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QUIGG PARTNERS

QUICK REFERENCE

Simon Martin
Partner
DDI: 474 0752
simonmartin@quiggpartners.com

Michael Quigg
Consultant
DDI: 474 0766
michaelquigg@quiggpartners.com

Nick Logan
Senior Associate
DDI: 474 0758
nicklogan@quiggpartners.com

Sarah Riceman
Associate
DDI: 474 0765
sarahriceman@quiggpartners.com

Stephanie Hawkins
Solicitor
DDI: 474 1370
stephaniehawkins@quiggpartners.com

FAIR PAY AGREEMENTS

The Government has announced that Fair Pay Agreement legislation will be introduced later this year. This could have significant effects on employers, employees, and the labour market generally.

Fair Pay Agreements (FPA) will set out the minimum entitlements and working standards for employees in a specific industry or occupation. Parties to a proposed FPA bargain collectively in an attempt to reach an agreement on the terms of the FPA. Once a FPA is agreed, it will legally bind all employers and employees in the industry or occupation - even those that did not participate in the bargaining process.

The proposed system in a nutshell

As the system is currently proposed, bargaining for a FPA would be initiated by the Union representing the relevant employees. The Union would need support from 10% of the employees in the industry or occupation, or 1000 employees in coverage, or at least meet a public interest test. A FPA would need to cover certain terms, such as base wage rates and overtime, but could include other terms agreed by the parties. Where bargaining parties encounter difficulties, mediation could assist, and if an agreement cannot be reached, the Employment Relations Authority could set the terms of the FPA. The Employment Relations Authority would vet all FPAs for lawfulness before the FPA went to a vote. A simple majority would be required from both the employers and employees. If that is achieved, MBIE will bring the FPA into force by creating secondary legislation.

Our thoughts

The introduction of FPAs represents the biggest change to the employment law landscape since the Employment Relations Act 2000 was introduced over 20 years ago. It signals a partial return to the award system which existed in New Zealand prior to the introduction of the Employment Contracts Act 1991. While our Australian readers will have more comfort with a system that looks similar to awards, it will be an unfamiliar experience for most New Zealand employers who have, for the last 30 years, had the ability to negotiate and agree on terms and conditions with either employees or Unions directly. The introduction of FPAs may lead to some employers instead having most terms and conditions imposed on them.

Given the amount of work and time required to bring an FPA from its genesis through to being in force, we do not expect to see a significant amount of FPA bargaining initiated once a system is in place. Unions will likely act with caution when selecting which industry/occupation they initiate bargaining in respect of. Early indications are that the Unions' efforts might initially be directed at 'employee-heavy industries' such as retail and supermarkets.

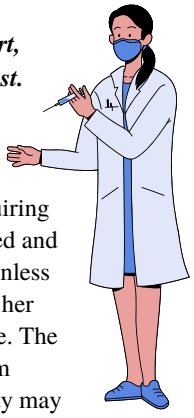
Defining industries and occupations is likely to be a difficult and involved exercise. We anticipate disputes will arise, for example, as to whether a certain employee is in a covered occupation, or a certain occupation is within a covered industry.

The proposed system is clear that industrial action, such as striking, will not be permitted during bargaining for a FPA. The recent nationwide nurses strike, which attracted 30,000 nurses, midwives, and other health professionals around New Zealand, would not have been permitted if it was in support of a FPA. This removes a tool that can give employees significant leverage when bargaining.

The Employment Relations Authority is unlikely to have any appetite to seriously 'shake up' labour markets and rates of pay. If it were charged with setting the terms of a FPA following parties reaching a stalemate, we expect it would need to set fairly middling terms to balance the interests of both parties. The Minister responsible for the FPA system has indicated that a new regulatory institution would be needed "over the longer term" to manage the FPA system.

VACCINE REFUSERS HAVE HOPES PRICKED IN THE AUTHORITY

The Employment Relations Authority has refused to remove a COVID-19 matter to the Employment Court, finding no important matters of law or public interest.



The Applicant, a border worker at a port, refused to be vaccinated against COVID-19. This was despite the Government's Public Health Response Order requiring such 'front-line' workers to not work unless vaccinated and requiring their employers to not allow them to work unless vaccinated. As the Applicant refused the vaccination, her employer brought her employment to an end on notice. The Applicant sought to remove her application for interim reinstatement to the Employment Court. The Authority may order removal if it considers important questions of law may arise, removal is in the public's interest, or if in all the circumstances it considers the Employment Court should determine the matter.

