Employment Law

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I Introduction

The election of the New Zealand Labour-led coalition government in 2017 has contributed to a number of developments in the area of employment law. This is reflected in this employment law review, which contains a summary of the legislative changes and a review of the main case law over the past two years.

The review considers the 2018 amendments to the Employment Relations Act 2000 (ER Act), which has updated a range of rules related to collective bargaining, trial periods, rest and meal breaks and reinstatement. The review also addresses the developments made with regard to the new domestic violence law, which allows for flexible working arrangements, special leave and protection against discrimination. This review further provides updates on the (not yet in force) Employment Relations (Triangular Employment) Amendment Act 2019 and the Privacy Bill 2019. There has also been a number of significant cases decided over 2018 and 2019. The review begins with an update on personal grievances which delves into the law surrounding notice periods, 90-day trials and mental health awareness. Next, there is a summary of recent decisions concerning workplace bullying and harassment. In particular, it highlights the complexity of defining bullying, perceptions of bullying, performance discussion and sexual harassment. Finally, the review covers a number of topics brought to light during the 2018–19 period, including cases regarding what constitutes work, interpreting a collective agreement and the penalty doctrine.

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II Legislative Changes — Employment Relations Amendment Act 2018

The Employment Relations Amendment Act 2018 came into force on 12 December 2018 and makes amendments to the ER Act. These amendments are designed to restore and improve the minimum standards and protections for employees, strengthen collective bargaining in the workforce and enhance union rights.[1] Most changes to the ER Act came into force on Monday 6 May 2019.

Over the years and up to 2015, various amendments were made to the ER Act with the result that the rights of trade unions and collective bargaining had been seriously eroded. The 2018 amendments intend to restore the original provisions of the ER Act with a view to strengthen the position of trade unions[2] by repealing or amending the previous changes introduced by the National government.[3]

The first set of key changes to the ER Act concerns unions' recognition and operation. New s 18A of the ER Act guarantees union delegates a normal pay rate for time spent undertaking union activities during their normal hours of work. The entitlement applies where: the employee has been appointed or elected as a union delegate; the activities relate to representation of employees of the employer; and the activities would not unreasonably disrupt the employer's business.[4]

Since 2011, trade union access to the workplace had been subjected to the prior consent of the employer. Amended s 20 of the ER Act now allows union representatives to enter the workplace without the prior consent of the employer for purposes related to the union's members, the union's business or health and safety issues. In other cases representatives of the union must request and obtain the employer's consent before entering the workplace unless there is a collective agreement in force between the employer and the union or bargaining has been initiated.[5]

The second main series of changes to the ER Act concerns employers' obligations to share information. Trade union membership has always been controversial. Compulsory membership was generally required for

1 New Zealand Parliament "Employment Relations Amendment Bill" <parliament.nz>.

2 Michael Leggat "Employment Relations Amendment Bill 2018 … some parts new, quite a bit old" [2018] ELB 24 at 24.

3 See Peter Skilling "Another swing of the pendulum: rhetoric and argument around the Employment Relations Amendment Act (2018)" (2019) 44(1) NZJER 59.

4 Employment Relations Act 2000, s 18A(1) [ER Act].

5 Section 20A(1)–(1A).

employees covered by awards during the period between 1936 and 1991,[6] but this was radically changed by the adoption of the Employment Contracts Act 1991, which introduced a strict regime of freedom of association and union membership. The ER Act remained generally neutral on this issue but in an effort to enforce the freedom of association, employers were under no obligation to inform employees about the unions operating within the undertaking. New s 30A of the ER Act changes this by providing that a union may give an employer information about the role and functions of unions to be passed on to prospective employees. An employer can refuse to comply with such a request only: if the information is confidential or is about the employer; would likely mislead or deceive the employee; and would significantly undermine the bargaining between the employer and prospective employee.[7]

In addition, the new s 62A of the ER Act requires the employer to share with the union the information about any new employee, unless the employee objects. Within the first 10 days of a new employee's employment, the employer must provide a form to assess whether an employee intends to join a union or objects to the employer providing information to the union.[8] New employees are therefore provided with an active choice as to whether they would like to be involved within unions or not.

The restoration of the 30-day rule for new employees represents another major change to the ER Act. Whether they are or are not a union member, the terms of employment of all new employees must be consistent with the applicable collective agreement,[9] unless there are more favourable terms agreed between the employer and the employee.[10] After the 30-day period has expired, the employer and the employee may vary the terms in an individual agreement as both parties see fit.[11]

A third key series of changes to the ER Act concerns the rules around collective bargaining. The objective of the ER Act is to build productive employment relationships through the promotion of good faith by, in particular, promoting collective bargaining.[12] The duty of good faith "to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to", removed from the ER Act under the National-led government, has been now restored in s 33(1).

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6 Gordon Anderson *Reconstructing New Zealand's Labour Law: Consensus or Divergence?* (Victoria University Press, Wellington, 2011) at 37.

