and determining matters for which the Authority has jurisdiction.[6] The Authority is unique among New Zealand tribunals. In order to properly exercise jurisdiction, the Authority has been afforded extensive powers, including to:

- call for evidence from the parties or any other person;
- require any person to attend an investigation meeting to give evidence;
- interview any person at any time;
- fully examine any witness;
- decide whether an investigation meeting is held in public or private; and
- follow whatever procedure it considers appropriate.[7]

The Authority can also take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.[8] The Authority can resolve an employment relationship problem, however described,[9] find that a personal grievance is of a type other than alleged;[10] and make, in relation to any employment agreement, any order that the District Court or High Court could make about contracts under any rule or enactment (except freezing and search orders).[11] The Authority also has powers under the Act to facilitate collective bargaining[12] and to fix terms and conditions for collective agreements.[13] This also includes pay equity matters under the Equal Pay Act 1972. The Authority performs similar functions under the Screen Industry Workers Act 2022.[14]

Support for the Authority, including Authority Officers and legal research services, is provided by the Ministry of Business, Innovation and Employment.[15]

[3] See *A Labour Inspector v Gill Pizza Limited* [2021] NZCA 192, [2021] ERNZ 237.
[4] See *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466.
[5] Law Commission *Tribunal Reform* (NZLC SP20, 2008) at 48.
[6] Employment Relations Act, section 161.
[7] Employment Relations Act, section 160(1).
[8] Employment Relations Act, section 160(2).
[9] Employment Relations Act, section 160(3).
[10] Employment Relations Act, section 122.
[11] Employment Relations Act, section 162.
[12] Employment Relations Act, section 50E.
[13] Employment Relations Act, section 50J.
[14] Screen Industry Workers Act 2022, section 74.
[15] Employment Relations Act, section 185.

Members marking the twenty-fifth anniversary of the Authority, 4 November 2025 in Christchurch

Back row: Robin Arthur, David Beck, Rowan Anderson, Matthew Piper, Alyn Higgins, Jeremy Lynch, Andrew Gane, Simon Greening

Middle row: Peter Fuiava, Geoff O'Sullivan, Sarah Kennedy-Martin, Claire English, Nicola Craig, Helen van Druten, Marija Urlich

Front row: Antoinette Baker, Sarah Blick, Eleanor Robinson, Dr Andrew Dallas (Chief), Philip Cheyne, Peter van Keulen

Absent: Rachel Larmer

Chiefs and Members of the Authority 2000-2025

CHIEFS OF THE AUTHORITY

ALASTAIR DUMBLETON (2000–2003, 2011–2013)

JAMES WILSON (2003–2011)

ROSEMARY MONAGHAN (2013–2015)

JAMES CRICHTON (2015–2019)

DR ANDREW DALLAS (2019–CURRENT)

MEMBERS OF THE AUTHORITY

Ken Anderson (2002–2006, 2009–2014)

Rowan Anderson (2022–2025)

David Appleton (2011–2019)

Robin Arthur (2005–2012, 2013–2026)

Denis Asher (2000–2011)

Antoinette Baker (2022–current)

Susan Bathgate (2000–2002)

David Beck (2020–current)

Sarah Blick (2022–current)

Vicki Campbell (2004–2011, 2014–2021)

Philip Cheyne (2000–2012, 2020–current)

Nicola Craig (2015–current)

James Crichton (2004–2019)

Dr Andrew Dallas (2015–current)

Helen Doyle (2001–2024)

Alastair Dumbleton (2000–2013, 2021–2024)

Claire English (2021–current)

Anna Fitzgibbon (2012–2020)

Peter Fuiava (2021–current)

William Fussey (2025–current)

Andrew Gane (2022–2025)

Ralph Gardiner (2000–2003)

Simon Greening (2025–current)

Christine Hickey (2012–2019)

Alyn Higgins (2025–current)

Sarah Kennedy-Martin (2021–current)

Dr Dzintra King (2000–2012)

Shane Kinley (2022–2025)

Rachel Larmer (2010–current)

Alex Leulu (2022–2025)

Michael Loftus (2010–2024)

Jeremy Lynch (2023–current)

Patricia MacKinnon (2012–2022)

Rosemary Monaghan (2000–2015)

Paul Montgomery (2003–2010)

Pamela Nuttall (2021–2022)

Yvonne Oldfield (2000–2011)

Geoffrey O'Sullivan (2019–current)

Matthew Piper (2025–2026)

Kenneth Raureti (2002–2005, 2006–2007)

Eleanor Robinson (2010–current)

Leon Robinson (2003–2010, 2021–2023)

Michele Ryan (2011–2022)

Janet Scott (2002–2008)

Paul Stapp (2000–2015)

Natasha Szeto (2022–2025)

Davinnia Tan (2023–2025)

Neville Taylor (2000–2002)

Tania Tetitaha (2012–2019)

Jenni-Maree Trotman (2017–2020)

Marija Urlich (2002–2010, 2020–current)

Helen van Druten (2025–current)

Peter van Keulen (2015–current)

Lucia Vincent (2022–2025)

James Wilson (2000–2002, 2003–2011)

Greg Wood (2000–2015)

Tom Woods (2002–2002)

Twenty-five determinations for Twenty-five years

Baguley v Coutts Cars Ltd ERA Auckland AA1/00, 2 November 2000

Member Alastair Dumbleton

BACKGROUND

The employee worked as part of a team of four employees. The employer advised three of the employees that they were considering making two of the four positions redundant. The employer obtained assessment forms from advisors. The company sales manager and the general manager completed these forms and discussed the results. Based on the outcome of the evaluations, the employer identified two employees to consult with further about the redundancy proposal. The employer invited the employee to a meeting for this purpose and to receive their feedback. The employee, through their representative, requested a copy of the criteria used by the employer to determine which two of the four positions were to be made redundant. The employer strongly opposed providing the selection criteria to the employee. The employee was dismissed by the employer with four weeks' notice due to redundancy. The employee sought reinstatement.

FINDINGS

The Authority considered the extent to which the newly enacted Employment Relations Act 2000 (Act) impacted established leading caselaw for redundancy dismissals. The Authority noted the principles established by the Court of Appeal in *Aoraki Corporation Ltd v McGavin (Aoraki)*,[16] namely that:

- it is for the employer as a matter of business judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with;
- it cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision; and
- the question is whether the steps taken to implement that termination of employment were unjustifiable. A just employer, subject to the mutual obligations of confidence, trust and fair dealing, will implement the redundancy decisions in a fair and sensitive way.

The Authority examined the requirements for good faith behaviour underpinning the Act. The Authority found those requirements were substantially the same as the implied contractual terms of fair dealing and trust and confidence.

The Authority disagreed with the employee's submission that the dismissal was unjustified due to the employer's refusal to provide a copy of the selection criteria. The Authority referred to *Mastertrade Ltd v Te Kooro*,[17] where the Employment Court rejected an assertion the employer's duty to disclose information was so high they needed to provide "every last bit" of information about how the decision to dismiss the employee was made. The Authority was satisfied that this decision remained good law and was not affected by the enactment of the Act.

In addressing the employee's argument the employer had failed to investigate the possibility of redeployment in other companies within the same group as the employer, the Authority found that there was no express or implied obligation for the employer to look beyond itself, as the employer was a distinct and separate legal entity from other companies in the same group.

The Authority stood back to look at the overall fairness of the employer's actions. The Authority concluded while the ideal of perfection was not achieved, the dismissal was for genuine reasons. The Authority found the dismissal was not an attempt to dress up another issue as a redundancy and that the employer had genuinely identified two roles that were surplus to their business needs. The Authority concluded the employer had acted fairly and reasonably, and that the dismissal was justified

[16] [1998] 3 NZLR 276 (CA).

[17] EmpC Christchurch CC43/98, 17 November 1998.

ADDITIONAL NOTES

This was the first determination to examine the scheme of the Act and its underpinning good faith requirements. The employee challenged the determination "de novo" (a hearing anew) in the Employment Court.[18] The Employment Court found that the employee was unjustifiably dismissed.[19] The court held the propositions expressed or implied in *Aoraki* no longer applied because of the enactment of the Act.[20]

The employer appealed to the Court of Appeal.[21] The Court of Appeal considered the legal principles of the Act and did not see the obligations of employers under the Act as differing significantly from those referred to in *Aoraki*.[22] The Court of Appeal approved the Authority's approach.

In 2004, Parliament amended section 4 of Act:

- to make it clear "good faith" was wider in scope than the implied mutual obligations of trust and confidence;
- to require the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
- to require an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more employees to provide affected employees with information relevant to the decision and an opportunity to comment on the information to their employer before the decision is made.[23]

[18] *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409.
[19] See [62].
[20] See [49], [50].
[21] *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 (CA).
[22] See [42].
[23] Employment Relations Act, section 4(1A).

New Zealand Amalgamated Engineering, Printing & Manufacturing Union v Independent Newspapers Ltd ERA Wellington WA51/01, 3 August 2001

Member Greg Wood

BACKGROUND

The New Zealand Amalgamated Engineering, Printing & Manufacturing Union (union) was engaged in collective bargaining with the respondents. Independent Newspapers Limited (INL) was a major media organisation that owned the ten other respondent employers in the matter, all of which were newspaper publishers. The union sought to enter into a multi-employer collective agreement (MECA) with all the companies within the INL group.

The employers expressed a strong desire for each company to bargain for their own collective agreement. The employers also said the duty of good faith underpinning the Employment Relations Act 2000 (Act) did not require them to enter into a MECA. The union claimed that the employers' statements demonstrated an intention to only engage in "perfunctory" negotiations for a MECA. The union said conduct amounting to "perfunctory" bargaining would be a breach of the Act.

The parties disagreed on many aspects of the bargaining, including the venue where the bargaining would take place. The union wanted the bargaining to take place in Wellington. The employers wanted the bargaining to occur elsewhere. The parties eventually met for bargaining. The parties had different expectations as to what would be discussed during the bargaining. The employers continued to reject proposals for a MECA. No further bargaining sessions followed these initial meetings.

The union claimed the employers had failed to consider and respond to its request for a MECA and breached good faith. The union sought a compliance order.