The 'important questions of law' submitted by the Applicant presupposed the employer had directed or required the Applicant to be vaccinated, and this constituted a change to her terms and conditions of employment. However, the Authority determined it was not apparent she had been so directed/required by the employer. The vaccination was never mandatory, and her terms and conditions were not changed. Other 'important questions of law' seemed to challenge the Public Health Response Order itself, which the Authority noted it, and the Employment Court, have no jurisdiction in respect of. The Authority also considered the public interest had been overstated as the matter involved a narrow contextual setting.

The Authority noted that the Applicant was prevented from continuing employment by an external, statutorily imposed requirement. The Authority considered the matter was analogous to an unlicensed employee not being able to continue employment in a role involving driving which required a license.

Although this determination did not make any substantive findings as to whether the employer had acted 'fairly and reasonably', it does not bode well for the Applicant in our opinion. If the Authority considers a statutory vaccine requirement is on par with a statutory drivers license requirement, then an outcome that the employer was found to have acted fairly and reasonably seems likely.

This matter can quickly be distinguished from circumstances where an employer dismisses an unvaccinated employee where no statutory requirement to be vaccinated applied. In those circumstances, the employer would have to meet a considerably higher bar to show it acted 'fairly and reasonably'. We note an Australian case later in this newsletter dealing with these circumstances. Cases of this nature in New Zealand are inevitable, and will require significantly more of employers seeking to justify a requirement to be vaccinated.

TRIANGULAR EMPLOYMENT ARRANGEMENT UPHELD

The Employment Relations Authority has found that labour hire employees placed on assignment with the IRD were not employees of IRD.

Eight individuals were employed by Madison Recruitment Limited (Madison), a labour hire company. Madison placed these eight employees on assignment with the Inland Revenue Department (IRD).

The employees sought a declaration from the Employment Court that the real nature of the relationship was that they were employees of IRD. The employees' claim had union backing and was advanced as somewhat of a test case. Twenty three witnesses gave evidence, 16 volumes of documents were produced, and very comprehensive submissions were filed.

Outcome – Not Employees of IRD

A full bench of the Employment Court heard the case over an 11-day period. Applying the usual tests of control and integration, and after examining the intention of the parties, the Full Court of the Employment Court decided that all eight claimants were not employees of the IRD.

Helpful Guide – Reality of the Relationship

The judgment that extends to 42 pages provides a thoughtful and comprehensive application of the tests to be applied when considering whether an individual is, in reality, an employee under section 6 of the Employment Relations Act. It is a useful guide for other labour hire companies and third party principals in assessing whether there might be 'misclassification' risks. As with all such cases, the matter was decided on a fact specific basis, so it can only be used as a guide. A key factor in the Employment Court's decision making was the fact that these employees had not been deprived of an employment relationship or the protections that come with that relationship. The employees' minimum entitlements had been met, and the employees were able to pursue a personal grievance against Madison if they wished.

Where individuals have been deprived of these protections as a result of being engaged as contractors, the Employment Court has been much more willing to overturn the contractual arrangements agreed between the parties.

Triangular Employment Relations Legislation

The Court's decision refers to the triangular relationship changes brought through the Employment Relations (Triangular Employment) Amendment Act 2019. The decision of the Court refers to the legislation in its broad form as it was not relevant to this case, as the events being litigated occurred before it was introduced. However, the Court stated that the introduction of the triangular relationship changes does have an impact on the section 6 analysis which will be undertaken by the Court going forward.

Our view is that the introduction of the concept of a 'controlling third party' (which in this case would have been the IRD) into the Employment Relations Act 2000 makes it more difficult for labour hire employees to argue that they are, in fact, employees of the end client. This is because the Employment Relations Act 2000 now contains two separate and distinct concepts, an employer and a controlling third party.

However, this does not mean that there will be a drop off in claims involving 'end clients'. We expect the opposite. The triangular changes allow an employee to more easily join a controlling third party to any personal grievance they might pursue against their employer. The employee does not need to clear the higher bar of section 6 to do this; it just needs to show that the end client exercises or is entitled to exercise control or direction over the employee that is similar or substantially similar to the control or direction that an employer exercises. As the employees in this case were subject to both an IRD job description and Code of Conduct, we consider that would have been relatively easy to show.

We understand that the employees are seeking leave to appeal to the Court of Appeal.