7 ER Act, s 30A(3).

8 Section 62A(2).

9 Section 62.

10 Leggat, above n 2, at 25.

11 ER Act, s 63.

12 Section 3(a)(iii).

The content of a collective agreement is also updated and must now include pay rates under new s 54, as well as indicate how the rate of wages or salary may increase during the employee's period of employment.[13]

In the same vein, the rules relating to strikes have been amended. Strikes are an essential element of collective bargaining. Although they are often a last resort, they represent legitimate actions and a fundamental right used by unions to advance their bargaining aims.[14] Section 82A(2)(a) recognises that strikes are a lawful action if preceded by a secret ballot of the union's members employed by the employers. No ballot is required where the proposed strike relates to a lawful strike on the grounds of health or safety under s 84.

New Zealand saw a significant uptake in strike activities over the 2018–19 period, which is likely to have resulted from a build-up of issues including underfunding, wage suppression and under-investment.[15] Among the strikers in 2018 and 2019 were nurses, junior doctors, teachers, bus drivers, fast-food, retail, port, steel workers as well as public servants. Women have led the recent strike wave. They also made up the majority of participants in these series of strikes. Erin Polaczuk, the Public Service Association secretary, highlighted that as unions have become more feminised and mature, the union movement has shifted accordingly.[16] The form of strikes has also evolved. Complete "walk off the job" strikes are often replaced with partial strikes as was done by H&M retail workers in July 2019.[17] Retail workers fighting for the "Living Wage" of $21.15 per hour also carried out their partial strike by refusing to serve customers or fold and hang clothes. The Employment Relations Amendment Act 2000 repealed ss 95A–H of the ER Act making it unlawful for employers to deduct specified pay in response to partial strikes.

Finally, a series of amendments is concerned with employment right protection. Following these amendments, the 90-day trial period is restricted under s 67A of the ER Act to small-to-medium-sized businesses that employ fewer than 20 employees. This limitation provides flexibility to small employers who are presumed to only have access to limited human resource services. As a result, it is assumed that recruitment processes and staff management is of a lower standard in such small-to-medium-sized

13 Section 54(4)(b).

14 Avalon Kent "Did the sky fall? The 2018 New Zealand strike 'wave'" [2018] ELB 2 at 2.

15 At 2.

16 Clare de Lore "Striking out in a new direction" *New Zealand Listener* (New Zealand, 3 February 2018) at 34.

17 Aimee Shaw "H&M workers take partial-strike action" *The New Zealand Herald* (online ed, Auckland, 6 July 2019)..

businesses than larger ones.[18] Large businesses of more than 20 employees continue to be able to use probationary periods as an alternative under s 67(1) of the ER Act. In this case, any dismissal must meet the procedural and justification tests within the ER Act.[19]

In addition, the rules surrounding rest and meal breaks have been restored. Section 69ZD(1) provides that employees are entitled to rest breaks and meal breaks. The employer and employee are able to discuss and agree when the employee is to take rest and meal breaks. In absence of such agreement, the Act prescribes timings as to when breaks are to be taken. This will generally require breaks to default to the middle of the work period if it is reasonable and practicable to do so. Exceptions are available in some circumstances such as employees engaged in New Zealand's national security or where breaks are provided for in other legislation.[20]

Finally, the amended s 125 of the ER Act restores reinstatement as the primary remedy where it is determined that the employee has a personal grievance.[21] Amendments brought to the Act in 2010 had only made reinstatement an option if it was practicable and reasonable to do so.[22] Now, unless it is impracticable, an order of reinstatement must be made to the employee's original position. One commentator has predicted that restoring reinstatement as the primary remedy will have little impact upon personal grievances.[23] However, as was stated in *Ashton v Shoreline Hotel*,[24] to primarily award compensation for job loss, instead of reinstatement, creates a system for licensing unjustified dismissals.

III Domestic Violence

The Domestic Violence—Victims' Protection Act 2018, which came into effect on 1 April 2019, inserts a new pt 6AB into the ER Act. The 2018 Act also amends the Holidays Act 2003 and the Human Rights Act 1993. The new law provides legal protection of employees affected by domestic violence[25] and creates new legal requirements for employers. The law further

18 Leggat, above n 2, at 27.

19 AJ Lodge "The end of 90 day trial periods, for some." (2018) Cavell Leitch <cavell.co.nz>.

20 ER Act, s 69ZEA.

21 ER Act, Section 125(1)(b).

22 Leggat, above n 2, at 26.

23 Barnaby Locke "Reinstatement: a political football?" [2018] ELB 11 at 12–13.

24 *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 (EmpC) at 436.

25 In accordance with s 69ABA of the Domestic Violence—Victims' Protection Act 2018, a person has been affected by domestic violence if they are a person against whom any other person inflicts, or has inflicted, domestic violence or a person with whom there

recognises the gravity of harm caused by domestic violence by establishing supportive workplaces in order to help victims remain in employment and find a way out of violence.[26] New Zealand is the second country in the world, after the Philippines, to offer this type of protection to employees who are victims of domestic violence, and has consequently received much coverage from media around the world.

The law allows workers victims of domestic violence to request flexible working arrangements. Under s 69AB, employees affected by domestic violence have the right to make a request, or have a request made on their behalf, for a short-term (two-months or less) variation of their working arrangements. Employers must ensure that any of their employees affected by domestic violence have their requests considered appropriately and responsibly. Under s 69ABF(2), an employer must respond within 10 working days of receiving the request and may only refuse to grant the request if proof of domestic violence is required but not produced, or if the request cannot be reasonably accommodated for business reasons. The employer's failure to address a request can be referred to a Labour Inspector, mediation or the Employment Authority.

