Developing themes in employment law

Placement of the goalposts in a changing world

Speech presented by Chief Judge Christina Inglis[1]
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E ngā mana
E ngā reo
Rau rangatira ma
Tēnā koutou, tēnā koutou, tēnā koutou katoa

I was very pleased to be invited to speak today, to a group which (I think) contains a large number of human resources practitioners. The human resources role is not, I suspect, a straightforward one – after all, it involves humans. I doubt that the job is going to become a simplistic paint-by-numbers exercise any time soon.

I am focussing in my talk on the goalposts – the two posts between which an employer and their adviser might wish to aim if they want to avoid difficulties with the on-course referee.

Profound changes are occurring in workplaces both within New Zealand and overseas. The changes are not limited to technological advances, the flow-on impact of the rise of the gig economy, and globalisation. More subtle changes are occurring in terms of the way in which work is perceived. There is a developing understanding of diversity, and individual and collective rights and interests, including the way in which they interweave with and inform the rights and interests of employers. The dynamism inherent in employment law and practice brings challenges for employers and employees, and those who advise them.

What themes are emerging, even at an embryonic stage, and what might the Employment Court, the Authority and Mediation Services begin to see more of in the near to middling future? I highlight some themes which I perceive to be gaining traction, and which have the potential to impact on what can and cannot be done, what is and is not regarded as reasonable or, to put it another way, on where the goalposts might be placed. I focus particularly on diversity and rights in an ageing workforce, flexible working arrangements, and the role of tikanga Māori.

I start with discrimination and the ageing population. The corollary is an ageing workforce. It is probably fair to say that considerably more effort has gone into analysing the challenges presented by new entries into the workplace than those in the older age bracket. While a number of concerns have been raised about ageism and its impacts on staff retention and recruitment, there has been little <u>legal</u> movement in this area. And while the Employment Reports of New Zealand are peppered with cases involving restructuring exercises, seldom is discrimination (including negative stereotyping based on age) identified as one of the grounds on which (for example) a dismissal for redundancy is said to be unjustified.

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[1] The views expressed are my own personal views. I would like to acknowledge the contribution of Suzanne Innes-Kent (Judges' Clerk) to the development of these speech notes.

The paucity of age-related cases in the employment institutions may reflect a number of things. I suspect that a key one is a perceived difficulty of proof – how do you go about persuading the Authority or the Court that you did not get the promotion you applied for because of your age rather than some other qualitative consideration? On one level such a claim is no different from any other claim – it simply requires an evidential base. It does not require a claimant to establish their claim beyond all reasonable doubt. Nor is it necessary to present the Authority/Court with the smoking gun – for example, an admission from the head of human resources that a decision to restructure and to prefer one candidate over another was prompted by date-of-birth considerations. It is rare for the outcome of litigation to turn on a shock admission of fault. Even the most skilled cross-examiners find it difficult to extract confessions. Rather, the Authority/Court is generally left with an inferential task of considering the surrounding facts and circumstances to see whether something has misfired with an employment process.

More fundamentally, the head of human resources may have genuinely believed that discriminatory grounds had nothing whatsoever to do with the decision. The research now tells us that subconscious bias has a pervasive impact across all areas of life. It has recently led the New Zealand Law Society to introduce subconscious bias training for lawyers.[2] I do not know whether such training is made available to those involved in decision-making processes in employment matters, but if not it might be timely to start thinking about it.

What does all of this mean for the people who are making employment decisions? The focus will not be on whether they thought the decision they reached was open to them, and untainted by discriminatory prejudice. It is an objective, rather than subjective, inquiry. The question is what could a notional fair and reasonable employer have done in all the circumstances? Is the notional fair and reasonable employer ever motivated, either consciously or unconsciously, by bias, predetermination or prejudice? If not, must a fair and reasonable employer be one who is appropriately informed, not only as to the factual basis for their decision (which is now well established), but more broadly? If so, it raises issues for employers as to the importance of keeping up with the times and educating themselves, including as to the perils of applying a stereotype-infected lens to decision-making. While a margin of appreciation can be perceived in the cases, the goalposts (the outer limits of what a fair and reasonable employer could do procedurally and substantively) will almost certainly shift along with developing societal expectations and norms.

The Employment Relations Act may be taken to suggest a degree of elasticity in terms of placement of the goalposts, directing consideration of justification in "all of the circumstances" (s 103A(2)). And, in terms of what is expected, the statute expressly requires the Authority and the Court to have regard to the resources of the employer in assessing any alleged deficiencies in an employment process (s 103A(3)(a)).[3]

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[2] See resources and a free webinar listed online at the New Zealand Law Society: <www.lawsociety.org.nz/law-society-services/women-in-the-legal-profession/unconscious-bias>.