HOLIDAYS ACT REVIEW

The Government has accepted the Holidays Act Taskforce's 22 recommendations. While the recommendations could resolve a number of thorny issues in the current Holidays Act, new issues will inevitably be created. Draft legislation is not expected until early 2022.

The most significant changes in the recommendations are:

New Calculations for Leave Payments

Payment for annual holidays will now be based on the greater of "Ordinary Leave Pay" (OLP), Average Weekly Pay for the last 13 weeks, or Average Weekly Pay for the last 52 weeks. OLP is a new calculation replacing the current Relevant Daily Pay and Ordinary Weekly Pay calculations. OLP includes the base rate for any hours worked in the relevant period, plus pay for scheduled overtime, allowances, incentives, or commission payments that would have been received had the employee worked in the relevant period. Family violence leave, bereavement leave, alternative holidays, public holidays, and sick leave (FBAPS) pay would be based on the greater of OLP and Average Daily Pay.

The recommendations would also provide a new definition of Gross Earnings being "…all cash payments received, except direct reimbursements for costs incurred." This would include bonus and incentive payments, including those which many employers have historically thought to be excluded from Gross Earnings calculations on the basis that these payments are discretionary.

New Calculations for Leave Entitlements

An employee's annual holiday entitlement would still be dealt with in weeks or in portions of weeks. The recommendations provide detailed steps to determine the amount of annual holiday entitlement to deduct where an employee with variable working hours takes annual holidays. The steps involve determining the employee's average hours worked over the past 13 weeks on corresponding days.

FBAPS entitlements would be dealt with in days, but sick leave and family violence leave could be taken in units as small as quarter days. FBAPS can only be taken on an "Otherwise Working Day". The recommendations provide a prescriptive test to determine if any day is an Otherwise Working Day for an employee: if the employee was expected to work according to a previously agreed work pattern, or if the employee worked on at least 50% of the corresponding day in the past four or 13 weeks. While these aspects are somewhat convoluted, they do provide greater certainty than currently exits.

Ability to Take Annual Holiday in Advance

The recommendations provide that employees should have the "ability" to take annual holiday in their first 12 months of employment in advance of their entitlement arising. The "ability" would arise on a pro-rata basis throughout the first 12 months. Currently, employees are not entitled to take annual holidays until they have continually worked for 12 months (although many employees are allowed by their employers to take it in advance).

This "ability" to take annual holiday in advance would not be an entitlement, but employers would be required to consider requests for annual holiday in advance in the same manner as requests for annual holidays that the employee is entitled to, i.e., the employer could not unreasonably withhold consent. With that in mind, the practical difference between having an "ability" to take annual holiday in advance and an "entitlement" to take annual holidays is not clear.

This recommendation does not entirely resolve the issue it seeks to address. In our experience, very few employers prevent employees from taking annual holiday in advance in their first 12 months. There is also no "ability" to take annual holiday in advance after an employee's first 12 months. This is likely to be a more common issue where employees take more annual holiday in their first 12 months, in reliance on their "ability" to do so, and so enter their second year of employment with a depleted annual holiday balance. The real root of these issues is the fact that annual holiday entitlements under the Holidays Act 2003 are granted in 4 week 'chunks' every 12 months rather than accruing slowly over time. These changes continue to ignore the fact that most, if not all employers, actually accrue annual holiday entitlements during the year, often in hours or days depending on their payroll system.

New Leave Eligibility

The recommendations propose that eligible employees be entitled to bereavement and family violence leave from the first day of employment. The class of people whose deaths trigger bereavement leave would also be extended. Eligible employees would be entitled to one day of sick leave from their first day of employment, with an

additional day of entitlement arising each month until the maximum level of entitlement is reached, which has recently been increased to 10 days each year. This method of 'accrual' is inconsistent with the approach which has been maintained in relation to annual holidays as noted above.

Eligible employees are those with "agreed hours and an expectation of continuous employment" (these terms are defined, and employers must reconsider the eligibility of employees not considered eligible every quarter) or any employee after six months of continuous employment.

Pay-As-You-Go (PAYG) holiday pay changes

Currently, parties may agree that employees who work on an intermittent or irregular basis or who have a fixed term agreement of less than 12 months may be paid an additional 8% (or more) in lieu of paid annual holiday. The recommendations would remove the ability to agree to PAYG for the fixed term employees and introduce a four-part test to determine if an employee works on an intermittent or irregular basis. The four-part test requires: 1) no minimum hours and no expectation of ongoing employment, 2) no obligation to provide or accept work, 3) no underlying pattern of work, and 4) periods, of at least a week, without work. The four-part test must be repeated every quarter for PAYG employees.

