

# **EMPLOYMENT LAW AND HUMAN RIGHTS – A CRUCIAL INTERFACE**

## **Employment Law as Public Law: the Implications for Application of Human Rights Norms**

### **INTRODUCTION**

The focus of this paper is the “crucial interface” between employment law and human rights norms. That is, not merely human rights as declared by statute, but also human rights recognised by or derived from international law and international standards, in particular international instruments to which New Zealand is a party. This paper does not address discrimination in employment under either the Employment Relations Act 2000 or the Human Rights Act 1993. These topics are being addressed in the companion paper to be delivered by my good friend and colleague Dr Andrew Butler.

### **Employment law as public law**

Why should we conceive of employment law as public law? After all, most employment relationships involve the private sector, and are governed by contracts negotiated by the parties, whether as collective employment agreements or as individual employment agreements.

Adopting a historical perspective, employment law (or industrial law as it used to be known) has for much of its existence as a body of law been almost entirely public law, in the sense of being law created by statute or legislative instrument rather than common law. As relatively recently as 1970, the author of the pioneering industrial law textbook was able (correctly) to observe that “Much of our industrial law is statutory”, and further that “Most of the really important rules of our industrial law have a statutory root”.<sup>1</sup>

The governance of what is now termed employment relations by statutory mechanisms for fixing of (collective) wages and working conditions and for resolution of disputes dates back to the Industrial Conciliation and Arbitration Act of 1894. That radical legislation introduced to this country an era of wholesale regulation of employment law

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<sup>1</sup> Dr DL Mathieson, “Industrial Law in New Zealand” (1970), at p vi and 2.

and employment relations by means of legislation, Arbitration Court awards, and (later) “industrial agreements” with quasi-legislative effect. This continued largely unchanged, until the repeal of the Industrial Conciliation and Arbitration Act 1954 by the Industrial Relations Act 1973.<sup>2</sup> Even under the Industrial Relations Act 1973 and the subsequent Labour Relations Act 1987, industrial awards and industrial agreements having normative force could be made (by the Arbitration Court or one of its successors), or registered. While these statutes held sway, employment law was in practice almost entirely “public law”, with very little “private law” featuring.<sup>3</sup>

It was of course the Employment Contracts Act 1991 which, under the twin banners of freedom of association and freedom of choice for employers and individual employees, substantially deregulated the sector and, at the same time, accorded primacy to contract law, as founded on a negotiated bargain struck between employer and employee or employees.<sup>4</sup> However, even under the Employment Contracts Act, the content of employment contracts,<sup>5</sup> and dispute resolution procedures and remedies, remained significantly regulated by statute.

The Employment Relations Act of 2000 can be said to have to some degree restored the regulatory balance which existed prior to the Employment Contracts Act, while leaving a continuing role for contract as a private law concept. By contrast with the Employment Contracts Act, the Employment Relations Act introduced or strengthened statutory regulation of employment relations in key respects, including the following:

- The statutory construct of the various “employment relationships” was introduced;

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<sup>2</sup> For a detailed outline of the history, see NS Woods, “Industrial Conciliation and Arbitration in New Zealand” (Government Printer, 1963).

<sup>3</sup> Although in principle a contract of employment underpinned every relationship of employment, the normative effect of awards and industrial agreements and the statutory remedies provided inevitably meant that the public law dimension to disputes was to the forefront, even if not so characterised at the time. The economic torts also provided an occasional private law battle ground for employers to take on unions and workers engaged in picketing or strike action.

<sup>4</sup> Under s 20 of the Employment Contracts Act, the necessary parties to a “collective employment contract” were the employer and the contracting employees employed by that employer, not the employees’ trade union; indeed, no involvement of a trade union was required for a collective employment contract to be concluded. Contrast s 17 of the Act. That represents a significant contrast with the position under Part 5 of the Employment Relations Act.

<sup>5</sup> Older readers will no doubt recall s 57, the “harsh and oppressive contracts” provision of the Employment Contracts Act.

- Wide-ranging duties of dealing in good faith as between the parties to an employment relationship were superimposed on their contractual relations, if any;
- The long-standing statutory overlay upon contract, of the over-arching employer obligation to refrain from acting without “justification”, was reaffirmed and in some respects strengthened;
- Greater recognition of the role of trade unions, and regulation of bargaining for and of the content of collective and individual employment agreements, was reintroduced;
- The existing judicial review jurisdiction of the Employment Court under the Employment Contracts Act<sup>6</sup> was affirmed and somewhat extended.<sup>7</sup>

Overall and taking a broad view, the “public law” component of employment law is substantial and significant. It governs the employment institutions including but not limited to the Employment Court and the Employment Relations Authority, which derive their jurisdiction and powers remedial and otherwise from statute and regulation. Likewise, the direct participants in employment relations - employers, employees and trade unions - have their rights, relationships and conduct regulated to a significant degree by statute. Crucial rights and duties are superimposed on contractual relationships arising under employment agreement by way of statutory good faith; the requirement of justification of employer actions; and indeed other standards and safeguards. These all give rise to a “public law” dimension which practitioners in the field ignore at their peril.

### **A public law/human rights “toolkit”**

If we are to engage effectively with employment law as public law, we need at our disposal at least a basic public law “toolkit”.<sup>8</sup> The complete employer lawyer will need to be fully aware of the principles of statutory interpretation, and as well have a reasonable feel for at least the basics of administrative law and judicial review. However, the “toolkit” needed for the purposes of this paper is a more limited one. As

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<sup>6</sup> Section 105 of the Employment Contracts Act. The judicial review jurisdiction was first conferred on the then Labour Court by s 280 of the Labour Relations Act 1987.

<sup>7</sup> Employment Relations Act, s 194; but see also ss 184 and 194A of the Act.