FINDINGS

The Authority found the employers, in rejecting Wellington as a venue for bargaining, were in breach of the duty of good faith as they had also failed to enter into a bargaining process agreement setting out an effective and efficient process for bargaining.

The Authority found one employer, Manawatu Standard Ltd, had a closed mind when it came to bargaining. The Authority found the other employers demonstrated that they were amenable to listening to the union's reasons and that the duty of good faith did not require more than this in respect of keeping an open mind. However, the Authority found while the employers had not refused to consider or respond to the union's proposals at all, it was clear they only intended to do so in a limited way, which breached good faith.

The Authority considered the effect of the Act on the parties and concluded that the employers were entitled to treat the issue of whether they should be parties to a MECA as a valid issue to bargain over.

The Authority issued a compliance order in relation to Manawatu Standard Ltd, requiring it to cease and desist from refusing to consider entering into a MECA.

The Authority issued a compliance order requiring the employers to meet with the union in Wellington for the purposes of bargaining for a MECA. The Authority required the employers to consider and respond to all the claims put forward by the union.

New Zealand Amalgamated Engineering, Printing, and Manufacturing Union v New Zealand Herald ERA Auckland AA190/02, 24 June 2002

Member James Wilson

BACKGROUND

Journalists who were employed by the New Zealand Herald (employer) and belonged to the New Zealand Amalgamated Engineering, Printing, and Manufacturing Union (union) went on strike on two separate occasions. During these strikes, the employer engaged workers to perform work normally done by the employees on strike.

The workers engaged to do the work were in five categories:

- employees who were employed by Wilson and Horton (Newspapers) Ltd (W&H Ltd);[24]
- a worker who was on a secondment to the employer from an overseas newspaper;
- "freelance"[25] workers who had previously contributed to the employer's publications;
- a casual employee who had been rostered to work more hours than was typical for them to work; and
- a freelance worker who was covering an employee on sick leave (the employee who was on sick leave returned to work but went on strike, the employer asked the freelance worker to continue working).

Section 97 of the Employment Relations Act 2000 (Act) restricted the circumstances in which employers could employ other people to do the work of striking or locked-out employees. They could either use existing employees who were not hired for that purpose and who agreed or bring in other workers strictly where necessary for health or safety reasons. Any replacement work was required to be temporary and limited to the duration of the strike or lockout, and breaches could result in penalties.

The union sought a determination the employer in employing and/or engaging a number of workers to perform the work of striking employees breached section 97 of the Act.

FINDINGS

The Authority made a number of findings about replacement workers employed or engaged during the strike:

- W&H Ltd was the employer and not the New Zealand Herald, consequently the employees in question were already employed by the employer at the time of the strike and had agreed to perform the work. Alternatively, even if the Herald was the employer, the employees in question remained employed by W&H Ltd and had volunteered to work at the New Zealand Herald;
- the seconded worker was not employed by the employer and the work undertaken by the worker was not work which would have been carried out by a striking employee;
- the two "freelance" workers were engaged to perform the work of striking employees, and it was probable the third freelance worker was engaged to perform the work of a striking employee, but this was not proved beyond reasonable doubt;
- the casual employee who was rostered to work more hours than usual was already employed by the employer at the time of the strike and agreed to perform the work; they were not employed principally for the purpose of performing the work of a striking employee; and
- the "freelance" worker who was covering an employee on sick leave and then continued working when that employee returned to work and went on strike carried out duties that would have been performed by the employee had they not been on strike.

The Authority concluded the employer breached section 97 of the Act with respect to three employees and ordered the employer to pay a penalty of $2,500.

[24] The New Zealand Herald was a division of W&H Newspapers Ltd.
[25] A common reference to contractors in a media context.

The Authority considered while section 97 of the Act was a new provision, Parliament had chosen explicitly to prohibit the engagement of replacement workers to perform the work of striking employees. The Authority found the employer did not deliberately set out to breach the Act. Rather, it elected to interpret section 97 in such a way as to cause as little disruption as possible to its business. Accordingly, a penalty was warranted but at the low end of the range.

Ross v Waimakariri District Council ERA Christchurch CA58A/02, 2 August 2002

Member Neville Taylor

BACKGROUND

The employee applied for a position which required a tertiary engineering qualification. The employee was the successful candidate. The employee stated to the employer they had completed the requirements of their New Zealand Certificate in Engineering (NZCE). The employer did not ask the employee to provide a copy of this qualification as part of the recruitment process.

The job application form asked whether the employee had any medical condition which the tasks of the job may aggravate or contribute to. The employee answered no.

Subsequently, the employee's supervisor formed the view the employee had dyslexia. In the event, the employer decided the employee had failed to disclose this. The employer then began to doubt the accuracy of the other information provided by the employee. The employer requested a copy of the employee's NZCE. The employee had not received the certificate for the same from the issuing tertiary institution and therefore could not provide it to the employer.

The employer alleged the employee had misrepresented their qualifications and had failed to disclose a "health condition" when they submitted the job application form. The employer alleged this amounted to serious misconduct. The employer initiated a disciplinary process and placed the employee on leave. The employer summarily dismissed the employee for serious misconduct.

The employee claimed they were unjustifiably dismissed, were subject to an unjustified disadvantage and discrimination in their employment. The employee sought permanent reinstatement. The Authority had previously granted the employee interim reinstatement.[26]

FINDINGS

The Authority found the employee had not misled their employer as to their qualifications. It said:

- there were a series of administrative errors which led to the employee not receiving their NZCE despite having completed the course requirements;
- there was no material difference between the qualification the employee had claimed to hold and what they actually held; and,
- when the employee eventually received the certificate, the NZCE was backdated to the correct date that they became qualified.

The Authority engaged the assistance of a registered psychologist who was an expert in dyslexia. The expert suggested it was unlikely the employee's dyslexia would affect their work. They also gave evidence that the Ministry of Health did not recognise dyslexia as a health condition, and most persons with dyslexia would not say they had a health condition but a learning difficulty. The Authority accepted this evidence and found the employee had not made any misrepresentations on the job application form including by drawing the distinction between a learning difficulty and a health condition.

The Authority found the employer's disciplinary process was unfair and that the investigator had an adverse and predetermined view of the employee. The Authority found a reasonable employer could not have dismissed the employee. Despite the employer pointing to the period of paid leave during the investigation and denying the employee was suspended, the Authority concluded the employee had been suspended, and the suspension was unfair.

The Authority was satisfied permanent reinstatement was the appropriate remedy, noting that interim reinstatement had worked well. The Authority also ordered the employer to pay $3,769.23 in lost wages and $10,000 in compensation.

[26] *Ross v Waimakariri District Council* ERA Christchurch CA58/02, 7 June 2002.

The Authority was not satisfied the employer had discriminated against the employee. The Authority noted the employer’s treatment of the employee was insensitive but found the learning difficulty was not the motivating factor of the employer’s behaviour, rather the incorrect belief the employee had provided misleading information regarding their qualifications.

National Union of Public Employees v Richmond Fellowship New Zealand ERA Christchurch CA78/03, 17 July 2003

Member Helen Doyle

BACKGROUND

The employer was a non-profit organisation which provided community services for people with disabilities. The National Union of Public Employees (the union) sought to bargain for a collective agreement. The employer had concerns about a collective agreement and stated their preference was for individual employment agreements. Some employees, who were concerned about the delay in bargaining, began negotiating individual employment agreements. The union acquiesced to this occurring alongside the bargaining for a collective agreement.

The parties attended mediation and concluded a bargaining process agreement. The employer presented a "heads of agreement" to members of the union. The members of the union did not accept the document and voted to strike. The employer told the union that the strike had no effect and continued to express its desire for individual agreements. The employer suggested "parking" the bargaining to allow it to negotiate individually with union members.

The union claimed the employer's proposal was provided on a "take it or leave it" basis with no scope for movement. The employer stated that this characterisation was unfair. The employer paused its bargaining process for individual employment agreements with union members. However, it would later recommence this process.

The union claimed that the employer did not engage in good faith bargaining as required by the Employment Relations Act 2000 (the Act). The union said the employer engaged in surface bargaining.

FINDINGS

The Authority noted that:

- discussions as to whether there should be a collective agreement at all dominated the discussions between the parties, whereas the bargaining should have been about the contents of a collective agreement; and,
- the employer could not rely on the desire expressed by some employees to bargain for individual employment agreements, as this expression of interest was prior to the signing of the good faith bargaining agreement.

The Authority concluded that:

- the parties had not entered into a bargaining process agreement arrangement as soon as possible after the initiation of bargaining. While this was largely due to the conduct of the employer, no specific breach of good faith was found as a bargaining process agreement was signed following mediation.
- the employer's action in suggesting they park the collective agreement and in expressing they did not want a collective agreement was a breach of the duty of good faith; and
- the employer's advice to the union they would not move on key areas was a breach of the duty of good faith.

The Authority reserved the question of remedies to allow the union to make submissions on remedies following consideration of the determination.

The Authority issued a subsequent determination on remedies.[27] The Authority noted the employer had subsequently entered multi-union bargaining. The employer also provided an undertaking to observe its good faith obligations. The Authority found, considering the move to multi-union bargaining and the employer's undertaking, a compliance order requiring the employer to comply with its good faith obligations would serve no practical purpose and declined to issue one.

[27] *National Union of Public Employees v Richmond Fellowship New Zealand* ERA Christchurch CA78A/03, 1 October 2003.

The union raised the issue of penalties for breaches of the implied term the parties would bargain in good faith. The Authority noted that the Act provided that where an employment agreement had been breached, an action for the recovery of a penalty may be brought by a party affected by a breach. As the individual employees were not parties to the proceedings, the Authority was not satisfied that penalties were available in this case. The Authority noted the duty of good faith did not require the parties to conclude a collective agreement.

ADDITIONAL NOTES

In 2004 Parliament amended the Act to provide that the duty of good faith required parties to conclude a collective agreement unless there was a genuine reason not to. The Act was also amended to provide that a party who breaches their good faith obligations may be liable to a penalty in specified circumstances.

Daniels v Māori Television Service ERA Auckland AA330/05, 29 August 2005

Member Alastair Dumbleton

BACKGROUND

The employee was a weekday news presenter for the employer, which was a newly established television service with the purpose of promoting te reo Māori and tikanga Māori. The employer's code of conduct referred to the values that form kaupapa Māori as being the principles that guided how the parties would operate and work together.