Other changes of note

- The requirement to pay employees 8% of their gross earnings and reset their annual holiday anniversary date when affected by a closedown period in their first 12 months of employment, would be removed.
- Employers would be required to provide employees with pay slips in a specified format for each pay period.
- Following the sale or transfer of a business, employees would have the choice to have their leave entitlement transferred to the new employer or paid out by their old employer and re-set with their new employer. It is currently a requirement to pay out leave entitlements. However, it is common practice to seek employee consent to transfer these entitlements to their new employer. This recommendation would legitimise this practice.
- An employer's ability to require employees to remain available to accept work under an availability provision would be suspended from the end of the work period before leave to the beginning of the work period following leave. Any days worked under an availability provision would automatically be an Otherwise Working Day, and entitlement to sick, bereavement, and family violence leave would apply to those days.

Overall, it is difficult to see at this stage how much complexity has been removed from the Holidays Act as it currently exists. In fact, there may be further complex definitions and tests for employers to tackle. The "proof" will be in the legislative "pudding" once it is drafted. This area seems destined to remain complex for all parties.

GATE GOURMET - WERE EMPLOYEES AT HOME DURING LOCKDOWN 'WORKING'?

The Employment Court has found that employees who remained at home during New Zealand's Level 4 lockdown were not 'working' for the purposes of s 6 of the Minimum Wage Act 1983 (MWA).

Background

Gate Gourmet New Zealand Ltd (Gate) provides in-flight catering to passenger aircraft. Gate was deemed an essential service and was permitted to stay open during the Level 4 lockdown in March/April 2020.

Upon the lockdown commencing on 26 March, Gate confirmed to its employees and the Aviation Workers United Inc Union (AWU) that if an employee was not rostered on or asked to come to work, Gate had no work for that employee and they should stay home. A subsequent closedown notice was emailed to employees on 27 March to confirm it would continue operating as an essential service but had to close down part of its business.

Gate presented three options to employees. Option two enabled employees to receive at least 80% of their normal pay. Option three enabled employees to receive at least 80% of their normal pay, and the employee could use their annual holiday entitlement to supplement their income so that they would receive 100 per cent of their normal pay. Both options were conditional on Gate receiving the wage subsidy. The AWU, on behalf of its members (including the defendants), agreed to options two and three, subject to Gate complying with all applicable legislation.

The minimum wage increased on 1 April 2020. Gate agreed to apply the new minimum wage rate of $18.90 to the defendants whether they were working or not. However, Gate maintained that it was only required to pay employees who remained at home not working at the agreed rate of 80 per cent of their normal pay based on the increased minimum wage rate. Working employees would receive their contracted rate for each hour of actual work.

The employees, through the AWU, filed a statement of problem with the Employment Relations Authority (the Authority), alleging that Gate had taken unilateral action in changing employees' terms and conditions of employment without proper consultation and that Gate had acted unlawfully in paying them below the minimum wage of $756 per week (based on a 40 hour week). The Authority found that if the employees were ready, willing, and able to carry out their function in an essential industry, Gate was required to pay them at least the minimum wage,

notwithstanding any agreement to the contrary. On a non-de novo basis, Gate challenged the correctness of the Authority's determination that the entitlements under the MWA applied to the defendants whether or not they were actually working for Gate.

Employment Court Decision

The importance of the issue warranted a Full Court of the Employment Court, and leave was granted to Business New Zealand and the New Zealand Council of Trade Unions to make submissions at the hearing.

The majority judgment of Judge Holden and Judge Beck stated that the MWA does not provide for a guaranteed minimum income, rather a minimum rate of payment in exchange for work performed by an employee. They framed the issue as being whether the defendants were entitled to the minimum wage under s 6 of the MWA, which, in turn, depended on whether they were 'working' for the purposes of that section. In consideration of whether an activity is work, the Employment Court considered the factors set out in the Court of Appeal's decision in the 'Sleepovers' case.

The Employment Court stated that Gate exercised no constraints on the defendants' activities, who also had no responsibilities to Gate or provided any benefit to Gate during the relevant period. Accordingly, when the defendants were at home, they were not 'working' for the purposes of s 6 of the MWA and, therefore, were not required to be paid the minimum wage.