<sup>8</sup> With a nod to Mai Chen, as author of, and no doubt holder of copyright in, the “Public Law Toolbox”.

already stated, it concerns the ways in which employment law can be informed, and hopefully even made more effectual, by means of human rights norms.

Thus the “toolkit” for present purposes comprises the following four fairly basic elements.<sup>9</sup>

**First**, like any other statute, the Employment Relations Act is subject to interpretation under s 6 of the New Zealand Bill of Rights Act 1990 (“Bill of Rights”). Where rights stated in the Bill of Rights are in play, relevant Employment Relations Act provisions must where possible be interpreted consistently, including where appropriate a “**Hansen** analysis”.<sup>10</sup>

The six-step **Hansen** analysis requires that the Courts:

- 1 Ascertain Parliament’s intended meaning;
- 2 Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom;
- 3 If an apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5;
- 4 If the inconsistency is a justified limit, Parliament’s intended meaning prevails;
- 5 If Parliament’s intended meaning represents an unjustified limit under s 5, examine the words in question again under s 6, to see if it is reasonably possible to identify a meaning which is consistent (or less inconsistent) with the relevant right or freedom. If so, that meaning must be adopted;
- 6 If it is not reasonably possible to find a consistent (or less inconsistent) meaning, adopt Parliament’s intended meaning (as mandated by s 4).

**Secondly**, where rights and obligations are established under international law obligations to which New Zealand is party, the Employment Relations Act like any

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<sup>9</sup> For a more in depth general discussion of relevant administrative law principles, see for example GM Illingworth QC, “The Bill of Rights and the Principle of Legality in Administrative Law”, in **Using Human Rights Law in Litigation**, New Zealand Law Society Intensive, June 2014.

<sup>10</sup> **R v Hansen** [2007] 3 NZLR 1, [92] per Tipping J.

other statute should be interpreted so as to give effect to those rights or obligations to the extent that they bear on the interpretation of the provisions at issue.<sup>11</sup>

**Thirdly**, at least where the branch of government, person or body (for convenience referred to as a “public actor”) is bound to observe the Bill of Rights under s 3(a) or (b) of that Act (discussed below), the public actor is required, subject no doubt to any available s 5 justified limitations, to give effect to applicable rights recognised by the Bill of Rights, with invalidity of action or decision-making the consequence if the relevant right is not duly delivered.<sup>12</sup> Thus at the very least, given that employment law institutions such as the Employment Court and the Employment Relations Authority fall within s 3 of the Bill of Rights, the institutions themselves are directly subject to that Act and must “deliver” on a relevant right when reaching their decisions.

**Fourthly**, at least as regards public actors, essentially the same proposition holds true as regards giving effect to relevant rights and obligations arising at international law.<sup>13</sup>

An interesting recent application of the fourth point is the decision of the Full Employment Court in **H v A Ltd**.<sup>14</sup> In that case, the plaintiff was seeking interim name suppression for reasons which included the feared effects of publication on his son, who it was claimed was particularly vulnerable by reason of disability. The majority Judges recited and relied on various provisions of the United Nations Convention on the Rights of the Child, in reliance on the Supreme Court decision in **Ye v Minister of Immigration**.<sup>15</sup> They identified several Articles of the Convention which applied to the Court’s consideration as to whether non-publication should be ordered “in the interests of J”, the child in question. In the words of the majority (at [87] – [88]):

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<sup>11</sup> **NZALPA v Attorney-General** [1997] 3 NZLR 269, 289; **Tranz Rail Ltd v Rail & Maritime Transport Union** [1999] 1 ERNZ 460, [40]; **Sellars v Maritime Safety Inspector** [1999] 2 NZLR 44, 57, 62; **Zaoui v Attorney-General (No 2)** [2006] 1 NZLR 289, [90].

<sup>12</sup> E.g. **Police v Beggs** [1999] 3 NZLR 615; **Drew v Attorney-General** [2002] 1 NZLR 58.

<sup>13</sup> See **Zaoui v Attorney-General (No 2)**, above, [90] – [91]; **Ye v Minister of Immigration** [2010] 1 NZLR 105, [24] – [26]; **Hounga (Appellant) v Allen and Another (Respondents)** [2014] UKSC 47, [50].

<sup>14</sup> [2014] NZEmpC 92, [85] – [90]; contrast [49] – [52]. To similar effect, see **Battison v Melloy** [2014] NZHC 1462, [50] and footnote 29 (Collins J).

<sup>15</sup> Footnote 13 above.

*These [Articles of the Convention] include, under art 3(1), that in a case concerning a child, the child's best interests should be the primary consideration in determining the matter of publication or non-publication:*

- *under art 16, the Court should be concerned to ensure that the child's privacy, honour and reputation should not be interfered with arbitrarily, and to grant the protection of the law accordingly;*
- *under art 19, in considering non-publication as an administrative measure, the Court should be concerned to protect the child from maltreatment; and*
- *under art 23, a disabled child should expect to enjoy a full and decent life in conditions which ensure dignity and facilitate the child's active participation in the community.*

*Such considerations are behind statutory regimes which prohibit absolutely and universally the identification of child victims or complainants in certain criminal proceedings. It is a fundamental tenet of fairness and humanity that children should not suffer for the sins of others, their parents, if it is possible to avoid such suffering.*

In the last decade, a series of cases involving low-paid and/or vulnerable workers has demonstrated the importance of international law standards, by relying on relevant international instruments to support interpretation of statutes forming part of this country's "minimum code of employment rights and obligations" so as to advance the protection of employees. Thus in **Terranova Homes and Care Ltd v Faitala**,<sup>16</sup> the Court of Appeal supported its interpretation of the Minimum Wage Act 1983 as prevailing over the KiwiSaver Act 2006, as consistent with New Zealand's "international obligations"<sup>17</sup> to the effect that the purpose of minimum wage legislation is that minimum wages shall not be subject to abatement by individual agreement".

