Employment Relations Authority
TE RATONGA AHUMANA TAIMAHI

Annual Report 2022

Te Kāwanatanga o Aotearoa
New Zealand Government

Employment Relations Authority
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More information

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

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Employment Relations Authority
TE RATONGA AHUMANA TAIMAHI

12 May 2023

Hon Michael Wood, MP
Minister for Workplace Relations and Safety
Parliament Buildings
WELLINGTON

Tēnā koe Minister,

I am pleased to present to you the inaugural annual report of the Employment Relations Authority Te Ratonga Ahumana Taimahi.

The reporting period is 2020–2022. From 2023 onwards, the annual report will cover single calendar years.

Nāku noa, nā

Dr Andrew Dallas
Chief of the Authority

Te Kāwanatanga o Aotearoa
New Zealand Government

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Introduction by the Chief

Tēnā koutou katoa. I am pleased to introduce our inaugural annual report. Due to the COVID-19 emergency this report covers the reporting period 1 January 2020 to 31 December 2022.

The Employment Relations Authority Te Ratonga Ahumana Taimahi (the Authority) is the principal adjudicative institution in New Zealand's employment jurisdiction. Twenty-two years on from its establishment in 2000, the Authority still holds true to its founding kaupapa: the resolution of employment relationship problems in communities across Aotearoa in a principled, practical, sensible and cost-effective manner.

PANDEMIC RESILIENCE

The impact of COVID-19 on the operations of the Authority cannot be understated. One thing in our favour was that as the Authority can determine its own procedure and is not bound by technicalities, we had significantly more flexibility in terms of practice and procedure than other tribunals and courts. Evidence of this came very early on in the pandemic. In preparation for the first nationwide lockdown, I was only required to issue one procedural direction to Members regarding unsworn/unaffirmed affidavits for interim matters. This allowed the Authority to transition (within 48 hours) from being a physical to a virtual tribunal.

In all other respects, however, the Authority confronted something of a perfect storm entering the pandemic in early 2020. First, the Authority, from establishment, suffered under-resourcing both in real terms and compared to other institutions, when workload and cost effectiveness to the Crown is taken into account. Second, the Authority was carrying long-term vacancies. Third, reduced access to mediation meant the locus of dispute resolution shifted from the Mediation Service to the Authority in the first few months of 2020 and remained there for nearly 12 months. Fourth, there was a significant surge in the number of applications lodged in the Authority; approximately 600 more applications received than in 2019.

While the Authority, as a tribunal, was recognised as an essential service, it did observe, as a virtual tribunal, various lockdowns, particularly in Auckland. This caused major delays to the Authority's operations at times. Over 200 in-person hearings were adjourned, often without a resumption date due to ongoing uncertainties. Additionally new files had to be worked into the file allocation equation to ensure the Authority's backlog did not completely blowout. Despite these early difficulties, the Authority was the only civil tribunal or court in Aotearoa to consistently offer in-person hearings during the pandemic. This allowed us to tread water rather than drown under the weight of our backlog. By April 2022, as a result of some excellent mahi by Members and increased resourcing, we were able to achieve workload equilibrium when all remaining files awaiting allocation were referred to Members. Quite the contrast to a year previously, when the number of files awaiting allocation to Members was approaching 500.

Throughout the pandemic, the Authority consciously sought to add value to the efforts of the 'team of five million'. We undertook bargaining facilitation involving critical health workers: laboratory workers, including those testing for COVID-19, and public health sector nurses. The Authority also prioritised matters where determinations might provide useful guidance for others dealing with pandemic-related issues. These included the interface between the government's wage subsidy and the payment of minimum wages, as well as redundancy issues.

The Authority also held extensive discussions with the Fair Work Commission (Australia) and the Workplace Relations Commission (Ireland) about what constituted 'pandemic best practice' in employment dispute resolution. Not only did these institutions learn a lot from each other during these discussions, it has also opened continuing avenues for dialogues and collaboration. Throughout the pandemic, the Authority also engaged extensively with parties, regular users, social partners and representative groupings by providing regular 'Covid-19 Updates' and updated health and safety advice to those attending in-person hearings.

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IMPROVING PARTICIPATION

There is no doubt a number of communities across the motu face barriers, some of them significant, accessing employment dispute resolution services. Better funding for navigation and representation services, including increased legal aid provision, is needed to assist and enhance participation in mediation and the Authority. In early 2022, the Authority did refresh its website, which now has greater emphasis on assisting parties, particularly self-represented parties, to navigate the Authority. A new website will also assist the Authority to engage with parties accessing our new jurisdictions. Also in 2022, in consultation with social partners, Business New Zealand and the New Zealand Council of Trade Unions Te Kauae Kaimahi, the Authority promulgated a new practice direction on costs incorporating a presumption of cost-neutrality for collective bargaining matters, processes and outcomes. Further, although more limited, reforms to our costs regime are anticipated in 2023.

As part of any understanding of the future direction of the Authority, consideration is being given to how the communities of Aotearoa participate in our processes. With this in mind, we have adopted an 'improving participation' strategy called 'Six Pillars'. These pillars are:

(i) examining and, if necessary, addressing, the perceived mischief associated with the identification of certain parties in determinations;
(ii) further reducing barriers caused by costs;
(iii) encouraging straightforward pleadings and simpler processes;
(iv) increased resourcing for the Mediation Service and the Authority;
(v) the regulation of advocates; and
(vi) the streamlining of enforcement processes.

Several of the strategy's pillars are currently being addressed directly by the Authority. However, others require governmental budgetary decisions or legislative reform.

JURISDICTIONS BEYOND THE AUTHORITY

It is worth noting here, with statistics provided further on in the report, that despite the availability of unrestricted rights of challenge to Authority determinations, the rolling average of challenges for the last three years is just 17.3 per cent. More remarkably perhaps, given the Authority's position as a primary trier of fact, the Court of Appeal has in the last five years agreed with the Authority in 75% of cases which commenced in the Authority and ended up before that court. Finally, the Supreme Court's decision in *FMV v TZB*[1] provided real clarity as to the scope of the Authority's jurisdiction to investigate and determine 'employment relationship problems' under the Employment Relations Act 2000.

FINAL WORD

In 2020, the Authority committed itself to achieving world class status as an employment/industrial tribunal. This has been frustrated by the COVID-19 pandemic. However, with no allocation backlog and increasing resourcing, the Authority is well positioned to recommence this important journey. The Authority is a nimble, procedurally lean and technically unincumbered tribunal. The new jurisdictions with which the Authority has recently been invested, demonstrate confidence in the institution. They also present both a challenge and opportunity to incorporate these into our journey to 'world classness'.

Dr Andrew Dallas
Chief of the Authority
May 2023

[1] [2021] NZSC 102.

Photo: Visit of the Fair Work Commission (FWC) to the Authority in March 2020.
From left to right: Bernadette O'Neill, General Manager of the FWC, Justice Iain Ross AO, President of the FWC, Dr Andrew Dallas, Chief of the Authority.

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Overview of the Authority

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

General functions of the Authority

While the Act places considerable emphasis on the primacy of mediation, to promote dispute resolution at the lowest possible level, it also recognises there will be some matters that will require adjudicative intervention by the Authority. This conceptualisation has been recognised by New Zealand's senior courts, the Court of Appeal and the Supreme Court. The New Zealand Law Commission has observed that the Mediation Service of the Ministry of Business, Innovation and Employment (MBIE) and the Authority "forms part of an integrated dispute resolution process".[2]

The general function of the Authority is to assist employers and employees (and their representatives) to achieve and maintain successful employment relationships, by resolving problems that arise. The Authority's role is one part of the Act's dispute resolution continuum.

As part of these functions, Members usually sit alone in the exercise of the statutory function of investigating and determining those matters for which it has jurisdiction. Support services, including Authority Officers and legal researchers, are provided by the MBIE.