The employee complained about a series of actions taken by the employer. The employee said the employer:

- discriminated against the employee and treated them unfairly on the basis of their political opinions when they prevented the employee from attending protest activities outside of work hours;
- made inconsistent decisions regarding their terms and conditions of employment, where the employer held training for all staff while the employee was away on leave and employed a new stylist to work with the presenters;
- did not communicate with the employee when they changed the presenter format of the weekday news show;
- did not take appropriate disciplinary action over discriminatory and homophobic remarks made about the employee's partner by the general manager; where the employer refused to tell the employee how these remarks were dealt with due to privacy concerns;
- marginalised the employee in their role as a news presenter when a newsbreak announced the appointment of a new Chief Executive Officer occurred;
- was unprofessional in their dealings with the employee; and
- caused the employee ongoing stress and isolation.

The employee advanced a series of personal grievances in the Authority relating to discrimination and unjustified disadvantage in the workplace. The employee stated their employer did not observe or reflect the Māori values that they proclaimed to embrace in how they treated the employee.

FINDINGS

The Authority found the employer had not acted reasonably in prohibiting the employee from attending protests in their own time as they had not provided guidance to the employee as to what conduct would constitute a "protest". The Authority also noted the employer declared an intention itself to promote public awareness and to encourage public dialogue and debate in matters relating to ethnicity and the Treaty of Waitangi. The Authority concluded that the prohibition on the employee from protesting unjustifiably disadvantaged the employee.

The Authority noted the Employment Relations Act 2000 (Act) placed a statutory duty on the parties to deal with each other in good faith, which required the parties to be, among other things, responsive and communicative. The Authority found:

- the employer had not communicated or consulted with the employee about the proposed format change;
- the failure to observe the statutory duty owed to the employee was unjustified and that this failure had disadvantaged the employee;
- the making of the homophobic remarks gave rise to a personal grievance; and
- the employee was entitled to some knowledge as to how the employer dealt with the employee who made the remarks.

The Authority dismissed the employee's other personal grievances. However, the Authority noted the unresolved issues which gave rise to the grievances had exacerbated the employee's other concerns.

The Authority said a fair and reasonable employer could be expected to follow their own undertakings where the employer had expressly undertaken to operate in accordance with kaupapa Māori. The Authority found the employer had not observed the values that formed kaupapa Māori. The Authority noted the employer's failure to observe these values added to the employee's grievances as the employee was committed to tikanga Māori and was an employee of an organisation which also expressed an intention to commit itself to tikanga Māori as its foundation. The Authority awarded the employee $16,000 as compensation for their established personal grievances.

The Authority also recommended:

- the procedures, policies, and rules intended to be published by the employer be extended to cover bullying in the workplace; and
- in formulating workplace bullying policies, the employer:
    - incorporated the values and kaupapa of the organisation;
    - recognised workplace bullying as a health and safety issue; and
    - made provision for staff and management education on workplace bullying.

Harding v Spectrum Care Trust Board ERA Auckland AA314/08, 1 September 2008

Member Alastair Dumbleton

BACKGROUND

The employee worked as a community support worker for a charitable trust, providing services for people with disabilities. The employee worked in a house operated by the employer providing support to the employer's clients. Under the collective agreement, the employer could require the employee to stay at the house overnight between their shifts. These were referred to as "sleepovers".

The employee was permitted to sleep on a foldout bed in the lounge during such sleepovers. However, the employee was required to check on clients whenever an alarm was activated. The employee stated they were woken between five and ten times a night by an alarm. The employee used the same facilities as the clients and was not permitted to leave the residence or to have any visitors.

The employee's salary was stated in the collective agreement. The employer paid the employee at an hourly rate which was calculated by dividing their salary by 2086, equivalent to an average of 40 hours per week. The employee's hourly salary was higher than the minimum salary prescribed in the Minimum Wage Act 1983 (MW Act). The employee was paid on a fortnightly basis based on their hours worked. Their hours varied each fortnight.

The collective agreement provided that a sleepover allowance of $45 would be paid to employees. This would later increase to $46. The collective agreement also provided a "disturbance allowance" which was payable to an on-call employee when they were required to be involved with a client.

The employee claimed their actions during the sleepover periods constituted work for the purposes of section 6 of the MW Act. The employee argued that because they were paid at an hourly rate, they were entitled to receive at least the minimum wage for each hour worked. The employer said as the employee was paid on a fortnightly basis, if sleepovers were considered work for the purposes of the MW Act, their average pay over each fortnight was compliant with the employer's statutory obligations.

FINDINGS

The Authority noted the employer's contention that work requires physical and/or mental exertion and that a person who is asleep is usually inactive and not productive. The Authority examined the nature of the employee's duties and considered that:

- the employee was responsible for the physical and emotional well-being of the employer's clients;
- the employee discharged functions and responsibilities similar to those of a parent;
- even during the sleepover periods, the employee was still "productive";
- the employee's presence was equally as valuable to both the employer and the employer's clients as labour involving physical or mental effort, and;
- the employee could not truly be at rest during the sleepover periods, as the employer-imposed restrictions on the employee during the sleepovers, including that they could not drink alcohol, have visitors or leave the premises.

The Authority concluded the work performed by the employee during sleepovers was work within the meaning of the MW Act. The employee was entitled to account for the sleepover periods when assessing whether they were paid their minimum entitlements under the MW Act.

The Authority found when the employer calculated the hours the employee worked on a fortnightly basis, including the sleepover hours, the amount paid to the employee averaged out to an hourly rate which was compliant with the MW Act. The Authority found the employer did not owe the employee any arrears.

Dickson v Idea Services Ltd ERA Wellington WA117/08, 5 September 2008

Member Greg Wood

BACKGROUND

Support workers undertook “sleepovers” in accordance with a collective agreement. The employee was a support care worker who worked in group homes taking care of vulnerable clients. The collective agreement provided employees would be paid $34 per sleepover. If the employees were required to work during the sleepover, they were required to submit an incident report and were compensated by a minimum payment of one hour’s pay. The question before the Authority was whether a sleepover constituted work for the purposes of section 6 of the Minimum Wage Act 1983 (MW Act).

FINDINGS

The Authority referred to the decision of the Employment Court in *Air New Zealand Air Line Pilots Association v Air New Zealand Ltd*[28] which recognised the application of significant restrictions on a worker can impact whether they may be seen as working or not.

The Authority considered the factors in favour of the employer:

- the parties agreed the employee was to be paid for work that was supported by an incident report;
- in over 95 percent of sleepovers no work duties were required; and
- the parties agreed, by implication, the employee was not doing paid work during the sleepover.

The Authority balanced these against the factors in favour of the employee:

- the employer-imposed conditions on the employee during the sleepovers, including they could not drink alcohol, have visitors or leave the premises.
- in order for the employer to meet their requirement to provide client care 24 hours a day, 7 days a week, the employee was required to sleep at the employer’s premises and to be available to immediately attend to the needs of the employer’s clients for health and safety reasons.
- the employee was unable to attend to the needs of their own family when on a sleepover; and
- the employee had to attend sleepovers if they wanted to remain employed as a community support worker.

The Authority concluded the restrictions placed on the employee were so pervasive as to constitute work for the purposes of the MW Act. The Authority reserved determining remedies.

ADDITIONAL NOTES

The employer challenged the determination in the Employment Court.[29] The court also found the employee was working during sleepovers for the purposes of the MW Act.[30] The employer appealed the decision to the Court of Appeal. This was unsuccessful.[31]

[28] [2008] ERNZ 62.
[29] *Idea Services v Dickson* [2009] ERNZ 116.
[30] See [83].
[31] *Idea Services v Dickson* [2011] 2 NZLR 522 (CA).

Alo v New Zealand Customs Service ERA Auckland AA305/10, 29 June 2010

Member Marija Urlich

BACKGROUND

The employee was posted in Bangkok as a Customs Liaison Officer. The employee worked in Thailand following the 2005 Boxing Day Tsunami. The employee experienced psychological harm from providing disaster relief. This led to the employee suffering from a major depressive condition, post-traumatic stress disorder and alcohol abuse.

The incoming post holder wrote to the employer to raise concerns about the employee's conduct during the handover and the impact of these actions on the employer's reputation. The employer investigated the allegations. An independent investigator appointed by the employer provided a report to the employer which concluded that the employee's conduct amounted to serious misconduct warranting dismissal. However, the investigator also identified several factors relating to the employee's personal circumstances which potentially mitigated the seriousness of the employee's actions.

The employee did not provide a comment to the employer on the investigator's report. The employer raised concerns about the employee's participation during the disciplinary process. The employee's representative told the employer that they suspected the employee's health prevented them from engaging in the disciplinary process any further. The employer considered the mitigating factors and subsequently dismissed the employee on notice instead of a dismissal without notice.

The employee claimed they were unjustifiably dismissed. The employee said the employer had failed to provide a safe and healthy workplace, which had unjustifiably disadvantaged them and was a breach of the employer's duties owed to the employee.

FINDINGS

The Authority found the employer's decision to dismiss the employee was substantively unfair and the employee was unjustifiably dismissed. In coming to this conclusion, the Authority said the employer had not sufficiently investigated the employee's ill health during the investigation, needed to consider the impact on the employee of involvement in the disaster relief efforts and provide the employee with a fair opportunity to comment on the allegations. In doing so, the Authority rejected the employer's argument any further inquiry into the employee's health would not have changed the outcome.

The Authority found that the employer:

- owed a duty to the employee to provide a safe and healthy workplace;
- owed a duty to the employee to take reasonable steps to safeguard health, which included mental health;
- had known about the psychological risks of the deployment;
- made a deliberate decision to conclude that the existing support that was provided to the employee was adequate;
- unreasonably failed to discharge the duty owed to the employee in making this decision; and
- caused the employee harm in unreasonably failing to discharge its duty to take sufficient steps to minimise or avoid harm.

As a consequence, the Authority found the employee was unjustifiably dismissed and unjustifiably disadvantaged and awarded the following remedies:

- lost wages of $164,027.50 (accepting that the employee had been medically unfit for return to work for a period of more than two years);
- compensation of $40,000;
- compensatory damages for medical treatment costs totalling $21,507.25; and
- general damages of $20,000 for breaches of contract.