In **Service and Food Workers Union v Terranova Homes and Care Ltd**,<sup>18</sup> the rest home caregivers equal pay case, the Employment Court again relied on New Zealand's international obligations (in conjunction with s 19 the anti-discrimination provision of the Bill of Rights) in support of its preferred interpretation of the Equal Pay Act 1972.

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<sup>16</sup> [2013] NZCA 435, [32].

<sup>17</sup> Under the Minimum Wage-Fixing Machinery Convention of 1930.

<sup>18</sup> [2013] NZEmpC 157, [47], [56] – [71] (reserved Court of Appeal decision pending).

In **Law and others v Board of Trustees of Woodford House and others**,<sup>19</sup> the “sleepovers” case brought under the Minimum Wage Act 1983, the Employment Court again had regard to the Minimum Wage-Fixing Machinery Convention of 1930, stating at [58]:

*The legislative instruments making up the minimum code [of employment rights and obligations] are to be interpreted in accordance with relevant international conventions and other instruments to which New Zealand has either acceded to specifically or which are of a body or bodies of which New Zealand is a member, principally the International Labour Organisation.*

International Labour Organisation Conventions to which New Zealand is a party or by which it is in any event bound have been relied on for interpretation purposes in a variety of contexts, not limited to minimum wages and conditions.<sup>20</sup> Having regard to their express mention in s 3(b) of the Employment Relations Act, the potential impact of ILO Conventions 87 on Freedom of Association and 98 on the Right to Organise and Bargain Collectively should in principle arguably be even stronger. However these particular Conventions appear to have had relatively limited impact on outcomes to date.<sup>21</sup>

The critical point flowing from all this is that, both for rights enjoyed under the Bill of Rights and for rights and protections recognised under international law,<sup>22</sup> individual (or indeed group or collective) human rights may be in play and brought to bear in argument, not only in respect of issues of statutory interpretation but also in relation to a challenged act or decision. Thus where the statutory language is open to interpretation, a rights-based argument may be deployed, often to good effect. Even where the statutory language is clear, at least where the person or entity taking the challenged action or decision is a public actor, a rights-based case may be advanced, either in support of a decision consistent with the right or rights in question or in support of a rights-based challenge to an adverse outcome.

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<sup>19</sup> [2014] NZEmpC 25, [57] – [63]. See also the earlier Full Court decision in **Idea Services Ltd v Dickson** [2009] ERNZ 116.

<sup>20</sup> Without attempting a comprehensive list, ILO 100 and 111 concerning equal pay for men and women and discrimination in employment featured in **Service and Food Workers Union v Terranova Homes and Care Ltd** (above) at [57] – [60]. ILO 158 addressing termination of employment is discussed in the dissenting judgment of Heath J in **Norske Skog Tasman Ltd v Clarke** [2004] 3 NZLR 323, [152] – [157] and in the earlier authorities there referred to.

<sup>21</sup> For discussion, see **NZEPMU v Witney Investments Ltd (formerly Epic Packaging Ltd)** [2008] 2 NZLR 228, [74] – [76], [83] and at first instance: **Epic Packaging Ltd v NZEPMU** [2006] ERNZ 627.

<sup>22</sup> At any rate where New Zealand is a party to the Treaty or Convention in question.

The proposition that the Employment Relations Act, or for that matter other legislation dealing with employment law, must be interpreted subject to or at least in light of relevant human rights enjoyed under the Bill of Rights, and indeed relevant rights arising under international law, is now well established. Cases illustrating these points are included in the later section of this paper dealing with applications of particular human rights. Well settled, also, is the proposition that employment institutions such as the Employment Court and the Employment Relations Authority must deliver on or at the very least have regard to relevant human rights, when deciding.

A more far-reaching and relatively unexplored question concerns whether the parties to the statutory employment relationships, and in particular employers, are bound to observe other parties' human rights. That is the focus of the next section of the paper.

### **DOES A PARTY TO AN EMPLOYMENT RELATIONSHIP OWE A DUTY TO RESPECT THE OTHER PARTY'S HUMAN RIGHTS?**

The "employment relationships" to which the Employment Relations Act and in particular the duty to deal in good faith apply are those identified in s 4(2). They include the relationships between an employer and an employee, a union and an employer, and a union and its member or members. In each of these relationships and indeed possibly others listed in s 4(2), it is possible to conceive of human rights being engaged on one side or the other. However, it is in the employment relationship between the employer and the employee that experience shows that human rights issues are most likely to arise – almost always, the human rights of the employee, often ranged against the asserted managerial rights (or "prerogatives") of the employer. It is therefore the issue of observance of human rights as between employer and employee that is the focus of what follows.

#### **Duties arising by virtue of section 3 of the Bill of Rights**

The obvious first question that arises is, does the Bill of Rights apply to employers? That question is addressed and seemingly answered by s 3 (emphasis added):

*This Bill of Rights applies **only** to acts done by –*

*(a) By the legislative, executive, or judicial branches of the government of New Zealand; or*

*(b) By any person or body in the performance of any **public function, power, or duty conferred or imposed on that person or body by or pursuant to law.***"

Section 3(b) requires the public actor in question to be acting in the performance of some **public function, power or duty**, being a function, power or duty "conferred or imposed on the person or body by or pursuant to law". Where the employment in question involves an employer in the private sector, to treat the employer as directly bound by the Bill of Rights via s 3(b) would at first sight negate the express intent of s 3.