The Authority is a unique investigative tribunal. In order to properly exercise jurisdiction, it has been afforded extensive powers including to:

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

It can take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. It can resolve the employment relationship problem, however described; find that a personal grievance is of a type other than alleged and make, in relation to any employment agreement, any order that the District or High Court could make about contracts under any rule or enactment (now, except freezing and search orders).

The Authority also has powers under the Act to facilitate collective bargaining and to fix terms and conditions for collective agreements, including for pay equity settlements under the Equal Pay Amendment Act 2020. The Authority also performs similar functions under the newly introduced Screen Industry Workers Act 2022 and Fair Pay Agreements Act 2022.

[2] Law Commission *Tribunal Reform* (NZLC SP20) 2008 at 48.

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The Authority's new jurisdiction

Fair Pay Agreements

The Fair Pay Agreements System

The Fair Pay Agreements system brings together unions and employer associations within a sector to bargain for minimum employment terms for all covered employees in an industry or occupation. This means that these organisations will meet to discuss and agree on a set of employment terms for the work being done. In some situations, the Authority may determine what those minimum employment terms will be.

Employment terms that must be in a Fair Pay Agreement

A Fair Pay Agreement must include what work is covered by the agreement and standard hours, minimum base rates (including overtime rates and penalty rates), training and development, how much leave an employee can have and how long the agreement applies for.

Bargaining, voting and the Fair Pay Agreement becoming binding and enforceable

It will take time for both bargaining sides to come to an agreement on a set of employment terms they both agree with. Once the bargaining sides agree and the proposed Fair Pay Agreement is confirmed to be compliant with the law, covered employees and employers in that sector will be able to vote on whether they agree with the terms or not. If a majority agrees from both bargaining sides, the voting process and result will be confirmed by MBIE and the Fair Pay Agreement will be finalised and be binding and enforceable.

Employment Relations Authority's role

The Authority has a range of roles under the Fair Pay Agreements Act, including:

- resolving disputes relating to proposed Fair Pay Agreements;
- assessing and approving Fair Pay Agreements, once bargaining sides have agreed. When agreed the proposed Fair Pay Agreement must be jointly submitted to the Authority by both bargaining sides so that the Authority can assess whether the proposed Fair Pay Agreement complies with the law, and whether its coverage overlaps with an existing Fair Pay Agreement;
- making a determination about which agreement provides the better terms overall if a proposed Fair Pay Agreement overlaps with an existing Fair Pay Agreement. A determination is a decision made by the Authority;
- making a recommendation about the content of an employment term in a Fair Pay Agreement. When bargaining sides cannot agree on a term in a proposed Fair Pay Agreement a bargaining side can make an application to the Authority to make a recommendation;
- in a panel of three members, making a determination to fix the terms of a proposed Fair Pay Agreement if:
    - the bargaining sides cannot reach an agreement;
    - there has been a breach of the duty of good faith that was deliberate, serious and sustained or undermined bargaining; or
    - the ratification vote has failed twice;
- making a determination whether or not an employee is a covered employee, or whether or not an employer is a covered employer, for a proposed or finalised Fair Pay Agreement; and
- imposing penalties under the Fair Pay Agreements Act.

The Authority can set the terms of a Fair Pay Agreement if no party comes forward to bargain on the side that did not initiate bargaining

The Authority also has an important role if there is no bargaining party on the side that did not initiate bargaining. The Fair Pay Agreement system relies on employee and employer bargaining sides to bargain with each other. If there is no willing and suitable bargaining party on one side, bargaining may be held up. If this happens, the Authority will fix the terms without any bargaining occurring.

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Screen industry workers

The Screen Industry Workers Act 2022 allows contractors in the screen industry to bargain collectively, bringing screen industry workers' representatives and producers' representatives to the table to bargain for minimum employment standards.

Workers will no longer need to negotiate individually for minimum employment standards but will still be able to negotiate individual terms based on skills and experience.

Employment Relations Authority's role

If parties encounter difficulties during bargaining for a screen industry collective contract, they can seek help from the Authority to resolve their differences.

Parties can also go to the Authority to enforce terms and conditions of a collective contract and penalise those who breach contractual obligations. The Authority will:

- decide whether to allow bargaining if satisfied there is sufficient support in favour of a collective contract; and
- assess the form and content of draft collective contracts and their suitability for ratification.

The Authority can also assist the parties during bargaining to resolve a disagreement on the terms and conditions of a collective contract through:

- facilitation; or
- final offer arbitration to fix the terms of the collective contract.

When the Authority can facilitate bargaining

If parties remain at a standstill in relation to one or more terms of the collective contract, they can refer a dispute to the Authority for facilitation (with a member of the Authority as the facilitator). The Authority can help the parties reach an agreement if:

- the dispute is interfering with the bargaining or the ability of the parties to conclude a collective contract; and
- the parties have made sufficient efforts at mediation to resolve their difficulties.

If the dispute remains unresolved at the end of facilitation, parties may apply to the Authority for a determination.

Final offer arbitration

If parties are still unable to reach an agreement on the terms of the collective contract, they can apply to the Authority to fix the terms of the collective contract by final offer arbitration, but only after the parties have made sufficient efforts to resolve the dispute through:

- mediation; and
- facilitation.

Final offer arbitration involves a 3-person panel comprised of: one employer party, one worker party, and one member of the Authority (the arbitrating body).

The arbitrating body will hear from both parties and determine the dispute to fix the terms of the collective contract. Once the arbitrating body has decided on the terms, these are final, binding, and enforceable against the parties.

Penalties relating to collective contracts

The Authority can order a penalty against a party to a collective contract for failing to comply with the terms or act in good faith or other obligations during bargaining. The Authority will follow the usual process for imposing a penalty and will consider relevant factors before making a decision.

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Pay equity

When parties involved in a pay equity claim cannot come to an agreement, they can ask the Authority to help resolve the issue.

When the Authority can get involved

Any party involved in a pay equity claim must act in good faith, and follow the agreed bargaining process in order to reach a resolution. In circumstances where this not possible, they can ask the Authority for help. The Authority can:

- help facilitate pay equity bargaining;
- provide a determination in a pay equity case; and
- apply a penalty to anyone who breaches their pay equity obligations.

Facilitating pay equity claims

The Authority can take a facilitation role in pay equity bargaining, similar to the role it has in collective bargaining. The Authority can agree to facilitate pay equity bargaining if:

- it will be useful to help resolve the claim;
- a party involved in the claim has failed to meet good faith principles, and this has either stalled the claim or undermined the bargaining process; and
- other efforts, including mediation, haven't resolved the issue.

The Authority can facilitate disputes about:

- whether an employee's work is the same as, or substantially similar to, work that is the subject of a pay equity claim raised by a union with their employer – to determine whether or not the employee is covered by the union's claim;
- whether work performed by others is comparable work, for the purposes of the assessment required; and
- whether proposed remuneration no longer differentiates between male and female employees for the purposes of settling a pay equity claim.

Making a determination

If parties involved in a pay equity claim cannot agree on a solution together, they can ask the Authority to make a determination in the case on their behalf.

Before the Authority can make a determination, it will first consider whether both parties have tried mediation or facilitation to solve the dispute. If not, the Authority may recommend they do this before reaching a determination in the case.

Some pay equity issues have specific conditions and suggested processes that apply when determining a claim, including applications to:

- determine whether an employee can raise a pay equity claim despite already being covered by a pay equity settlement;
- determine whether work is undervalued;
- fix remuneration;
- fix a pay equity review process; and
- remedy unfair bargaining.

The Authority will follow the relevant process and act in good faith with all parties while working to reach a determination.

Breaches of pay equity agreements

The Authority can issue a compliance order to enforce terms of a pay equity agreement, and may choose to impose a penalty on any party not acting in good faith.