Wrigley v Vice-Chancellor Massey University ERA Wellington WA1/10, 6 January 2010

Member Denis Asher

BACKGROUND

The employer undertook a restructuring which required some of its employees to apply for new positions created out of the restructuring. Two employees (including the applicant) were unsuccessful in their applications and were made redundant by the employer.

The employer used a selection panel to conduct interviews and assess each candidate. Employees were given time to provide further information on the preliminary findings of the panel before the panel's recommendations were finalised. The employees were provided with their individual assessment sheets. The employees provided feedback to the panel convenor. The panel considered the feedback but did not change its original recommendation. The employer provided the employees with a copy of the panel recommendations with the parts relating to other candidates redacted. The employer provided the employees with a last chance to provide further comments before they made any formal appointments.

Employees had information relating to the selection criteria, the composition of the selection panels, the identities of the other candidates, feedback received from the selection panel and copies of individual assessment sheets setting out the selection panel's scoring of the applicants. However, the employees did not have access to:

- interview sheets completed by the selection panel in respect of all the candidates;
- a candidate comparison/summary of ratings sheet prepared by the selection panel's convenor;
- panel recommendations to the employer containing information about the successful candidates;
- notes created for the meetings with the employees and notes taken during those meetings; and
- any other information considered by the panel and the decision maker which was taken into account during the decision-making process but not recorded in writing.

The employee said the employer breached the good faith obligation set out in section 4(1A) of the Employment Relations Act 2000 (Act) by refusing to provide the information about its assessment of other candidates and an opportunity to respond to this information before the decision was made.

The employer said section 4(1A)(c) of the Act did not apply to all information and the information provided to the employees would fairly and reasonably ensure they could provide meaningful responses. The employer argued, as a consequence, that the core requirements were met and no elements of bad faith were present.

FINDINGS

The Authority agreed with the employer that the employees were not entitled to all information, only the information which was relevant. The Authority found the employees were entitled to more information for the purpose of ensuring that there were no illogical scores or any mathematical errors in the scoring and a comparison of scores with the other candidates, as these scores were fundamental in the termination of the employment.

The Authority further found a practical assessment was required to ensure that the employees were provided with sufficient information and opportunity to comment. The Authority required the employer to provide the employees with the interview sheets, individual assessment sheets, candidate comparison sheets and the recommendations of the panel.

However, the Authority declined "to reach into the minds of the selection panel members". It found there was sufficient written evidence of their thinking and the outcomes they reached.

ADDITIONAL NOTES

The Vice-Chancellor challenged the determination in the Employment Court.[32] The court found the disputed documents directly informed the employer's decision to choose the preferred candidates and accordingly the decision to dismiss the employees.[33] The information the employee's requested was relevant information for the purposes of section 4(1A) of the Act.[34] The court found for the purposes of section 4(1B), which provided a limited confidentiality "carve out" from the duty to disclose the information, there was no good reason for the employer to maintain confidentiality over the requested information.[35]

32 *Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 37.
33 See [123].
34 See [123].
35 See [127], [128].

Corbett v UDP Shopfitters Ltd [2012] NZERA Christchurch 151

Member David Appleton

BACKGROUND

The employee was a migrant carpenter. They began work for the employer as a contractor and later became an employee.

The employee said a supervisor of the employer treated them without respect, swore at them and abused them. The employer engaged a contractor who began to work with them. The employee claimed they began to experience even more hostility from this contractor and another one of their supervisors. The employee stated this abuse included derogatory remarks directed to the employee about their country of origin.

The employee raised their concerns regarding the workplace bullying to the employer. The employee claimed the employer told them that they had to put up with the behaviour. The employer said they had intended to speak to the employee's supervisors about the employee's unhappiness with the comments but preferred to wait until after they had completed work on four large projects.

The employee stated while they were working, the contractor pushed them against a wall. Later that night, the employee went to the hospital due to an injury they received from being pushed. The employee remained away from work on accident compensation payments.

Following this incident, the employee spoke with the employer over the phone. During the call, the employer made comments to the employee in which the employer questioned whether the employee fitted in with the employer. The employee did not return to work following the call. The employer tried to arrange a meeting with the employee, but the employee did not attend this meeting. The employer claimed that actions of the employee in not attending the meeting and in sending a friend to pick up their work tools amounted to abandonment of their employment.

The employee claimed they were

- subject to bullying and abuse at their work and that the employer's failure to prevent this amounted to an unjustified disadvantage;
- subject to racial harassment in their employment;
- assaulted by the contractor and this unjustifiably disadvantaged them; and
- unjustifiably dismissed by the employer, or if they were not dismissed, they were unjustifiably constructively dismissed.

FINDINGS

The Authority found that:

- the employee was:
    - subjected to abuse and bullying which went beyond an acceptable range of banter.
    - targeted to an extent by their co-workers and supervisors.
- the employer:
    - failed to ensure the employee had a safe work environment.
    - failed to prevent and address the abuse when the employee raised their concerns to the employer.
- the comments directed to the employee were examples of hostility and contempt on the grounds of national origins.
- if the employee's supervisor or the contractor had problems with the employee's work, they could have raised their concerns without reference to the employee's national origin.
- the incident between the employee and the contractor was an assault.
- the employer failed to investigate the assault and had downplayed the incident.

The Authority concluded the employee was racially harassed and the employer's failures unjustifiably disadvantaged the employee.

The Authority considered the combination of the abuse and assault endured by the employee, the failure of the employer to address these issues and the message to the employee that they did not fit in. The Authority found it was reasonably foreseeable that the employee would resign. The Authority concluded the actions and failures of the employer unjustifiably constructively dismissed the employee.

The Authority awarded the employee $3,161, the equivalent to five weeks of lost wages. The Authority found the actions of the employer in: (a) suggesting to the employee they did not "fit in" and (b) not taking their complaints seriously caused the employee to suffer humiliation, loss of dignity, and injury to feelings. The Authority found the employer's ongoing failure to act reasonably was a continuous act. The Authority awarded the employee $10,000 in compensation.

The Authority exercised its jurisdiction to make a recommendation, which stated that:

- senior management familiarise themselves with their responsibilities towards individuals of different ethnic and national origins;
- senior management should develop and implement a training session for all current and future staff to ensure they are aware hostility or ridicule against staff on the grounds of ethnic or national origin may be unlawful and could be treated as a disciplinary matter; and
- a written policy be made available to all current and future staff setting out appropriate standards of conduct to prevent racial harassment.

Hirini v Bay of Plenty District Health Board [2013] NZERA Auckland 548

Member Rosemary Monaghan

BACKGROUND

The employee worked for the employer as a clinical psychologist.

The employee gave an opinion on a case file during a team meeting. The employee said another employee aggressively belittled and disagreed with the employee's opinion. The employee said their team leader not only failed to address the response of the other employee but actively supported it.

The employee submitted a reportable event form to the employer, which stated the events of this meeting were part of an overall pattern of bullying. The employer requested more information from the employee. The employee submitted a second reportable event form to the employer which provided more information about the behaviour which comprised the overall pattern of bullying.

The employer did not meet with the employee regarding the investigation into the complaints raised by the employee until one month after the second reportable event form was submitted. The employee expressed their anxiety to the employer about the delay in the investigation process. The employee also expressed a concern they were required to continue to work with their employees they had complained about without addressing how the investigation process had impacted these relationships. The employer did not respond. The employer requested a meeting with the employee after another month. The employee declined this meeting as they were unsure of its purpose.

The employee's team leader and the other employee denied the allegations and raised concerns to the employer they themselves were bullied by the employee. The employer suspended the employee pending an investigation into their behaviour.

Other colleagues, including several not employed by the employer, expressed concerns to the employer regarding the employee's case management. The employer conducted a review into the employee's case files and engaged an independent consultant to conduct a further review. The employer directed the employee not to have any contact with patients until after they could meet to discuss the concerns. The report of the independent investigator concluded the employee should not be practicing as a clinical psychologist. The employer forwarded the report to the body that oversaw the professional registration of psychologists in New Zealand without consulting the employee.

The employee resigned from their employment and raised a personal grievance for unjustified constructive dismissal.

FINDINGS

The Authority found the employer:

- unduly delayed the investigation;
- wrongly limited the scope of the complaint, as the employer incorrectly believed that they could not investigate matters which occurred more than 90 days earlier;
- failed to address the employee's concerns about being forced to continue to work with the employees who were the subject of their complaints;
- did not give the employee the chance to be heard, as, although the letter to the employee was titled "proposed suspension", in reality this was not a proposal; and
- should have provided the employee with the independent investigator's proposed summary of findings and an opportunity to comment on the findings before the matter was forwarded to the New Zealand Psychologists Board.

The Authority concluded the employer:

- breached its duty to the employee to promptly and properly investigate the employee's complaints
- breached its duty to take reasonable steps to keep the employee safe during the length of the investigation;
- acted unfairly in suspending the employee without giving the employee the opportunity to comment on the suspension;
- did not act unfairly or unreasonably in restricting the employee's duties pending the investigation into their case management; and
- breached its duty to the employee in failing to give them the opportunity to comment on the findings.

The Authority found the breaches caused the employee's resignation. The Authority said the cumulative impact of these breaches on the employee was such that their resignation was reasonably foreseeable. The Authority concluded the employee was unjustifiably constructively dismissed.

The Authority awarded the employee three months lost remuneration and $7,500 in compensation.

Howe-Thornley v The Salad Bowl Ltd [2013] NZERA Christchurch 25

Member Michael Loftus

BACKGROUND

The respondent company intended to open another outlet pending council approval. The company advertised for a new staff member to work in the employer's new premises. The worker responded to the advertisement and was interviewed for the position.

The worker claimed that they were offered a job at the end of the interview. The company denied this and stated they were required to undergo a three-hour trial to ascertain their suitability for the role before an offer of employment would be made. No written employment agreement was provided to the employee.

The worker attended the company's premises over two days to do a work trial. At the end of the second day the director of the company was counting the money in the till and identified a shortfall. They alleged that the worker took this money from the till. The director sent the worker a message which stated there was no need for the worker to return to the premises the next day and that they would be in touch. The worker assumed this was due to the company's new premises not being ready to open yet.

