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Editorial

Issue 4 Editorial

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This edition of the ELB focuses on employment law issues predominantly affecting women. It highlights the fact that there are numerous areas in which women are potentially disadvantaged without our employment framework, and identifies how this historical discrimination might be remedied.

Steph Dyhrberg and Tanya Narayan, explore the landmark decision of the Human Rights Review Tribunal in *BGH v Kumar,* focusing on the Tribunal's finding that the victim, BGH, could pursue her claim of sexual harassment directly against the perpetrator. Steph and Tanya work through the factual matrix of the case, which prevented a claim from being made against an employer, and the statutory framework and case law to highlight why the Tribunal considered it possible and just for BGH to pursue their claim directly against the perpetrator. The article concludes that this outcome should improve and broaden the pathways available for victims of sexual harassment when seeking justice.

Annick Masselot and Alexandra Crampton from the University of Canterbury analyse the Employee Remuneration Disclosure Amendment Bill. They suggest that, despite being well-intentioned, the Bill is largely symbolic and that, on its own, it fails to establish a comprehensive pay transparency regime. Masselot and Crampton state that more than just legal reform is needed to tackle the deeply rooted issues related to pay transparency, suggesting that we should be looking abroad for guidance. The pair highlight that to address the core issues surrounding pay transparency, there needs to be a societal transformation, essentially reframing the focus to be on the inherent value of work performed.

Mathew Barnett and Bronwyn Heenan of Simpson Grierson examine the legal and practical complexities of dismissals during parental leave under New Zealand's Parental Leave and Employment Protection Act 1987, highlighting the narrow exceptions involving redundancy and dismissals involving key positions, and the heightened scrutiny such terminations attract. The pair question whether the current enforcement framework is up to task, and note that stronger enforcement mechanisms, including a more visible MBIE-led (Ministry of Business, Innovation and Employment) compliance unit, may provide a better process in protecting potentially vulnerable employees. The article rounds out by providing practical considerations for employers and employees who may be looking at or dealing with dismissals in such circumstances.

Megan Vant of Dundas Street Employment Lawyers examines the contentious Equal Pay Amendment Act, providing a summary of the background to pay equity in Aotearoa New Zealand, including the difference between equal pay and pay equity and the application of the Act to date. Vant explores the impact of the amendments, providing a critical analysis of the changes to the framework and test under the Equal Pay Act 1972, concluding that some of the changes reinforce the key purpose of pay equity, but others may create significant procedural and evidential barriers to raising and settling pay equity claims.

For our Q and A we have the current National Secretary of the Public Service Association (PSA) Fleur Fitzsimons. Fleur is a seasoned advocate for workers' rights and social justice, currently serving Aotearoa New Zealand's largest union. With over two decades of experience in the union, Fitzsimons brings deep expertise and unwavering commitment to public service advocacy. This Q and A is a must-read as Fleur provides some key insights into the work being done by the PSA and addressing headline topics, including pay equity and the overhaul of the public sector touted as being the largest in decades.

Articles

The Landmark Decision of *BGH v Kumar*: upholding accountability for sexual harassment perpetrators


Steph Dyhrberg, Barrister and Tanya Narayan, student at Waikato University

The recent Human Rights Review Tribunal (HRRT) decision in *BGH v Kumar (also known as Bala)*[1] (*BGH v Kumar*) sets an important precedent in New Zealand's human rights landscape, particularly concerning sexual harassment in employment. This ruling not only reiterates the standard for proving sexual harassment claims but also delivers a crucial insight into the fact victims can pursue claims directly against individual perpetrators, even when claims against an employer are not possible. This article will delve into the details of the *BGH v Kumar* decision, examining the legal framework applied, the Tribunal's findings, and most importantly, the implications for victims seeking direct redress from those who harass them.

Survivors of workplace sexual harassment by a co-worker can take proceedings in either the employment jurisdiction or the Human Rights jurisdiction. Only in the latter can damages be sought against a perpetrator who is not a party to the employment relationship.

Two years of harassment

The plaintiff, BGH, was the only female employee at Viti Panel and Paint Ltd (Viti), where the defendant, Tarun Kumar (Kumar aka Bala), held the position of second-in-charge and was a close family friend of the company owner. BGH commenced proceedings in the Tribunal, alleging that Kumar sexually harassed her over a span of two years through what was described as "day-to-day" behaviour, culminating in a deeply disturbing "peeping incident" through a hole in the toilet wall.

BGH's allegations covered a range of behaviours, which the Tribunal later found to be more probable than not to have occurred. BGH's careful, measured account was preferred over Kumar's contradictory, self-serving denials and excuses.

The "day-to-day" harassment included Kumar:

- commenting on BGH's appearance and clothing, her marital status, and using terms like "you look very pretty today" and calling her "Princess" and comparing her to his wife;
- singing Hindi love songs in BGH's presence, which BGH felt were directed at her. Kumar admitted singing these songs but claimed they were not directed at BGH, a denial the Tribunal rejected due to his inconsistent evidence;
- sending inappropriate text messages, such as "why u driving baby", and acknowledging that he deleted this from the evidence provided to the Tribunal;
- sending BGH a video depicting a waitress displaying a menu on her bare buttocks, which he also shared and laughed about with male colleagues in the office; and
- repeatedly touching BGH on her shoulder and encroaching on her personal space.

The harassment escalated to two more serious incidents in November 2016:

- The office incident (2 November 2016): BGH claimed Kumar entered her office while she was on the phone, pushed a ring onto her finger, and then touched her shoulder, waist, thigh, and the side of her buttock. Kumar admitted only touching her shoulder and apologising later, but the Tribunal preferred BGH's account, noting Kumar's implausible and inconsistent evidence, and the owner's subsequent rule prohibiting employees from entering BGH's office when she was there.
- The peeping incident (15 November 2016): this was the catalyst for BGH's resignation. BGH learned from a former employee, Mr Prasad, about a hole in the

1. *BGH v Kumar (also known as Bala)* [2024] NZHRRT 2, (2024) 20 NZELR 438 [*BGH v Kumar*].

toilet wall. She later saw Kumar peeping through the hole while she was in the toilet. Kumar denied peeping but admitted knowing about the hole for an extended period and taking no action to repair it or inform anyone. The Tribunal found Kumar's account of this incident "improbable and implausible" due to his contradictory statements, his focus on the weather as a defence, and his subsequent interaction with Mr Prasad, all of which undermined his credibility. BGH's immediate actions, including confronting Kumar, informing her employer, contacting the police, and leaving her employment, were consistent with someone deeply distressed and humiliated. The Tribunal concluded that it was more probable than not that the peeping incident occurred in the manner described by BGH.

- The Tribunal rejected Kumar's speculative claims that BGH was inventing or embroidering the allegations for improper purposes, such as for money or to benefit her immigration status.

Establishing sexual harassment under the Human Rights Act 1993

BGH's claim was brought under s 62(2) of the Human Rights Act 1993 (HRA), which defines unlawful sexual harassment in employment settings. For a claim to be established, the Tribunal must be satisfied on the balance of probabilities (ie, more probable than not) that the following elements are met:

- Identification of language, visual material, or physical behaviour of a sexual nature: this involves determining what behaviour actually occurred.
- Whether that behaviour was of a sexual nature and occurred in the place of employment: this assessment is an objective test, meaning the Tribunal considers how a reasonable person would view the words or behaviour, with the defendant's intention being irrelevant. Context is paramount, especially in workplaces and where there is a power imbalance. The Tribunal acknowledged that even "day-to-day" behaviours, though at the lower end of the spectrum, become clearly sexual when considered in the context of their repetition over two years and the power imbalance between Kumar (second-in-charge, older, close to owner) and BGH (sole female, younger). The office and peeping incidents were unequivocally deemed sexual in nature, particularly given the expectation of privacy in a toilet and the power dynamic. The Tribunal noted the useful list of examples of behaviour in the Employment Court judgment in *Lenart v Massey University*.[2]
- Whether that behaviour was unwelcome or offensive to BGH: this is a subjective test, meaning if BGH found the behaviour unwelcome or offensive, that is determinative, regardless of Kumar's knowledge or intention. BGH provided "compelling and clear evidence" that she found all the behaviour unwelcome and offensive. The Tribunal explicitly noted that tolerating or "putting up with" such behaviour, particularly for a woman in an isolated and vulnerable position with significant power imbalances, does not negate its unwelcome or offensive nature. BGH's initial silence was due to her need for employment and lack of power, but her consistent actions after the peeping incident demonstrated her true feelings.
- Whether the behaviour was either repeated, or of such a significant nature that it had a detrimental effect on BGH in respect of her employment: detriment is broadly interpreted; it is not required to be financial or material in nature, nor does it demand robust objection. It includes the detriment of having to work in a hostile or demeaning environment, loss of self-esteem, and loss of trust. The Tribunal found that the behaviours were both repeated (day-to-day harassment over two years) and significant (the peeping incident) and had a detrimental effect on BGH's employment. Working in an environment where one feels compelled to accept unwanted sexual behaviour is inherently detrimental.

Ultimately, the Tribunal concluded that all elements necessary to prove the claim of sexual harassment under s 62(2) had been established, confirming that Kumar had breached the HRA.

Pursuing a direct claim against the perpetrator

One of the most significant aspects of the *BGH v Kumar* decision is the Tribunal's handling of the claim directly against the individual perpetrator, Kumar, in circumstances where a claim against the employer became unavailable.

Initially, BGH filed her complaint against both Kumar and Viti Panel and Paint Ltd, alleging that Viti was vicariously liable for Kumar's actions. However, Viti, the employer, was subsequently liquidated and removed from the Companies Register. For practical reasons, BGH chose not to apply to the High Court to restore Viti to the register, meaning the claim proceeded solely against Kumar as the perpetrator.

This situation presented an important legal question: could damages for sexual harassment, including pecuniary loss, be awarded directly against a fellow employee (the perpetrator) when the employer was no longer a party? The Tribunal's decision explicitly affirmed this possibility:[3]

> Mr Kumar is now the only defendant in this claim. The Tribunal was presented with no case authorities precluding the making of an award of damages for pecuniary loss as a result of loss of income against a fellow employee. Likewise, s 92M of the HRA does not preclude this. In the

2. *Lenart v Massey University* [1997] ERNZ 253.
3. *BGH v Kumar*, above n 1, at [76].

circumstances of this case we consider that Mr Kumar should be ordered to pay BGH damages for the pecuniary loss that the Tribunal has found she is entitled to.

This finding is profoundly important for victims of sexual harassment. It underscores that perpetrators can be held personally accountable for their actions under the HRA, even if their employer is no longer solvent or available to be sued. This means:

- increased accountability: individuals who commit sexual harassment in the workplace cannot hide behind the corporate veil or hope that employer-focused litigation will shield them from personal liability;
- direct redress: victims have a clear pathway to seek compensation directly from the harasser, which can be crucial in cases where the employer is defunct, unsupportive, or otherwise unavailable for a claim;
- reinforced deterrence: the prospect of personal financial liability, including damages for lost income and emotional harm, may serve as a stronger deterrent against committing acts of sexual harassment; and
- empowerment of victims: this decision empowers victims by providing an additional, robust avenue for justice and compensation, reinforcing that their suffering will not go unaddressed, regardless of the employer's status.

The fact that the Human Rights Act, s 62(2) applies to "any person" involved in employment settings facilitates this direct accountability. This broad phrasing ensures that the focus remains on the unlawful behaviour itself and its impact on the victim, rather than solely on the employer-employee relationship.

