

LEGAL FORUM

Discrimination and Human Rights: An Overview of Remedies

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Up until 10 August 1993, New Zealand's anti-discrimination law consisted of three statutes: The Employment Contracts Act 1991, The Race Relations Act 1971 and The Human Rights Commission Act 1977. There is also the Equal Pay Act 1972, which abolished gender based wage differentials in industrial awards but this is of less practical significance now and accordingly is not considered further. The Human Rights Act 1993 repeats and replaces the latter two Acts from 1 February 1994. The new Act provides protection from discrimination not only in the employment relationship, but also in such areas as the provisions of goods and services, accommodation, advertising and access to public places.

In the employment context, the new Act mirrors the protection provided by the Employment Contracts Act and in some areas strengthens it. The two Acts stand alongside one another providing alternative routes for the aggrieved employee.

The existence of two regimes means that an act of discrimination may result in proceedings under either statute with different remedies. It is therefore necessary to examine both statutes when considering remedies.

The Human Rights Act 1993

Liability

The new Act does not prohibit discrimination at large, nor discrimination in the popular sense. It is only specific types of behaviour in specific situations which are expressly prohibited.

Section 22 of the Human Rights Act is the pivotal section on discrimination in employment matters. It provides:

Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer, -

- (a) To refuse or omit to employ the applicant on work of that description which is available; or
- (b) To offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or
- (c) To terminate the employment of the employee, or subject that employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or
- (d) To retire the employee, or to require or cause the employee to retire or resign; by reason of any of the prohibited grounds of discrimination.

The prohibited grounds for discrimination are set out in Section 21 of the Act. They are:

- (i) Sex;
- (ii) Marital status;
- (iii) Religious belief;
- (iv) Ethical belief;
- (v) Colour;
- (vi) Race;
- (vii) Ethnic or national origins;
- (viii) Disability;
- (ix) Age;
- (x) Political opinion;
- (xi) Employment status;
- (xii) Family status; and
- (xiii) Sexual orientation.

Thus the definition has two operative components. For discrimination to occur the employer must:

- (a) Make a decision in one of five broad areas, namely:
 - (i) Recruitment;
 - (ii) Offering terms and benefits;
 - (iii) Promotion and transfer;
 - (iv) Training;
 - (v) Dismissal or retirement; **and**
- (b) That decision must be influenced by consideration of one of the thirteen factors listed in Section 21.

In addition to Section 21, the Act provides for some further forms of discrimination.

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Sexual and racial harassment

Sexual and racial harassment are two further grounds on which the complaints of discrimination can be made. Neither previously had a specific place in Human Rights Legislation, although such claims have been possible under the Employment Contracts Act.

When a complaint is made, the behaviour complained of, being behaviour which the complainant finds unwelcome or offensive, must be either repeated, or of such a significant nature that it has a detrimental effect on the complainant in relation to his or her employment.

Employers are liable for the behaviour of their employees (s.68). A complaint about the actions or behaviour of *another employee* is possible *without* first having to notify the employer in writing. This means that employers are liable for harassment of which they have no knowledge. Only the existence of an appropriate programme or procedure will afford protection against such claims.

Sexual or racial harassment complaints may also be made in respect of an employer's customer or client. Any such complaint is to be made in writing to the employer who must enquire into the matter and take all practicable steps to prevent a repetition. If harassment does occur again, and nothing has been done to prevent it, the employer is deemed to have breached the Act. The affected employee may then lodge a complaint.

The Act has extended the protection from sexual and racial harassment to the pre-employment situation (s.62(3)(a) and s.63(2)(a). This is a significant extension to the protection given under the Employment Contracts Act and will prevent sexual/racial harassment in, for example, job interviews (ie before the employment contract is entered into).

Indirect discrimination

Discrimination need not be direct. A complaint may be made where a particular activity, although not intended to be discriminatory, may, nevertheless, be discriminatory in effect. For example, holding training sessions in the evening may mean employees with family responsibilities cannot attend. In the event of a complaint, the employer would need to be able to show why no other time was available. If an activity is discriminatory in its effect, it is unlawful unless there is a good reason for it.