On the day that the company's new premises was due to open, the worker followed up with the director. The director told the worker to find a new job due to money missing from the till. The worker told the director that they did not understand and requested more information, but the director did not provide any more information.

The worker also asked the director if they would be paid for the two days that they worked, the director did not answer this question. The company said they always paid prospective workers for trial periods worked but that they changed their mind following the identification of the money allegedly missing from the till.

The worker claimed they were an employee of the company and they were unjustifiably dismissed. The company claimed that the worker was not an employee.

FINDINGS

The Authority considered the work undertaken by the worker during the trial period, namely that they prepared products for sale and served clients. The Authority found that as there was an intended exchange of labour for remuneration, the fundamental characteristics of an employment agreement were met. The Authority concluded the worker was an employee.

The Authority noted that even if they were incorrect about the worker being an employee, Parliament addressed the issue of trial periods through the requirement for trial periods to be confirmed in writing prior to the commencement of employment. Parliament had also said trial periods were paid employment. The statutory scheme did not allow for short unpaid trials.

The Authority also noted an argument could be made that the worker was a person intending to work and could pursue a personal grievance regardless.

The Authority found the company dismissed the employee. The Authority noted the longstanding requirements for a dismissal to be justified and found no compliance by the employer with these requirements.

The Authority concluded the employee was unjustifiably dismissed. The Authority awarded remedies of $1,215 in lost wages and $5,000 in compensation. The Authority also found the employee was owed arrears of $67.50 for hours worked.

ADDITIONAL NOTES

The company challenged the determination in the Employment Court.[36] The court agreed the worker was an employee of the company.[37] The court also agreed the employee was unjustifiably dismissed and made the same orders as the Authority in respect of remedies.[38]

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[36] *Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152.
[37] See [52].
[38] See [98], [102].

New Zealand Airline Pilots Association v Air New Zealand Ltd [2014] NZERA Auckland 11

Member James Crichton

BACKGROUND

The employer, Air New Zealand Limited, was a party to collective agreements with multiple unions.

Clause 24.2 of the employer's collective agreement with the New Zealand Airline Pilots Association (ALPA) (the first collective agreement) stated that during the term of the agreement any other collective agreement entered into by the employer with another union which was more favourable would be passed on to ALPA's members upon request.

The employer then entered into a collective agreement (the second collective agreement) with another union. The second collective agreement provided for better rates of remuneration for some employees than the first collective agreement.

After the second collective agreement was concluded, ALPA wrote to the employer seeking to invoke clause 24.2 in relation to the rates of remuneration. The employer declined the request and said the clause did not apply in the circumstances.

The employer said the clause did not allow ALPA to choose parts of the second collective agreement and superimpose them in the first collective agreement. Rather, clause 24.2 of the first collective agreement gave ALPA the option to accept the second collective agreement in its entirety.

Contrastingly, the union said:

- the word "agreement" should be interpreted as meaning each agreement between the employer and another employee group on a particular matter;
- the proper interpretation of the clause allowed for the passing on of specific terms and conditions agreed to between the employer and any other union to affected members of ALPA; and
- the employer had breached the first collective agreement and owed arrears to the specified union members.

FINDINGS

The Authority concluded that the ALPA's interpretation of the word agreement was contrary to the plain words of clause 24.2. The Authority was satisfied that the use of the word "agreement" in clause 24.2 of the first collective agreement was a reference to a collective agreement as a whole and not to individual parts of an agreement.

The Authority said the consequence of accepting the ALPA's arguments, meant it would be impossible to accurately predict the number of employees who would choose to take up the provisions of the second collective agreement and the cost of such elections.

The Authority found that the employer was not in breach of the clause.

ADDITIONAL NOTES

ALPA challenged the determination in the Employment Court.[39] The court concluded the individual terms and conditions found in another agreement may be the subject of a request by ALPA to pass onto its members and that different wording would have been used in favour of the employer's interpretation of the clause.[40] The court required the employer to pass on the remuneration provisions to the relevant employees.[41]

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[39] *Air New Zealand Air Line Pilots Association v Air New Zealand Ltd* [2014] NZEmpC 168.
[40] See [71], [72].
[41] See [80].

The employer appealed the decision to the Court of Appeal.[42] The Court of Appeal found the Employment Court erred in its interpretation of the clause and failed to give the natural and ordinary meanings to the words "any agreement".[43] The Court of Appeal agreed with the Authority and reinstated its determination.[44]

ALPA appealed to the Supreme Court.[45] The Supreme Court noted that leave to appeal was only granted on a question of whether the Court of Appeal should have dismissed the appeal for lack of jurisdiction.[46] The Supreme Court found the interpretation of the clause 24.2 of the first collective agreement advanced by the union was incorrect.[47] The Supreme Court declined to state that the employer's interpretation was correct, having found that there may be alternative interpretations of clause 24.2.[48] The Supreme Court dismissed the appeal.[49]

[42] *Air New Zealand Ltd v New Zealand Air Line Pilots Association* [2016] NZCA 131.
[43] See [77].
[44] See [83].
[45] *New Zealand Air Line Pilots Association v Air New Zealand Ltd* [2017] NZSC 111.
[46] See [100].
[47] See [101].
[48] See [101].
[49] See [102].

Nova Energy Ltd v Mitchell [2015] NZERA Auckland 337

Member Robin Arthur

BACKGROUND

The individual employment agreement between the parties stated the employee agreed, among other things, not to use the employer's confidential information for their advantage or for the advantage of any third party. The employee also agreed that upon termination of the employment, they would return any company property to the employer, including files, documents, and records.

The employee signed an exit agreement which included a restraint of trade clause prohibiting the employee from being directly or indirectly engaged in any activity which was, or was likely to be, in competition with any business activity carried out by the employer. The restraint of trade clause also prohibited the employee from directly or indirectly soliciting the custom of certain customers or suppliers that they had contact with during their employment.

The employee took confidential information from the employer and began employment as the general manager for a competing energy company that they had established. The employee's company specifically targeted the employer's customers who were near the ends of their contracts with the employer and paying significantly higher rates than the market average. The employer commenced a counter-campaign to identify its top 500 customers in terms of the margins the employer was earning from them and to offer a discount in exchange for them signing new supply contracts with the employer.

The employee accepted they breached their duties of fidelity and confidentiality and that they were liable for penalties for these breaches. The employee denied there was any valid or reasonable restraint of trade on their business activities.

In an earlier determination, the Authority found the employee was liable for damages in respect of losses from the employee's actions and steps taken by the employer to mitigate their losses.[50] The Authority also found the employee was liable for penalties for breaching the employment agreement and the duty of good faith.

FINDINGS

The Authority broadly identified three categories of loss suffered by the employer because of the employee's actions:

- seven customers of the employer which the employer lost after the employee approached them;
- 81 customers who signed new supply contracts with the employer at lower rates negotiated by the employee's company; and
- 237 customers who signed new supply contracts with the employer at lower rates following the employer's counter-campaign.

The Authority considered two differing formulas for the quantum of damages put forward by expert witnesses for each party. Both experts agreed the annualised loss arising from the first category was quantified at $45,936.

The Authority preferred the methodology advanced by the expert witness for the employer. Under this methodology the annualised loss for the second category of customer was calculated by the Authority as being $471,306. The annualised loss for the third category of customer was calculated by the Authority as being $503,967.

The Authority found the total damages the employee was liable for was to be calculated from applying the annualised loss of $1,021,209 over a period of seven years. The Authority noted that the calculation to reach the total amount required the application of relevant discount factors. The Authority left it to the parties to consult with the experts to calculate the full amount and granted the employer leave to return to the Authority if necessary.

[50] *Nova Energy Ltd v Mitchell* [2014] NZERA Auckland 94.

The Authority ordered the employee to pay penalties of $30,000 for their breaches of the duties of confidentiality and good faith. The Authority ordered the employee's company to pay penalties of $50,000 for aiding and abetting the employee's breaches of their duties.

A Labour Inspector v Ahuja [2016] NZERA Auckland 420

Member Eleanor Robinson

BACKGROUND

A Labour Inspector received complaints that two companies failed to provide minimum wage and holiday entitlements to employees. The Labour Inspector commenced proceedings against the two companies and three individuals who were directors or officers of the companies.

Two former employees of the companies who were due to appear before the Authority as witnesses for the Labour Inspector claimed they were threatened in connection with their intended appearance.

The first witness stated that a person with "Black Power" tattooed on their face appeared at their home at 10:30pm to tell them that they were paid to threaten the witness and to warn them not to show up to the proceedings. The witness stated that the person knew the details of the case and the details of their previous employment. The witness called the company officers to ask why their family was being threatened. The company officers denied knowing anything about the person's visit to the witness' home but advised the witness to do what the person told them to do.

The second witness stated while they were working, they received a phone call from a person who knew their address and the details of their car. During the phone call the person told the witness they should withdraw their case. The person also told the witness that they would meet the witness at their car at the end of their shift, or at their home.

On its own motion, the Authority brought a determination which investigated whether the respondents had obstructed or delayed the Authority investigation and whether penalties should be imposed on the company officers if so.

FINDINGS

In relation to the first witness, the Authority considered the knowledge that the person had of the employment relationship problem and found that the details would have only been known by a small number of people. The Authority considered the statements made by two of the company officers on the phone to the witness, and their knowledge of the third officer being involved in the person's visit to the witness. In relation to the second witness, the Authority considered the detailed information provided to them that pointed to the involvement of the company officers.

The Authority was satisfied the Investigation Meeting was obstructed by the fact that the people had placed unnecessary and undue pressure on the witnesses in the giving of their evidence. The Authority found the three company officers were responsible for the application of pressure on the witnesses. It concluded the respondents had subverted or pre-empted the effective application of the dispute resolution process.

The Authority stated the penalties should reflect the disapproval of the serious nature of the behaviour. It ordered each of the three company officers to pay a penalty of $20,000 for obstructing the Authority's investigation.

ADDITIONAL NOTES

The company officers challenged the determination in the Employment Court.[51] The court found the employees were telling the truth about the threats that were made to them.[52] The court was not satisfied two of the three company officers were involved in soliciting the individuals who made the threats.[53] The court was satisfied the third company officer was the perpetrator of the threats and intimidation.[54] The court reduced the quantum of penalties to $12,000 and confirmed the Authority's determination that half should be paid to the Crown, with the other half split evenly between the two former employees.[55]

[51] *Ahuja v A Labour Inspector* [2018] NZEmpC 31.
[52] At [36].
[53] At [42].
[54] At [43].
[55] At [45].