An employee affected by domestic violence may make a request at any time, regardless of when the violence occurred, even if it occurred before employment started.[27] The request must be made in writing, stating the employee's name, date of the request and that the request is made under s 69ABC of the ER Act. The request must further include the required new working arrangements as well as explain how the flexible employment will assist the employee with regard to their situation.[28] Such requirements, in particular the requirement to provide proof of domestic violence, might act as deterrents to employees who will find domestic violence a painful and sensitive subject to raise. It is unlikely that employees will be able to access these rights unless employers are proactive in minimising such deterrents by, for instance, providing template forms, or appointing staff to assist employees make requests and guide them towards existing community or workplace supports when they apply for leave or flexible working arrangements.

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ordinarily/periodically resides a child against whom any other person inflicts, or has inflicted, domestic violence. If an individual falls under either of these definitions, they may request flexible short-term working arrangements or domestic violence leave.

26 New Zealand Law Society "Domestic Violence Victim Protection bill passes" (26 July 2018) <lawsociety.org.nz>.

27 ER Act, s 69ABB.

28 ER Act, s 69ABC.

The Domestic Violence—Victims' Protection Act 2018 creates a new category of leave under the Holidays Act 2003, which is distinct from annual, sick and bereavement leave entitlements. The law requires employers to provide up to 10 days' paid leave from work for victims of domestic violence, separate from annual leave and sick leave entitlements. Employees are entitled to the leave on the condition that they have completed six months of current continuous employment with the employer.[29] Entitlement to such leave also arises if the employee has worked for the employer over a period of six months for an average of at least 10 hours per week[30] and for no less than one hour in every week during those six months or no less than 40 hours in every month during that period.[31] Despite this being a new type of leave for New Zealand law, it must be treated similarly to sick or bereavement leave. Therefore, employers must be flexible and aware that they may be without staff members for up to 10 days at a time.[32]

In addition, discriminating against employees affected by domestic violence is prohibited under the new s 62A of the Human Rights Act 1993. This provision applies during recruitment processes as well as within the period of employment. An employee has grounds for a personal grievance under the ER Act, or a claim under the Human Rights Act, if they are treated adversely in their employment on the grounds that the employee is, or is suspected or assumed or believed to be, a person affected by domestic violence.

The new law is relatively complex and highly prescriptive but these new requirements should be understood as a minimum for employers. It is expected that employers who care about employees' wellbeing and morale, gender diversity and inclusion, improving staff retention, enhancing productivity, and being seen as socially responsible must do more than meet these minimum legal requirements. The very personal nature of domestic violence as well as the wide-ranging effects of domestic violence means that these rights could have significant implications for employers managing their business. The critical issue of privacy is not considered by the Act, which therefore operates within existing privacy law. Employers will have to consider who made a request and what information is recorded or shared, and with whom — including within payroll and on payslips.

29 Holidays Act 2003, s 72D(1)(a).

30 Section 72D(1)(b)(i).

31 Section 72D(1)(b)(ii).

32 Hamish Kynaston and others "Legislative changes coming to a workplace near you" (16 April 2019) Buddle Findlay <buddlefindlay.com>.

IV Triangular Employment

Eleven years after the Bill was first introduced to Parliament, the Employment Relations (Triangular Employment) Amendment Act 2019 received Royal Assent on 27 June 2019. The Act amends the ER Act and it is predicted to come into force on 27 June 2020. This Act aims to attempt to regulate triangular employment relationships and represents a response to concerns regarding the exploitation of temporary workers.[33] It reflects New Zealand's evolving workplace structure, which shows a steady increase in employees entering into triangular arrangements as well as other forms of precarious employment. Triangular employment arrangements arise where an employee is employed by one company or organisation, such as a temp agency, but works under the control or direction of a controlling third party. Triangular employment arrangements are known to increase the risk of non-compliance with employment law because of their complexity and the temporary nature of the work.[34] The general absence of legislation in this area contributes to the exploitation of workers and risks increasing their precariousness. The amendments to the ER Act aim to "ensure that employees employed by one employer, but working under the control and direction of another business or organisation, […] are not subject to a detriment in their right to allege a personal grievance".[35]

The amended s 5 of the ER Act clarifies that a controlling third party has a contract or other arrangement with an employer where one of its employees performs work for the benefit of that person; and the third party exercises, or is entitled to exercise, control over the employee in a way that resembles the control that the employer has over the employee. Thus, controlling third parties will no longer be able to avoid liability by hiding behind the employee's primary employer.