Stating the obvious, an employer duty to observe human rights undoubtedly exists to the extent that discrimination in employment in terms of s 104 of the Employment Relations Act or the equivalent Human Rights Act provisions is at issue. But discrimination aside, the conventional view at Employment Court level is that the Bill of Rights does not apply (i) to private employers, or even (ii) to employers who are public entities or operating in the public sector. This is said to be because employment as such does not involve the "performance of a public function, power or duty" by the employer, in terms of s 3(b) of the Bill of Rights.

The logical starting point is whether the Bill of Rights applies to employers operating in the public sector. That is not a straightforward matter.

In **NZEPMU v Air New Zealand Ltd**,<sup>23</sup> the union relied on s 21 of the Bill of Rights (unreasonable search and seizure) when challenging the airline's drug testing policy. It argued that the issuing of the policy by Air New Zealand as an airline operator carrying out statutory functions and subject to statutory duties under the Civil Aviation Act 1990 and Civil Aviation Rules was to be regarded as acting in the performance of a public function, power or duty imposed by or pursuant to law. The Full Court at [204] described that argument as "challenging" and "ingenious". The Court remarked (at [205]):

*The position of air carriers is regulated and underpinned by statute to such an extent that, in relation to most of the activities of such a carrier, but especially in regard to acts driven by safety considerations, it might be said that an air carrier is discharging public functions, powers, and duties conferred or*

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<sup>23</sup> **NZEPMU v Air New Zealand Ltd** [2004] 1 ERNZ 614, [204] – [208].

*imposed by or pursuant to law. The phrase “pursuant to” implies an indirect connection with statutory law and can apply to delegated legislation.*

The Court further noted the various duties imposed on the defendant by the Civil Aviation Act, but ultimately concluded (at [207]):

*However, we do not think that is enough to bring the first defendant’s operations and activities within s 3 of the NZBORA. Many private commercial activities are conducted under statutory authority or licence but could not reasonably be described as discharging public functions. We therefore conclude that the first defendant is not subject to the NZBORA.*

In **Electrical Union 2001 Inc v Mighty River Power Ltd**,<sup>24</sup> another employer drug testing policy was under challenge. Unusually, the collective agreement between the parties itself expressly incorporated “the principles of” s 11 of the Bill of Rights (conferring “the right to refuse to undergo any medical treatment”). It also imported the “principles of the Privacy Act 1993”. Consequently the Employment Court (Colgan CJ) was required to examine the effect of s 11, independently of the possible effect of s 3(b) of the Bill of Rights. However, in response to a submission from the employer that the Bill of Rights did not apply (that is, other than in terms of the collective agreement), the Court considered this issue.<sup>25</sup>

The Court noted that the employer was a former State-owned enterprise which ceased to have that status as from 4 March 2013, the challenged policy having however been introduced by the employer before that date. The reasoning of Chief Judge Colgan on this issue needs to be set out in full:

*[53] There is, nevertheless, authority supporting the proposition that the NZBORA does not apply to public bodies in respect of their non-public activities, including employment relationships.<sup>26</sup> So even as a State-owned enterprise, the defendant says that its drug and alcohol policy was not involved in the performance of a public function. That is because it applied only to its employees and contractors and its purpose was to ensure their safety on safety-sensitive sites.*

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<sup>24</sup> **Electrical Union 2001 Inc v Mighty River Power Ltd** [2013] NZEmpC 197, [51] – [56].

<sup>25</sup> It appears to have been raised by Counsel for the defendant but not responded to by the lay advocate for the plaintiffs.

<sup>26</sup> A footnote here references **Poole v Horticulture and Food Institute of New Zealand Ltd** [2002] 2 ERNZ 869 at [208].

[54] *In this regard the defendant also relies on one of the leading texts in the field.*<sup>27</sup>

*The intent of s 3(b) is to apply the Bill of Rights to acts done in performance of the public function, rather than to all acts done by a body that happens to perform a public function. Actions ancillary to the performance of a function, such as the procuring of premises and supplies, and the employment and dismissal of staff, are more properly governed by the principles of general private law.*

[55] *This statement of the law has since been adopted by the High Court in an employment-related case.*<sup>28</sup>

[56] *I agree with the defendant that the NZBORA has no general application to this case except to the extent that one of its provisions (s 11) has been adopted expressly in the parties' collective agreement.*

However, I would suggest that these various decisions and statements do not represent the last word on the question whether the Bill of Rights can govern public sector employment relationships via s 3(b). The cited case of **Poole v Horticulture and Food Institute** contains at [206] – [220] an extensive summary of the opposing submissions of counsel. But the Court's own reasoning is (with respect) conclusory, and does not directly face up to the crucial question why employment by a public actor cannot properly be regarded as a “public function” in and of itself.

The Rishworth and others extract (above) cites only limited Canadian authority in support, this notwithstanding the absence of an equivalent to s 3 in the Canadian Charter of Rights and Freedoms.<sup>29</sup> Moreover, the distinction drawn between performance of the conferred “public function” and actions “ancillary to the performance of a function” is not one reflected in the express language of s 3(b) itself. That refers much more widely to “acts done ... in the performance of **any** public function [**or**] power, **or** duty”. The narrow Rishworth and others approach also disregards the established requirement that s 3 be given a generous interpretation.<sup>30</sup>

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<sup>27</sup> A footnote here references Rishworth and others, *The New Zealand Bill of Rights* (Oxford University Press, Victoria, 2004) at p 96 (“Rishworth and others”).

<sup>28</sup> A footnote here references **Butler v McCutcheon** HC Auckland, CIV-2011-404-923, 18 August 2011 at [58].

<sup>29</sup> Drs Andrew and Petra Butler in *The New Zealand Bill of Rights Act: A Commentary* (2005) (“Butler and Butler”) at paras 5.2.8 and 5.7.12 caution against the use of Canadian authority when interpreting s 3 of the Bill of Rights, for that very reason.