Remedies

The Human Rights Commission has the power to investigate complaints for any possible breach of the Act. If the complaint is not settled in the preliminary stages civil proceedings may be brought at the suit of the Commission before the Complaints Review Tribunal. Where the Tribunal finds that the Act's discrimination provisions have been breached, it

may grant one or more of the following remedies (s.86):

- (a) A declaration that the defendant has committed a breach of the Act;
- (b) An order restraining the Defendant from continuing to, or permitting others to, breach the Act;
- (c) Damages for:
 - (i) Pecuniary loss suffered, and expenses reasonably incurred by the complainant as a result of the breach;
 - (ii) Loss of any benefit which the complainant might reasonably have been expected to obtain but for the breach;
 - (iii) Humiliation, loss of dignity, and injury to the feelings of the complainant;
- (d) An order that the defendant perform any acts with a view to redressing any loss or damage suffered by the complainant as a result of the breach;
- (e) A declaration that any contract entered into or performed in contravention of Part II of the Human Rights Act is an illegal contract;
- (f) Relief in accordance with the Illegal Contracts Act 1970 in respect of any contract to which the defendant and complainant are parties; or
- (g) Such other relief as the Tribunal thinks fit.

Costs may be awarded whether or not any other remedy is granted. No award of damages, or indeed any remedy granted, may exceed the monetary limit of \$200,000 set out in the District Courts Act 1947. In deciding what remedies (if any) to grant, the Tribunal must take into account the fact that a particular breach was unintentional or without negligence on the employer's part.

The Employment Contracts Act 1991

Liability

The Labour Relations Act 1987 made the personal grievance procedures available to claims of discrimination for the first time. The Employment Contracts Act maintains that right. An employee may bring a personal grievance against his/her employer if the employee is discriminated against in terms of Section 28 of the Employment Contracts Act.

As mentioned above, there is a significant overlap between personal grievance proceedings under Section 28 and complaints made under the Human Rights Act.

Under Section 28 an employee is discriminated against if:

- ... the employee's employer or a representative of that employer -
 - (a) Refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or

- (b) Dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
- (c) Retires that employee, or requires or causes that employee to retire or resign -
- by reason of the colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief, or age of that employee or by reason of that employee's involvement in the activities of an employee's organisation.

The grounds of discrimination under the Human Rights Act are wider than the Employment Contracts Act. Under the Human Rights Act the further grounds of disability, political opinion, employment status, family status and sexual orientation are made unlawful. On the other hand the Employment Contracts Act protects discrimination by reason of an employee's involvement in the activities of an employees' organisation - a ground missing from the Human Rights Act.

Like the Human Rights Act, the Employment Contracts Act also provides remedies for sexual harassment (s.29).

Remedies

If an employee is found to have a grievance, the Employment Tribunal or Court has the power to award a range of remedies. These include:

- (a) The reimbursement to the employee of the wages or other money lost as a result of the grievance;
- (b) Reinstatement of the employee to their former position or placement in a position no less advantageous;
- (c) The payment of compensation by the employer, including compensation for:
- (i) Humiliation, loss of dignity, and injury to the feelings of the employee; and
 - (ii) Loss of any benefit which the worker might reasonably have been expected to obtain if the grievance had not arisen;
- (d) If the Tribunal or Court finds an employee to have been sexually harassed, recommendations to the employer concerning the action the employer should take in respect of the person who was guilty of the behaviour, which action may include the transfer of that person, the taking of disciplinary action against that person, or the taking of rehabilitative action in respect of that person.

The Act also provides that in deciding on the nature and extent of the remedy to be awarded the extent to which the actions of the employee contributed towards the situation giving rise to the grievance should be taken into account.

The Employment Contracts Act provides no limit on the amount of compensation that can be awarded by the Tribunal for distress and humiliation.