As the law currently stands, triangular employees cannot easily claim a personal grievance against the controlling third party as the employee must first prove that the third party was in fact their true employer. This often leads to unfair employment practices and a deprivation of employment rights. The key changes brought by the Act provide a simplification of the personal grievance process and an increased access to justice for triangular employees. The new s 103B of the ER Act provides that an employee can apply to join a controlling third party to an existing personal grievance claim against their employer. Before this can happen, an employee must

33 Eloise Callister-Baker "Temporary (migrant) workers and triangular employment relationships" [2018] ELB 89 at 89.

34 At 88.

35 (3 April 2019) NZPD (Employment Relations (Triangular Employment) Amendment Bill — Second Reading, Jamie Strange).

raise a personal grievance with their employer regarding an alleged action which occurred while working for the controlling third party.[36] Furthermore, pursuant to the new s 115A, within 90 days of the personal grievance being raised, either the employee or employer must notify the controlling third party that they consider their actions to have caused or contributed to the personal grievance.[37] Pursuant to the new s 123A, in making a decision with regard to remedies, the Employment Authority or court must consider the extent of the actions caused or contributed to by the controlling third party which gave rise to the personal grievance.[38] Any remedies awarded must reflect the extent of the parties' contribution. An employee may be reimbursed for any lost wages or salary, or may receive compensation for any humiliation, loss of dignity and injury to feelings suffered.[39]

Industries involved in labour hire arrangements, those in sectors affected by seasonal fluctuations, and those who hire a temporary workforce are clearly impacted by this new law. However, it is important to note that triangular employment relationships are also likely to apply to employees on secondment from their employer to another business or organisation.

V Privacy Bill 2018

The Privacy Bill 2018 was introduced to Parliament by Hon Andrew Little on the 20 March 2018. The Bill, which is expected to be adopted during the course of 2020, will update and modernise the 25-year-old Privacy Act 1993 and bring New Zealand's privacy law up to date with the digital society. The reform will also bring New Zealand into line with international laws, in particular with the European General Data Protection Regulation.[40] One of the key purposes of the Privacy Bill is to assure individuals that their personal information is secure and treated properly by strengthening the compliance aspects of the regime.[41]

A key change introduced in the Bill is the mandatory reporting of privacy breaches. Clause 118 of the Bill provides that an agency must notify the Privacy Commissioner as soon as practicable after becoming aware that

36 ER Act, s 103B(1)(b).

37 Section 115A.

38 Section 123A.

39 Section 123.

40 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L/119.

41 New Zealand Parliament "Privacy Bill" <parliament.nz>.

a privacy breach has occurred. Any affected individuals must be notified of the breach or a public notice must be raised where a privacy breach is at risk of causing harm.[42] What amounts to a privacy breach is set at a low level and includes any unauthorised or accidental access to, or disclosure, alteration, loss or destruction of personal information.[43] Alternatively, a "privacy breach" means an action that prevents the agency from accessing the information on a temporary or permanent basis.[44]

Agencies which fail to report a breach to the Privacy Commissioner are liable to fines of up to $10,000,[45] which represents a relatively moderate remedy in comparison to other countries. If the Privacy Commissioner considers there to be a breach of privacy law or there has been a breach of an IPP (information privacy principle) or interference with an individual's privacy under another Act, they may issue a compliance notice to an agency to enable them to comply with the law.[46] The Bill also makes it a criminal offence to mislead an agency in a way which affects someone else's information.

Another key change concerns the protection of cross-border data flow and clarifies the law with regard to transfer of information overseas. The Bill empowers the Commissioner to prohibit the disclosure of information overseas without consent, unless the overseas person is in a country with comparable privacy laws, or the agency believes the person will protect the information in a comparable manner and there is a permitted exception.[47]

Furthermore, the Privacy Commissioner's powers are strengthened through the new Bill as they will be able to make decisions on complaints relating to access to information.[48] This is compared to decisions being placed in the hands of the Human Rights Tribunal. The Commissioner's decisions will be able to be appealed to the Tribunal. The Commissioner is also able to shorten the period in which an agency must comply, giving them strengthened gathering power.

42 Privacy Bill 2018 (34-2), cl 119.
43 Clause 117(1).
44 Clause 117(1).
45 Clause 122.
46 Clause 124.
47 Clause 193.
48 Clause 202.

VI Personal Grievances

A *Payment in lieu as opposed to working out notice period*

In *Ioan v Scott Technology NZ Ltd*,[49] it was claimed that proper written notice of termination was not provided and therefore the employer failed to comply with s 67B(1) of the ER Act. Mr Ioan sought to bring a claim of unjustified dismissal to the Employment Court, however due to being under a trial period, he was unable to do so.

Mr Ioan appealed on a question of law on the basis of the letter provided by Scott stating:[50]

> Your notice period, as outlined in your employment period, is four weeks however we have decided you will be paid in lieu of working out your notice period. Therefore, your effective last day of work is today.

In agreement with Judge Holden in the Employment Court, the Court of Appeal held that notice of termination in accordance with s 67B of the ER Act includes a situation where an employer gives the requisite notice period but does not require the employee to work it and instead pays for that period of notice.[51] Therefore, the employee was prevented from raising a personal grievance as the requisite notice had been given. The Supreme Court has subsequently accepted and agreed with this interpretation.[52]

B *90-day trial period*

Roach v Nazareth Care Charitable Trust[53] highlights the importance of complying with notice provisions when relying on the 90-day trial period. Roach was dismissed from his role at Nazareth Care which was subject to a 90-day trial period. However, Roach had previously been offered and accepted a Business Manager's position at Nazareth, which was also subject to a 90-day trial. He never started work in this position or performed any of the duties before he took on the current role, which he was dismissed from. Roach therefore argued that Nazareth could not rely on the 90-day trial period as he was a previous employee and that Nazareth failed to give him the requisite notice.