<sup>30</sup> See **R v N** [1999] 1 NZLR 713, 721; Butler and Butler, para 5.7.3.

The case of **Butler v McCutcheon**, also relied on by Colgan CJ in **Mighty River Power**, is a decision at Associate Judge level involving the striking out of “scatter gun” claims by a self-represented litigant suing everyone having any connection, remote or otherwise, with his dispute with the University of Auckland as employer. The plaintiff in that case had sued individual University staff members personally in the High Court, rather than proceeding against his employer by way of personal grievance. In that context the judgment pronounced at [59] – [60]:

*The university may have public functions conferred by law under s 3(b), but they do not include the conduct of informal meetings with Mr Butler, investigating the complaint made by Mr Butler, calling a disciplinary meeting for Mr Butler and terminating his employment. Those employment matters are ancillary to the university’s public functions and are not within s 3(b).*

*Further, the appropriate defendants for any complaint of breach of the Bill of Rights Act by the university would be the university itself or the Vice Chancellor (if the employment function could be within s3(b))...The staff personally do not perform any public function conferred by law and cannot be sued under s 3(b).*

For completeness, reference is also made to the contrasting decision of the Full Court in **Low v Tararua District Council**.<sup>31</sup> In that case, the employee had been dismissed for speaking out at a “town meeting” called by the respondent council to discuss proposals which affected her continued employment. The Court treated s 14 of the Bill of Rights (freedom of expression) as applicable to the employer’s actions, in the absence of any justified limitation under s 5.<sup>32</sup>

It is accepted that there can be no bright line dividing public sector employment from private sector employment. But it surely remains open to argument that employment in the “mainstream” public sector, at least, involves or may involve the performance of a public function, power, or duty in terms of s 3(b). In the case of employment in the public service, s 56 of the State Sector Act imposes on chief executives a statutory duty

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<sup>31</sup> [1994] 1 ERNZ 887 at p 900 – 1. For a similar Employment Relations Authority decision, see **Daniels v Maori Television Service**, Employment Relations Authority at Auckland (A Dumbleton), AA33/05, 29 August 2005 (respondent broadcaster treated as acting in the performance of its public function of television broadcasting within s 3(b) when instructing its employee to refrain from taking part in protests against the Foreshore and Seabed Bill; the employee’s disadvantage agreement was upheld). Note also **Meaden v Chief Executive of the New Zealand Fire Service Commission**, Employment Court, Christchurch Registry, CEC 41/98, 30 July 1998, Judge Palmer, at p 16 – 17, 29 – 30 (dismissal of fireman arising out of vigorous public protest against Fire Service restructuring proposals, fireman off duty but in uniform; interim reinstatement ordered).

<sup>32</sup> The direct application of the Bill of Rights appears largely to have been conceded by counsel for the employer.

to operate a personnel policy that complies with the principle of being a “good employer”. Likewise for employment in the “education service”,<sup>33</sup> s 77A of that Act imposes substantially similar “good employer” obligations. Given the “good employer” statutory duty and indeed a host of related statutory obligations, it is difficult to see why employers in the public service and the education service should not be regarded as performing public functions (or powers, or duties) in terms of s 3(b), in relation to their employment relationships with individual employees.<sup>34</sup>

Finally on this aspect, it should also be noted that case law regarding the scope of s 3(b) remains generally in a developing state. At the least, consideration whether a particular sphere of “public” employment falls within s 3(b) needs to take into account subsequent case law, such as the current leading decision of **Ransfield v Radio Network Ltd.**<sup>35</sup>

### **Applying the Bill of Rights in an employment context without relying on section 3 of the Bill of Rights**

Assuming that the employment in question is in the private sector or in any event is one in relation to which the Bill of Rights cannot be invoked via s 3(b) of the Bill of Rights, what arguments are available to hold the employer accountable in human rights terms?

In **NZEPMU v Air New Zealand Limited** (above), although the Court concluded that the airline was not subject to the Bill of Rights, it did not disregard the Bill of Rights entirely. The Court stated (at [208]):

*Nevertheless, the NZBORA is legislation that informs other activities and, in particular, is valid to be considered when the question for decision is whether an employer’s action is reasonable when it cuts across fundamental rights recognised by the NZBORA. It emphasises that there is a balancing exercise to be carried out. The NZBORA contributes by stressing that the limits to search and seizure must be reasonable (no more than necessary), prescribed by law (including the common law) and demonstrably justified in a free and democratic society. We accept the need to lean in favour of individual rights in the manner*

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<sup>33</sup> “Education service” is defined in s 2 so as to include schools and institutions at kindergarten, primary, secondary and tertiary level, excluding true “private schools” not operating as integrated schools under the Private Schools Integration Act 1975.

<sup>34</sup> Schools (and equally tertiary institutions) are regarded as generally bound via s 3(b) to respect their students’ human rights, in the disciplinary context in particular. It would surely be anomalous for students to be thus protected when their teachers are not.

<sup>35</sup> [2005] 1 NZLR 233. For a recent decision arising in the context of an employment-related dispute see **Ziegler v Ports of Auckland Ltd** [2014] NZHC 2186, [20] – [21], [32] – [38] (issuing of trespass notice neither judicially reviewable nor within s 3(b) of the Bill of Rights). See also the extended analysis of the cases and helpful general discussion in Butler and Butler at paras 5.7.1 – 5.8.21.