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Authority locations

The Employment Relations Authority has regional offices in Auckland, Wellington and Christchurch. Members of the Authority also travel to hold investigation meetings in any town across the motu.

AUCKLAND

TĀMAKI MAKAURAU

Email

aucklandera@era.govt.nz

Mail

PO Box 105 117
Auckland 1143

Phone

09 970 1550

Location

Level 3
167B Victoria Street West
Auckland

The Auckland office covers:

- Northland;
- Auckland;
- Waikato;
- Coromandel;
- Bay of Plenty;
- East Coast; and
- Central Plateau.

WELLINGTON

TE WHANGANUI-A-TARA

Email

wellingtonera@era.govt.nz

Mail

PO Box 2458
Wellington 6140

Phone

04 915 9550

Location

Mezzanine Floor
50 Customhouse Quay
Wellington

The Wellington office covers:

- Wellington;
- Manawatu-Whanganui;
- Hawke's Bay;
- Wairarapa; and
- Taranaki.

CHRISTCHURCH

ŌTAUTAHI

Email

christchurchera@era.govt.nz

Mail

PO Box 13 892
Christchurch 8140

Phone

03 964 7850

Location

Level 1
Taylor Shaw House
53 Victoria Street
Christchurch

The Christchurch office covers the:

- South Island;
- Stewart Island; and
- Chatham Islands.

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The Members of the Authority

The Chief and Members of the Employment Relations Authority are appointed by the Governor-General on the recommendation of the Minister for Workplace Relations and Safety.

In addition to their legal qualifications, the current Members collectively hold over 400 years of accumulated knowledge in employment relations derived from working for employers, unions, government and private legal practice.

CHIEF OF THE EMPLOYMENT RELATIONS AUTHORITY

Dr Andrew Dallas (Chief 2019–, Member 2015–)

MEMBERS (DURING 2020-2022 PERIOD)

Rowan Anderson (2022–)

Robin Arthur (2013–)

Antoinette Baker (2022–)

David Beck (2020–)

Sarah Blick (2022–)

Vicki Campbell (2014–2021)

Philip Cheyne (2020–)

Nicola Craig (2015–)

Helen Doyle (2001–)

Alastair Dumbleton (2022–)

Claire English (2021–)

Anna Fitzgibbon (2012–2021)

Peter Fuiava (2021–)

Andrew Gane (2022–)

Sarah Kennedy-Martin (2021–)

Shane Kinley (2022–)

Rachel Larmer (2010–)

Alex Leulu (2022–)

Michael Loftus (2010–)

Trish MacKinnon (2012–2022)

Pamela Nuttall (2021–2022)

Geoffrey O'Sullivan (2019–)

Eleanor Robinson (2010–)

Leon Robinson (2021–)

Michele Ryan (2011–2022)

Natasha Szeto (2022–)

Jenni-Marie Trotman (2017–2020)

Marija Urlich (2020–)

Peter van Keulen (2015–)

Lucia Vincent (2022–)

Note 1. Member Eleanor Robinson was the Chief Delegate during the reporting period (2020–2022).

Performance of the Authority

Statistics of the Authority's performance for the years 2020, 2021 and 2022

Applications received

Applications received by Authority office

NUMBER OF APPLICATIONS RECEIVED BY OFFICE			
Office	**2020**	**2021**	**2022**
Auckland	1,424	1,208	1,100
Wellington	446	398	362
Christchurch	605	508	508
TOTAL	**2,475**	**2,114**	**1,970**

Matters referred to mediation

Number of applications referred or directed to the Employment Mediation Service of the Ministry of Business, Innovation and Employment

NUMBER OF MATTERS REFERRED TO MEDIATION		
2020	**2021**	**2022**
1,622	**1,341**	**1,170**

Note 1. The Authority has a duty to consider mediation under section 159 of the Act. If a matter has not yet attended mediation before the application is lodged with the Authority, it is very likely to be referred or directed to mediation.

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Determinations issued

Number of determinations issued by Authority office

NUMBER OF DETERMINATIONS			
Office	**2020**	**2021**	**2022**
Auckland	294	294	356
Wellington	89	107	168
Christchurch	156	180	165
TOTAL	539	581	689

Note 1. The output of determinations was affected by the COVID-19 lockdowns in 2020. The return to workload equilibrium and the appointment of new Members meant the Authority was able to clear its allocation backlog in 2022.

Facilitation applications

Number of collective bargaining facilitations

NUMBER OF DETERMINATIONS					
2020		**2021**		**2022**	
Referred to facilitation	Declined	Referred to facilitation	Declined	Referred to facilitation	Declined
5	2	6	0	11	0

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Reinstatement

Number of interim and permanent reinstatement determinations

INTERIM REINSTATEMENT			
	2020	**2021**	**2022**
Successful	4	8	5
Unsuccessful	11	20	9
TOTAL	**15**	**28**	**14**

PERMANENT REINSTATEMENT			
	2020	**2021**	**2022**
Successful	0	3	2
Unsuccessful	7	11	8
TOTAL	**7**	**14**	**10**

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Location of hearings

Places across Aotearoa where investigation meetings were held

LOCATION OF HEARINGS			
Location	**2020**	**2021**	**2022**
Alexandra		1	
Ashburton		1	1
Auckland	117	142	181
Blenheim	3	2	2
Chatham Islands	1		
Christchurch	72	84	72
Dunedin	7	5	6
Gisborne		1	3
Gore			1
Greymouth			1
Hamilton	5	7	8
Hāwera		1	
Invercargill	10	7	2
Kaikohe		1	
Kerikeri		1	4
Manukau			1
Masterton	2	1	1
Napier	3	9	11
Nelson	2	7	9
New Plymouth	1	3	4
Oamaru	1		
Ōtaki		1	
Palmerston North	5	4	9
Queenstown	3	4	3
Rotorua	1	1	4
Tauranga	3	3	8

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Location	2020	2021	2022
Timaru	1	3	2
Tokoroa			1
Wānaka	2	2	
Wellington	36	46	67
Whakatāne	1	1	1
Whanganui	1	1	2
Whangārei	1	1	3
TOTAL	278	340	408

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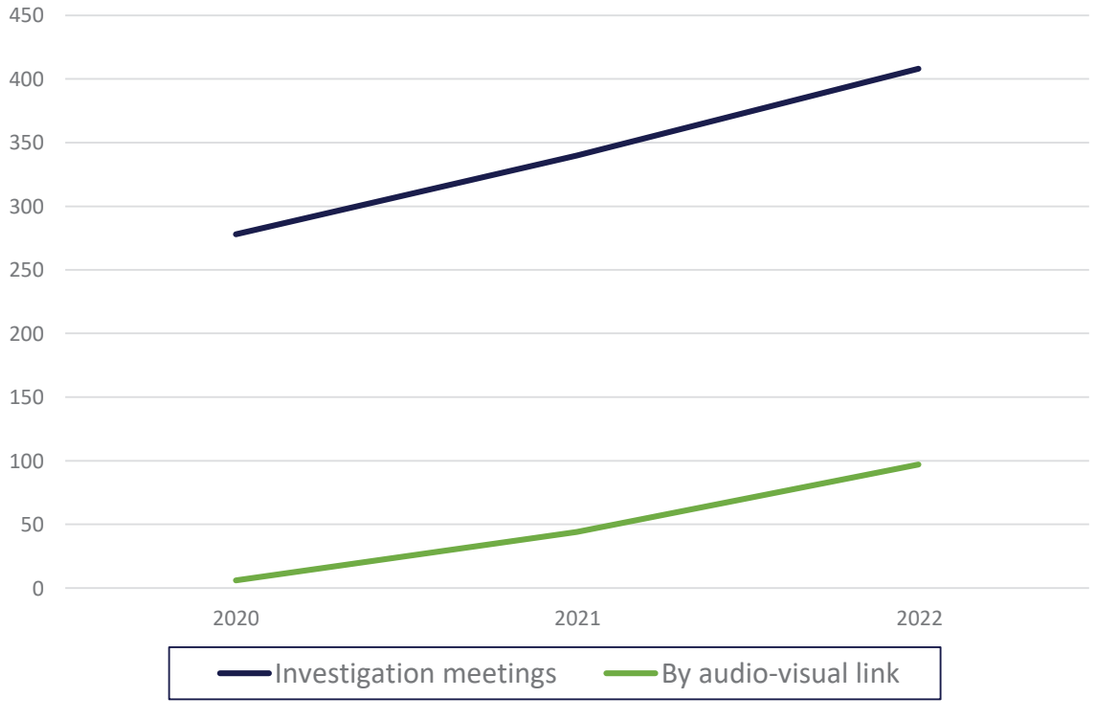
Hearings involving audio-visual links