A Labour Inspector v Karamea Holiday Homes Ltd (in liquidation) [2017] NZERA Christchurch 226

Member Andrew Dallas

BACKGROUND

The respondents were two related companies and their sole director and shareholder. Karamea Holiday Homes Ltd was a small holiday home business. The second respondent company was a small organic farm. The companies relied heavily on volunteer "WWOOFers", who predominantly came from overseas.[56]

A Labour Inspector received a complaint from a client of the sole director. The complaint raised concerns that the workers on the property were not being paid. The Labour Inspector investigated the complaint. The director told the Labour Inspector that the workers were volunteers. The Labour Inspector closed the complaint for lack of evidence. The Labour Inspector re-opened the investigation into the director and their two companies after viewing job advertisements for positions which the Labour Inspector considered to be consistent with employment.

The Labour Inspector again met with the director. The director advised the Labour Inspector that the workers on the properties worked in exchange for a payment of $120 per week, as well as accommodation and food. The director and the workers also advised the Labour Inspector that the workers were sent to other properties by the director and the director received payment for "hiring-out" the workers. These payments were not passed on to the workers. The director asserted that the workers were volunteers who were engaged in a WWOOFER programme of cultural and skill-based exchange and were not employees.

The Labour Inspector, on behalf of the two workers, lodged proceedings in the Authority. The Labour Inspector claimed the workers were employees within the ambit of section 6 of the Employment Relations Act 2000 (the Act) and accordingly were entitled to minimum wage and holiday pay.

FINDINGS

The Authority noted that:

- the director ran a series of commercial operations for profit and that the workers were engaged in activities in support of those operations,
- the workers were "working" for the purposes of the Employment Relations Act 2000 (Act),
- the workers expected to receive a reward for the work that they performed; and
- non-monetary benefits in exchange for work can also be indications of an employment relationship.

The Authority concluded each worker was an employee within the meaning of section 6 of the Act.

The Authority considered the question of the identity of the employer and found the workers were employees of the second respondent company and not of the director personally.

The second respondent company did not produce wage or time records when requested by the Labour Inspector. The Authority accepted the Labour Inspector's calculations of arrears. The Authority ordered the second respondent company to pay the first worker $2604.38, and the second worker $2675.42, in arrears for unpaid wages and holiday pay.

The Authority reserved the issue of penalties. In a subsequent determination of the Authority, the Authority found the employer liable for penalties of $45,900 for the breaches of minimum employment standards.[57] The determination confirmed that "WWOOFers" can be employees rather than volunteers even where there is an exchange of work for accommodation or other benefits including potentially unquantifiable "cultural" benefits.

[56] A "WWOOFer", at least in New Zealand is a person employed/engaged in an organic farming operation associated with the "Worldwide Opportunities on Organic Farms" programme.

[57] *A Labour Inspector v Karamea Holiday Homes Ltd (in liquidation)* [2018] NZERA Christchurch 89.

Sunair Aviation Ltd v Walters [2017] NZERA Auckland 91

Member Andrew Dallas

BACKGROUND

The employer, Sunair Aviation Limited, was an airport services and aviation company at Tauranga Airport. The employer operated the rescue fire service on behalf of the airport. Mr Walters was employed by the company as a rescue fire service operator. Tauranga City Council (council) issued a request for tender for the rescue fire service. The employer submitted a tender and advised its employees in the rescue fire service that they would be made redundant if the tender was unsuccessful. The employee submitted a tender under the name of a partnership they established with their wife.

The council advised the employee that their tender was successful and advised the employer their tender was unsuccessful. The Chief Executive of the airport stated they identified three deficiencies in the employer's tender, however these were not raised with the employer before they were advised that they were unsuccessful.

The employer lodged proceedings in the Authority. The employer claimed the employee breached their employment agreement, duty of fidelity and fiduciary obligations. In its first determination, the Authority found the employee breached terms of the employment agreement and the implied duty of fidelity.[58] The Authority rejected the employer's contention that the employee owed fiduciary obligations.[59] The Authority left the quantum of remedies to be determined.

In its second determination, the Authority was required to assess the likelihood of the employer winning the tender in the absence of the employee's application and whether the employee's breaches gave rise to damages for any loss by the employer. The employee argued there was no prospect of the employer winning the tender and the employer could not establish causation between their conduct and any loss.

FINDINGS

The Authority considered whether the employer had established there was a real or substantial chance they would have won the tender but for the actions of the employee. The Authority found the employer had not demonstrated on the balance of probabilities the necessary causation between the employee's breaches and their loss.

However, the Authority found that the employer was entitled to an evaluation of damages for "loss of a chance", after finding:

- the Chief Executive of the airport was aware the tender was submitted by a current employee of the employer and should have advised the employer of the tender's existence;
- the employer performed the rescue fire service contract for 27 years; this length of time meant the Chief Executive of the airport should have afforded the employer the courtesy of notifying them of the deficiencies in their tender and the opportunity to address them;
- the failure to provide this opportunity meant the loss of a chance to submit a more acceptable tender;
- this loss of a chance made the employee's tender seem appealing despite having similar attributes; and
- the failure to advise the employer of the tender's existence also deprived them of the chance to seek an injunction or take other action to prevent the employee's breaches.

[58] *Sunair Aviation Ltd v Walters* [2016] NZERA Auckland 198 at [56].
[59] At [55].

The Authority was provided with a calculation of the profits for the life of the contract. The Authority took a 90 percent chance of this figure as the starting point. The Authority referred to a series of contingencies. The most significant being that the council was under no legal obligation to award the tender to any applicant and there was doubt as to whether the council would have awarded the tender to the employer. The Authority also noted the employee was not subject to a restraint of trade and did not use any confidential information to prepare and submit their tender. The Authority reduced the chance by 40 percent due to the non-binding nature of the tender and by a further 20 percent for the other contingencies. The Authority awarded the employer damages calculated at 30 percent of the profits for the life of the contract which amounted to $66,681.90.

Pelabon v Zumo Retail Nelson Ltd [2018] NZERA Wellington 44

Member Michele Ryan

BACKGROUND

The employee claimed they were unjustifiably dismissed and owed arrears of wages. The Authority previously issued two determinations in favour of the employee. In the first determination the Authority ordered the employer, who was the first respondent, to pay the employee $10,824.07 in wages arrears and remedies for their personal grievance.[60] In the second determination the Authority ordered the employer to pay $2,250 in costs to the employee.[61]

The employer did not make any payments to the employee. The employee sought a compliance order from the Authority under section 137 of the Employment Relations Act 2000 (Act). The employee named the ultimate holding company for the employer and the sole director of both companies as the second and third respondents in the application. The employee requested the Authority make an order that both the first and second respondents comply with the earlier Authority determinations, and that the second and third respondents ensure that the employer complied with the orders made.

The director of the company stated that the employer was a separate corporate entity from the holding company and that the employer was essentially wound up. The Authority issued a direction to the employer requesting them to provide certain information regarding their financial status. The employer did not comply with this direction.

FINDINGS

The Authority did not find any reason as to why a compliance order should not be made against the employer, noting that:

- the employer remained listed on the Companies Office Register;
- the employer had not been wound up at the date of the determination; and
- the burden was on the employer to demonstrate that they did not have the funds to pay if they wished to avoid the compliance order.

The Authority found there was no need to look behind the corporate veil to resolve the employee's claims.

The Authority referred to the decision of the Labour Court in *Northern Clerical Workers Union v Lawrence Publishers Co of New Zealand Ltd*[62] (*Lawrence Publishing*) as precedent for the obligations of the holding company and director. The court in *Lawrence Publishing* found compliance orders could be made against third persons who were not parties to the original proceedings where such parties had the power to ensure compliance. The court in *Lawrence Publishing* referred to a number of similar cases to establish that such compliance orders were not personal obligations but a matter of establishing who is responsible for ensuring that the employer would carry out the actions they were ordered to do.

In its discussion of *Lawrence Publishing,* the Authority noted the director and holding company had complete control over the employer. Accordingly, it was found each party had the power to put the employer in a position to pay the monies owed.

The Authority compared the degree of control that the holding company and director had over the employer in *Lawrence Publishing* to the degree of control that the holding company and director had over the employer in the present application. The Authority concluded that it was appropriate to make orders against all the named respondents to ensure that the employer made the required payments to the employee. The Authority referred to the observations of the court in *Lawrence Publishing* that such orders would have the effect of prohibiting the respondents from doing any action which would put the employer in a position of being unable to make the required payments.

[60] *Pelabon v Zumo Retail Nelson Ltd* [2017] NZERA Wellington 101 at [49].
[61] At [10].
[62] [1990] 1 NZILR 717.

ADDITIONAL NOTES

The employer challenged the determination in the Employment Court.[63]

The court considered whether the Authority was correct in concluding that *Lawrence Publishing* provided appropriate precedent regarding the obligations of the director and the holding company.[64] The court concluded *Lawrence Publishing* was relevant to an application under section 137, in circumstances such as the ones in the current application.[65]

The court rejected the employer's assertion the Authority was wrong in reaching the conclusions that it did.[66] The court was satisfied that the director and holding company held the necessary control over the employer.[67] The court was also satisfied that it was necessary in the interests of justice for the Authority to exercise its discretion to order the director and holding company to ensure that the employer made the necessary payments to the employee.[68] The court held that the orders of the Authority stood, with an extension of time granted for compliance with the orders.[69]

[63] *Allen Chambers Ltd v Pelabon* [2019] NZEmpC 45.
[64] At [30].
[65] At [42].
[66] At [58].
[67] At [58].
[68] At [58].
[69] At [61].