*thus indicated. Although not determining that the policy is unlawful, the NZBORA informs our decision on whether it is reasonable.*

Thus the current position appears to be that, even if the Bill of Rights does not apply directly, the rights which it affirms are fundamental ones, which if engaged need to be considered when assessing the reasonableness or validity of an employer action or policy.<sup>36</sup>

However, this watered-down approach to the Bill of Rights effectively relegates both it and the rights which it affirms to at best a secondary role in employment relationships, and in particular the employer–employee relationship. This paper propounds and will attempt to develop two lines of legal argument in support of a more potent role for the Bill of Rights in this area. These are available in tandem:

- The statutory test of justification under s 103A of the Employment Relations Act is itself subject to s 6 Bill of Rights interpretation, with the preferred interpretation of the “fair and reasonable employer” construct being that only justifications and employer actions consistent with relevant rights affirmed by the Bill of Rights (subject to justified limitations, if any) can be recognised as fair and reasonable actions on the part of an employer;
- The statutory obligation to deal in good faith owed by the parties to an employment relationship is itself subject to s 6 Bill of Rights interpretation, with the consequence that their dealings (and in particular employer actions towards employees) must, under the preferred interpretation of the content of good faith duties, be consistent with relevant rights affirmed by the Bill of Rights (subject to justified limitations, if any).

Both arguments postulate a scenario where a right enjoyed by one party to an employment relationship (typically an employee) is being infringed by the other party (typically an employer) in some significant respect. Obvious examples include alcohol and drug testing policies, and employer-imposed limitations on freedom of expression (in relation to speech, dress or appearance, for example). Where a right protected by the Bill of Rights is engaged, the prescribed test or standard for evaluation of conduct under the

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<sup>36</sup> See also **Poole v Horticulture and Food Institute**, above, [208].

Employment Relations Act must (the argument runs) be interpreted in accordance with s 6 of the Bill of Rights (by way of **Hansen** analysis), with a view to securing delivery to the employee or indeed other party of the right in question, unless subject to a “justified limitation”.<sup>37</sup>

Turning first to the s 103A test of justification, that applies for the purposes of s 103(1)(a) and (b) of the Employment Relations Act; that is, to personal grievances alleging unjustifiable dismissal of or detriment to an employee. The test laid down by s 103A(2) in its current form asks “whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred”. The test is an objective one: s 103A(1). Section 103A(3) identifies four mandatory considerations for the application of the test. Section 103A(4) provides that, in addition to the four listed factors, “the Authority or the court may consider any other factors it thinks appropriate”.

Section 103A therefore creates a construct, namely the “fair and reasonable employer”. Logically, the meaning of that construct needs to be addressed before there is any consideration of what such an employer “could” (or indeed would) have done in the circumstances. The “fair and reasonable employer” construct is not defined in the statute, and accordingly its content is left to interpretation and judicial development.

On this approach, the preferred interpretation of the “fair and reasonable employer” construct and of the statutory test of justification overall is that, subject to any s 5 “justified limitations”, such an employer will refrain from breaching an employee’s affirmed rights under the Bill of Rights. To put the argument another way, it is only employer actions consistent with relevant rights affirmed by the Bill of Rights (subject to justified limitations, if any) that are capable in law of being recognised as fair and reasonable actions on the part of an employer.<sup>38</sup>

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<sup>37</sup> The case law contains numerous examples of Courts interpreting ambiguous or open-ended language in conformity with rights such as freedom of expression. See for example **Brooker v Police** [2007] 3 NZLR 91 (“disorderly behaviour”) and **Hopkinson v Police** [2004] 3 NZLR 704 (“dishonouring”). More generally, see Burrows and Carter, “Statute Law in New Zealand” (4<sup>th</sup> Ed 2009) at p 354 – 8.

<sup>38</sup> Where the breach of the Bill of Rights asserted by the employee is breach of the right to natural justice under s 27(1), it is likely that the allegation will add nothing to the case, as observing the principles of natural justice “is part of what a fair and reasonable employer would [or could] do”: see **Vice-Chancellor of Lincoln University v Stewart**, Employment Court, Christchurch, CRC 2/08, 17 June 2008, Couch J at [26].

The second line of argument subjects the statutory obligation to deal in good faith imposed on the parties to an employment relationship under s 4 of the Employment Relations Act to the necessary s 6 Bill of Rights interpretation. Again, the language of s 4 and in particular the central concept of “good faith” is sufficiently open-ended to lend itself to interpretation consistent with the rights and freedoms contained in the Bill of Rights, as mandated by s 6. The consequence of this argument is that good faith dealings between the parties to an employment relationship and in particular employer actions towards employees must, to satisfy good faith, be consistent with relevant rights affirmed by the Bill of Rights, again subject to justified limitations, if any.

So far as I am aware, no argument along these lines has to date been advanced. While it can be said that the current approach at Employment Court level<sup>39</sup> stops short of using either justification or good faith as a means of importing human rights norms, the interpretation arguments and indeed a fully developed **Hansen** analysis await deployment in a suitable case, hopefully one with good strong factual merits.

Perhaps the strongest counter to both these arguments is that their effect is to apply the Bill of Rights to the private sector, in a manner inconsistent with the statement in s 3 that “This Bill of Rights applies **only** to acts done by” public actors. One response is that s 3(a) applies the Bill of Rights to the activities of the judicial branch, while s 6 imposes on the judicial branch a duty to interpret **all** “enactments” – not merely those applicable to the public sector – in a manner consistent with the Bill of Rights.<sup>40</sup>

Nor should interpretation of the Bill of Rights in a manner that indirectly applies it equally and without differentiation to both private sector and public sector employment be regarded as revolutionary. The International Covenant on Civil and Political Rights (“ICCPR”), which it is part of the Bill of Rights’ purpose to affirm, does not itself limit application of the rights with which it is concerned to the public sector. Articles 2 and 3 of the ICCPR impose wide-ranging obligations on each State Party to (in particular)

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<sup>39</sup> As in **NZEPMU v Air New Zealand Limited**, above. Contrast **Munz v TLNZ Ltd**, Employment Court, Auckland Registry, ARC 34/07, 21 December 2007, Colgan CJ at [73] – [74], [98] – [99] and [126] – [128].