Number of hearings that utilised Zoom or other audio-visual technology



Note 1. In 2020, less than 3 per cent of hearings utilised audio-visual technology. As a result of the pandemic, the utilisation of audio-visual technology increased in this timeframe. In 2022, approximately 24 per cent of hearings were partly or wholly conducted by audio-visual link. However, most investigation meetings are still held in person.

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Representation of parties

Parties are able to choose whether to be represented in the Authority. If a party is represented, they can be represented by a lawyer or an advocate. An employee can also be represented by their union, or in some minimum standards cases, the Labour Inspectorate.

REPRESENTATION OF EMPLOYEES (%)			
Representation	**2020**	**2021**	**2022**
Legal	40%	39%	39%
Advocate	34%	37%	41%
Self-represented	20%	15%	13%
No appearance	1%	2%	2%
Union	1%	2%	2%
Labour Inspectorate	4%	5%	3%

REPRESENTATION OF EMPLOYERS (%)			
Representation	**2020**	**2021**	**2022**
Legal	63%	62%	59%
Advocate	12%	11%	13%
Self-represented	15%	17%	17%
No appearance	10%	10%	11%

AGGREGATE TOTAL (%)			
Representation	**2020**	**2021**	**2022**
Legal	51%	51%	49%
Advocate	23%	24%	27%
Self-represented	17%	15%	15%
No appearance	6%	6%	6%
Union	1%	1%	1%
Labour Inspectorate	4%	3%	2%

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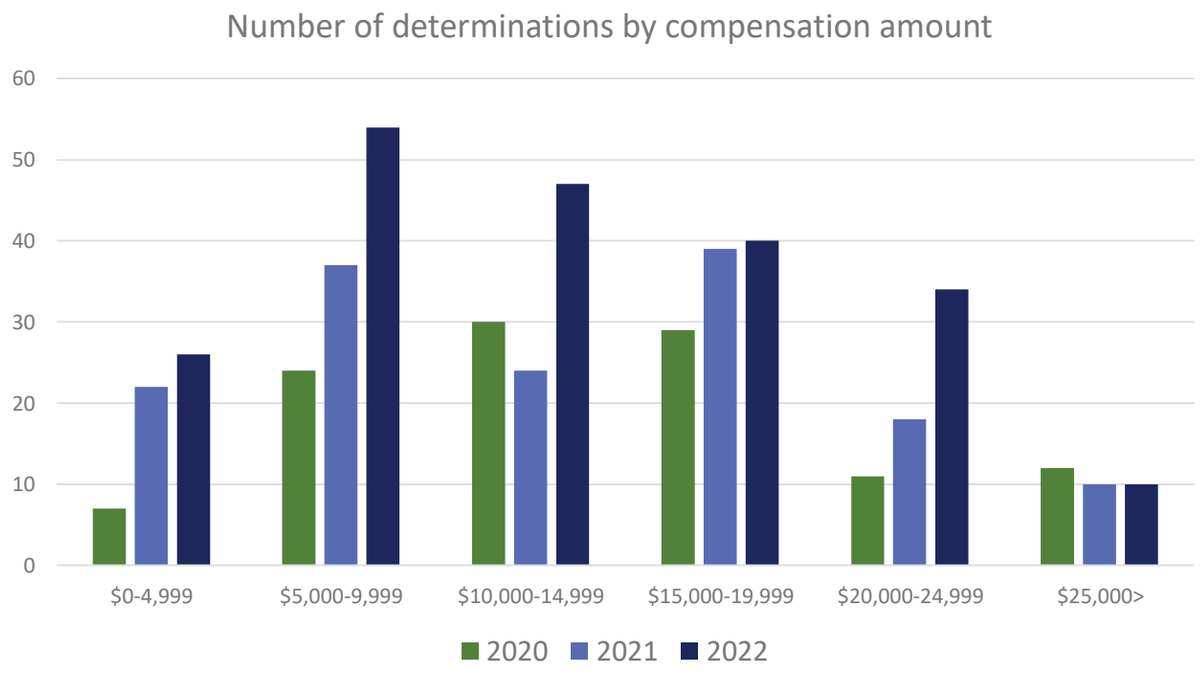
Compensation

Average compensation awarded for successful personal grievances under section 123(1)(c)(i) of the Employment Relations Act 2000



Note 1. Two hundred and eleven applicants were awarded compensation as a remedy for a successful personal grievance in 2022.

Note 2. The lowest compensation award was $500 and the highest $37,500.

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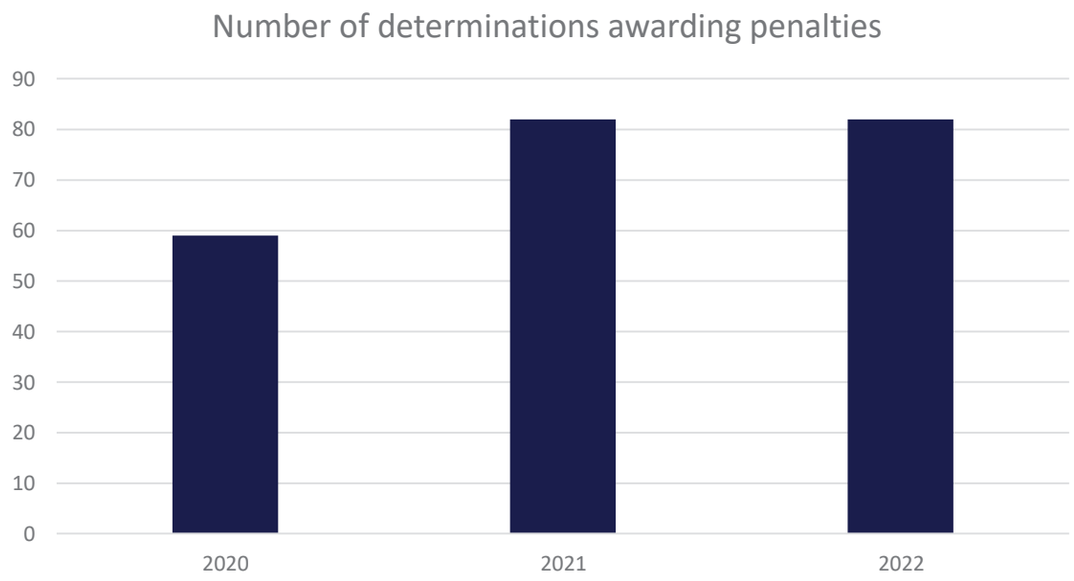
Penalties

Penalties awarded for breaches of employment legislation



Note 1. The lowest penalty award was $100 for a breach of the terms of a record of settlement. The highest penalty award was $230,000 for multiple breaches of minimum employment standards in respect of several employees.

Note 2. Penalties were most commonly issued for breaches of the Employment Relations Act 2000 (breaches of records of settlement, failure to provide a written employment agreement, failure to keep wage and time records); the Holidays Act 2003 (failure to keep holiday and leave records, failure to pay annual leave or public holiday entitlements); the Minimum Wage Act 1983 and Wages Protection Act 1983.