The Court considered the potential effect of s 7(2) of the MWA, which prevents pay deductions in respect of time lost by any worker, except for time lost by reason of the worker's default, illness, or accident. The Court concluded that if no wages are payable because the employee is not working under s 6, then there are no wages from which a deduction can be made.

In her dissenting judgment, Chief Judge Inglis stated that the relevant question is not whether the employee was actually working when a claimed unlawful deduction is made but rather whether their terms and conditions provided them with a right to perform work. The Chief Judge considered that s 7(2) reflected the common law rule that an employee is entitled to wages in circumstances where they are ready and willing to perform work and would have found that there was a breach of the MWA. Whilst the defendants could have agreed to temporarily reduce their hours of work, they could not agree to a reduction in their wages to 80 per cent, which constituted an unlawful deduction under the MWA.

Comment

The approach of Judge Holden and Judge Beck framed the issue as being whether the defendants were, in fact, working as opposed to whether the defendants were ready and willing to perform work (the Chief Judge's approach). The Chief Judge's indication that no breach of the MWA would have arisen if the employees had reached an agreement with Gate to reduce their hours of work (rather than wages) would have been a strange agreement to reach, given both parties were aware of the unavailability of work during the relevant period, and that they would not be expected to "work". The employees have been granted leave to appeal this decision to the Court of Appeal. If Chief Judge Inglis' approach is preferred, it could have significant consequences for huge numbers of employees.

New Zealand media and more comment than this case, perhaps, indicating general public confusion as to employment status issues. The 2019/2020 Government discussion paper on better protections for contractors indicates that the result in this case could be subject to change, with potential legislative changes on the horizon. The UK approach may then be more relevant if protections for 'dependent' contractors are introduced, or even the third 'worker' status is adopted in New Zealand.

UBER DRIVER NOT AN EMPLOYEE

The Employment Court has found that an Uber driver was not an employee.

Background

Mr Arachchige had previously worked as a taxi driver. He entered into a Services Agreement with Uber (the Agreement) in 2015. Mr Arachchige completed 5,623 trips through the Uber Driving App as an "independent provider of peer-to-peer passenger transportation services" as per the Agreement. His access to the Uber Driver App was unilaterally deactivated when Uber received a passenger complaint. Having never received the details or been given the opportunity to respond to the complaint, Mr Arachchige sought a declaration from the Employment Court that he was an employee so that he could pursue a personal grievance for unjustified dismissal.

Decision

The Court's decision focused on the definition of an "employee" in s 6 of the Employment Relations Act 2000. To determine the 'real nature' of the relationship, the Court must consider all relevant matters, including matters indicating the parties' intention. The Court found that the Agreement was not an employment agreement in substance nor in form. The Agreement expressly rejected the prospect of creating an employment relationship, and throughout its term, Mr Arachchige intended to and did, operate his business independently. Mr Arachchige was able to engage in work for competing organisations, and he was not permitted to display any Uber or other signage on his vehicle or clothing. He supplied his own vehicle, smartphone, insurance and determined his working days, hours and locations of service.

In the Court's view, Mr Arachchige had a considered understanding of the business model, and it was only after Uber terminated the Agreement that he sought to argue the relationship had been one of employment. Whilst Mr Arachchige was subject to qualification requirements and performance expectations; these are not exclusive to employment relationships. Interestingly, the Court only touched lightly on the level of control Uber has over drivers when they are 'on' a trip. The Court rejected Mr Arachchige's principal argument for his employment status, being that the Uber model offered no opportunity to build a customer base, suggesting he could improve the profitability of his business in other ways.

On balance, the Court found that Mr Arachchige was not an employee.

Comment

In its decision, the Court contrasted two recent decisions of the Employment Court, which found that a courier driver and four taxi drivers were employees. In both cases, the drivers were not found to be in business on their own account and were subject to significant control from the employing companies, for example, through pre-determined routes, set days/hours of work, limited holiday entitlements, and controlled vehicle arrangements. The Court contrasted this against Mr Arachchige's significant autonomy from Uber, and his understanding of his contractor status, unlike the employees in the other cases.

Uber's operating model has been considered in the UK, France and Australia (among other countries), with mixed conclusions. The Court discussed four Australian cases that held Uber drivers were not employees and UK Supreme Court decisions that found Uber Drivers were 'workers'; a third category between the employment and contractor status (the 'worker' category is not present in New Zealand). Despite the fundamentally different legal landscape in the UK, the UK decision has attracted much comment in New Zealand media and more comment than this case, perhaps, indicating general public confusion as to employment status issues. The 2019/2020 Government discussion paper on better protections for contractors indicates that the result in this case could be subject to change, with potential legislative changes on the horizon. The UK approach may then be more relevant if protections for 'dependent' contractors are introduced, or even the third 'worker' status is adopted in New Zealand.