<sup>40</sup> Refer also to Butler and Butler at paras 5.2.11, 5.8.10 and 5.8.16. The latter reference notes that “The sphere of private law subject to BORA extends beyond the rules of common law that regulate private relationships. Statute is subject to BORA; to the extent that legislative regimes govern interpersonal relationships they must adhere to BORA standards”. Contrast **R v N** above, 718 – 9; PA Joseph, *Constitutional and Administrative Law in New Zealand* (4<sup>th</sup> Ed 2014), para 28.4.2(4)(a) – (c).

“ensure to all individuals ... the rights recognised in the present Covenant”. No distinction is drawn between the enjoyment of human rights in the public sector and that in the private sector.

Moreover, General Comment No. 31 issued by the Human Rights Committee, which addresses the nature of the general legal obligation imposed by Article 2 on States Parties to the Covenant, makes the following highly pertinent statements:<sup>41</sup>

*The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on State parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. ... The covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.*

In light of this authoritative statement of the effect of the ICCPR, there are therefore substantial arguments, founded on the need for consistency with the ICCPR’s approach, that in a state-regulated field such as employment relations in New Zealand, human rights are to be observed by the parties, and in particular by employers, regardless of the status of the employer. That in turn supports the Bill of Rights preferred interpretation arguments advanced above.

## **SPECIFIC APPLICATIONS OF HUMAN RIGHTS IN AN EMPLOYMENT LAW CONTEXT**

Selected rights affirmed in the Bill of Rights which have particular potential to arise in an employment relations context will now be discussed. For reasons already mentioned,<sup>42</sup> the right to natural justice contained in s 27(1) will not be addressed.

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<sup>41</sup> ICCPR/C/21/Rev.1/ADD.13, 26 May 2004 at para 8. See also paras 3 – 4 and 6.

<sup>42</sup> See footnote 38 above.

**Application of section 17 of the Bill of Rights: “Everyone has the right to freedom of association”**

The Employment Relations Act directly addresses freedom of association (and non-association) in s 3 (promoting collective bargaining and adherence to ILO Convention 87) and in Part 3. The freedom not to associate (collectively) has been invoked, unsuccessfully, in that context.<sup>43</sup> Assertions of the positive freedom to associate in an employment context have generally been seen as adding nothing to the governing regime.<sup>44</sup>

The Canadian Charter equivalent of s 17 of the Bill of Rights (s 2(d)) has been the subject of significant development in the employment context, in two recent leading Supreme Court of Canada decisions. They are **Health Services and Support Facilities Bargaining Assn v British Columbia**<sup>45</sup> and **Ontario (A.G.) v Fraser**.<sup>46</sup>

These decisions have established the freedom of association guarantee in the Canadian Charter as the Constitutional foundation (capable of invalidating legislation to the contrary) for a right of employees to organise collectively and indeed to engage in good faith collective bargaining, or more specifically a right to be free from substantial interference with that activity. In the words of McLachlin CJ and LeBel J in **Fraser**:

*[47] ...What is protected is associational activity, not a particular process or result. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws... ) or by government action, a limit on the exercise of the s. 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the Charter.*

*[48] The resolution of this appeal does not rest on stark reliance on a particular conception of collective bargaining... The question ... is whether the legislative scheme [in question] renders association in pursuit of workplace goals impossible, thereby substantially impairing the exercise of the s. 2(d) associational right.*

The Canadian Courts have thus far declined to recognise a Charter-based right to strike as an adjunct to the right to engage in good faith collective bargaining derived from s

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<sup>43</sup> See **New Zealand Dairy Workers Union Inc v NZ Milk Products Ltd** [2004] 3 NZLR 652, [57] – [58]; **NZEPMU v Witney Investments Ltd**, above, [74 – [79].

<sup>44</sup> See e.g. **Air New Zealand Ltd v Kippenberger** [1999] 1 ERNZ 390.

<sup>45</sup> [2007] 2 SCR 391, 2007 SCC 27.

<sup>46</sup> [2011] 2 SCR 3, 2011 SCC 20.

2(d) of the Charter: see **R v Saskatchewan Federation of Labour**.<sup>47</sup> An appeal to the Supreme Court of Canada against this decision was argued earlier this year, as were two other appeals relating to the right to engage in good faith collective bargaining, and reserved decisions are currently being awaited in Canada with considerable interest.<sup>48</sup>

The implications in this country of the Canadian developments are perhaps not immediately apparent in relation to the law as it stands; but may well be pertinent were the Government to seek to remove or curtail collective bargaining rights by statutory amendment.

**Application of section 14 of the Bill of Rights: “Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form”**

Freedom of expression, in particular employer communications to employees during collective bargaining, became an area of controversy under the Employment Contracts Act. The limits of free speech were further examined and ultimately (apparently) resolved in the context of the duty to conduct collective bargaining in good faith introduced by the Employment Relations Act.<sup>49</sup> Although undoubtedly giving rise to significant Bill of Rights issues, this area is currently in a state of quietude.

By contrast, attempts by employers to control employee freedom of speech both work-related and outside the workplace and, more broadly, freedom of expression (through clothing, hair styles and body art) invite review of employer actions or policies against human rights standards. The two alternative Bill of Rights preferred interpretation arguments discussed above could be invoked to argue the case for the employee.