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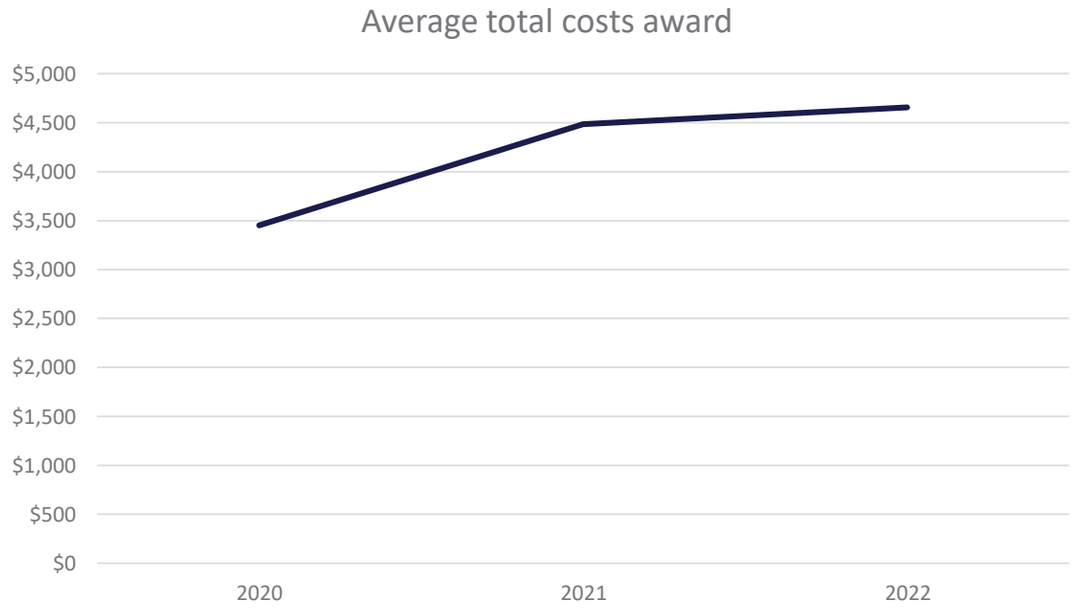
Costs

Contribution to costs awarded to the successful party



Note 1. The Authority uses a notional tariff as a starting point to awarding costs:

- $4,500 for the first day of an investigation meeting
- $3,500 for each additional day of an investigation meeting.

The notional starting point can be adjusted to reflect the circumstances of the particular case.

Note 2. The Authority's practice note on costs is available at: era.govt.nz/determinations/awarding-costs-remedies/.

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Access to justice

Number of determinations that noted a party was the recipient of legal aid or was represented by a Community Law Centre. Also, by way of comparison, the number of determinations where a party was self-represented.

DETERMINATIONS INDICATING ACCESS TO JUSTICE			
	2020	**2021**	**2022**
Legal aid	7	3	14
Community Law (representation)	4	1	5
Community Law (preparation only)	4	4	4

NUMBER OF SELF REPRESENTED PARTIES			
	2020	**2021**	**2022**
Employees	105	86	93
Employers	80	97	116

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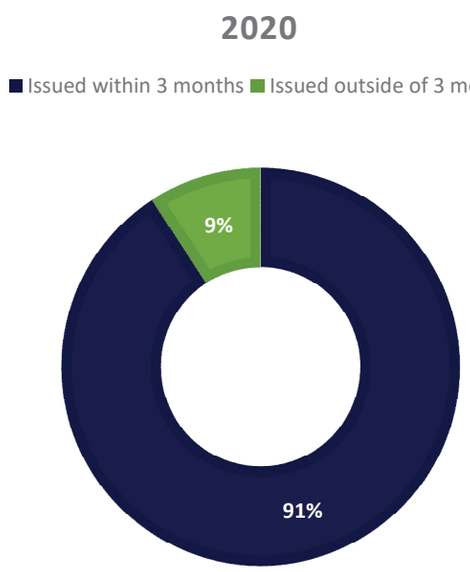
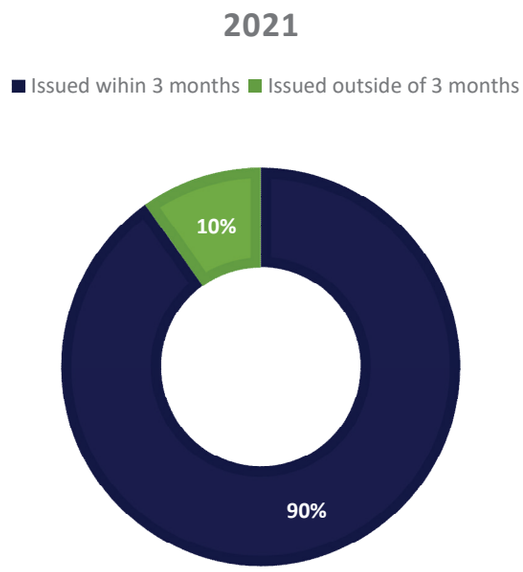
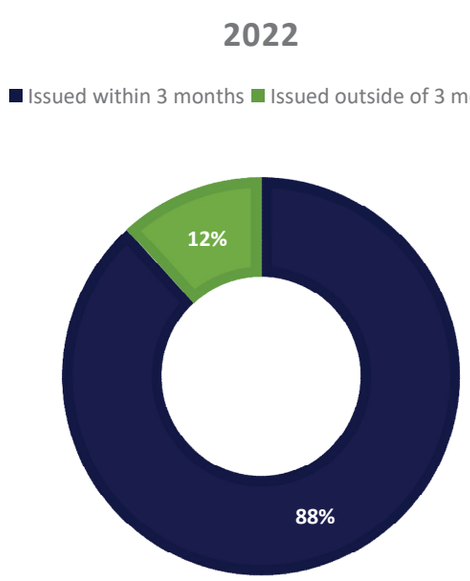
Timeliness of determinations

Percentage of determinations issued within 3 months of the investigation meeting or provision of final material.

The Authority issues an overwhelming majority of determinations within 3 months of the date of the investigation meeting or the date on which the Authority received the last evidence or information from the parties.







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Challenges in the Employment Court

Percentage of Authority matters challenged in the Employment Court (lodged with the Court 2020–2022)

PERCENTAGE OF MATTERS CHALLENGED			
	2020	**2021**	**2022**
Percentage of matters challenged	18%	17%	17%

Judgements of the Employment Court are available at employmentcourt.govt.nz/judgments/decisions/.

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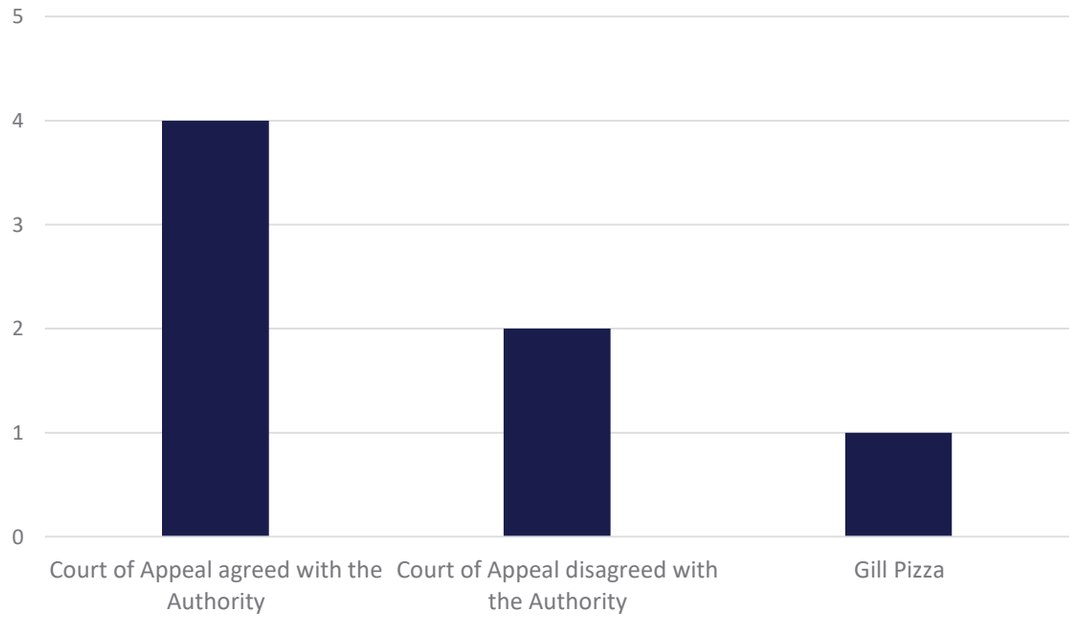
Challenge results in the Court of Appeal