Compensation for the harm suffered

Having established Kumar's breach of the HRA, the Tribunal moved to determine the appropriate remedies. BGH sought a declaration, damages for pecuniary loss, and damages for humiliation, loss of dignity, and injury to feelings.

- Declaration of breach: the Tribunal issued a formal declaration that Kumar had sexually harassed BGH, finding it appropriate given the established breach.
- Damages for pecuniary loss: BGH sought $25,160 for lost wages, representing 37 weeks of income after her resignation. The Tribunal acknowledged a clear causal connection between Kumar's sexual harassment and BGH's departure from work and subsequent loss of income, particularly as she did not give or receive notice due to the circumstances. However, citing a lack of evidence regarding BGH's attempts to find alternative employment, the Tribunal awarded a more conservative amount of $2,720, equivalent to four weeks' income, to cover the immediate loss of income due to the sudden departure without notice. As discussed, this award was made directly against Kumar.
- Damages for humiliation, loss of dignity, and injury to feelings: this category of damages is intended to compensate for the emotional harm suffered by the complainant, not to punish the defendant, and must be "genuinely compensatory and not minimal". BGH claimed $35,000.
  - Harm suffered: BGH's evidence, corroborated by her and documentary evidence from counselling and GP appointments, clearly showed she suffered significant embarrassment, humiliation, fear, and distress. She felt her "whole life had fallen apart" and was "not coping day to day". BGH described becoming "distraught and upset", crying, feeling violated, and experiencing a toll on her physical and mental state.
  - Assessment and quantum: the Tribunal referred to previous awards, noting that cases are fact-driven and often fall into bands, as identified in *Hammond v Credit Union Baywide*.[4] While not undertaking a full "recalibration" of awards, the Tribunal acknowledged the passage of time since previous sexual harassment awards and increasing awareness of its effects.
  - Factors considered: key factors in assessing the quantum included the nature and type of harassment (including physical contact), its ongoing nature and frequency, BGH's age and vulnerability, and the psychological impact.
  - Tribunal's conclusion: the Tribunal found the harm BGH experienced to be in the upper half of the middle band (typically $10,000 to $50,000). The "loss of dignity that occurs when being watched in the toilet cannot be over-stated" and significantly contributed to this finding. Kumar's attempts to minimise the harassment as "largely verbal" were rejected given the extensive range of behaviours. The Tribunal awarded $29,000 as appropriate compensation for the humiliation, loss of dignity, and injury to feelings experienced by BGH.
- Interest on damages: the Tribunal, as it is not bound by the Interest on Money Claims Act 2016, did not award interest on the sums ordered.

Non-publication orders: protecting the victim's identity

A crucial aspect of victim protection in human rights cases, particularly those involving sexual harassment, is the use of non-publication orders. The Tribunal ordered the prohibition of publication of BGH's name, address, occupation, and any other identifying details, as well as restricting search of the Tribunal file.

4. *Hammond v Credit Union Baywide* [2015] NZHRRT 6.

This decision balanced the fundamental principle of open justice (which ensures transparency and public confidence in judicial proceedings) with the need to protect vulnerable complainants. The Tribunal recognised that:

- publication of BGH's identity would "unnecessarily compound her sense of humiliation and distress" and could lead to further significant distress, potentially requiring more medical or therapeutic care;
- BGH had not discussed the sexual harassment with her wider family or some friends, and publication would force such distressing discussions;
- non-publication orders are common (and in the criminal jurisdiction, mandatory) in sexual harassment cases, as the disclosure of "distressing and often intimate details may be a deterrent to complainants, which would be highly undesirable"; and
- the public interest in open justice could still be maintained by publishing the Tribunal's decision with redacted identifying details, ensuring transparency of the reasons without compromising BGH's privacy.

A precedent for perpetrator accountability

The *BGH v Kumar* decision is a powerful testament to the Human Rights Review Tribunal's commitment to holding perpetrators of sexual harassment accountable. By meticulously assessing the evidence, applying the relevant legal test, and confirming the ability to award damages directly against an individual harasser, the Tribunal has provided a clear pathway for victims seeking justice.

This case serves as a critical reminder that:

- sexual harassment encompasses a wide range of behaviours, from "day-to-day" comments and unwanted touching to severe incidents, and context, particularly power imbalances, is key to determining its sexual nature;
- a victim's initial tolerance of unwelcome behaviour does not diminish its offensive nature, especially when they are in a vulnerable position;
- the fact the Police do not lay criminal charges is irrelevant to civil liability;
- the detriment suffered by victims of sexual harassment is broad, extending beyond financial loss to include the harm of a hostile work environment and significant emotional distress; and
- most importantly, the decision firmly establishes that victims of sexual harassment can pursue claims and obtain remedies, including pecuniary loss and damages for emotional harm, directly from the perpetrator, even if a claim against the employer is unavailable. This strengthens the legal recourse available to those who experience harassment, ensuring that accountability rests with the individual who commits the harmful acts.

BGH v Kumar will undoubtedly be cited as a significant authority, not only for its detailed application of sexual harassment law, but also for confirming a clear pathway for victims to seek redress from the individuals directly responsible for their suffering.

It is, however, noteworthy and concerning that the events took place 2014-2016, the claim was filed in 2019, the hearing was completed in late 2020, but the decision was only released in 2024. That is, by any definition, justice unacceptably delayed. Survivors of unlawful harassment should not have to wait eight years for justice.

The illusion of progress: why the Pay Transparency Bill has limited impact


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Introduction

Pay transparency, the practice of making remuneration information more accessible, has long been a contentious issue in Aotearoa New Zealand. Advocates argue that increased transparency is essential for addressing pay disparities and promoting fairness in the workplace. Conversely, critics caution that it may undermine employee morale and disrupt employer-employee relations. Yet in numerous jurisdictions, pay transparency is increasingly regarded as a critical tool in the effort to eliminate persistent gender and ethnic

pay gaps,[1] as well as being an important legal instrument in both the enforcement of and compliance with pay equity legislation.[2]

Currently, there is no legislative requirement for pay transparency in Aotearoa New Zealand. In fact, it remains perfectly lawful for employment agreements to include clauses explicitly prohibiting employees from discussing their remuneration with colleagues, the so-called "pay secrecy" clauses.

The Employment Relations (Employee Remuneration Disclosure) Amendment Bill (the Bill), currently at the Committee of the Whole House stage, appears to signal progress towards greater pay transparency in Aotearoa New Zealand. Its stated rationale aligns with international trends toward greater openness in remuneration practices.[3] However, upon closer examination, the Bill appears largely symbolic and falls significantly short when compared to comprehensive pay transparency regimes implemented abroad.

Moreover, legal reform alone is unlikely to suffice in achieving substantive pay equity in Aotearoa New Zealand. Meaningful progress will require broader societal transformation, one that reorients the prioritisation of economic and legal systems toward fundamental social rights, and that addresses systemic inequities across both gender and ethnicity. What is needed is a structural and cultural paradigm shift: one that reframes remuneration not in terms of who performs the work, but in recognition of the value of the work itself.

Outline of the proposed legislation

The Employment Relations (Employee Remuneration Disclosure) Amendment Bill, introduced by Labour Member of Parliament Camilla Belich, was drawn from the member's ballot and introduced to the House on 20 March 2024. The Bill progressed through its first reading on 6 November 2024 and its second reading on 16 July 2025. It received cross-party support at both stages from the New Zealand Labour Party, the New Zealand National Party, the Green Party of Aotearoa New Zealand, and Te Pāti Māori. However, the Bill was opposed by ACT New Zealand and New Zealand First.[4]

The Bill proposes to amend the Employment Relations Act 2000[5] by introducing a new category of personal grievance: "adverse conduct for remuneration disclosure reason".[6] The stated objective is to provide statutory protection to employees who either disclose their own remuneration or seek information about the remuneration of others.[7] The proposed protection is structured around a two-limbed test. First, there must be an act of "adverse conduct" on the part of the employer. Second, that conduct must be causally linked to a "remuneration disclosure reason".[8] Under the proposed amendment, an employee who is subjected to disadvantage or dismissal for having disclosed their remuneration, or for having inquired into the remuneration of another employee, would be entitled to raise a personal grievance under this new ground.[9]

Importantly, the Bill does not impose any obligation on employees or employers to disclose remuneration information.[10] Rather, it establishes legal protections for employees who voluntarily engage in pay-related discussions. Notably, the Bill does not prohibit the inclusion of pay secrecy clauses in employment agreements. As such, employers would remain legally entitled to include such provisions, so long as they do not take adverse action against employees who choose to engage in remuneration-related discourse.[11] This stands in clear contrast to the position in Australia, which enacted the Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023. Under this legislation, pay secrecy clauses are no longer legally enforceable, and their inclusion in new employment contracts is expressly prohibited.[12]

Individual vs structural approaches to pay transparency

The term *pay transparency* may be somewhat conceptually inadequate, as it tends to imply a simplistic model whereby

1. Amanda Reilly "Why New Zealand Employers Should Be Subject To Mandatory Pay Transparency" (2019) 12 JIALawAA 86 at 90.
2. See Morten Bennedsen and others "Do Firms Respond to Gender Pay Gap Transparency?" (Bureau for Economic Research, Cambridge, January 2019); Cynthia Estlund "Extending the Case for Workplace Transparency to Information about Pay" (2014) 4 UC Irvine Law Review 781; Jill Rubery and Aristea Koukiadaki *Gender, Equality and Diversity Branch, International Labour Office, Closing the Gender Pay Gap: A Review of the Issues, Policy Mechanisms and International Evidence* (International Labour Office, 2016); and Martha Ceballos, Annick Masselot and Richard Watt "Pay Transparency across Countries and Legal Systems" (2022) 23 CESifo Forum 3.
3. Employment Relations (Employee Remuneration Disclosure) Amendment Bill (32-2) (commentary).
4. (6 November 2024) 779 NZPD (Employment Relations (Employee Remuneration Disclosure) Amendment Bill — First Reading); and (16 July 2025) 785 NZPD (Employment Relations (Employee Remuneration Disclosure) Amendment Bill — Second Reading).
5. Employment Relations Act 2000, s 103.
6. Employment Relations (Employee Remuneration Disclosure) Amendment Bill (32-2) at cl 5.
7. Employment Relations (Employee Remuneration Disclosure) Amendment Bill (32-2) (commentary).
8. Employment Relations (Employee Remuneration Disclosure) Amendment Bill (32-2) (commentary).
9. Employment Relations (Employee Remuneration Disclosure) Amendment Bill (32-2) at cl 5.
10. Employment Relations (Employee Remuneration Disclosure) Amendment Bill (32-2) (commentary).
11. Employment Relations (Employee Remuneration Disclosure) Amendment Bill (32-2) (commentary).
12. Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth).

individuals routinely disclose and access detailed information regarding remuneration, including salaries, bonuses, and other forms of compensation, within the workplace and, potentially, in the public domain. This interpretation assumes that employees will be fully apprised of their colleagues' earnings, a notion that is frequently contested on several grounds. Objections are commonly raised based on the right to privacy, the principle of contractual autonomy, the potential administrative and compliance costs for employers, and broader cultural resistance to open discussions of pay. Such concerns are often raised in Aotearoa New Zealand underscoring the tension between transparency objectives and prevailing legal, economic, and social norms.