[3] Employment Relations Act 2000, s 103A(1)): "… the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2)." The test in subs (2) requires the Authority/Court to have regard to whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. Section 103A(3)(a) provides that, in applying the test, the Authority/Court must consider "whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee."

The possible degree of fluidity, or range of factors that qualify for consideration under the "all of the circumstances" umbrella, and the extent to which such factors may impact on the placement of the goalposts, has received surprisingly little analysis in either the caselaw or commentary. A couple of rhetorical questions illustrate the point:

- What of the dismissal of an ageing employee based on subconscious bias by a rural sole owner/operator of a business in an area where there is high youth unemployment?

- Are there any 'no-go' zones for any employer, no matter how ill-resourced, and if so what are they?

Reinstatement has now (itself) been reinstated as a primary remedy.[4] Some view this as a legislative acknowledgment of the importance of the relationship, its preservation and resurrection. If that is the starting point, there may be a consequential ripple effect on investigative/disciplinary practices. How compelling, for example, is an argument that a relationship has irretrievably broken down, and is a basis for refusing reinstatement, where the employer has been found to have actively contributed to that state of affairs through their management of an investigation and subsequent disciplinary process? Might a fair and reasonable employer be expected to actively engage in constructively rebuilding what has been damaged in such circumstances or, for that matter, in most circumstances?

All of this might be said to sit comfortably with recent steps in exploring the potential for a more restorative approach in this jurisdiction, most recently highlighted by the Chief of the Employment Relations Authority,[5] and reflected in what I understand to be a restorative practice stream currently being scoped by Mediation Services. There may be room for a broader application of such practices, which are well known and accepted in the criminal justice sector, within the employment institutions and employment relationships more generally.

Flexible work is a growing reality for many, and received legislative endorsement some time ago (Part 6AA of the Act: "Flexible working").[6] The purpose of the legislation is to address the needs of employees who, for a variety of reasons, desire an ability to do their work at different times and/or places while balancing the operational needs of the employer. While there has been, as far as I am aware, no litigation under these provisions of the Act a number of interesting issues arise for both employers and employees, including:

- To what extent may an employer monitor what is going on in a home that is, for several hours a day, a workplace?

- To what extent, if any, *must* an employer do so?

- How does all of this interweave with any privacy rights?

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4 Employment Relations Act 2000, s 125, Reinstatement to be primary remedy; passed into law on 12 December 2018 by Employment Relations Amendment Act 2018, s 47.

5 J Crichton "Employment institutions – an argument for reform?" (paper presented to the Marlborough Colloquium of the Society of Local Government Managers, Blenheim, January 2019). See too the discussion in C Inglis "From There, to Here, to Where? Societal change and legal development" (paper presented to Employment Law Conference "Employment Law in a Time of Change", Auckland, October 2018) at 11.

6 Part 6AA inserted on 1 July 2008.

- What health and safety obligations arise for both the employer and the employee?

- To what extent is it justifiable for an employer to turn down a request to work non-standard hours (eg a nine-day fortnight) because the employer wants the employee to be available when the employer is?

- To what extent can an employer require an employee to work from home when the employee would prefer not to? And what of the financial cost of the overheads involved in doing so?

The desire by some for flexible work arrangements, and the availability of "gig"-related tasks as opposed to traditional forms of employment, raises particularly acute issues for the legislative framework, including how to protect workers from exploitation while addressing the operational imperatives underpinning demand for this type of labour delivery. These issues are currently being considered by government.[7] In the meantime they are likely to continue to raise difficult issues from a practical perspective, including the risks associated with a finding that the person you thought was an independent contractor is, in fact, an employee and has been for many years; or the person you thought was employed by company A to provide services to your company under a commercial agreement is, in fact, an employee of your company and has been for many years.

Clarity of any written agreements will be one bow to the armoury, but is unlikely to be a complete shield to a claim, as the case of *Prasad* recently demonstrated.[8] Participants in any working relationship will be well advised to keep a weather eye on the way in which the relationship is operating in practice in terms of risk management. Relationships – and the nature of working relationships – can and do develop and change over time. This, in turn, has a tendency to change the legal liability landscape.

It can also be said with a degree of confidence that issues relating to the real nature of the working relationship, the calculation of wages and holiday pay and the like, will come more, not less, into focus with the changes in work practices and different forms of contractual relationships. As was recently observed:[9]

> … Our society still caters to the Monday to Friday working week even though that paradigm has long passed. We live in a seven-day-a-week, 24-hour-a-day work environment and many of us aren't lucky enough to have Saturdays and Sundays off every week.