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49 *Ioan v Scott Technology Ltd* [2019] NZSC 130.

50 At [2].

51 At [6].

52 At [7].

53 *Roach v Nazareth Care Charitable Trust* [2018] NZEmpC 123.

Roach argued that for the purposes of s 5 of the ER Act, he was a person intending to work, thus the 90-day trial period was not valid. The Court, however, agreed with Nazareth that the purpose of s 67A of the ER Act is to enable an employer to assess an employee's suitability for the position without opening itself up to a personal grievance action. The Court also emphasised that actual performance of the tasks is needed, not just mere agreement to conduct work. On the basis of this reasoning, the 90-day trial period was held to be valid under s 67A.

When Roach was dismissed, instead of working his notice period, he received payment in lieu. He argued that Nazareth could not rely on the trial period due to inadequate notice, as there was no mention of a payment in lieu notice in his employment agreement. The Court agreed with Roach on this point and stated that Nazareth did not comply with the employment agreement when dismissing Roach. As a result, Nazareth was unable to rely on s 67B(1) and Roach was able to raise an unjustified grievance claim.[54]

The next question was whether Roach had been unjustifiably dismissed in breach of the test in s 103A of the ER Act?[55] Prior to the dismissal, Roach had not been made aware of any issues Nazareth had with his conduct. Furthermore, there was no evidence that the concerns were justified or that they might have led to his dismissal. Accordingly, the actions were not considered to be what a fair and reasonable employer could have done.[56]

This case demonstrates that it is critical for an employer to include and follow the trial period provisions contained in the respective employment agreement before termination. Furthermore, this case confirms that a trial period commences only when that employee actually performs and carries out work.

C *Managing illness and mental health issues*

In *FGH v RST*,[57] the Employment Court emphasised the importance of managing and taking care of employees with mental health conditions. In her role, FGH (H) would process applications for documents to be issued to the public. Over a period of seven months, H was required to participate in both informal and formal performance management processes, however, her anxiety disorder affected her whilst undertaking these. Alongside this, it was known to H's employers that she suffered from attention deficit disorder

54 At [62].
55 At [63].
56 At [67].
57 *FGH v RST* [2018] NZEmpC 60, (2018) 15 NZELR 944.

(ADD), which consequently affected her work performance. As a result, H fell ill and was forced to leave work for a few weeks. Before leaving, she asserted that she had been bullied and that the workplace had various health and safety issues.[58] After returning to work, there were a number of disputes and disagreements between H and her employer. H then raised a disadvantage grievance stating that RST failed to provide a safe work environment when dealing with her performance issues, claiming this caused unwarranted stress.[59]

The Employment Court held that RST's actions were not what a fair and reasonable employer could have done in all the circumstances[60] and that RST failed to provide H with a safe and healthy work environment, in breach of statutory and contractual obligations. In saying this, the Court accepted that H's unjustified disadvantage grievance was established.[61]

This case provides insight on two important matters. First, where employees are acting inappropriately and disciplinary matters commence, an employer must be aware of any underlying medical conditions which could be linked to the employee's work performance.[62] Second, when an employer is aware that an employee has a medical condition, steps must be taken to manage the employee and employers must be prepared to seek a medical assessment.[63]

VII Workplace Bullying and Harassment

Bullying and harassment within the workplace can create a significant risk to an individual's health and safety. Consequently, an employer has a legal obligation under the Health and Safety at Work Act 2015 to manage risks arising from the conduct of their business, which includes protecting employees from harmful behaviour such as bullying.[64] WorkSafe New Zealand, acknowledging that bullying in the workplace has destructive effects on employees, published guidelines to provide employers, employees and the courts with direction on potential issues of bullying within the workplace. The guidelines defines workplace bullying as "repeated and unreasonable behaviour directed towards a worker of group of workers that

58 At [2].
59 At [4].
60 At [277].
61 At [278].
62 Cassandra Kenworthy "*FGH v RST*" [2018] ELB 103 at 104.
63 At 104.
64 David Beck "Resolving Workplace 'Bullying'" (2018) 43(3) NZJER 33.

creates a risk to health and safety".[65] Thus, employers are able to use this definition as a guide to determine whether behaviour in the workplace is potential bullying which ought to be addressed.

WorkSafe's definition of workplace bullying represents merely a guideline. It is possible for any workplace to have an internal definition. This can lead to a problematic understanding of the term as seen in *Emmerson v Northland District Health Board*.[66] Here, Dr Emmerson alleged that she was subject to continuous bullying and intimidation from another doctor.[67] Furthermore, she stated that NDHB were aware or should have been aware of the bullying and that they permitted it to occur, thus failing to provide her with a safe working environment.[68] It was acknowledged that NDHB had their own definition, different from WorkSafe's, as to what constituted bullying, which was defined as:[69]

> Bullying in the workplace is repeated, unwanted, unwarranted behaviour that a person finds offensive, intimidating and/or humiliating so as to have a detrimental effect upon a person's dignity, safety, wellbeing and functionality.