OVERSEAS SNIPPETS

REQUIREMENT TO BE VACCINATED REASONABLE

Australia's Fair Work Commission (FWC) has held that the dismissal of an employee on the basis that she refused to receive a flu vaccination was lawful and reasonable. The FWC noted its decision was specific to flu vaccinations in the childcare industry. However, the decision still provides useful guidance to employers in other industries who will be making important decisions in relation to COVID-19 vaccinations in the coming months and years.

Background

The employer, Goodstart Early Learning (Goodstart), runs early childhood care centres and employed Ms Barber as a Lead Educator for 14 years. Goodstart introduced a policy requiring its workers to have a flu vaccination (the policy). Before the policy was implemented, Goodstart consulted with relevant unions and its employees. The policy provided that Goodstart would bear the cost of the vaccination and provided an exemption to employees who had a valid medical reason to not have a flu vaccination.

Ms Barber claimed to be exempt on the basis she had suffered an allergic reaction to a past vaccination but was unable to provide a medical certificate verifying this. She also stated she lived a "chemical free life" and had coeliac disease. Goodstart provided Ms Barber over three months to provide proof of a valid medical reason to be exempt from the policy. Ms Barber was unable to do so and was eventually dismissed by Goodstart. Ms Barber claimed she was unfairly dismissed.

The FWC's decision

The FWC said that the policy was reasonable because:

- Goodstart and Ms Barber both had statutory health and safety duties;
- The workplace, being a childcare facility, was subject to additional regulatory obligations regarding health and hygiene practices;
- Given the nature of the workplace, vaccinations were more effective and appropriate than other hygiene practices, such as physical distancing and hand hygiene, which could be difficult to maintain among young children; and
- Goodstart had prepared the policy following consultation with affected employees.

As the policy was reasonable, the FWC said that Goodstart acted lawfully when it directed Ms Barber to have a flu vaccination and when it ultimately dismissed Ms Barber for not complying with that direction.

New Zealand implications

The question of whether a New Zealand employer can direct that any employee be vaccinated against COVID-19 will come down to whether that direction is fair and reasonable in all the circumstances.

Just like the FWC's decision, this will be highly fact specific and require an assessment of the COVID-19 risk level involved in the industry, the workplace, and the position in question. Whether the Government's COVID-19 vaccination rollout has reached the relevant employee and is available will also be highly relevant.

The New Zealand Government has already implemented legislation requiring employees in certain high risk industries, workplaces, and positions to obtain a COVID-19 vaccine before continuing work. Vaccine availability is currently limited, but as this expands (particularly to the general public), the number of industries, workplaces, and positions where a vaccine direction could be considered fair and reasonable may also expand.

Employers who are considering developing a COVID-19 vaccination policy should consult with affected employees and should consider providing appropriate exemptions within the policy. Before an employee could be dismissed on the basis of refusing to comply with a reasonable direction to be vaccinated, the employer should first consider alternatives to dismissal, such as redeployment to a position without an associated COVID-19 vaccine direction.

OPTIMISTIC CAREER PROJECTION APPEALED

A UK gynaecologist was awarded £880,302 after succeeding in a whistleblowing detriment claim. The award was based on ten years of projected career losses. However, the Respondent (a private hospital provider) appealed to the Employment Appeal Tribunal on four grounds, all of which were upheld, leading to the claim being remitted for a reassessment of lost earnings:

1. The extent to which the detriment caused the gynaecologist's losses;
2. The possibility that the Respondent's hospital would close;
3. The possibility that the gynaecologist's career would not progress as claimed;
4. Whether it was reasonable to expect the gynaecologist to relocate to mitigate his losses.

In New Zealand, employees who suffer retaliatory action following whistleblowing causing lost wages will only be awarded the lesser of: wages actually lost or three months' remuneration (the Authority and Court have the discretion to increase this award, but this is the exception, not the rule). Career projections over a decade will therefore not be an issue. However, just like in the UK, lost wages awards can be reduced if the employee's conduct contributed to their loss, and the employee must act reasonably to mitigate their loss. This includes making attempts to find new employment, and employees should expect their ex-employer to request evidence of this.