In practice, however, the concept of pay transparency is far more nuanced. It encompasses a spectrum of institutional and regulatory measures aimed at fostering openness, accountability, and equity in remuneration practices. Rather than mandating full disclosure, it seeks to dismantle cultures of secrecy around pay and to promote environments where compensation is subject to informed inquiry, dialogue, and scrutiny.

Legal frameworks promoting pay transparency are often heterogeneous in nature, comprising a diverse array of regulatory measures that may operate independently or in combination. These measures vary in scope, form, and enforcement mechanisms, reflecting differing legislative approaches to addressing pay equity and information asymmetry in employment relationships. Key legal instruments used to operationalise pay transparency include the following:

- an employee's right to request information regarding the remuneration of other employees performing the same or substantially similar work;
- mandatory gender pay gap reporting by employers, disaggregated by occupational category or position;
- obligations on employers to conduct gender-based pay audits;
- the requirement to address pay equity as a distinct matter in the context of collective bargaining processes;
- the development, promotion, and dissemination of gender-neutral job classification and evaluation systems;
- the obligation to disclose pay ranges in job advertisements;
- a prohibition on employers inquiring into applicants' prior remuneration during recruitment processes; and
- a statutory ban on the inclusion of pay secrecy clauses in individual employment agreements.

These legal measures may be broadly categorised according to whether they adopt an individual or structural approach to pay transparency.

Individual-focused measures primarily rely on the initiative of the employee to access or disclose remuneration information. In jurisdictions such as Finland, Ireland, and Norway, for example, employees are granted the right to request information concerning the pay of others performing the same or equivalent work.[13] This model places the evidentiary and procedural burden on individual employees, which can significantly limit its practical effectiveness. In contexts where remuneration systems lack transparency or are obscured by complex pay structures, it may be particularly difficult for employees to obtain the necessary information to substantiate claims of unequal pay or discrimination.[14]

By contrast, structurally-oriented measures shift the responsibility for pay transparency from the individual employee to the employer. Such measures include mandatory gender pay gap reporting, gender-based pay audit obligations, the inclusion of equal pay as a distinct item in collective bargaining processes, and the implementation of gender-neutral job classification and evaluation systems. These regulatory mechanisms are designed to uncover and address structural and systemic pay disparities, particularly where women and men performing work of equal value are remunerated unequally. By imposing proactive obligations on employers, these measures seek to move beyond individual claims and toward broader institutional accountability for pay equity.

A notable development of structurally oriented measures is found in the European Union's Pay Transparency Directive, which was adopted in June 2023.[15] The Directive aims to establish binding obligations on Member States, including pre-employment transparency measures such as mandatory disclosure of salary ranges by employers and a prohibition on inquiring into an applicant's prior remuneration. Member States have been granted a three-year period, until June 2026, to transpose the Directive into their respective domestic legal systems, although several had already enacted comparable measures prior to its adoption.[16] The Directive imposes specific reporting obligations on larger employers. Entities with at least 100 employees will be required to publish data on gender pay disparities, and where a gender pay gap of five per cent or more is identified, a joint pay assessment must be conducted in collaboration with workers' representatives. Significantly, the

13. Albertine Veldman "Pay Transparency in the EU: A legal analysis of the situation in the EU Member States Iceland, Liechtenstein and Norway" (research paper from the European Network of Legal Experts in Gender Equality and Non-Discrimination, Luxembourg, 2017).
14. See, for example, some member states with short limitation periods, the victims decide to not bother because of the "unsurmountable difficulties" involved in taking action within the time limits. European Commission *Commission Staff Working Document Evaluation of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on 'equal pay for equal work or work of equal value'* (2020) at 23.
15. Directive (EU) 2023/970 of the European Parliament and of the Council [2023] 132 OJ 21 [Directive 2023/970].
16. Directive 2023/970, above, art 34(1).

Directive introduces a reversal of the burden of proof in equal pay claims, placing the onus on employers to demonstrate compliance. This regulatory shift may exert extraterritorial influence, encouraging jurisdictions with close economic ties to the European Union to adopt analogous measures in order to maintain access to EU markets and align with evolving international labour standards.[17]

Australia has similarly adopted a pay transparency framework that prioritises addressing structural pay inequities over the resolution of individual claims. Since 2014, large employers, defined as those with 100 or more employees, have been subject to gender equality reporting obligations, which were further strengthened by the Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023. The United States and Canada have also introduced pay equity legislation, including some that has regard to pre-employment pay transparency and pay secrecy.[18]

In contrast, Aotearoa New Zealand's current approach to pay transparency and proposed legislation appears comparatively limited in ambition when measured against recent international developments. These developments reflect a growing global trend toward structural and mandatory pay transparency regimes aimed not merely at identifying, but also at rectifying, systemic wage disparities.[19] The Bill adopts an individualised approach to pay transparency, yet empirical research increasingly indicates that structural mechanisms are more effective in addressing pay inequities and fostering cultural change.[20] While the Bill affords legal protection to employees who voluntarily disclose their own remuneration or inquire into the remuneration of others, it stops short of imposing any obligations on employers to disclose pay information.[21] Nor does it prohibit the use of pay secrecy clauses in employment agreements. As a result, wage information remains largely inaccessible, and transparency is unlikely to be substantively achieved.

Enforcement under the Bill relies on the personal grievance process, requiring an individual employee to initiate a claim before the Employment Relations Authority where they believe they have suffered disadvantage for engaging in pay-related discourse. This enforcement model continues to place the burden of identifying and challenging discrimination on individual employees, disproportionately affecting women, while failing to guarantee access to the information necessary to substantiate such claims. In the absence of a corresponding employer duty to disclose remuneration data, the capacity to enforce pay equity rights remains materially constrained.[22]

The Bill thus stands in contrast to a growing body of scholarship and evidence indicating that individualised transparency measures are insufficient, and may even be counterproductive as limited transparency, particularly where pay disparities are disclosed without corresponding mechanisms for redress, can exacerbate employee dissatisfaction and resentment.[23] In such contexts, disclosure alone does not advance cultural or institutional change, nor does it foster meaningful accountability; rather, it risks entrenching inequities by rendering them visible without offering a path to remedy.

The decision in *Talley's Fisheries Ltd v Lewis* serves as a salient example of how structural pay disparities may endure in the absence of institutional oversight or systemic scrutiny.[24] In this case, brought under the Human Rights Act 1993, the New Zealand High Court upheld a claim of pay discrimination, finding that Talley's had systematically assigned women to lower-paid trimming roles while reserving the higher-paid filleting positions for men, despite equivalent levels of skill and experience across both groups. The Court concluded that Ms Lewis had been subjected to less favourable terms of employment on the basis of her sex, in contravention of the Act. The case underscores the limitations of relying solely on individual enforcement mechanisms, and highlights the need for broader structural interventions, such as mandatory reporting or job classification reviews, to surface and address entrenched patterns of gender-based occupational segregation and pay inequity.

A structural lens also invites a broader conversation about how work is valued. Employer reporting mechanisms that assess pay by skill and job content, rather than by title alone, support this reframing. This aligns with the concept of "work of equal value", which requires consideration of factors such as responsibility, training, and working conditions.[25] Job classification risks gender prejudices and stereotypes with mainly female jobs being undervalued since

17. Carl Blake and Alice Itasheva "International trends in Employment Law 2024" [2024] ELB 48.
18. Blake and Itasheva, above, at 49.
19. Ceballos, Masselot and Watt, above n 2, at 4.
20. In the European Commision "Pay Transparency in the EU", this is called the "individual rights strategy", placing the onus on employees to prove gender pay discrimination — despite limited access to colleagues' pay and role comparability.
21. Employment Relations (Employee Remuneration Disclosure) Amendment Bill (32-2) (commentary).
22. Employment Relations (Employee Remuneration Disclosure) Amendment Bill (32-2).
23. Sara Benedí Lahuerta, Katharina Miller and Laura Carlson (eds) *Bridging the Gender Pay Gap through Transparency* (Edward Elgar Publishing, Cheltenham (UK), 2024).
24. *Talley's Fisheries Ltd v Lewis* (2007) 8 HRNZ 413, 4 NZELR 447 (HC).
25. Directorate-General for Justice and Consumers *Study to support the evaluation of the relevant provisions in Directive 2006/54/EC implementing the Treaty principle on 'equal pay for equal work or work of equal value'* (European Commission, February 2020) at 49.

there is often no detailed analysis of the job content.[26] Traditional job classification systems often embed gendered assumptions, resulting in the systematic undervaluation of female-dominated roles due to insufficient analysis of job content. A systemic approach compels employers to assess whether remuneration genuinely reflects the value of work performed, irrespective of gender or ethnicity. Such a shift, from valuing who performs the work to what the work entails, necessitates collective, institutional mechanisms rather than individualised interventions.

Ultimately, the Bill's reliance on an individualised and voluntary approach risks overburdening employees with the responsibility of identifying and challenging pay inequities, while leaving broader organisational and systemic practices unexamined. In the absence of structural accountability mechanisms, pay transparency may serve merely to illuminate disparities without effecting meaningful change or redressing entrenched patterns of inequality.

Enforcement and first step toward cultural change

Research indicates that pay transparency laws are most effective in producing systematic and measurable reductions in the gender pay gap when they are underpinned by mandatory employer obligations, possess broad sectoral applicability, and are supported by credible and robust enforcement mechanisms.[27] Comparative analyses of varying legislative approaches to pay transparency consistently conclude that such frameworks yield tangible results only when compliance is mandatory. Notably, the effectiveness of these regimes does not necessarily depend on stringent sanctions or the imposition of remedial obligations; rather, the presence of enforceable requirements alone, regardless of severity, appears sufficient to drive behavioural and institutional change.[28]

For instance, initially transparency reporting in the United Kingdom operated on a voluntary basis; however, participation rates were notably low. In response, the government introduced a mandatory reporting regime in 2017 through the Equality Act 2010 (Gender Pay Gap Information) Regulations.[29] These Regulations require employers with more than 250 employees to publish annual data concerning the gender pay gap within their organisations. While the framework does not impose any obligation to implement remedial measures, it aims to exert reputational pressure and foster public accountability — mechanisms that may prompt internal review processes and, in some instances, catalyse organisational or cultural change. Nevertheless, even where reporting obligations are made compulsory, the absence of substantive enforcement mechanisms or penalties may continue to undermine compliance and limit the regime's overall effectiveness.[30]

In contrast to more robust international frameworks, the New Zealand Pay Transparency Bill adopts a limited approach, offering only voluntary disclosure protections at the individual level and imposing no obligation on employers to report systemic gender-based pay disparities. Although the Bill aspires to "increase transparency about pay, and allow any pay discrimination to be more easily identified and remedied",[31] its voluntary character means that neither employers nor employees are compelled to disclose remuneration information. The Education and Workforce Committee, in its commentary on the Bill, acknowledges that it does not offer a "remedy for injustice" but rather seeks to facilitate the identification and potential resolution of such injustice.[32] Consequently, the Bill represents only a modest intervention and leaves the substantive legal framework largely unchanged.

Pay transparency functions as a mechanism in service of the broader objective of achieving pay equity. The international examples demonstrate that mandatory structural pay transparency measures are effective at reducing gender pay gaps. Such compulsory and structural measures further contribute to reframe pay equity not as an individual concern but as a collective social issue. Without similar accountability mechanisms, New Zealand's Bill risks offering only the appearance of progress, while leaving systemic inequalities intact.