The Court assessed the alleged bullying in accordance with the NDHB definition.[70] In turn, it was established that Dr Emmerson's new role in the organisation subjected her to greater scrutiny.[71] This, as well as other factors, affected her health and performance as a doctor. The Court held that although many situations were difficult for Dr Emmerson, they did not constitute bullying.[72] Therefore, although behaviour may have been unwanted, it was not seen as unwarranted by the Court and so the claim of workplace bullying was dismissed.

The Court's approach in this case emphasises the significance of assessing particular definitions within an employee's workplace. Although internal definitions will not be conclusive of any case, they are certainly relevant in assessing particular circumstances in litigation.[73]

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65 WorkSafe "Examples of bullying behaviour" (2017) WorkSafe Mahi Haumaru Aotearoa <worksafe.govt.nz>.

66 *Emmerson v Northland District Health Board* [2019] NZEmpC 34.

67 At [153].

68 At [154].

69 At [155].

70 At [157].

71 At [171].

72 At [173].

73 Geoff Davenport "Workplace bullying — the challenges of seeking redress" [2019] ELB 58 at 59.

Emmerson v Northland District Health Board also highlights the issue of perceptions regarding bullying. Dr Emmerson claimed that she was often "ripped into", blamed, threatened and given inconsistent instructions.[74] The Court acknowledged that in such a scenario it is important to consider the perception of the opposing party. Considering both sides, the Court established that Emmerson had exaggerated the alleged events and that although many situations were challenging, they were not bullying.[75] Such an approach emphasises the need to consider different perceptions of the alleged workplace bullying.

In *Marx v Southern Cross Campus*,[76] the Employment Court distinguished bullying from discussion in performance meetings. Although conversations may be difficult and challenging, it does not necessarily mean that the circumstances amount to bullying.[77] In such situations the court will assess the background of events to determine whether conduct amounts to bullying or simply represents a criticism with regard to performance.

Relatedly, allegations of sexual harassment must be taken seriously. Section 37 of the Health and Safety at Work Act 2015 provides that a person conducting a business or undertaking (PCBU) must ensure that the workplace is without risks to the mental and physical health and safety of a person. Sexual harassment can cause both mental and physical harm, thus, employers must be proactive about preventing this harm from occurring.[78] Employees are protected from sexual and racial harassment in the workplace under the ER Act as well as under the Human Rights Act 1993. Section 117 of the ER Act relates to situations where a person is sexually harassed by someone other than the employer. If s 117 applies, the employee may make a complaint about the other employee's behaviour. In this case, the employer must "inquire into the facts" and, if satisfied the behaviour has taken place, the employer or their representative must take whatever steps practicable to prevent the behaviour occurring again.[79] An employee may take a personal grievance against an employer who fails in its duty to take practicable steps under s 118. The Human Rights Act 1993 sets out similar obligations for employers to investigate allegations of sexual harassment and provides that failure to do so may give rise to an action under that Act.[80] Furthermore, under s 68 of the Human Rights Act 1993, vicarious liability can be established if

74 *Emmerson*, above n 66, at [162].

75 At [172]–[173].

76 *Marx v Southern Cross Campus Board of Trustees* [2018] NZEmpC 76, (2018) 16 NZELR 24.

77 Davenport, above n 73, at 61.

78 Mike Hargreaves "Bullying and Harassment" [2018] ELB 117 at 118.

79 ER Act, s 117(3)–(4).

80 Human Rights Act 1993, s 69.

it can be proved that the employer did not take reasonably practicable steps to prevent the sexual harassment from occurring.

The extent of the employer's duty to take practicable steps has been discussed in *A Ltd v H*.[81] In it, the Court of Appeal held that employers' decisions should not be subjected to pedantic scrutiny, instead the proper approach is to overall assess whether the decision was fair and reasonable in all of the circumstances. In this case, H was dismissed after it was found that he had breached A Ltd's sexual harassment policy, leading to serious misconduct. The respective misconduct involved H, a 51-year-old pilot, making inappropriate comments, advances and physical touches towards a 19-year-old flight attendant.

Judge Corkill in the Employment Court held that H had been treated unfairly in the investigation process. He stated that all evidence was not considered in an even-handed manner.[82] Further, it was said that there was disparity between the way H was treated compared to how A Ltd treated another employee in similar circumstances years earlier. Accordingly, Judge Corkill determined that H's dismissal was not a decision which a fair and reasonable employer could make.[83]

On appeal, the Court of Appeal disagreed and while it was accepted that a balanced approach is appropriate, it said that the Employment Court did not allow for a range of potential responses or actions that may be open to a fair and reasonable employer. Based on the approach taken in *Angus v Ports of Auckland Ltd*,[84] the Court of Appeal emphasised that under s 103A of the ER Act, a case-by-case assessment of what the employer did and how a fair and reasonable employer in the circumstances could have acted is necessary.[85] The Court decided to set aside the Employment Court's orders, granting H reinstatement, payment of wages and compensation as well as referring the matter back to the Employment Court for remedies. Thus, this case provides clarity on the overall standard of justification for dismissal, which is reasonableness and fairness as opposed to exactness and a judicial-like process.[86]

81 *A Ltd v H* [2016] NZCA 419, [2017] 2 NZLR 295.