On another note, there is now a growing recognition that tikanga Māori (and other aspects of the Māori world view) have a legitimate place in the law of New Zealand. I query whether this should come as a shocking revelation - the right to have traditional values included in State-supported processes is enshrined in international law: The Declaration on the Rights of Indigenous Peoples (UNDRIP).[10] New Zealand became a signatory to this Declaration in

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7 See, for example, Employment Relations (Triangular Employment) Amendment Bill (17-2), reported from the select committee on 17 December 2018.

8 *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, (2017) 15 NZELR 178.

9 Joanna Mathers, "Take action to end Mondayisation blues" *The New Zealand Herald* (online ed, Auckland, 22 January 2019.

10 United Nations Declaration on the Rights of Indigenous Peoples, Res 61/295, adopted 13 September 2007.

2010.[11] In a very recent conference paper it was suggested by a member of the Supreme Court that "customary law, to the extent not extinguished by statute, may well be part of the common law in New Zealand or at least be relevant to its development."[12] If so, it may well have consequences for employment law and practice.

In the Employment Court there only appear to be two cases involving consideration of Māori values by employers. The first is *Good Health Wanganui v Burberry*.[13] The defendant applied for leave (as she had every year for 17 years) to attend a kapa haka festival. On this occasion it was denied. She took the next two days off without authorisation, and as a result was summarily dismissed and marched off the premises. Judge Shaw said that:[14]

> … it is simplistic and artificial for Good Health Wanganui to attempt to categorise some issues as "cultural or Maori" and others not. The fact that an employee is Maori and is working in a Maori setting should have been sufficient to alert them to a need for an appropriate procedure. *The onus should not have been on Mrs Burberry to assert her mana Maori or plead for her cultural identity to be recognised.*

Judge Shaw also observed that Māori issues were seen as an annexure rather than "an integrated part of the culture" of the workplace.[15]

The second case is *Taiapa v Te Runanga O Turanganui A Kiwa Trust t/a Turanga Ararua Private Training Establishment*, where an employee claimed that his employer should have adopted a culturally appropriate approach to addressing his illness.[16] The Court found that if the employer had known of the issue it could reasonably have been expected to approach it in a culturally appropriate manner.[17]

In an article surveying decisions involving cultural issues at the Court, Myregel Carambas argued that good faith and reasonableness should include cultural awareness.[18] She referred to the fact that there are over 150 different ethnic groups in New Zealand, and that clients of the Māori Legal Services arm of the Community Law Centre repeatedly had no idea that their behaviour would be seen as "serious" by their employer, potentially leading to dismissal. They

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[11] Waitangi Tribunal "Ko Aotearoa Tenei: A Report into claims concerning New Zealand Law and Policy Affecting Māori Culture and identity: Te Taumata Tuarua, Volume 2" at footnote 19: <https://forms.justice.govt.<nz/search/Documents/WT/wt_DOC_68356606/KoAotearoaTeneiTT2Vol2W.pdf>.

[12] Susan Glazebrook "Unjust Enrichment: the platypus of private law" (paper presented to 35th Annual conference of the Banking and Financial Services Law Assoc, Queenstown, September 2018), citing (amongst a number of other authorities) *Takamore v Clarke* [2013] 2 NZLR 733, [2012] NZSC 116 at [164], where McGrath J (for the majority) said in the context of customary burial practises that: "… the common law of New Zealand requires reference to the tikanga [of the relevant iwi], along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation." Also cited was Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2017) 5 Journal of Māori and Indigenous Issues 25 at 36; and J Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1 at 15-16.

[13] *Good Health Wanganui v Burberry* [2002] ERNZ 668.

[14] At [58], emphasis added.

[15] At [57].

[16] The Māori tikanga of identifying and treating physical and spiritual maladies in an individual: [33].

[17] *Taiapa v Te Runanga O Turanganui a Kiwa Trust t/a Turanga Ararua Private Training Establishment* [2013] NZEmpC 38, [2013] ERNZ 41 at [35].

[18] Myregel Carambas, "Cross-cultural issues in employment law" [2006] ELB 141.

also report a desire to avoid confrontation and a reluctance to question an employer's viewpoint.

Active consideration of, and appropriate response to, cultural values and norms might be seen as part of the good faith requirement, and may have a bearing (for example) on how disciplinary investigations and procedures are to be carried out and later assessed by the Authority/Court. A cookie cutter approach to such matters may well become an increasingly high-risk strategy.

Further, this may be said to reflect the statutory imperative for an assessment to be made as to the reasonableness or otherwise of what the employer did, and how they did it, having regard to "all of the circumstances," if it is accepted that "all of the circumstances" includes applicable cultural norms which the employer either knew of, or ought to have known about had they been properly informed. Whose responsibility is it to be appropriately informed? Judge Shaw suggested, in the circumstances of the case she was dealing with, that it fell squarely on the employer.