Substantive challenge results in the Court of Appeal 2020–2022



Note 1. *Labour Inspector (Ministry of Business, Innovation and Employment) v Gill Pizza Ltd* [2021] NZCA 192, [2021] ERNZ 237 is displayed in a category of its own for the following reason. In *Labour Inspector of the Ministry of Business, Innovation and Employment v Gill Pizza Ltd* [2018] NZERA Wellington 113 (*Gill Pizza*), issued on 17 December 2018, the Authority determined it did not have jurisdiction to determine whether delivery drivers were employees or contractors where their status was disputed. Three days later, on 20 December 2018, another Member of the Authority determined it did have such jurisdiction in *Hairland Holdings Ltd v Chief Executive of the Ministry of Business, Innovation and Employment* [2018] NZERA Christchurch 196 (*Hairland Holdings*). The Court of Appeal disagreed with the approach taken by the Authority in *Gill Pizza*, but in doing so, affirmed *Hairland Holdings* and the Authority's jurisdiction to determine whether a person is an employee.

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Website visitors

Website views and individual users

WEBPAGE VIEWS			
Website	**2020**	**2021**	**2022**
Employment Relations Authority (total) era.govt.nz	248,512	217,589	220,550
Employment Law Determinations Database (total elaw section of Employment New Zealand website) employment.govt.nz/elaw-search/	274,353	290,236	332,811
Employment New Zealand (total) employment.govt.nz	13,247,445	12,113,400	11,215,238

INDIVIDUAL USERS			
Website	**2020**	**2021**	**2022**
Employment Relations Authority (total) era.govt.nz	48,460	40,413	38,282
Employment Law Determinations Database (total elaw section of Employment New Zealand website) employment.govt.nz/elaw-search/	20,031	19,809	20,714
Employment New Zealand (total) employment.govt.nz	3,372,239	3,555,058	3,559,265

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Social media

The Authority is on linkedin

https://www.linkedin.com/company/employment-relations-authority-te-ratonga-ahumana-taimahi/

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Summary of key 2022 determinations

WANG V HUNGRYPANDA (NZ) LTD [2022] NZERA 154

Employment Relations Authority – Employee status – Food delivery driver – Online app delivery service

At issue was whether a takeaway food delivery driver was an employee or a contractor.

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

The applicant was a Chinese immigrant. The applicant had a master's degree in science from the United Kingdom, but said he sometimes struggled in spoken English. The applicant worked as a takeaway delivery driver for the respondent for almost two months. The respondent disconnected the applicant from the app after a restaurant owner complained about his attitude.

The applicant raised a personal grievance with the respondent seeking remedies and reinstatement. The respondent claimed the applicant was an independent contractor. In this determination the Authority considered only whether the applicant was an employee or an independent contractor.

The Authority determined that, taking into account the totality of the relationship, how it operated and the objects of the Act, the real nature of the relationship was one of employment (see [66]**–[**68]).

Some factors the Authority took into account were:

- While the written agreement between the applicant and the respondent stated the applicant was an independent contractor, the agreement was in English; the respondent did not provide a copy of the agreement to the applicant; the respondent did not explain the terms of the agreement; the applicant was not able to get advice on the agreement before signing it (at [46]–[48]).
- The applicant had to indicate his availability for rosters in advance; he could not just log in and "grab" orders (at [51], [52]).
- While the applicant had a significant degree of choice over when and where he chose to work, the model of business gave the respondent significant control over him when he was working (at [49]–[56]).
- While the applicant used his own vehicle, which had no signage, delivery drivers were essential and integral to the respondent's business model as the only tangible "public face" of the business (at [57]).
- While the agreement provided that drivers could contract substitute drivers if they were unavailable, this was "a somewhat illusory benefit as the applicant had no guaranteed work to undertake" (at [57]).
- The applicant had no ability to expand the customer base to his advantage; there was no evidence he was in business on his own account (at [49], [59], [60]).
- Take-away food delivery drivers had a greater level of vulnerability when compared to taxi or courier operations which had been considered in other cases (at [64], [66]).

LYE V ISO LTD [2022] NZERA 258

Employment Relations Authority – Availability Provisions – Breach of Employment Relations Act 2000, s 67D – Unjustified disadvantage – Compliance order

At issue was whether the employee was disadvantaged by his employment agreement which contained an availability provision in breach of s 67D of the Act.

The employee was a stevedore at a port. In 2018, the Authority determined that the provisions in his and other employees' individual employment agreements were unlawful availability provisions, and not compliant with s 67D. On appeal, the Employment Court confirmed this, and ordered the employer to cease including availability provisions that:

- did not specify guaranteed hours of work; and
- did not specify the period which employees are required to be available above those guaranteed hours.

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The employee raised a personal grievance against the employer. He claimed that his employment agreement, which required him to be available for work 24/7 without reasonable compensation, disadvantaged him. He sought remedies in the form of compensation for a loss of benefit had the provision been compliant, and compensation for distress.

The Authority found that the employee's grievance of disadvantage was established for the following reasons:

- The employee's working arrangement caused a real intrusion into his private life (at [83]). He did not have any certainty in terms of the agreed hours of work, and the days and times in which they would fall (at [68]). Lack of certainty about shifts in advance meant that he could not make commitments, like booking appointments or picking his son up from school (at [53]).
- The employee was not reasonably compensated for his availability as required under the Act (at [61]).
- Even though the employee had access to Planned Time Off (PTOs), using a PTO would mean he could not be offered an additional shift that fortnight and would be paid less than the guaranteed retainer (at [68]). PTOs could also be cancelled by the company and there were a limited number of PTO days which could be sought (at [68]).

The Authority awarded the employee:

- $22,500 in compensation, for a loss of benefit (based on the amount of compensation he should have received under the availability provisions of the ERA); and
- $15,000 compensation for humiliation, loss of dignity and injury to feelings.

A LABOUR INSPECTOR V SAMUEL [2022] NZERA 295

Employment Relations Authority – Person involved in minimum standards breaches – Penalties

At issue was the accessorial liability of domestic partners in breaches of minimum standards.

Following the Authority's substantive judgment in *Labour Inspector v Samuel* [2021] NZERA 479, the Authority reserved whether the partner of the employer would be joined as a person involved in minimum standards breaches under s 142Y of the Act. It did so pending the Court of Appeal's decision in *Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705, [2021] ERNZ 1345 (see summary on page 37 below).

The Authority found that the employer's partner had actual knowledge of the essential facts of the employer's minimum standards breaches when she (at [10]):

- told the Labour Inspector she was the owner of the business;
- confidently answered questions about the terms of the employees' employment;
- displayed a detailed understanding of the daily operations of the business;
- deployed the employees' labour;
- lied to the Labour Inspector; and
- was involved in a threatening telephone call to an employee.