82 *H v A Ltd* [2014] NZEmpC 189 at [79].

83 At [80].

84 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466.

85 *A Ltd v H*, above n 81, at [46].

86 Johanna Drayton and Alistair Clarke "*A Ltd v H* [2016] NZCA 419" [2018] ELB 56 at 59.

VIII What Constitutes Work?

What is considered to be work for the purposes of s 6 of the Minimum Wage Act 1983 has been the focus of a number of cases in recent years. While work cannot be paid under the legal minimum rate, the Act does not define what constitutes "work". No other statute defines "work" for the purposes of the Minimum Wage Act.

The discussion began in *South Canterbury District Health Board*,[87] where the issue was whether staying overnight at accommodation provided by the employer could be considered work for the purposes of s 6 of the Minimum Wage Act. The nature of the employment required anaesthetic technicians to be placed on a call-back roster as surgery services were offered 24 hours each day. It was expected that employees should be at the hospital within 10 minutes of being called back. Employees who lived more than 10 minutes away were provided free accommodation adjacent to the hospital when on call. The issue was to determine whether this could be considered work.

In reaching a conclusion, the "sleep-over principles" developed in *Idea Services Ltd v Dickson*[88] were applied:[89]

a) the constraints placed on the freedom the employee would otherwise have to do as he or she pleases;
b) the nature and extent of responsibilities placed on the employee; and
c) the benefit to the employer of having the employee perform the role.

After undertaking a case-specific assessment, the Employment Court was satisfied that when on call employees ought to be regarded as undertaking work for the purposes of s 6 of the Minimum Wage Act.[90] This was furthermore accepted by the Court of Appeal and leave to appeal was therefore declined.[91]

On a similar issue, *Labour Inspector of the Ministry of Business, Innovation and Employment v Smiths City Group Ltd*[92] considered whether a 15-minute staff meetings held every morning, before store opening, at Smith City Group Ltd constituted work as per s 6 of the Minimum Wage Act. Sales staff, who were expected to attend the 8.45 am–9.00 am weekday meetings and 9.45 am–10.00 am weekend meetings,[93] were not paid for

87 *South Canterbury District Health Board v Sanderson* [2018] NZCA 82.
88 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 at [7] and [10].
89 *South Canterbury District Health Board*, above n 87, at [5].
90 At [6].
91 At [15].
92 *Labour Inspector of the Ministry of Business, Innovation and Employment v Smiths City Group Ltd* [2018] NZEmpC 43.
93 At [5].

these meetings and were instead paid from when the stores opened. Smiths City considered these meetings as an "integral part of a store manager's job" and it even went as far as having a regional manager undertaking regular checks that each store was in fact holding the meetings.[94] Smiths City explained that in compensation employees were able to take longer breaks or even finish early when stores were quiet.[95]

In determining whether employees are to be paid for the meetings, the Employment Court also turned to the three factors established in *Idea Services Ltd v Dickson*.[96] With regard to the first factor, Smiths City argued in contrast to the employees in *Idea Services*, Smiths City employees were not constrained or compelled to attend the meeting. In *Idea Services* employees were sometimes required to be at a community home overnight so that they could deal with any potential issues that arose during the night. Such sleepover-type arrangements placed significant constraints on employees by limiting privacy, comfort and free time. Although Smiths City Group is distinct in the nature of the work required from employees, the Employment Court concluded nevertheless that employees were constrained because in practical reality sales staff had to attend the meeting so as not to be seen as a poor performer.[97] Employees making a presentation were also constrained, as they had to attend and discuss the promotion of products.[98] With regard to the responsibility factor, the Court considered that while there were no "active" responsibilities as such, the employees were still obligated to sit, listen and absorb the work-related information being presented to them. Employees presenting, however, had work-related responsibilities by "imparting prepared information to their colleagues".[99] Thus, the second factor was satisfied. The Court concluded that the last factor was clearly established. Smiths City Group evidently benefitted from the meetings as it was a cost-free opportunity for staff to be prepared for the working day.[100] The meetings were therefore found to be "work" as per s 6 of the Minimum Wage Act.

Finally, the question as to whether donning and doffing could be defined as "work" under s 6 of the Minimum Wage Act 1983 arose in *Ovation New Zealand Ltd*.[101] Here, it was said that work was expected to be performed

94 At [10].
95 At [12].
96 *Idea Services Ltd*, above n 88.
97 *Labour Inspector*, above n 92, at [65].
98 At [65].
99 At [67].
100 At [68].
101 *Ovation New Zealand Ltd v The New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 151 [*Ovation* (EC)].

during employees' breaks in the form of "doffing and stowing and sterilising equipment and gear and donning such equipment and gear for use".[102] Based on the three factors from *Idea Solutions*, the Court concluded that the constraints placed on the employees were significant.[103] Furthermore, the responsibilities placed on employees when entering and leaving processing areas were enough to satisfy the second *Idea Solutions* factor. Lastly, donning and doffing was considered to be an essential part of the business: without proper hygiene procedures, the business would be unable to operate in accordance with legal requirements.[104] On this basis, donning and doffing was found to be work for which employees must be paid. This decision was approved by the Court of Appeal.[105]