A Labour Inspector v Southern Taxis Ltd [2019] NZERA 291

Member Andrew Dallas

BACKGROUND

A Labour Inspector alleged that the employer breached minimum employment standards with regards to four taxi drivers. In its first determination, the Authority found the four taxi drivers were employees.[70] In coming to this conclusion, the Authority made findings of facts based on an orthodox application of the Supreme Court decision in *Bryson v Three Foot Six Ltd.*[71]

The Labour Inspector also applied to the Authority under the now repealed section 234 of the Employment Relations Act 2000 (Act) for authorisation to join the directors of the company to the proceedings due to default in payment of wages or other moneys to the employees for the period *before* 1 April 2016. To cover off the period *after* 1 April 2016, the Labour Inspector further applied for leave under section 142Y of the Act, the successor provision to section 234, thereby opening the door for the directors to be found to be "persons involved" in breaches of "minimum employment standards" and liable for default in payment of wages or other moneys by the company.

The Labour Inspector argued that the directors had directed or authorised the default in payments of minimum entitlements as they were responsible for the day-to-day operations of the business including paying their office staff. The Labour Inspector stated that the directors knew that the taxi drivers in question were employees. The Labour Inspector referred to the evidence of the directors before the Authority that the business would be unsustainable if they paid the taxi drivers a minimum wage and therefore, it was argued, the decision to not pay the drivers the minimum wage was an intentional business decision.

The directors opposed the applications. They stated that there was no evidence they had any knowledge that the company breached its legal obligations. They said correct wage payments to office staff who were employees was evidence of their genuine belief that the taxi drivers were contractors and not employees.

FINDINGS

In respect of the application under section 234, in granting authorisation to the Labour Inspector to join the directors to the proceedings, the Authority applied the two-stage test approved by the Court of Appeal in *Brill v A Labour Inspector*.[72] The first stage of the test was the Labour Inspector needed to satisfy the Authority that a "tenable cause of action" existed. For the second stage, the Labour Inspector had to prove that the director, officer, or other agent of a company knew that the company was in default of its minimum obligations relating to wage and holiday payments and that such knowledge could be provided by direct evidence or through inference.[73]

The Authority was then required to consider what was required to grant leave to the Labour Inspector for the directors to be liable under section 142Y of the Act. The Authority referred to the earlier determination in which it was found that the taxi drivers in question were employees, as the employer provided them with vehicles, issued payslips, and deducted PAYE and KiwiSaver. The Authority contrasted this with the directors' treatment of contractor drivers, who provided their own vehicles and paid "depot fees". The Authority found this difference in treatment undermined any belief that the drivers were contractors.[74]

The Authority noted the employer company acted through its directors as human agents and the actions of the company and the directors were effectively indistinguishable *but for* the "corporate veil" that separated them.[75] The Authority said the purpose of section 142W was to "visit default by the body corporate on human agents" by operating "as a limited lifting of the veil to disclose the human agents behind and apportion liability between them and the body corporate for misdeeds in respect of breaches of minimum employment standards".[76]

[70] *A Labour Inspector v Southern Taxis Ltd* [2018] NZERA Christchurch 2018 at [81].
[71] [2005] NZSC 34 (SC)
[72] *Brill v A Labour Inspector* [2017] NZCA 169.
[73] At [27].
[74] [2019] NZERA 291 at [37].
[75] At [45].
[76] At [45].

The Authority considered the employers had been put on notice, including by the Inland Revenue Department, that there was "something amiss" with the arrangements in place and a prudent employer would have then sought advice. The Authority found "the section 142 regime is broader in compass than that which is, or was, applicable under section 234" and that the "wilful blindness" of the directors to the legal realities of employees and contractors was enough for liability to flow to them.[77] The Authority also found the directors were jointly and severally liable with the employer for any arrears owing.[78]

ADDITIONAL NOTES

The employer challenged the determination in the Employment Court.[79] The court agreed with the findings of the Authority's preliminary determination and held the taxi drivers were employees of the company.[80] The court considered whether the directors should be personally liable for any of the breaches and referred to the Court of Appeal in *Brill v A Labour Inspector,* which stated section 234 was only intended to apply as a last resort where there was evidence of personal and deliberate avoidance of the company's obligations.[81] The court accepted the directors' evidence that they did not believe the four taxi drivers were employees.[82] The court found the directors did not know they were in default of the company's statutory obligations; accordingly, they could not be personally liable under section 234.[83] Turning to the requirements for liability to flow to the directors under section 142W, the court considered that the language of the provision suggested intentional involvement in a breach was required.[84] The court found that because the Labour Inspector has not proved the director knew the contractors were employees, the necessary pre-requisite for liability – being proof of intentional and purposeful actions of breach of the relevant employment standard – was not made out.[85]

The Labour Inspector appealed the decision to the Court of Appeal.[86] The Court of Appeal allowed the appeal and determined the level of knowledge required to establish liability under section 142W was knowledge of the essential facts that established the breach by the employer.[87] The Court of Appeal considered whether employee status was an "essential fact" and found that it was irrelevant whether the directors believed the drivers were not employees[88] having already noted that wilful blindness as to those essential facts would be sufficient.[89] A subsequent appeal to the Supreme Court was abandoned.[90]

[77] At [43].
[78] At [47].
[79] *Southern Taxis Ltd v A Labour Inspector* [2020] NZEmpC 63.
[80] See [124].
[81] See [154].
[82] See [171].
[83] See [171], [172].
[84] At [180].
[85] At [189]–[190].
[86] A *Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705.
[87] See [7].
[88] See [57].
[89] At [42]
[90] https://www.courtsofnz.govt.nz/cases/maureen-valerie-grant-v-a-labour-inspector-southern-taxis-limited-maureen-valerie-grant-and-nathan-adams-as-administrators-in-the-estate-of-ronald-james-grant.

First Union v Jacks Hardware and Timber Ltd [2019] NZERA 374

Member Christine Hickey

BACKGROUND

First Union (the union) initiated collective bargaining with the employer on 13 October 2013. Between 2015 and the publication of this determination the proceedings had resulted in seven determinations of the Authority, two recommendations of the Authority after facilitation processes and six judgments of the Employment Court. This determination of the Authority culminated in the first collective agreement between the parties by fixing the last remaining disputed terms.

The union applied to the Authority under section 50J of the Employment Relations Act 2000 (Act) to ask the Authority to fix the terms of a collective agreement. This was the first time since section 50J was inserted in the Act in 2004 that the Authority was required to fix the provisions of a collective agreement. The Authority granted the union's application. The employer argued in the Employment Court that the requirements for fixing a collective agreement were not made out by the union. The court dismissed the challenge, paving the way for the Authority to fix the provisions of the collective agreement.

The Authority was required to fix two matters: the term (duration) of the agreement and remuneration.

The union sought to set the term of the agreement to 31 August 2020, the employer asked to set the agreement until 30 June 2020.

The union sought remuneration of $21.50 per hour for Tier 1 (entry-level) employees, $23.00 per hour for Tier 2 employees and an additional trade qualification rate of $3.00 per hour. The employer wished to keep the status quo and continue to pay employees their current rate of remuneration. The employer sought to set their lowest pay rate at 25 cents above the minimum wage, being $17.95 per hour for Tier 1 employees and $18.70 per hour for Tier 2 employees. It also sought to keep its existing rate of $1.00 per hour for the additional trade qualification rate.

The union argued the wages should be fixed in line with a main competitor chain of hardware stores and a major supermarket model. The employer disagreed, preferring to be compared to two other Mitre 10 stores in small towns.

FINDINGS

The Authority noted the Act does not outline any process for the Authority to follow when fixing the terms of a collective agreement. It affirmed it was acting in line with the purposes of the Act, including building productive employment relationships based on good faith, addressing the inherent inequality of power in employment relationships and promoting collective bargaining. It also noted the point of collective bargaining was to challenge the status quo, particularly to address the inequalities between the parties and give more power to the employees.

The Authority considered the following factors in coming to its determination:

- comparable wages in the market,
- the financial position of the company,
- the length of time between the initiation and finalisation of the collective agreement,
- pressure in the economy to increase wages, and
- the employer's preference to maintain internal parity.

After weighing the evidence and arguments of the parties, the Authority concluded the Tier 1 wages would be fixed at $19.00 per hour, Tier 2 at $21.00 per hour and the additional trade qualified rate at $2.00 per hour.

The Authority decided the term of the collective agreement should be fixed to operate from the date of the determination until 31 August 2020.

Sandhu v Gate Gourmet New Zealand Ltd [2020] NZERA 259

Member Geoffrey O'Sullivan

BACKGROUND

The employer was a business providing inflight catering services to passenger aircraft. It was an "essential service" for the purposes of the COVID-19 lockdown that commenced on 26 March 2020. This case involved several employees who were not part of either of the two collective agreements that covered the worksite but were part of a union: the Aviation Workers United Incorporated Union (AWU) which was involved in collective bargaining at the time of the determination.

As an essential service, the employer remained open for business during the COVID-19 lockdown. The employer advised that as a result of having very little work to offer employees, it proposed a partial shutdown of operations, and three options for pay:

- using annual leave until exhausted and then moving to option (2);
- being paid 80 per cent of normal pay, conditional on the employer receiving the government wage subsidy; or
- using annual leave to top up the 80 per cent of normal pay by using one day a week.

The AWU agreed to options (2) and (3). The applicant employees were on the minimum wage which increased to $18.90 per hour on 1 April 2020. The employer, however, believed that only employees who were working would be paid at the new minimum wage, and that those employees who were not rostered and did not work would continue to be paid at 80 per cent of normal pay calculated at the date of the commencement of the partial closedown (i.e. 80 per cent of the old minimum wage of $17.70 per hour). The employer applied the new minimum wage after objection from AWU but still only paid 80 per cent of the new minimum wage for the employees who were not working.

The employees claimed the employer took unilateral action threatening to cease paying the employees without proper consultation, and that the employer failed to pay the employees a minimum wage. The employer defended its position in reliance on the slogans "no work, no pay" and "partial performance, partial remuneration".

The employees claimed they were entitled to their normal wage since the employer was an essential service, and its partial closedown was a unilateral decision made without any final arrangement with employees regarding pay. The employees argued that the common law proposition of "no work, no pay" applies only when an employee refuses or fails to perform their part of the contract, and not in this case as the employees were ready and willing to work. The issue was also raised as to whether the employer had to pay at least the minimum wage whether or not employees were working, and whether paying the employees 80 per cent of their normal wage when this would reduce their pay to 80 per cent of the minimum wage is a breach of the Minimum Wage Act 1983 (MW Act).

The parties lodged an agreed statement of relevant facts in the Authority.