Achieving substantive progress toward structural pay parity in Aotearoa New Zealand will require not only legal reform but also a broader cultural transformation. However, the current political climate reflects a clear shift away from worker protections and pay equity initiatives, posing a significant risk to sustained advancement in this area.[33] The government's recent policy direction, including the repeal of pay equity obligations, the disbandment of the Pay Equity

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26. European Commission, *Commission Staff Working Document Evaluation of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on 'equal pay for equal work or work of equal value'* (European Commission, Final Report, 2020) at 30.
27. See Andreas Gulyas, Sebastian Seitz and Sourav Sinha "Does Pay Transparency Affect the Gender Wage Gap?" (2021) CRC TR 224 Discussion Paper.
28. Ceballos, Masselot and Watt, above n 2, at 6.
29. Reilly, above n 1, at 94.
30. Archon Fung, Mary Graham and David Weil *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press, 2007).
31. Employment Relations (Employee Remuneration Disclosure) Amendment Bill (32-2) (commentary).
32. Employment Relations (Employee Remuneration Disclosure) Amendment Bill (32-2) (commentary).
33. The New Zealand Government, has amended the Equal Pay Act, amending it to place more limits and restrictions on pursuing pay equity claims.

Taskforce, and an overt emphasis on the interests of employers and the business sector, signals a retreat from prior commitments to gender equity in the workplace. As of 2024, Aotearoa New Zealand's national gender pay gap remains at 8.2 per cent,[34] with significantly higher disparities affecting Māori, Pacific, other ethnic minority women, and women with disabilities,[35] underscoring the structural and intersectional dimensions of pay inequality that remain unaddressed.

While the current legislative proposal on pay transparency remains limited in scope, it nonetheless represents a marked progression from earlier efforts in Aotearoa New Zealand. A previous attempt to legislate in this area — via the Green Party's Pay Transparency Bill introduced in 2017 — failed to progress beyond its first reading.[36] Despite continued advocacy by the Human Rights Commission for mandatory reporting by large employers, and longstanding support from civil society and non-governmental organisations, successive governments have been reluctant to advance meaningful reform.[37]

The present Bill, having now passed its second reading, signals a shift in the political landscape and suggests the emergence of some degree of political will. Although modest, the Bill may be best understood as a preliminary step toward a more comprehensive framework. Its provisions, which affirm employees' rights to discuss remuneration and seek to normalise conversations about pay, could facilitate a broader cultural shift by challenging entrenched norms of pay secrecy.

However, to effect substantive change, this initial reform must be followed by the adoption of a mandatory and universal pay transparency regime, informed by international best practices. Only through such a shift can transparency be leveraged not merely to illuminate disparities, but to drive systemic and enduring transformation in pay equity.

How precarious is employment during parental leave?

Mathew Barnett, Senior Solicitor and Bronwyn Heenan, Solicitor, Simpson Grierson

If you are reading this, I am going to proceed on the assumption that you are already familiar with the basics — an employer cannot terminate an employee's employment because they are pregnant or on parental leave. Employment Law 101, right up there with "you need a fair process" and "do not fire your employees by text". But what about the inevitable nuance in organisations and how that works at the edges of this rule?

What happens if, while on parental leave (or shortly before or after), the employment relationship is severed? Is it always unlawful? Is it ever okay? It is worth exploring the treacherous terrain of terminating employment around parental leave and reflecting on whether the settings, as they are, provide a fair framework for employees and their employers.

It also raises a broader question: is the current enforcement framework up to the task? While the Parental Leave and Employment Protection Act 1987 (PLEPA) includes a standalone complaints process under s 56, it is rarely used and arguably underpowered. Should we be thinking about reforms that allow for better oversight and perhaps a more visible or well-resourced mechanism, integrated more closely with the Ministry of Business, Innovation and Employment's (MBIE) existing enforcement functions, or one designed to flag patterns of concerning terminations across industries? If we want to truly protect working parents, it may be time to ask whether the system is fit for purpose or due for an overhaul.

Section 49 of PLEPA lays out a deceptively simple principle: an employer must not terminate the employment of an employee due to their pregnancy or while they are on parental leave.

34. Ministry for Women "Gender pay gaps" <www.women.govt.nz>. This is measured based on median hourly wage and salary earnings for men and women.
35. Ministry for Women, above n 34.
36. Employment (Pay Equity and Equal Pay) Bill 2017 (29-1).
37. Reilly, above n 1, at 88.

The legislation and case law has provided for exceptions in two narrow circumstances:

- It is not reasonably practicable to provide temporary replacement because the employee occupies a key position.
- The termination is due to redundancy.

It is refreshingly black-letter law. However, in classic employment law fashion, the real complexity lies in the grey margins.

Key positions

Factors that may weigh in favour of a position being "key" include:

- highly specialised skills or institutional knowledge not readily replicated;
- a leadership role that cannot be split or delegated; or
- the size of the organisation (smaller employers often have fewer options).

The threshold for a "key position" is high. It is not enough for the employee to be competent, liked, or even integral to operations. The position must be such that a temporary replacement simply is not feasible. This typically requires consideration of the nature of the work, the availability of qualified substitutes, and the impact on the business. The courts have traditionally interpreted this narrowly. In *New Zealand Bank Officers Industrial Union of Workers (IUOW) v ANZ Banking Group (NZ) Ltd*,[1] the Employment Court reinforced the need for a "genuine and demonstrable impracticability" in arranging cover and made the clear point that those with elementary skills in large organisations could not be considered key positions; of course, the inverse of this is that specialist and/or those in small organisations may be able to be labelled with the damaging "key employee" label. The employer must not simply decide it is easier to restructure or reassign; they must actively attempt to find a temporary replacement, and only upon failing to do so might a key position justification arise.

Even then, there must be clear documentation of attempts to replace, and evidence that no reasonable alternative existed.

In *Richardson v Thomas,*[2] the Court looked at the size of the employer's business and the practicality of arranging cover. Richardson was employed by a very small enterprise, and the Court accepted that replacement was genuinely impracticable.

In reality, this approach of identifying employees as key employees to enable termination is very rarely used due to the high bar that has been set for what can be considered a key employee. By the time you reach that threshold you are probably indispensable anyway!

Redundancy

The second lawful pathway to termination under the PLEPA is redundancy. But before employers get carried away, it is worth noting that the standard principles still apply and an employer will be held to a higher level of scrutiny:

- the redundancy must be genuine;
- there must be consultation; and
- the process must be fair and reasonable under s 103A of the Employment Relations Act 2000 (ERA).

The Employment Relations Authority (Authority) has been open to finding that the redundancy of an employee on parental leave was not genuine. This is where the role still existed, and/or no sufficient justification has been given for disestablishment.

More importantly, a redundancy that occurs during parental leave will be viewed under a microscope. The Employment Court and the Authority tend to be sceptical. Timing is everything. Even if the redundancy is substantively justified, a procedurally flawed process can lead to a successful personal grievance.

Termination near parental leave

What if the termination occurs shortly before the parental leave is due to start? Or right after the employee returns from parental leave?

While s 49 technically applies only to the "parental leave period" (defined in the ERA), employment protections are not confined to that narrow window. Terminating someone before their parental leave starts or immediately after they return will raise eyebrows, is fertile grounds for a personal grievance, and could attract scrutiny from the Authority.

This is where the ERA kicks in. Sections 103 and 104 (unjustifiable dismissal and discrimination, respectively) operate to protect employees from disadvantage or dismissal due to their parental status. A dismissal timed suspiciously close to leave may not breach PLEPA but could still be a breach of good faith or discrimination under the ERA.

Employers should be aware that the Authority is generally unimpressed with "coincidental" restructures days before or after parental leave.

Pregnancy discrimination and constructive dismissal

While s 49 is focused on parental leave, do not forget about pregnancy itself. Adverse action based on pregnancy may breach s 21 of the Human Rights Act 1993 (HRA) or amount to constructive dismissal if the employee is pushed, or feels like they are being made, to resign.

A demotion, pay cut, or exclusion from decision-making during pregnancy (or in anticipation of leave) can be enough to give rise to a grievance. The law does not just protect the

1. *New Zealand Bank Officers Industrial Union of Workers (IUOW) v ANZ Banking Group (NZ) Ltd* [1983] ACJ 803 (ArbCt).
2. *Richardson v Thomas* [1997] 1 ERNZ 246.

leave period; it protects the status and rights of pregnant and parenting employees more broadly.

The special process requirement

Even where a termination is lawful under the PLEPA, there are specific procedural obligations:

- employers must notify the employee in writing of their intention to terminate;
- they must give the employee a reasonable opportunity to respond; and
- the employer must genuinely consider any response.

This is akin to the usual requirements of a fair process under the ERA, but with the additional complexity of communicating with someone who is on parental leave and, possibly, less responsive (sleep deprivation is a cruel beast).

You cannot simply pop a letter in the post and start counting down to termination. Employers must be proactive in facilitating meaningful consultation, which may involve accommodating the employee's availability or communicating through agreed channels.

An underutilised complaints mechanism?

Section 56 of PLEPA outlines the complaints process for breaches, but how often is it used? MBIE's Labour Inspectorate has limited visibility over what are, in practice, often procedurally complex and fact-specific grievances. Employees rarely make use of the s 56 process in isolation — it is often folded into broader unjustified dismissal claims under the ERA.

There is a strong argument that PLEPA's enforcement regime could benefit from greater integration with MBIE, or the creation of a specialist compliance unit to investigate potentially systemic patterns of termination post-parental leave — understanding whether certain industries or employers are more susceptible to maltreatment of employees on parental leave. After all, most parents do not have time (or energy) for protracted litigation. A mechanism that empowers early intervention — particularly in small and medium-sized enterprise (SME) contexts — could make a real difference.

A unit within MBIE could use data to identify patterns and deal with systemic risk areas — as with many issues in employment law there is a perception that vulnerable workers are more likely to be impacted by discriminatory conduct in relation to employment while on parental leave, this type of unit could put this theory to the test and ultimately do something about it. Of course, resourcing will be an issue.

It would also allow for an even more effective response time to endeavour to resolve issues, as mentioned, vulnerable employees would be empowered to utilise a much more accessible MBIE-led operation — employers could even be required to provide them information about their rights when the employees confirm that they are intending on taking parental leave, a "statement of rights" which could provide a simplified explanation of entitlements and contact details for fast escalation if a breach does occur.

Further options to consider strengthening such a regime would be to give them auditing powers and the ability to require evidence of a thorough process when redundancy occurs during parental leave.

MBIE already administers parental leave payments via the Inland Revenue Department (IRD) and mediation services for general employment issues, so there is an existing cross-over which would allow for the effective delivery of such a service.

Practical takeaways for advising employers

- Document everything. If relying on redundancy or key position justifications, keep meticulous records.
- Engage early and often. Do not wait for a grievance to find out that emails to the employee went unread.
- Consult meaningfully. Yes, even when the employee is on leave. It is not ideal, but it is legally required.
- Avoid assumptions. That someone is hard to replace does not mean they cannot be replaced.
- Use caution with timing. Actions taken close to the parental leave period will be subject to enhanced scrutiny.

And for advising employees ...

- If something smells off, seek advice. Timing and motive matter more than most people realise.
- Stay in touch during leave if possible. It can help ensure you do not miss important communications.
- Understand an employee's rights. Section 49 is just the start; an employee is also protected under the ERA, HRA, and general principles of good faith.