IX Interpretation of a Collective Agreement and the Estoppel Defence

The case of *AsureQuality Ltd*[106] demonstrates the importance of keeping accurate records and provides a good example of the application of the estoppel doctrine. This case concerned a debate over the interpretation of a clause in the employees' collective agreement. The particular clause 10.4(b) stated that "*[a]ll work by an employee on Saturdays and Sundays at Monday to Friday plants will be paid at T1.5*".[107] Controversy arose over whether employees in Monday to Friday plants whose shifts carry over from Friday night to Saturday morning were entitled to T1.5, which the Court described as "the 'hang-over' period".[108] Another issue arose in this case as to whether the Public Service Association was estopped from relying on its interpretation in the particular circumstances.

In relation to the interpretation issue, the Court considered clause 10.4 in the context of the entire collective agreement in order to cast some light on the meaning that the parties intended the clause to bear.[109] The Court considered the use of the word "all" in clause 10.4(b), stating that "all" seems to include any work done on a Saturday or Sunday by an employee at

102 *Ovation New Zealand Ltd v The New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 92 at [4].

103 *Ovation* (EC), above n 101, at [268].

104 At [271].

105 *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2019] NZCA 146.

106 *AsureQuality Ltd v New Zealand Public Service Assoc Inc* [2018] NZEmpC 70, (2018) 15 NZELR 896.

107 At [7] (emphasis in original).

108 At [3].

109 At [12].

a Monday to Friday plant, incorporating the hang-over period. In conclusion, the Court considered that the ordinary and natural meaning of the clause was clear, all work done on Saturday and/or Sunday which includes the hang-over period from a Friday night requires payment of T1.5.[110]

AsureQuality argued that a defence of estoppel applied in this case as it did in both *Schollum v Corporate Consumables Ltd*[111] and *Singh v Trustees of Wellington Rudolf Steiner Kindergarten Trust*.[112] In order to establish a defence of estoppel, four key elements must be satisfied:

(a) A belief or expectation must have been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged;
(b) The party relying on estoppel must establish that the belief or expectation has been reasonably relied upon by that party alleging the estoppel;
(c) Detriment will be suffered if the belief or expectation is departed from; and
(d) It must be unconscionable for the party against whom the estoppel is alleged to depart from that belief or expectation.

With regard to the first element, AsureQuality argued that the defendant accepted on behalf of its members that the hang-over provisions did not apply to Monday–Friday shifts. However, the Court acknowledged that the company was making payments in accordance with the defendant's interpretation at one of its other plants. Therefore, AsureQuality's argument did not have to be determined.[113] Although the other elements were not required to be established given the failure of the first element, the Court considered the second element and found that the issue was one of legal contractual interpretation which the company was well placed to satisfy itself without relying on the union to raise it.[114] In response to the argument that AsureQuality had lost an opportunity to deal with the issue earlier, the Court stated that this is not the type of detriment which is required to successfully raise an estoppel defence.[115] Finally, in relation to the fourth element, the Court held that unconscionability relates to the party against whom the estoppel is asserted and is not directed at some general assessment of impact

110 At [23].
111 *Schollum v Corporate Consumables Ltd* [2017] NZEmpC 115 at [166].
112 *Singh v Trustees of Wellington Rudolf Steiner Kindergarten Trust* [2017] NZEmpC 47 at [24]–[25].
113 *AsureQuality*, above n 106, at [30].
114 At [31].
115 At [32].

on the company.[116] It was therefore held that the plaintiff's arguments regarding estoppel failed on all four elements.

X The Penalty Doctrine

As a result of *127 Hobson Street v Honey Bees Preschool*,[117] New Zealand has a new leading judgment on the penalty doctrine. Honey Bees operated a childcare facility in premises leased from Hobson. Under a collateral deed, Hobson agreed to install a second lift in the building. The deed also stated that if the second lift were not fully operational by a certain date, Hobson would indemnify Honey Bees for their losses arising out of the failure to install the lift. Honey Bees invoked the indemnity clause when Hobson failed to install the lift by the deadline.

In the High Court, it was found that the indemnity clause protected a legitimate interest which Honey Bees had with regard to the second lift being installed. The Court furthermore said that the absence of a second lift could affect the preschool business.[118] On appeal, the Court of Appeal confirmed that the primary test for a penalty clause is the disproportionality test. Therefore, the essential question is "whether the secondary obligation challenged as a penalty imposes a detriment on a promisor out of all proportion to any legitimate interest of the promisee in the enforcement of the primary obligation".[119] This test acknowledges that those who are commercial entities are likely to be the best judges of their own interests.[120] After applying the test, the Court of Appeal held that the installation of the second lift access was of considerable importance to Honey Bees, and the business would suffer without it.[121]

116 At [33].

117 *127 Hobson St Ltd v Honey Bees Preschool Ltd* [2019] NZCA 122, [2019] 2 NZLR 790 [*Honey Bees* (CA)].

118 *Honey Bees Preschool Ltd v 127 Hobson Street Ltd* [2018] NZHC 32.

119 *Honey Bees* (CA), above n 117, at [31].

120 At [31].

121 At [57].