Technological change is making a dramatic mark on the way in which work is done, what jobs are replaced, what are created, and how we do our work. The placement of the goalposts are likely to come under sustained scrutiny. So, for example, if the components of a job are subject to change because of technological advances, what obligation (if any) does a fair and reasonable employer, acting in good faith, have to engage in "job-crafting" for existing (for example, ageing) employees?

It seems to me that technological advances may offer some positive options in respect of access to legal advice within the employment jurisdiction, and assistance both for small employers and many employees via the rise in online tools to simplify processes. One of the potential benefits of such online tools is their adaptive nature. They can be set up in multiple languages, with culturally appropriate adaptations, question trees and decision trails. This might, I suggest, be particularly useful for employers who lack resources and/or an understanding of basic employment laws and practices, and for employees in a similar situation. Might there also be room for thinking about the way in which dispute resolution services are delivered, while assiduously ensuring that any developments meet the needs of justice, and expediency does not become the tail wagging the dog?[19]

A more general (but related) point can also be made. To what extent are the conventional ways of dealing with litigation processes in purely commercial matters effective in the employment arena? Is it time to consider some recalibration? Costs and name publication might be two examples worth further reflection. Both were identified as a major impediment to access to justice at a recent symposium ("Barriers to Participation in the Employment Institutions"), attended by various unions; Business NZ; community groups; mediators, Authority members and Judges; academics; researchers; lawyers and advocates.[20] A key theme to come out of the symposium was that costs in the Authority be revisited (currently the conventional (ordinary Court) approach of costs following the event applies). The model of costs lying where they fall (the approach adopted in some other jurisdictions, notably the UK and Ireland, for first

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[19] For a general discussion see G Venning "Online Courts: Refresh for Justice – the place of Courts in the age of the internet" (Paper presented at ODR forum 2018, Auckland – citation not available at present). For further exploration of possible online initiatives, see C Inglis "A brave new technological world: Opportunities for gain and pain …" (Dinner speech to New Zealand Labour Law Society Conference, November 2017); available on the Employment Court website: <www.employmentcourt.govt.nz/about/papers-and-speeches>.

[20] <https://workresearch.aut.ac.nz/reports-and-projects/papers-and-presentations#barriers>.

instance employment matters)[21] received much support. The Chief of the Employment Relations Authority has very recently delivered a paper expressing personal support for the proposed introduction of such a costs regime in the Authority.[22]

Another concern which emerged at the symposium was the quelling effect of name publication in determinations (again, an approach which has been adopted from the ordinary Courts). The Chief of the Authority has (in the same recent paper) mooted the idea of a different approach to naming parties in Authority determinations, to protect against unforeseen consequences on future job prospects. He apparently receives numerous letters requesting retrospective non-publication orders from ex-employees (and witnesses) named in determinations whose re-employment prospects are compromised because recruiters and prospective employers are using the power of the internet to informally vet applications. I remain unclear as to how it can logically be said that a person who has asserted their legal right to bring a grievance against their employer, or who has appeared as a witness, deserves to have their future employment prospects compromised in this way. It might be said to lead to a particularly perverse result.

I end with a general observation from the bench. A number of people, with a range of different skill sets, are involved in employment law and practice at every level – employers and employees; human resources advisers; lawyers; advocates; union officials; mediators (appointed under the Act and private mediators); members of the Employment Relations Authority; Judges. An understanding of the dual emphasis in the statutory framework of the *law* and employment as a *relationship* is, in my view, key to effectiveness.

Both the law and practice are subject to ongoing developments in terms of thinking and societal expectations. Savvy participants in this specialist field need to keep a firm finger on the pulse of incremental changes in the landscape. Effectiveness requires a flexible, at times nuanced, approach. This is reiterated in the statutory language – the Authority and the Court must (not may) have regard to all of the circumstances and what is just and equitable. The statutory requirement on the Authority and the Court to approach matters within this overarching framework may be said to reflect the way in which participants in the employment relationship are also expected to approach matters over the lifecycle of the working relationship.

Ngā mihi nui

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[21] See, for example, rr 34, 34A of the Employment Appeal Tribunal Rules 1993 (UK); r 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (UK); referred to in C Inglis, "Employment Litigation Costs" (paper prepared for Auckland District Law Society seminar, August 2016) at 4.

[22] J Crichton "Employment institutions – an argument for reform?" (paper presented to the Marlborough Colloquium of the Society of Local Government Managers, Blenheim, January 2019).