Final thoughts

Parental leave is not a career death sentence, nor is it an HR trapdoor. The law provides robust protections, but they rely heavily on fair process, good faith, and a shared understanding that babies (and careers) require time, attention, and support. Our suggestion is that the involvement of MBIE as an intermediate step before the ERA could provide employees, particularly vulnerable ones, with better access to this robust but very technical regime.

So, whether you are advising an employer thinking about swinging the redundancy axe mid-nappy change, or an employee that receives "just checking in on your plans" email two weeks into leave, remember: timing is everything, and process is king.

Pay equity – the amendments

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In May 2025, the Equal Pay Act 1972 (the EPA) was amended under urgency. Workplace Relations Minister, Hon Brooke van Velden, fronted the amendments and described them as making the EPA "more robust, workable and sustainable".[1]

This article considers the impact of the 2025 amendments, particularly in relation to the fundamental purpose of the concept of pay equity: the removal of systemic sex-based undervaluation from the remuneration of women.

Equal pay vs pay equity

Before analysing the effects of the amendments, it is useful to define key concepts in this arena. Specifically, to define and differentiate the concepts of equal pay and pay equity.

"Equal pay" is the requirement that men and women working in the same job under the same conditions (and typically for the same employer) should be paid the same amount. Establishing this requires an objective assessment of whether the jobs are the same. If they are, the pay should be equivalent. This obligation to ensure "equal pay" has existed in New Zealand since 1960 for the public service and 1972 for the private sector.

"Pay equity" is a different concept. Rather than requiring the same pay for the same job, it requires the same pay for *work of equal value*. This means that men and women performing different jobs but of equal value — requiring substantially similar skills, responsibility, experience, working conditions and degrees of effort — should receive comparable compensation. Achieving this requires a subjective assessment of whether the work is truly of equal value.

The path to pay equity

In 2012–2014, in litigation involving Kristine Bartlett and Terranova Homes and Care Ltd, the Employment Court and the Court of Appeal found that the EPA, as it stood at the time, could include a claim for pay equity.[2] A Crown settlement resolved the litigation, but it ultimately led to legislative reform — the 2020 amendments to the EPA.

The 2020 amendments to the EPA

The EPA was amended in 2020 to specifically incorporate the concept of pay equity by expressly prohibiting differentiation on the basis of sex between the rate of remuneration for work that is predominantly performed by women and the rate of remuneration that would be paid to men who have the same, or substantially similar, skills, responsibility, experience, conditions of work and degrees of effort.

To implement this concept, the 2020 amendments established a "simple and accessible process" to raise, assess, bargain, and settle a pay equity claim, with a low threshold for raising a claim.[3] It was hoped that the ability of a union (or unions) to raise a claim for a whole workforce performing the same or substantially similar work, including with multiple employers, would assist with the comprehensive resolution of sex-based pay inequities across workforces.

Resolving claims involved assessing the work, terms and conditions of employment, and remuneration of the claimant workforce, and comparing it to the work, terms and conditions of employment, and remuneration of comparator workforces. This enabled the parties to determine whether the work of the claimant workforce was subject to sex-based undervaluation, and if so, to quantify that sex-based undervaluation and resolve it through settlement of the pay equity claim.

Using this process, pay equity claims were raised, progressed, and settled for various female-dominated workgroups, including nurses, midwives, social workers, school support staff, and school librarians.

However, the current coalition Government was concerned that pay equity claims were overly broad, advancing without substantial evidence, and, because of this, that the cost to the Crown was excessively high.[4] The Government posited that claims could progress "without strong evidence of undervaluation" and that where broad claims

1. Beehive "Changes to improve pay equity process" (press release, 6 May 2025).
2. *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] ERNZ 504; and *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516.
3. Equal Pay Act 1972, version as at 20 December 2023, now replaced s 13A.
4. Beehive, above n 1.

were raised, it could be "difficult to tell whether differences in pay are due to sex-based discrimination or other factors".[5]

In addition, the Government appears to have been concerned that unions were getting two bites at the cherry in using both collective bargaining and pay equity processes to ramp up pay rates. As the Finance Minister, Hon Nicola Willis stated, during the third reading of the Amendment Bill, "pay equity processes should be used for genuine issues of discrimination. They should not become a parallel route for bargaining. They should not become a backdoor route for bargaining".[6]

Pay equity is intended to only correct for sex-based undervaluation, not for any other differences in pay that might exist. There are many reasons that work of equal value may not receive equivalent pay; sex-based discrimination is only one such reason. If differences in pay are due to market-based factors, such as supply and demand, or an employer's chosen remuneration policy, then those differences in pay are not due to sex-based undervaluation, and there should be no expectation that they will be resolved by a pay equity process.

Unfortunately, there is no simple mathematical formula that can determine whether pay is undervalued on the basis of sex or what would be paid for female-dominated roles if they were not performed predominantly by women. Therefore, it is reasonably easy for the outcome of pay equity claims to be challenged as either under- or over- compensating for sex-based undervaluation.

It was because of the above concerns that the Government considered it necessary to make further amendments to the EPA, which it did in May 2025.

The May 2025 amendments

The process and retrospective impact

One of the key criticisms directed against the May 2025 amendments is the way in which they occurred. The Amendment Bill was introduced to the House on 6 May 2025 under urgency and passed on 7 May 2025 with no public consultation or select committee process. The justification given for this approach was to prevent existing claims from being rushed through the current system before the amendments could be enacted. This would have led to more claims being settled under a regime that the Government had significant concerns about.

Further criticism was aimed at the highly unusual retrospective impact of the legislation, especially given the urgency and lack of public consultation. The amendments resulted in the discontinuance of all existing pay equity claims (including those where proceedings had been filed with the Employment Relations Authority or Employment Court),[7] and review clauses from existing pay equity claim settlement agreements were rendered of no effect, including where they had been incorporated into employment agreements.[8]

To push through amendments with retrospective impact without public consultation was problematic, and yet, discontinuing existing claims and rendering review clauses nugatory was necessary to achieve the Government's purpose for the amendments — a new, more robust (and therefore lower cost) regime.

Historical, systemic sex-based undervaluation

Sex-based undervaluation that is "systemic" is undervaluation that is structural or engrained in the system. If a problem that is systemic is resolved, for example, by increasing remuneration to the level that would be paid to men performing the undervalued work, it is unlikely that the issue can recur at the systemic level within a year or two.

Although the 2020 amendments to the EPA were premised on the pay equity regime being aimed at removing systemic sex-based undervaluation from a workforce,[9] this concept was not explicitly reflected in the language of the legislation itself. The 2025 amendments remedied this by emphasising in the EPA that the pay equity process is aimed at removing *systemic* sex-based undervaluation from a workforce. This can be seen in the new "merit" test (discussed further below), which requires that for a pay equity claim to progress, there must be reasonable grounds to believe that work has been historically undervalued and continues to be subject to *systemic* sex-based undervaluation.[10] Further, the purpose of the pay equity part of the EPA is to provide a process that facilitates the resolution of pay equity claims where there is evidence of *systemic* sex-based undervaluation of work predominantly performed by female employees.[11]

Secondly, as well as relating to undervaluation that is systemic in nature, pay equity is about removing only *sex-based* undervaluation. Not all differences in pay are due to sex. For example, if a particular role is in high demand but there is a limited supply of qualified workers, salaries will tend to be higher. This is not due to the sex of the workers, but the demand for their skills.

Although this concept was provided for by the 2020 version of the legislation, it was not well understood and led to fraught issues between parties working towards the settlement of pay equity claims. At times, various unions incorrectly took the view that where comparators were

5. Beehive, above n 1.
6. (6 May 2025) 783 NZPD (Equal Pay Amendment Bill — Third Reading Speech, Hon Nicola Willis).
7. Equal Pay Act 1972, sch 1, cl 8.
8. Equal Pay Act, sch 1, cl 10.
9. See for example (16 October 2018) NZPD (Equal Pay Amendment Bill — First Reading Speech, Hon Iain Lees-Galloway) https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20181016_20181016_24.
10. Equal Pay Act, s 13F(1)(b).
11. Equal Pay Act, s 13A.

identified as performing work of equal value, the claimant workforce should receive identical remuneration to those comparators, without consideration of whether remuneration differences were due to sex-based undervaluation or other factors.

Following the 2025 amendments, the EPA now expressly refers to sex-based undervaluation in relation to the pay equity assessment process,[12] and requires the parties to take into account the fact that "undervaluations or other differences in remuneration that are identified are not necessarily based on sex".[13]

The 2025 amendments have therefore helpfully clarified the EPA by making it explicit that pay equity is aimed only at the removal of systemic sex-based undervaluation, not the removal of all differences in pay.

Merit test

The 2025 amendments replaced the low-threshold, light-touch, arguable case approach[14] of the EPA with a significantly higher threshold for a claim to make it into the pay equity process. In order for a claim to meet the new merit test and enter into the pay equity process, claimants must provide evidence that the work of the claim is subject to both historical and current sex-based undervaluation.[15] Previously, the claimants simply had to make an arguable case that the work is or was undervalued.[16]

Putting the onus on the claimants to provide evidence demonstrating both historical and current undervaluation in the first instance ensures that only claims likely to result in a settlement make it across the merit threshold. However, requiring this information to be provided before the evidence gathering and assessment process provided for by the legislation can commence puts a significant burden of proof on the claimants, and feels a lot like putting the cart before the horse.

The other key change with the introduction of the merit test relates to the definition of what it means to be a predominantly female workforce. To be predominantly female under the 2020 legislation, a workforce had to be approximately 60 per cent female; now, a workforce must be at least 70 per cent female and have been so for at least 10 consecutive years to be considered predominantly female.

These changes restrict the workforces that will be able to cross the threshold into the pay equity process.

Comparator hierarchy

Once a pay equity claim has passed the threshold and entered the pay equity claim process, the parties are required to undertake a work assessment process to assess the work of the claimant workforce and of appropriate comparator workforces. A comparator does not perform the same work as the claimant workforce; rather, a comparator performs different work but work that is of equal value. The pay equity assessment process is aimed at assessing the value of different work to enable comparisons to be made and appropriate remuneration to be assessed.

The selection of appropriate comparator workforces has been restricted by the 2025 amendments to the EPA and fixed by way of a hierarchy. This occurred due to concerns that the male-dominated roles being considered as comparators for claimant workforces were inappropriate. For example, Minister Brooke van Velden stated:[17]

> The current Act provides the flexibility to choose from a wide range of comparators, which has led to comparators being chosen even where the comparator's work and skills are very different to the claimant's. Health New Zealand admin and clerical staff, as an example, have been compared to mechanical engineers, Health New Zealand librarians have been compared to transport engineers, and Oranga Tamariki's social workers have been compared to air traffic controllers.

Post the 2025 amendments, in the first instance, the parties must now look within the employer of the claimant workforce for comparators. If the employer does not employ any appropriate comparators, the parties may look outside the employer to similar employers. If no comparators can be found within that group, the parties may look to other employers within the same industry or sector. If there are no comparators within the same industry or sector, the employer can give notice to the claimant that there are no appropriate comparators available for selection, and the claim is discontinued.[18]

The amendments in relation to comparators are aimed at restricting the breadth of comparator choices and ensuring that comparators more closely related to the claimant workforce are chosen, and there may be some legitimacy to these changes. Determining whether differences in remuneration are due to sex-based undervaluation or other factors may be more straightforward where the comparator and claimants are more closely related.