The fact scenarios in **Lowe v Tararua District Council** and likewise, **Daniels v Maori Television Service** (above) demonstrate the potential for reliance by employees on s 14 freedom of expression rights. These and comparable cases also raise the question, why

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<sup>47</sup> 2013 SKCA 43 (Saskatchewan Court of Appeal).

<sup>48</sup> Refer to “Supreme Court update: A New Era for Labour Rights or the Same Old Story?”, Christopher D Pigott, International Law Office, Employment & Benefits, 30 July 2014, accessible at [www.internationallawoffice.com/Newsletters](http://www.internationallawoffice.com/Newsletters).

<sup>49</sup> **Christchurch City Council v SLGOU** [2007] 2 NZLR 617.

should the legal position be any different, depending on whether the employee is employed in the private sector as against the public sector?

The Human Rights Review Tribunal decision in **Haupini v SRCC Holdings Ltd**<sup>50</sup> provides another illustration. There the employee, who had a moko tattooed on her left forearm, was directed to cover it up while engaged in food service to the public at a social function which the employer was engaged to cater for.<sup>51</sup> The plaintiff complained that the employer's different treatment of her constituted discrimination in her employment on the grounds of race. The Tribunal rejected the plaintiff's complaint. It found that the employer had not acted as it did by reason of any racial dimension relating to the display of the moko. In effect, it held that the employer would have required the display of a tattoo to be covered up, irrespective of the race or ethnicity of either the wearer or of the tattoo itself.

Ms Haupini might have stood a better chance, had she pursued a disadvantage grievance in reliance on s 14 of the Bill of Rights, arguing that the moko constituted legitimate self-expression on her part. Indeed, rather than having to make out actual discrimination, she could also have asserted her right under s 20 of the Bill of Rights to enjoy her Maori culture. Arguably, she would have faced a lesser hurdle in advancing her case in that way – although that is not to say that her personal grievance would necessarily have succeeded, in the particular circumstances.

Although relatively uncommon these days, picketing (with or without accompanying strike action) and “political protest” strikes by employees or their trade unions may engage rights affirmed by the Bill of Rights, in particular freedom of expression under s 14 and the freedoms of peaceful assembly and of association under ss 16 and 17. These rights have featured in Canadian Charter cases.<sup>52</sup> The facts of the “Mr Whippy”

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<sup>50</sup> [2011] NZHRRT 20.

<sup>51</sup> The employer had recently moved from a long-sleeved uniform top to one with short sleeves, revealing the plaintiff's moko. She was required to revert to the long-sleeved version which most other employees were no longer using.

<sup>52</sup> See for example **Grain Workers' Union, Local 333 v B.C. Terminal Elevator Operators' Assn** 2009 FCA 201, [2010] 3 FCR 255; **British Columbia Teachers' Federation v British Columbia Public School Employers' Assn**. 2009 BCCA 39 (CanLII).

case, **Dickson’s Service Centre Ltd v Noel**,<sup>53</sup> illustrate one such freedom of expression scenario.

**Application of section 11 of the Bill of Rights: “the right to refuse to undergo any medical treatment” and section 21 of the Bill of Rights: “the right to be secure against unreasonable search or seizure” (and possibly associated rights such as those under sections 9, 10, 22 and 23(5) of the Bill of Rights)**

Challenges by employees or unions to employer actions asserting freedom from involuntary testing procedures and unreasonable search have periodically arisen for determination under employment law. The leading cases<sup>54</sup> have eschewed direct application of the Bill of Rights, unless expressly imported by the terms of the parties’ (collective) agreement.

The two alternative arguments based on Bill of Rights preferred interpretations advanced above would enable a more direct invocation of relevant rights enjoyed under the Bill of Rights in drug and alcohol testing cases. But doing so may well not advance the argument for the employees concerned, if the substantive rights are treated as not themselves “delivering the goods”, or as subject to “justified limitations” in any event.<sup>55</sup>

## CONCLUSION

In Molière’s play *Le Bourgeois Gentilhomme*, the “Would-be Gentleman” of the title, blessed with more money than sense, hires a tutor to improve his prospects in society. He is enlightened by the tutor concerning the difference between prose and poetry, and both delighted and proud to find that he has been speaking prose all his life. Some of you may have been similarly impressed to learn that you have been practising public law all the while.

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<sup>53</sup> [1998] 3 ERNZ 823, especially at p 846, 854, 861 – 2. See also **BL & JA McGinty Ltd v Northern Distribution Union**, High Court, Auckland Registry, CP1959/91, 4 December 1991, Temm J; **Port of Napier Ltd v Rail and Maritime Transport Union Inc**, Employment Court, Wellington, WC32A/07, 17 December 2007, Colgan CJ at [54].

<sup>54</sup> **NZEPMU v Air New Zealand Ltd**, above; **Electrical Union 2001 Inc v Mighty River Power Ltd**, above; **MUNZ v TLNZ Ltd**, above. Note also **Hooper v Coca-Cola Amatil (NZ) Ltd** [2002] NZEmpC 11, [34] – [36].

<sup>55</sup> Contrast **Cropp v Judicial Committee** [2008] 3 NZLR 774.

However, it is important not to get carried away. Running human rights arguments in an employment law (or indeed any other) context requires more than enthusiasm. It requires both application and discernment. Counsel (or advocates) who simplistically wave human rights about like flags, without undertaking the necessary supporting analysis and detailed research, do their clients no favours. Putting forward weak human rights arguments sets back the overall development of human rights law rather than advancing it. As with all advocacy, the rule of thumb should be that, if your first two or three best arguments cannot carry your client's case, then a make-weight additional argument, human rights-based or not, will undoubtedly not do so.

With that caveat, next time a case with a human rights dimension comes along, chance your arm. The present boundaries such as they are deserve to be pushed.

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16<sup>th</sup> September 2014