FINDINGS

The Authority found the nature of the payments made to the employees were not gratuitous payments, but payments made on the basis of the employment agreement. This meant that if the employees were ready, willing and able to work in an essential service, the employer was required to pay them at least the minimum wage. This was reinforced by the fact that the government wage subsidy was meant to "support workers to stay connected to their employer, even if they [were] unable to work".

The Authority noted there may have been other alternatives open to the employer, however by availing itself of the wage subsidy the employer had confirmed it would carry on the employment relationship. The Authority found the workers were ready, willing and able to work, and that employees are entitled to be paid both for work performed, contracted for, and work for which the employee is ready and willing to perform. In this case, the employer was an essential service and directed employees not to work. The lack of work was not due to the COVID-19 lockdown.

The Authority ultimately found the employer breached the MW Act by paying 80 per cent of wages and ordered the employer to pay the employees at least the minimum wage for 40 hours of work.

ADDITIONAL NOTES

The employer challenged the determination in the Employment Court.[91] The majority of the court held that when the employees were not rostered, they were not working for the purposes of section 6 of the MW Act.[92] They also held that as the MW Act was not engaged no minimum entitlements under the legislation arose.[93]

The employees appealed the decision to the Court of Appeal.[94] The Court of Appeal found the "only logical" reading of section 6 is that the minimum wage must be paid for the whole of the time the parties agreed the employee would work.[95] The Court of Appeal said the MW Act is a minimum protection that "sets a floor below which employers and employees cannot go".[96] The Court of Appeal reinstated the determination of the Authority and referred the case back to the Authority to determine any outstanding matters.[97]

[91] *Gate Gourmet New Zealand Ltd v Sandhu* [2020] NZEmpC 237.
[92] At [45].
[93] At [45].
[94] *Sandhu v Gate Gourmet New Zealand Ltd* [2021] NZCA 591.
[95] At [46].
[96] At [47].
[97] At [61], [62].

Wang v Hungrypanda (NZ) Ltd [2022] NZERA 154

Member David Beck

BACKGROUND

The respondent company provided a food delivery service via an online "app". The app allowed customers to order Chinese food items from local restaurants and grocers and to get them delivered through drivers who were also connected to the app. Customers were able to make orders in Mandarin and the service mainly provided for the local Chinese community.

The worker was a migrant. The worker had a master's degree in science from the United Kingdom but said they sometimes struggled to communicate in spoken English. The worker communicated with the company in Mandarin. The worker was employed as a takeaway delivery driver for the respondent for almost two months.

The worker went to pick up an order from a restaurant. They said that they had previously encountered issues with this restaurant due to orders not being ready. The worker also complained that the owner of this restaurant was abusive. The restaurant owner complained about the worker's attitude to the company. The company disconnected the worker from the delivery app. The worker raised a personal grievance with the company seeking reinstatement and other remedies. The company claimed the worker was a contractor.

FINDINGS

The Authority determined, taking into account the totality of the relationship, how it operated and the objects of the Act, that the real nature of the relationship was one of employment.

The factors the Authority considered when determining the worker was an employee were:

- while the written agreement between the applicant and the respondent stated the applicant was an independent contractor:
  - the agreement was in English;
  - the respondent did not provide a copy of the agreement to the applicant;
  - the respondent did not explain the terms of the agreement;
  - the applicant was not able to get advice on the agreement before signing it.
- the applicant had to indicate their availability for rosters in advance; they could not just log in and "grab" orders.
- while the applicant had a significant degree of choice over when and where he chose to work, the model of business gave the respondent significant control over him when he was working.
- while the applicant used his own vehicle, which had no signage, delivery drivers were essential and integral to the respondent's business model as the only tangible "public face" of the business.
- while the agreement provided that drivers could contract substitute drivers if they were unavailable, this was "a somewhat illusory benefit as the applicant had no guaranteed work to undertake".
- the applicant had no ability to expand the customer base to their advantage; there was no evidence they were in business on their own account.
- take-away food delivery drivers had a greater level of vulnerability when compared to taxi or courier operations which had been considered in other cases.

Bowen v Bank of New Zealand [2024] NZERA 361

Member Peter van Keulen

BACKGROUND

The employee was the manager of a small business team at a bank. In March 2016 the employee raised a complaint about the business conduct of their senior manager and a complaint relating to a team member about bullying. The employer investigated these two complaints and found no basis for either. That is, there had not been any unethical business conduct by the manager nor any bullying by the team member.

In September 2016 the employer began consultation over a proposed restructure that included the disestablishment of the employee's small business team. In October 2016 the employee raised a personal grievance, alleging the proposed restructure was motivated by retaliation for her complaints: in this they asserted the complaint about the senior manager was a protected disclosure under the Protected Disclosures Act 2000 (the applicable Act at that time).

In response to the personal grievance the employer suspended the restructure as that related to the employee, and they were placed on paid special leave whilst the employer investigated their grievance. The employer decided there was no basis for the employee's personal grievance, which included a finding by it that the complaint against the senior manager was not a Protected Disclosure, and the grievance was not resolved. In July 2018, the employer then recommenced consultation over proposed restructure. Ultimately, the outcome of the employer's consultation was the employee's role was disestablished, and they were dismissed by way of redundancy.

EMPLOYMENT RELATIONSHIP PROBLEM

There were several elements to the employee's employment relationship problem the Authority investigated. The two key aspects were personal grievances. One for unjustified action causing disadvantage based on the proposed restructuring of the employee's small business team in 2016. The other for unjustified dismissal in 2018.

FINDINGS

The Authority found that the employee was unjustifiably disadvantaged by the employer's proposed restructure in 2016: there was no business rationale for the proposal, and the restructure was in retaliation for the employee's complaint against their senior manager. As part of its analysis of the grievance and its reasoning, the Authority concluded that the employee's complaint against their senior manager was a Protected Disclosure. This was because the complaint met the requirements of the Protected Disclosures Act – it was a complaint about serious wrongdoing, the employee believed on reasonable grounds the complaint was correct, the employee wanted the complaint investigated, the employee wanted to be protected in making the disclosure and the employee made the complaint in line with the employer's policy. Whilst the Authority could have found an unjustified disadvantage grievance without deciding whether the employee had made a Protected Disclosure, this was a key aspect for the employee, and the finding provided the context of the employer's unjustified action

The Authority also found the employee was unjustifiably dismissed: the employer's consultation in 2018 regarding the proposed restructure was flawed as the employer failed to provide the employee with updated business information after the long hiatus; further, the proposed restructuring was not substantively justified in 2016 and absent further information it remained substantively unjustifiable in 2018.

The employee's employment relationship problem as that related to four other disadvantage personal grievances were dismissed, two of which because they were raised outside of 90 days.[98] The employee was also unsuccessful with their claims for penalties on the basis the employer had not breached good faith and the terms of the employment agreement as alleged.

[98] Contrary to section 114 of the Employment Relations Act 2000.

This determination was limited to liability. In a subsequent determination,[99] the Authority awarded the employee: compensation of $105,000, lost remuneration and other benefits totalling $391,040, which included lost salary, medical costs incurred, and other lost monetary benefits and special damages of $10,000 for legal representation relating to the first restructuring process.

[99] *Bowen v Bank of New Zealand* [2025] NZERA 380.

Maritime Union of New Zealand v Holcim (New Zealand) Ltd [2025] NZERA 848

Member Nicola Craig

BACKGROUND

Members of the Maritime Union of New Zealand (the union) worked on the MV Buffalo, a cement ship on the New Zealand coast operated by the employer. Six union members were also parties to the proceedings.

The employer entered into discussions with overseas companies regarding the sale of the vessel and subsequent arrangements to charter the vessel back to the employer. The employer consulted with the union and the employees regarding various options.

The employer agreed principal terms to sell the vessel. The purchaser notified the employer that they intended to take the vessel away from New Zealand instead of chartering it back to the employer; the purchaser would not offer the employees employment on the vessel.

The employer entered into an agreement to sell the vessel. The employees were told their employment on the vessel would continue until the time the vessel was sold, and the replacement vessel arrived.

The employer entered an arrangement with a foreign company to provide a replacement vessel under a time charter. Under the Maritime Transport Act 1994, a foreign vessel, operated by a foreign company with a foreign crew, could not transport coastal cargo without Ministerial authorisation. The Ministerial authorisation was declined. As the replacement vessel could not arrive in New Zealand as scheduled, the employer stated an intention to transport their cargo by land.

The employer gave notice to the six employees that their roles were disestablished. These notices stated their employment would be terminated due to redundancy in the absence of any redeployment opportunities.

The employer said there were no suitable vacancies available for the six employees but that they would continue to assess redeployment opportunities.

The union noted that advertisements for crew members were posted, which were in line with crew requirements in the safe manning certificate of the replacement vessel. The owner of the intended replacement vessel stated these advertisements were placed in error by immigration advisors assisting their clients.

The union sought an injunction to prevent the employer from making the six employees redundant.

FINDINGS

It was not disputed that the Authority had the jurisdiction to order an interim injunction with the effect of pausing the termination of the employment.

The Authority concluded that the possibility of the employer moving to a land-based solution was likely to adversely impact the continuation of the employment. There was no evidence before the Authority the employer had provided the union or the employees with information regarding this proposed change. The Authority found there was a serious question to be tried that the employer breached its good faith obligations.

The Authority said that if an interim order was not made, the six employees would be redundant which itself tended to be disadvantageous.

The Authority accepted that a fairly high threshold was required to warrant intervention. The Authority noted the obligation of the employer to provide the vessel to the purchaser. However, the Authority found the employer arguably chose to enter into an arrangement which required Ministerial authorisation without a contingency plan. The fact the employer would not receive the replacement vessel did not permit the employer to get out of its employment obligations. The Authority found the overall justice favoured the union and the employees. The Authority granted an interim injunction preventing the employer from making the six employees redundant.

In a subsequent determination, the Authority found there was no reason the employees could not have performed their duties if reinstated. However, by that stage the prospect of the employer entering an agreement for a replacement vessel had fallen away, with discussions involving another company having concluded without agreement. The Authority therefore considered reinstatement was no longer a practicable remedy and declined to issue a permanent injunction.[100]

[100] *Unasas v Holcim (New Zealand) Ltd* [2026] NZERA 461.