However, the fact that a lack of comparators in the same industry or sector will result in the discontinuance of a claim and no ability to identify and resolve any systemic sex-based undervaluation that may exist for that claimant workforce is a confronting outcome of the 2025 amendments. A pay equity claim can meet the threshold of providing evidence that the work of the claimant workforce is

12. Equal Pay Act, s 13ZD(1)(a). Compare this with previous s 13ZD(1) (version as at 20 December 2023).
13. Equal Pay Act, s 13ZD(3)(a)(ii).
14. See Equal Pay Act, version as at 20 December 2023, now replaced ss 13A, 13F and 13Q(2).
15. Equal Pay Act, ss 13F and 13I.
16. Equal Pay Act, version as at 20 December 2023, now replaced s 13F.
17. (6 May 2025) 783 NZPD (Equal Pay Amendment Bill — First Reading Speech, Hon Brooke van Velden).
18. Equal Pay Act, s 13ZE.

both historically undervalued and continues to be subject to systemic undervaluation, but if no comparators can be found within the employer, similar employers, or the industry or sector, the claim ceases and the claimant workforce loses their chance at a pay equity settlement to correct sex-based undervaluation in their remuneration.

Review clauses

Under the 2020 legislation, pay equity claim settlements were required to include a review clause to ensure that pay equity was maintained. Reviews were required to occur in alignment with the collective bargaining cycle, meaning that they had to occur at least every three years. Where more than one collective agreement was impacted by a pay equity claim settlement (a reasonably frequent occurrence), aligning reviews with each collective bargaining cycle could have reviews occurring at least every one to two years.

Under this system, claimants with settled pay equity claims were using the requirement to review and maintain pay equity to claim that the remuneration of the claimant workforce must remain in lockstep with that of comparator workforces or, in other words, that remuneration increases received by comparator workforces since the settlement of a pay equity claim should be directly applied to settled claimant workforces also. This ignores the fact that pay equity is only about removing sex-based undervaluation, not all differences in pay, and there may be reasons other than the sex of the comparator workforce justifying increases in pay.

The 2025 amendments removed the requirement for a pay equity claim settlement to include a clause to review the remuneration of the claimant workforce;[19] and rendered existing review clauses of no effect.[20]

Alongside requiring that reviews occur to ensure that pay equity was maintained, the pre-2025 legislation provided no ability to raise a future pay equity claim for a workforce that had already settled a claim (unless the Authority determined that "exceptional circumstances" existed, justifying the raising of a new claim).[21] The implication was therefore that once a pay equity claim was settled, reviews would be ongoing, possibly indefinitely, but no future pay equity claim could be raised.

Under the 2025 version of the EPA, reviewing a pay equity claim settlement is not required (and in fact agreeing to do so in a settlement is expressly prohibited), but a new claim may be raised after a 10-year period. Presumably, this is based on the premise that historic and/or systemic sex-based undervaluation of a workforce once removed, is unlikely to re-emerge within the space of a year or two but may re-emerge over a period of 10 years. Therefore, frequent reviews are not required, but a new claim can be raised after 10 years (provided the merit test is met). In this regard, the amendments support the underlying purpose of pay equity being to remove historical, systemic sex-based undervaluation from a female-dominated workforce.

Whilst the removal of the frequent and ongoing opportunities to advocate for higher pay rates for female dominated occupations with settled pay equity claims is unlikely to be appreciated by the unions, it does mean that, to be justified on the basis of pay equity, any future increases for a workforce with a settled pay equity claim requires a stand-down period of 10 years after which a full pay equity assessment is required to determine whether sex-based undervaluation has re-entered the workforce.

Elimination of back pay and phased settlement

Prior to the 2025 amendments, the Employment Relations Authority had the ability to award back pay when fixing remuneration for the parties to a pay equity claim, back to the date the claim was raised (up to a maximum of six years).[22] This had the effect of focusing the employer's mind on resolving the matter themselves (rather than by determination of the Authority), and provided some impetus to keep the process moving (to limit the length of time for which back pay could be awarded if the matter did end up before the Authority).

The 2025 amendments have removed the ability for the Authority to award back pay, thereby removing these structural tensions within the process. The good faith obligation to ensure that the claim is progressed in an orderly, timely and efficient manner[23] remains, but in comparison to an award of back pay, it lacks teeth (although can result in a penalty).[24]

Another amendment impacting the settlement phase relates to the phasing in of a pay equity claim settlement. Prior to the 2025 amendments, once a pay equity claim was settled, the remuneration agreed to by the parties, or fixed by the Authority, as amounting to "pay equity" was due and payable. There was no ability to "phase in" pay equity remuneration. Rather, to continue not to pay the claimant workforce the pay equity remuneration would be to knowingly underpay the workforce on the basis of sex.

However, the 2025 amendments expressly provide for the remuneration specified in a pay equity claim settlement, or fixed by the Authority, to be phased in over a maximum period of three years from the date of settlement.[25] This is justified on the basis that it "allows employers to better

19. Compare Equal Pay Act 1972, s 13ZH(1) and (3) pre and post-amendment.
20. Equal Pay Act, sch 1, cl 10.
21. Equal Pay Act, version as at 20 December 2023, see in particular now replaced ss 13E(6) and 13ZY, and amended s 2B.
22. Equal Pay Act, version as at 20 December 2023, repealed ss 13ZZD and 13ZZE.
23. Equal Pay Act, s 13C(2)(e).
24. Equal Pay Act, s 18.
25. Equal Pay Act, s 13ZH.

mitigate any potential negative impacts such as on employment, which should benefit all parties".[26] Whilst that justification may have some merit, the amendment ultimately provides statutory backing to an employer openly and knowingly paying a workforce less than the rate that is accepted as being required to ensure there is no undervaluation on the basis of sex for a period of up to three years.

Conclusion

The EPA did, and still does, require that there is no differentiation on the basis of sex between the remuneration paid for work that is predominantly performed by women and the remuneration that would be paid to men with substantially similar skills, responsibility, experience, degrees of effort, and conditions of work.

Some of the 2025 amendments operate to reinforce the implementation of this concept of pay equity through the pay equity claim process, while others appear to be a step back from resolving sex-based undervaluation by creating significant procedural and evidential barriers to successfully raising and settling a pay equity claim.

Whilst it is difficult to determine whether (and if so, how much) pay is undervalued on the basis of sex, that does not mean that we should not try to fix recognised, systemic sex-based undervaluation.

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26. (6 May 2025) 783 NZPD (Equal Pay Amendment Bill — In Committee, Hon Brooke van Velden).

Q and A

Fleur Fitzsimons, National Secretary, Public Service Association

You have had a diverse career including as a student representative, union lawyer and local politician. You are now National Secretary of the New Zealand Public Service Association (PSA). How has your career to date prepared you for this role?

I feel so fortunate to have worked with such a wide range of people and learn from so many. When I was 21 years old, I attended Treaty training by Moana Jackson and have never forgotten the way that he spoke about Te Tiriti o Waitangi and used chairs to demonstrate the place of Māori pre and post-colonisation.

I was also a member of activist feminist groups at university. When I was at the New Zealand University Students' Association, Camilla Belich and I filed a claim with the Human Rights Commission alleging the student loans scheme was unlawful discrimination against women, this was when there was interest on student loans and women took twice as long to pay back loans!

Being a Wellington City Councillor was an insight into the work done by so many in the community that is unseen, especially those who support the homeless and the work being done by community organisations to prevent sexual violence.

So yes, I have been lucky in the lead-up to being a PSA National Secretary. I have worked at the PSA in four different roles too, so I have a good insight into the important work that our members do in the public service, state sector, local government, health and the NGO sector.

Having worked in a variety of roles within the Public Service Association, what do you think are the most common misconceptions about the work of unions?

I think some people think unions are a combative handbreak on employers; this is not how I see us at all. The vast majority of collective agreements and issues that arise in workplaces are resolved by agreement. At the PSA, we want the employers we work with to succeed because we really value the importance of the services our members deliver. Some people still think unions want to create problems not sort them out but if you talk to union delegates and officials, you'll find that they spend most of their lives resolving issues directly with employers. Another misconception is that unions are only focused on the immediate interests of members whereas the reality is much broader. We know that enduring solutions to complex problems like inequality, climate change, authoritarianism and poverty are needed as part of our work.

With the rise of gig work and digital platforms, what do you see as the key issues these new ways of working present to employees and society?

The rise of gig work and digital platforms are a fundamental challenge to the worker rights and economic security that unions have fought decades to establish. For those working in home support, there are moves from some to move towards platform-based forms of employment where work is allocated through apps.

These workers are employees but most working through platforms do not treat them as employees. The imbalance of power with their employers is immense. They work alone, separated from colleagues. It is extremely difficult for them to collectively organise to counter this and improve conditions. It's our challenge as unions to create ways for this to happen.

Most platform workers face the harsh reality of being classified as independent contractors rather than employees, stripping them of basic protections like paid sick leave and access to processes to resolve disputes like personal grievances (PGs), and the right to bargain collectively.

The algorithmic management systems used by these platforms subject workers to constant surveillance and arbitrary decisions about pay and work availability. From a societal perspective, this shift transfers costs from profitable corporations to individual workers, while weakening the collective bargaining power that has historically been essential for ensuring economic gains are shared broadly rather than concentrated among platform owners and shareholders.

Pay equity continues to be a major issue in New Zealand and has been particularly controversial following the recent legislative changes. What are your views on the changes and the potential short- and long-term impacts for this country?

The changes to pay equity legislation and the cancelling of claims amounts to constitutional vandalism and wage theft.

We were about to file briefs of evidence in the Employment Relations Authority for our care and support workers' pay equity claim when the Government cancelled the claim late one evening in Parliament with no prior signalling and without a Select Committee process. It really is a remarkable overreach of the executive branch into the judicial branch.

The impacts on New Zealand women are far-reaching. The landmark Kristine Bartlett decision which paved the way for aged care and support workers to be properly recognised for their work has been undermined. These workers are now banned from even raising a claim until 2027 and then, even if they did so under the amended Act, they would not achieve pay equity because of the new barriers and obstacles.

The true impact of the cancelling of pay equity claims was illustrated when politicians from opposition parties presented care and support workers with giant cancelled cheques at Parliament on 1 July, which was three years to the day since their pay equity claim was raised. The amount on the cheques was calculated at what these workers would have received and was $20,644.45. It is a lot of money and part of the $12.8 billion that Treasury had made the Government put aside in the fiscal contingency to settle pay equity claims. This is money that these women should be able to spend on rent, clothes, food and their kids. Describing it as wage theft is no exaggeration.

Why is it important that a group of former female MPs have formed a "people's select committee" to analyse the Government's changes to the Equal Pay Act? What do you think this committee might achieve?

It is just great to have this group of former MPs from across the political spectrum picking up this important work, it should never have come to this point though. These women are doing the task that Parliament should have done but instead the Government abused urgency to ram through changes to the Equal Pay Act 1972.

The PSA is proud to be supporting the people's select committee with secretarial assistance and many different sectors within the union have made a submission. There is a lot of frustration from women who are in our libraries, probation service, social workers, psychologists, administrators and care and support workers whose claims were cancelled and they want to be respected enough to be listened to — the people's select committee will give them an outlet to be heard.