The Authority alternatively held that at the least, the employer's partner was wilfully blind to the breaches (at [11]). The Authority found the partner was a person involved and ordered she pay $38,000 in penalties. It also ordered she pay any arrears the employer was unable to (at [18]).

CAE V HEXION (N.Z.) LTD [2022] NZERA 325

Employment Relations Authority – Personal grievance – Unjustified dismissal – Interim reinstatement

At issue was whether the Authority would reinstate the employee to his position on an interim basis pending the Authority's substantive determination of the employee's claim for unjustified dismissal.

The employee had a Ministry of Health exemption from wearing a face mask under the COVID-10 Public Health Response (Protection Framework) Order 2021. His employment was terminated for refusing to comply with the employer's requirement to wear a face mask at the workplace. The employee raised a personal grievance claim of unjustified dismissal against his employer. The employer claimed that it had undertaken a risk assessment and explored alternatives to masks but had found no other available options that could sufficiently address the health

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and safety risk. The employer noted that the employee had worn respirators at work on a regular basis without reporting concerns and he was only required to wear a face mask in limited circumstances. The employee sought interim reinstatement from the Authority until his substantive claim for unjustified dismissal could be investigated and determined.

The Authority granted his application for interim reinstatement. The Authority found there was a seriously arguable case to be tried for the following reasons:

- It was arguable that there were accommodations that could have been made to mitigate risk and dismissal was premature (at [69]).
- The employer had continued doubt about the employee's inability to wear a mask, which impacted its decision making. It was possible those doubts also impacted on any assessment of accommodation that could reasonably have been made. Arguably there were some limits on the requirements of an employer for an employee to prove they have a disability (at [74]).
- The employee wore a face shield in the workplace after the implementation of the rule. Arguably that face shield provided more limited protection but packaged with testing daily may have mitigated risk (at [88]).
- The balance of convenience favoured the employee. The Authority considered the employee's substantive claim for unjustified dismissal and permanent reinstatement to be strongly arguable. It had not been subjected to case law to date and it was not a straightforward matter (at [106]).
- Overall justice favoured ordering the interim reinstatement of the employee on the condition that the employer might, at its discretion, comply with the order by reinstating him only to the payroll without requiring him to attend work. If the employee were required to attend work, he would be required to wear a face shield, take a daily rapid antigen test, observe strict handwashing standards, and report and stay away from work if he developed COVID-19 symptoms (at [109]).

The Authority noted that this was the first case concerning mask exemptions. Mask wearing provided known public health benefits. Whether there were suitable alternatives in workplaces was one of many issues that would be addressed in the Authority's substantive investigation (at [111]).

QUINTON-BOUNDY V WAIMAKARIRI DISTRICT COUNCIL [2022] NZERA 616

Employment Relations Authority – Unjustified disadvantage – Constructive dismissal – Bullying – Failure to take reasonable steps to prevent harm

At issue was whether the employer unjustifiably constructively dismissed the employee when it failed to take action to protect the employee from bullying.

The employee was employed in a district council as the manager of the Environmental Services Unit (ESU). The employee had an executive assistant (EA) who reported to her. The employee's manager and the EA had a close relationship going back many years. The effect of the relationship was that they would discuss operational matters to do with the ESU and effectively bypass and undermine the employee in her role as ESU manager.

The employee had numerous discussions with Human Resources (HR) about the pair's behaviour, over more than a year. The employee told them she was feeling harassed by her EA and not supported by her manager; that she was stressed and tired of the lies and manipulation; that her EA would constantly report to her manager behind her back; that there was no respect and that she was being ignored and shut out.

HR repeatedly responded by advising her to discuss her concerns with her manager and advising her to performance manage her EA. The employee's attempts to performance manage the EA failed. HR escalated the employee's concerns to the Chief Executive.

The Chief Executive discussed with the employee's manager the possibility of him moving into a special project role or another such arrangement, pending his retirement; in the meantime, the manager remained in his existing role. The Chief Executive did not follow up with the employee how she was coping or if anything else was required; he considered the matter was resolved with the prospect of the manager moving on at some time.

The employee's manager worked another two months in his role before resigning with three months' notice. The employee continued to have the same problems with her manager and the EA while the manager worked out his notice. The employee continued to raise issues with HR without any result.

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Nearly six months after raising matters with the Chief Executive, the employee resigned, saying she was feeling strained and harassed by her EA ignoring her; and had become upset and overwhelmed with her manager undermining her and escalating tensions with ESU staff.

The employee claimed she was unjustifiably constructively dismissed, as the employer had breached its duty to provide a safe workplace.

The Authority accepted the employee was unjustifiably constructively dismissed. The Authority determined that the employer "failed to meet its duty to provide a safe workplace and in the circumstances, this was sufficiently serious to warrant [the employee] resigning" (at [41]). The Authority found the employer's "response to the foreseeable and actual bullying…was wholly inadequate" (at [40]). The Authority stated that the employer (at [37]):

> responded to the complaints and the knowledge it had in addition to those complaints by continually expecting [the employee] to manage her own relationships with [the pair]. This was wholly inadequate. It was clear that this was not working and more was required both for [the employee] and for the ESU team.

The Authority said the bullying had been foreseeable as witnesses gave evidence of a previous ESU manager having a similar experience (at [36]). The Authority took into account that the employer had taken no action in relation to the EA; the Authority considered that even with the employee's manager resigning, problems with the EA would have continued (at [45], [47]).

The Authority found that the employer should have initiated an independent investigation and then taken appropriate action based on the outcome. The Authority considered the employer knew that but chose not to take those steps because of the long service and pending retirement of the employee's manager (at [39]).

The Authority ordered the employer to pay (at [72]):

- $32,000 compensation for distress under s 123(1)(c)(i) of the Act;
- 20 weeks' lost remuneration; and
- a penalty of $12,000 for breach of good faith.

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Summary of key employment decisions from the Senior Courts

FMV V TZB [2021] NZSC 102, [2021] 1 NZLR 466

Supreme Court – Employment-related tort actions – Jurisdiction of the High Court and Employment Relations Authority – Operation of Employment Relations Act 2000, s 161(1)(r)

At issue was whether the High Court had jurisdiction to hear an employee's negligence action against an employer. The case concerned the interpretation of the "tort exception" in s 161(1)(r) of the Act. This case is of interest because it changes the law on jurisdiction as stated by the Court of Appeal in *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] 3 NZLR 618 (*JP Morgan*).

The employee resigned after working for the employer for a year. Almost seven years later, the employee filed dual proceedings against the employer in the High Court and in the Authority. In the High Court the employee claimed the employer negligently failed to protect her from harm. In the Authority the employee raised a personal grievance in relation to the same fact situation.

Initially the employee progressed only the claim in the Authority. However, after the Authority investigation was stayed, the employee sought to progress the High Court action.

The employer applied to strike out the High Court proceedings on the basis (at [19]):

1. The Authority had exclusive jurisdiction in relation to the dispute between the parties.
2. The claim was an abuse of process because it duplicated the employee's personal grievance.

The High Court granted the strike out application. On appeal the Court of Appeal upheld the decision to strike out. The employee then appealed the Court of Appeal decision to the Supreme Court.

The appeal to the Supreme Court raised two questions (at [25]):

1. Were the employee's High Court claims "employment relationship problems"?
2. If so, were they nevertheless excluded from the Authority's jurisdiction by the tort exception in s 161(1)(r)?

In the Supreme Court, Winkelmann CJ and O'Regan and Williams JJ (the majority), in a joint judgment, dismissed the appeal. The majority held that if a claim "reflects a problem that relates to or arises from an employment relationship" it comes within the exclusive jurisdiction of the Authority, even if it could be framed another way. If a claim could be framed in terms of one or more of the examples in s 161(1)(a)–(qd), it *must* be brought before the Authority. If not, it is then a question of "whether the problem nevertheless relates to or arises out of an employment relationship" (at [94], [95], [127]). In this case, as the employee's tort action could be framed as a personal grievance it did not fall within the tort exception in s 161(1)(r) and came within the exclusive jurisdiction of the Authority (at [134]).