I think the people's select committee will help keep the spotlight on the betrayal that New Zealand women experienced and be an outlet for women all over New Zealand to be heard. The best-case scenario is that the Government see the error of their ways and rethink their approach on pay equity.

The public sector is undergoing a major transformation, with recent changes being described as the most significant overhaul of the public sector in decades. What impact has this had on your members and the work you are doing, and what do you see as the likely long-term effect?

There have been thousands of job losses in the public sector, including in health, since this Government took office. These dismissals have had truly devastating impacts on individuals and their families, who are not only personally traumatised but also worried about who will do their important work when they are no longer there. There is no doubt in my mind that these cuts and job losses will feature as a tragic mistake in Royal Commission reports in the future because they were made in a rushed and nonsensical way.

The Government's proposed changes to the public sector, including moving away from a requirement to focus on the long-term public policy issues facing New Zealand and moves to dispense with important provisions around ensuring our public sector is diverse and inclusive, are shortsighted attempts to be populist that we will all pay for.

There has been a higher than usual level of strike action being taken in the public sector recently. What do you believe is triggering this?

The Government has only itself to blame for the strikes happening in the public sector. It has not funded the public sector to the levels needed to address the cost-of-living increases facing public sector workers or increased staffing to the levels needed to address our growing and ageing population.

This is clear in waiting lists for children to be allocated social workers at Oranga Tamariki, in waiting times for mediation at the Ministry of Business, Innovation and Employment (MBIE), and in the unfilled rosters which are commonplace within our public health system, to name a few.

The Government is starving the public sector of the funding needed to even keep services going. We have also seen a hostile approach from public sector employers to bargaining where they are trying to take important existing rights workers have, such as flexible work, away from them.

Looking ahead, what areas of employment law do you think will be most dynamic or contentious in the next five years?

We are operating in an environment of constantly diminishing rights for working people, which is particularly damaging given unemployment is at over five per cent and a pound of butter costs $10.

The proposed changes to the contractor test which Uber have strongly influenced and the changes to PG remedies

effectively mean fire at will for all workers — that is a fundamental shift in every workplace. We will campaign to resist this at the same time as finding ways to build public support for an alternative approach to employment that puts a living wage and dignified treatment for working people at the centre of it.

The role of the Authority and the Court will become more important as unions try hard to find ways to strictly enforce the few rights left and advance the position of working people in New Zealand.

What key legislative change(s) would you urge the Government to prioritise in New Zealand?

Settling pay equity claims, properly respecting Te Tiriti o Waitangi in legislation and actions, health and safety reform that focuses on compliance and enforcement, ensuring secure work arrangements are the norm, increasing the minimum wage to at least the living wage (how is it even plausible that we have a minimum wage which a person can't live on?), introducing an industry approach to collective bargaining with an unashamed commitment to increasing wages and improving conditions would be a good start!

You are performing a demanding, dynamic, public-facing role. How do you switch off?

I go to the gym and listen to music, and I usually watch trashy television before I go to sleep. I love indoor netball, but my enthusiasm significantly exceeds my ability. Currently, I am obsessively watching the NYC Mayoralty race mainly on TikTok as Zohran Mamdani feels like such a fresh ray of hope for the world. I have four children with their own friends and lives so it's lovely to have that world too.

Case Comments

Bread of Life Christian Church in Auckland v Chen

[2025] NZEmpC 69

Introduction

This case involved an acrimonious split within a church and required the Employment Court to analyse a complex web of facts and determine whether Pastor Chen was in an employment relationship, whether he was unjustifiably dismissed in 2022 and 2024, and remedies.

Background

The Bread of Life Christian Church in Auckland was founded in 1998 by the Bread of Life Church in Taipei (the Mother Church). It is governed by a charitable trust that holds its assets and is managed by a board of six trustees. Pastor Chen began working for the Church in 2015 as a salaried preacher, initially without a written agreement. On 2 September 2019, he signed a fixed-term agreement to serve as pastor until 31 March 2022. The Trust paid his salary and remitted Pay As You Earn (PAYE) to Inland Revenue.

The Church operated through various committees, including the Core Fellowship Committee and Human Resources Committee. These committees ceased functioning around 2020–2021, and their responsibilities reverted to the Trust Board. In 2021, Pastor Chen was appointed senior pastor and became a trustee.

From late 2021, tensions escalated within the Trust Board, particularly over property decisions and leadership. On 12 April 2022, three trustees resolved to suspend Pastor Chen's salary (Pastor Chen abstained due to a conflict of interest), citing the expiry of his fixed-term agreement. Despite objections from other trustees and support from the Mother Church, Pastor Chen's salary was not reinstated. Pastor Chen filed proceedings in the Employment Relations Authority for unjustified dismissal and continued performing his pastoral duties.

On 9 June 2023, the Authority held that Pastor Chen was in an employment relationship and ordered interim reinstatement.[1] On 5 April 2024, the Authority issued its substantive determination, holding that the Trust could not rely on the fixed term[2] and that the dismissal was unjustified.[3] It ordered permanent reinstatement and made recommendations under s 123(1)(c)(a) of the Employment Relations Act 2000.[4] Five days later, Pastor Chen was dismissed again, this time due to redundancy. Pastor Chen filed further proceedings, which were removed to the Court.[5]

The acrimony has spilled into the High Court. The three plaintiff trustees seek the removal of Pastor Chen and the other two trustees, as trustees of the Trust. A counterclaim seeks the removal of the three plaintiff trustees.

Analysis — employment status

The Court applied s 6 of the Act, using the approach in *Bryson v Three Foot Six Ltd*,[6] as applied by the Court of Appeal in its two-stage analysis in *Rasier Operations BV v E Tū Inc*.[7] The first stage involved identifying the substance of the relationship. Pastor Chen had signed a written agreement which the Court found had all the hallmarks of a contract, with little doubt that the parties intended to be legally bound.[8]

Pastor Chen also signed a "Call Document" acknowledging his spiritual calling and expressing a willingness to avoid litigation. The Court held this indicated that they saw their relationship as transcending, rather than excluding, their legal relationship.[9] There was more to the relationship than could be described in purely legal terms.[10] Drawing largely on New Zealand[11] and Australian[12] authorities, the Court rejected any presumption that ministers of religion and churches do not intend to be legally bound,[13] and held that the spiritual nature of a role is relevant but not determinative.[14]

Applying the second stage or common law tests, the Court found that the Trust exercised control over Pastor

1. *Chen v Bread of Life Christian Church in Auckland* [2023] NZERA 298 [Interim Determination]; and *Chen v Bread of Life Christian Church in Auckland* [2024] NZERA 198 [Substantive Determination].
2. Substantive Determination at [79]–[80].
3. At [102] and [107].
4. At [141]–[153].
5. *Chen v Bread of Life Christian Church in Auckland* [2024] NZERA 310 at [11] [Removal Determination].
6. *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
7. *Rasier Operations BV v E Tū Inc* [2024] NZCA 403, [2025] 2 NZLR 150 at [97].
8. *Bread of Life Christian Church in Auckland v Chen* [2025] NZEmpC 69 at [80].
9. At [84].
10. At [84].
11. At [66], citing *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513 (CA) at 524.
12. At [67], citing *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, [2002] HCA 8 at [26]–[28].
13. At [69].
14. At [73].

Chen, including performance reviews, salary decisions, disciplinary steps, powers of dismissal and decisions about renewing his contract.[15] He was fully integrated into the Church,[16] PAYE was deducted and he received KiwiSaver contributions as well as paid holidays and sick leave in accordance with the Holidays Act — all of which was indicative of an employment relationship.[17] Pastor Chen was an employee.[18]

On the question of the employer's identity, the Court held that the Trust, acting through delegated committees, was Pastor Chen's employer.[19] Alternatively, when those committees collapsed back into the Trust, any agreements with those committees were taken on by the Trust.[20]

Unjustified dismissals

The Court found that Pastor Chen was unjustifiably dismissed twice. The first dismissal, in April 2022, followed the expiry of his fixed-term agreement. The Court rejected the Trust's argument that the agreement had ended automatically and held that the fixed term relied on was non-compliant with s 66 of the Act as it failed to provide written reasons for the ending of employment.[21] Pastor Chen had treated the term as ineffective and was unjustifiably dismissed.[22]

The second dismissal, in April 2024, was framed as a redundancy. The Court held there was no proper consultation process before Pastor Chen's employment was terminated.[23] The Trust did not discuss alternatives to redundancy or even provide notice of termination. Finally, in both dismissals, the Trust failed to obtain approval from the Mother Church, as required by its own procedures, before dismissing Pastor Chen.[24] Pastor Chen was unjustifiably dismissed again.[25]

Remedies

Following its findings, the Court awarded remedies that reflected both statutory principles and the unique context of religious employment. Under s 128 of the Act, it ordered lost remuneration from 1 April 2022 to the date of judgment, recognising that Pastor Chen had continued to serve without pay for about three years.[26]

Reinstatement was ordered under s 125 of the Act. The Court rejected arguments of irreparable breakdown, noting that both factions of trustees contributed to the conflict and that Pastor Chen had shown a willingness to reconcile.[27] The Trust's financial arguments were also dismissed.[28]

Acknowledging the complexity of reinstatement in a fractured religious community, the Court directed the parties to meet with representatives of the Mother Church to facilitate a managed transition back into the Trust's employment.[29]

Comment

This case reaffirms that religious workers are not beyond the reach of employment law. The judgment rightly rejects any presumption against employment status for ministers of religion, and emphasises that spiritual callings do not, in themselves, preclude contractual obligations. The decision sends a signal to religious organisations that the Court will look to the real nature of the relationship, rather than religious framings, when determining employment status.

Saadi Radcliffe, Senior Associate, McBride Davenport James

Wiles v Vice Chancellor of the University of Auckland

[2025] NZEmpC 109

In the recent Employment Court decision of *Wiles v Vice Chancellor of University of Auckland*,[1] the Court awarded the Applicant, Associate Professor Wiles (Wiles), a total sum of $205,059.94 in costs and disbursements.

The Applicant, Wiles, is a microbiologist Associate Professor at the University of Auckland (University). During the COVID-19 pandemic she became the "go-to" for all matters COVID-19-related. Unfortunately, due to her media presence, Wiles became a target of online and in-person abuse and harassment.

15. At [126].
16. At [130].
17. At [133].
18. At [135].
19. At [147].
20. At [148].
21. At [154].
22. At [156] and [161].
23. At [165].
24. At [160] and [174].
25. At [175].
26. At [176].
27. At [190]-[192].
28. At [191].
29. At [204]-[205].
1. *Wiles v Vice-Chancellor of University of Auckland* [2025] NZEmpC 109.

Subsequently, Wiles raised a claim against the University stating that it had failed to protect her from online bullying and harassment, breached its good faith obligations, breached its contractual duty to act as a good employer, and her academic freedom and obligations under Te Tiriti o Waitangi.

In the Employment Court decision, *Wiles v Vice-Chancellor of University of Auckland*,[2] Wiles received mixed success. The Court held that the University did have an obligation to protect Wiles pursuant to its health and safety obligations and that it had failed to do so. However, the Court rejected Wiles' claims that the University had breached her academic freedom or rights under Te Tiriti o Waitangi. The Court reserved the issue of costs.