In taking the approach it did, the majority overturned the approach to jurisdiction under s 161(1) taken by the Court of Appeal in *JP Morgan. JP Morgan* held that whether a problem was an "employment relationship problem" and so under the exclusive jurisdiction of the Authority, depended on whether the problem "directly and essentially" concerned the employment relationship. According to *JP Morgan*, if the "essence" of a claim was not employment related the claim should not be regarded as within the Authority's jurisdiction (see *JP Morgan* at [95]–[97]).

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The majority rejected the "essence" approach in *JP Morgan*. The majority held the "essence" approach:

- was too arbitrary (at [87], [91]);
- allowed parties to frame their pleadings so as to "plead their way out of the Authority's distinctive jurisdiction" (at [90], [91]);
- was not consistent with the legislature's choice "not to ground the Authority's jurisdiction in the way claims might be pleaded or traditionally categorised" (at [92]); and
- invited "an inappropriately narrow inquiry in light of the broad language of the section" (at [93]).

William Young J in a minority judgment would have also dismissed the appeal, but for differing reasons (at [166]–[172]). Glazebrook J, in dissent, would have allowed the appeal based on a "plain reading" of s 161(1)(r) (at [218]–[221]).

SANDHU V GATE GOURMET NEW ZEALAND LTD [2021] NZCA 591, [2021] ERNZ 1065

Court of Appeal – Minimum Wage Act 1983, s 6 – Whether s 6 applies to employees who do not perform work – COVID-19

At issue was whether, in the absence of sickness, default, or accident, the minimum wage is payable for all of a worker's agreed contracted hours of work; or whether it is lawful to make deductions from wages for lost time not worked at the employer's direction.

The employer provided inflight catering services to passenger aircraft. The five applicants were full-time employees. Their employment agreements provided for a minimum 40-hour week. The employees' rate of pay was the minimum wage at that time. When New Zealand entered an Alert Level 4 lockdown due to the COVID-19 pandemic in March 2020, the employer was deemed an essential service. However, there was a lot less demand than usual for inflight catering. The employer partially closed down. The applicant employees were not required to work. The employer proposed to its employees that they would be paid 80 per cent of their normal pay, conditional upon the employer receiving the government wage subsidy.

The parties disagreed over whether this arrangement breached the Minimum Wage Act 1983 (MWA). The relevant provisions were:

> 6 Payment of minimum wages
>
> Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract or service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.
>
> 7 Deductions for board or lodging or time lost
>
> …
>
> (2) No deduction in respect of time lost by any worker shall be made from the wages payable to the worker under this Act except for time lost—
> (a) by reason of the default of the worker; or
> (b) by reason of the worker's illness or of any accident suffered by the worker.

The Court of Appeal found (at [54]):

> It is not lawful to make deductions from wages for lost time not worked at the employer's direction. The minimum wage is payable for the hours of work that a worker has agreed to perform, but does not perform because of such a direction.

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The Court of Appeal held that the s 6 term "payment for his work", if read in isolation, could either be a reference to work actually performed by the employee, or work the employee agreed to perform (whether or not it was actually performed). However, s 6 must be read in the context of the MWA as a whole. Section 7(2) would be superfluous if s 6 only applied to time actually worked. It is concerned with time lost, that being time that was agreed to be worked but for specific reasons was not worked (at [42]–[45]).

The Court of Appeal decided that the "only logical" reading of s 6 is that the minimum wage must be paid for the whole of the time the parties agreed the employee would work (at [46]). The MWA is a basic protection that "sets a floor below which employers and employees cannot go" (at [47]).

The Court of Appeal observed that parties are able to agree that employees take leave without pay, and the MWA would not apply to that leave (at [51]). In this case, however, there was no agreement between the parties that would justify not paying the employees the minimum wage (at [55]). The Court of Appeal restored the determination of the Authority (at [61]).

A LABOUR INSPECTOR V SOUTHERN TAXIS LTD [2021] NZCA 705, [2021] ERNZ 1345

Court of Appeal – Employment Relations Act 2000, s 142W – Liability of persons involved in breaches of employment standards – Level of knowledge required for liability

At issue was the level of knowledge required to establish liability for a person "involved in a breach" of employment standards under s 142W(1) of the Act.

The employer operated a taxi business. The employer had a number of "commission" drivers it treated as independent contractors. The Authority found the drivers were employees. It found the employer was liable to pay four drivers a total of around $97,000, to meet its obligations to the drivers under the MWA and Holidays Act 2003.

The employer ceased trading and was unable to pay the amount owing. The Labour Inspector sought to make the former directors of the employer liable for the arrears under s 142W(1) of the Act, as persons involved in the breaches. The former directors claimed they were not liable, as they had genuinely believed the drivers were independent contractors.

The Authority found the directors were persons involved in the breaches and therefore liable for the amounts owing (at [19]). In a challenge to the Authority determination, the Employment Court found the directors were not liable because they genuinely believed the drivers were not employees. The Employment Court considered that liability under s 142W(1) required deliberate involvement in a breach (at [31]–[33]).

The Labour Inspector appealed the Employment Court decision on the following question of law (at [6)]:

> What is the level of knowledge required to establish liability for a person "involved in a breach" of employment standards under s 142W(1) of the Act?

The Court of Appeal held that what was required for liability of persons involved was "whether each of them knew the essential facts establishing the breaches". The Court of Appeal held (at [7)]:

> [I]t is irrelevant that the Grants believed that the drivers were not employees. Rather, the inquiry should focus on whether they knew the primary facts that led to the finding that the drivers were employees, and the primary facts relevant to the finding that Southern Taxis had failed to make the required payments to those drivers.

The Court of Appeal allowed the appeal (at [8]).

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A LABOUR INSPECTOR (MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT) V GILL PIZZA LTD [2021] NZCA 192, [2021] ERNZ 237

Court of Appeal – Employee status – Jurisdiction of Employment Relations Authority to determine employee status in proceedings brought by the Labour Inspectorate

The issue was whether the Authority had jurisdiction to determine whether pizza delivery drivers were employees or contractors in an action brought by the Labour Inspectorate; or whether only the Employment Court had jurisdiction to decide the drivers' employee status.

The Labour Inspector was pursuing a wage recovery claim on behalf of pizza delivery drivers. The company denied that the drivers were employees, arguing they were independent contractors. The Employment Court decided that only the Employment Court, not the Authority, had jurisdiction to decide whether workers were employees or contractors when the Labour Inspector was bringing a claim on the workers' behalf. The Labour Inspector appealed to the Court of Appeal.

The Court of Appeal overturned the Employment Court's decision, finding that the Authority did have jurisdiction to decide employment status. The Court of Appeal made the following findings:

- The Employment Court's conclusion was wrong because it was inconsistent with the text and with the purpose of both s 6(5) of the Act, which states that the Court may declare whether a person is an employee, and the scheme of the enforcement provisions (at [31]).
- The Authority would always have to be satisfied that a worker is an employee before it went on to make a substantive determination (at [32]). It has done so several times in the past (at [35]–[36]).
- The suite of tools provided to the Labour Inspectorate was intended to allow it to manage non-compliance "in the most efficient way, avoiding lengthy and costly litigation" (at [16]). Having "different issues in the same action [decided] in different fora is plainly inefficient and would usually be regarded as an abuse of process" (at [52]).
- The natural and ordinary meaning of s 161(1)(c) is that that the Employment Court only has exclusive jurisdiction to decide employment status *if* a s 6(5) application is made. Otherwise, the Authority has jurisdiction (at [34]).

Te Kāwanatanga o Aotearoa
New Zealand Government

ERA 9816