Wiles later filed a memorandum of costs in the Employment Court seeking a contribution to her legal fees of $349,450.67, a contribution to her application for costs of $6,325.00, and disbursements totalling $24,477.64 (include GST). She sought these costs on the basis that she was the successful party and claimed that the starting point in calculating those costs should be on a 3C guidelines scale and categorisation.

The University opposed Wiles' application for costs submitting that Wiles had been awarded less than what she had been offered in a Calderbank offer presented by the University to Wiles on 15 August 2022. Notably, the University's Calderbank offer mentioned that there was "no winning party" to the proceedings. The University went on to submit that Wiles' categorisation of the case as 3C was incorrect and instead the starting point was better placed under category 2B.

The University referred to its 15 August Calderbank offer and contended that costs should be reduced in recognition of the time and resources required by the University to defend Wiles' unsuccessful claims. It also contended that Wiles should not be granted costs on her costs application.

In considering costs, the Court acknowledged that although Wiles was the successful party, she did not succeed on all points. In the Court's view, any award had to reflect the additional time spent by the University to address the unsuccessful claims made by Wiles.

The Court went on to outline its review of the 15 August Calderbank offer noting that in addition to seeking compensation, damages and penalties, Wiles also sought recommendations from the Court as to steps that the University should take to prevent similar employment relationship problems.

Notably, there was no mention of non-financial matters in the 15 August Calderbank offer from the University. The Court identified that Wiles' main drivers in this matter were matters of principle and for non-financial remedies and so it considered it reasonable for Wiles to have declined a purely financial offer.

The Court went on to establish the proper categorisation of the matter. It considered it was telling that both parties had engaged senior and experienced counsel to assist them in the dispute. Accordingly, it agreed with Wiles that the substantive proceedings were category 3 proceedings and band C was appropriate.

Acknowledging the substantial costs incurred by Wiles ($551,838.32 being her total actual costs), the Court held that the matter warranted an uplift as it considered that Wiles had no choice but to continue litigation to address the matters important to her. Ultimately, the Court decided on a starting figure of $176,182.30 and allowed the disbursements sought in full.

Wiles was also awarded costs on the cost's application of $4,400 with the Court seemingly disproving of the University's characterisation of the substantive matter as having "no winning party".

In total, Wiles was awarded $205,059.94.

The decision by the Court sends a firm message to employers undertaking settlement negotiations to be alert to an employee's focus and aim in relation to an ongoing dispute. This includes considering agreeing to non-financial matters such as agreed statements or other remedial actions.

Chief Executive of Oranga Tamariki — Ministry for Children v Hill

[2025] NZEmpC 98

In *Chief Executive of Oranga Tamariki — Ministry for Children v Hill*,[3] the Employment Court overturned the decision of the Employment Relations Authority in *Hill v Chief Executive, Oranga Tamariki — Ministry for Children*[4] which held that the Applicant, Ioan Hill (Ms Hill), was unjustifiably dismissed following an incident in which she used force against a rangatahi.

Factual background

Ms Hill was a youth worker at a youth justice residence operated by Oranga Tamariki. She had worked with Oranga Tamariki since 2017. In March of 2021, Ms Hill was summarily dismissed by Oranga Tamariki for using excessive and unnecessary force on a rangatahi.

The incident in question occurred with an additional six rangatahi and four staff present.

Ms Hill had provided another rangatahi a pen. When she asked for the pen back, the rangatahi all said that they did not have the pen. This included the rangatahi involved in the incident, M.

After stating that he did not have the pen, M later returned it to another staff member. Ms Hill was informed of this and instructed M to sit at the Non-Participation Table (NPT). The NPT was an area for those whose behaviour was deemed non-compliant or disruptive.

2. *Wiles v Vice-Chancellor of University of Auckland* [2024] NZEmpC 123.
3. *Chief Executive of Oranga Tamariki — Ministry for Children v Hill* [2025] NZEmpC 98.
4. *Hill v Chief Executive, Oranga Tamariki — Ministry for Children* [2024] NZERA 336.

Upon receiving the instruction, M started to challenge Ms Hill and ask her why. The matter escalated, and M began making offensive comments to Ms Hill, calling her a "slut". Ms Hill, feeling threatened by this behaviour, decided to use an approved Safe Tactical Approach and Response (STAR) defence technique called a "Train stop" on M. A Train stop involves using both hands to push an individual away. The decision set out that Ms Hill conducted a Train stop on M twice during the incident.

After Ms Hill conducted the second Train stop, other staff members intervened in the altercation and Ms Hill left. The incident was recorded on CCTV; however, there was no corresponding audio available.

After having watched the CCTV footage, Oranga Tamariki thought it was clear that no further investigation was warranted. Accordingly, it elected to move forward with a disciplinary process regarding Ms Hill's use of force and invited her to a disciplinary meeting.

In its invitation to meet, Oranga Tamariki pointed to various documents outlining its obligations and Ms Hill's obligations. These obligations included its code of conduct, values and policies, and the Oranga Tamariki (Residential Care) Regulations 1996 (the Regulations).

In the disciplinary meeting, Ms Hill acknowledged, amongst other things, that she could have been less reactive and that she had made a mistake. Oranga Tamariki asked Ms Hill if she knew why she had reacted in the way she did and how she could reassure it that she would not conduct herself in a similar manner in the future. Ms Hill attempted to reassure Oranga Tamariki that the same would not occur again and that she had no psychological triggers/trauma.

Oranga Tamariki say they genuinely considered Ms Hill's responses and then later provided her with a preliminary decision to dismiss without notice. After hearing her responses to the preliminary decision, it later finalised its decision.

Therefore, Oranga Tamariki dismissed Ms Hill without notice, stating that she had acted contrary to its policies and there was no lawful ground for her to use force against M.

Ms Hill, through her representative, raised a personal grievance in relation to her dismissal. In the Employment Relations Authority, Ms Hill claimed that during the 5 March incident she had been acting in self-defence and so her actions were lawful.

In its determination, the Authority concluded that Oranga Tamariki was not in an adequate position to decide that there was no self-defence in Ms Hill's actions as they had failed to conduct an investigation into the matter. On this basis, the Authority held that Oranga Tamariki could not reasonably have rejected Ms Hill's position about her concerns for her safety.

In the non-de novo hearing, the Employment Court largely disagreed with the Authority's assessment of the matter.

In its judgment, the Court considered whether the use of force by Ms Hill was lawful in accordance with reg 22 and s 48 of the Crimes Act 1961. The Court opted to apply the broader test set out in s 48 but noted that even on application of the narrower reg 22 test, the outcome would have been the same.

The s 48 test asks the Court to consider the following:

1. What did Ms Hill believe about the circumstances when she used force?
2. Did she use force for the purpose of defending herself?
3. Was the force reasonable in the circumstances as Ms Hill believed them?

In interpreting s 48, the Court also considered the broader framework in the Regulations and Oranga Tamariki Act 1989 to be helpful, noting that certain principles were relevant, such as "rangatahi must be treated with dignity and respect at all times".

The Court also considered that the Oranga Tamariki policies were relevant. Specifically, the "Working with Tamariki and rangatahi in residences" policy. This policy included guidance like "if there is a situation with rangatahi, staff must try to resolve the situation verbally" and "physical force must not be used when a less intrusive form of intervention is adequate".

The Court emphasised that the STAR programme is a verbal and physical intervention model that staff are trained to use to de-escalate matters when dealing with rangatahi. Physical force is considered a last resort. Further, any use of force under the STAR Programme must be lawful, proportionate, necessary, and reasonable.

With this context in mind, the Court applied the s 48 criterion to the circumstances and held that although M was making offensive comments, he was complying with Ms Hill's verbal instructions. While the Court accepted Ms Hill's evidence that she feared for her safety and had used force for the purpose of defending herself, it ultimately concluded that Ms Hill's use of force was not reasonable in the circumstances.

The Court specified that this was an objective assessment and so the Authority had erred in its decision by focusing solely on the subject element of Ms Hill's claim. The Court emphasised that the incident had occurred in a youth justice facility where there is an inherent power imbalance between staff and rangatahi. Rangatahi in youth facilities have faced serious hardship. The Court stated that "[i]t is not uncommon for them to act out and verbally abuse staff". A staff member in Ms Hill's position is expected to react appropriately and put the best interests of rangatahi as a primary consideration.

The Court held that Ms Hill had been the one to enter M's personal space and there were other alternative interventions available which did not involve use of force. Due to this, any force used against rangatahi in this situation could not have been justified.

In its decision, the Court made note that the Authority had made its decision on the basis that Oranga Tamariki could not reasonably have rejected Ms Hill's position about her concerns for her safety. However, the Court stated that the Authority should have considered whether, even if her account of the incident was accurate, the force used was

unreasonable. The Court held Ms Hill's use of force was not reasonable and therefore it was unlawful.

Although the Court agreed with the Authority's critique of Oranga Tamariki's failures to investigate and decision to dismiss promptly after Ms Hill engaged a new representative, it considered that Oranga Tamariki was entitled to take Ms Hill's responses at face value and any minor defects did not result in Ms Hill being treated unfairly.

The Court concluded that it was open for Oranga Tamariki to dismiss Ms Hill as a fair and reasonable employer in the circumstances and so the Authority erred in finding that Ms Hill was unjustifiably dismissed. The awards issued by the Authority were set aside.

In this decision, the Court confirmed that self-defence in employment matters must still be judged against what is reasonable in the circumstances. Even if an employee believes they are protecting themselves, the legal test is whether the force used was proportionate and necessary, and unreasonable actions may still justify dismissal. In this case, staff working with vulnerable youth were expected to de-escalate situations safely and avoid unnecessary physical intervention.

Zachary Pentecost, Senior Associate and Phillis Goredema, Lawyer

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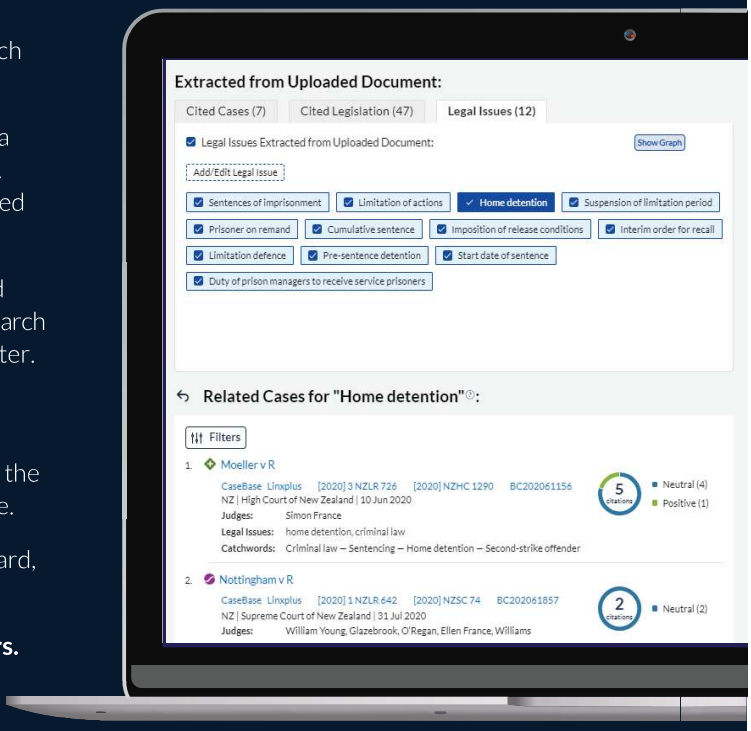

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