Choice of procedure

As indicated above complainants must elect which procedure they wish to follow. They may pursue either a personal grievance under the Employment Contracts Act, or a complaint under the Human Rights Act, but not both (s.39 of the Employment Contracts Act and s.64 of the Human Rights Act).

A factor that is presently relevant when deciding which procedure to invoke is that the remedies available under the two statutes vary. Section 40 of the Human Rights Commission Act currently provides that damages for humiliation and loss of dignity of the aggrieved person shall not exceed \$2,000, whereas under the Employment Contracts Act the equivalent Section 40(1)(c) has no limit on the amount of compensation that can be awarded by the Tribunal for distress and humiliation.

This distinction is all but gone under the new Act. The ceiling on compensation has been raised from \$2,000 to the District Courts Act limit of \$200,000. As a result, it would seem that the differences between actions under the Human Rights Act, and personal grievance claims under the Employment Contracts Act, will be minimal. Although as the Court of Appeal indicated in *Telecom South Limited v Post Office Union Inc.* ([1992] 1 NZLR 275) awards of the Employment Court in excess of \$50,000 are "exceptional".

Recent Cases

There is no case law on the Human Rights Act 1993 as it is not effective until 1 February 1994. It is therefore not possible to predict with complete certainty the approach that the Tribunal and the Courts will take under the new legislation. However, given that the new Act does not radically alter the present position, it is doubtful that there will be any significant change in approach. It follows that recent cases under the present legislation will be the guide.

It is perhaps easiest to separate out each head of discrimination for discussion. Because of the similarities in the two pieces of legislation and the likelihood of similar results under each, the decisions of the two judicial bodies, the Complaints Review Tribunal and the Employment Tribunal, are considered together.

Sex

This ground of discrimination has given rise to some of the most widely publicised cases.

The Equal Opportunities decision in *Human Rights Commission v Air New Zealand* ([1989] 2 NZELC 96,614) was the first opportunity the Tribunal had to invoke the procedures of the Human Rights Commission Act. In the landmark decision in December 1988, the Tribunal found that sex discrimination had occurred because of the treatment of female cabin crew as compared to male cabin crew and in the ability of females to obtain the same

promotion as their male colleagues. The Tribunal found that the 17 female complainants had endured behaviour and incidents which ranged from indifference to extreme harassment of a sexist and at times racist nature and awarded compensation for loss of salary, opportunity and annual leave and damages for humiliation and loss of dignity.

While the individual payouts to the women and the total amount of the settlement remained confidential, the company did agree to meet the costs of the Human Rights Commission in taking the case to the Tribunal. These amounted to \$303,858.

In *Barry v NZ Fire Commission* (Human Rights Commission, 28 January 1982) Mrs Barry applied to join the fire service and was turned down on the grounds that she was below the minimum height requirement. The Human Rights Commission found that there was no minimum height required, and that she had in fact been rejected because of the all male tradition of the service. Mrs Barry was subsequently appointed to fire fighting duties.

A more recent case was *Proceedings Commission v Armourguard Security Limited* (21 August 1991, EOT 13/90). Armourguard was held to have breached the Human Rights Commission Act because it would not employ women on armoured car and various other duties between the hours of midnight and 6:00am. Nor would it afford women the same terms of employment and opportunities for training, promotion and transfer as were made available to their male equivalents. It was held that women were subjected to detriment in that they were precluded from work attracting higher pay.

The Tribunal made orders restraining Armourguard from continuing the breaches and awarded damages of \$5,000 in respect of humiliation, loss of dignity and injury to feelings of the five female Armourguard employees. It also ordered that Armourguard implement and maintain for a minimum period of three years an equal employment opportunities programme, and required Armourguard to display a notice of its non-discrimination policy at all branches. Finally, a joint press release on the matter by Armourguard and the Human Rights Commission was ordered.

The most recent case concerning this form of discrimination was *Proceedings Commission v Howell & Anor* (18 June 1993, EOT 5/93). The complainant, who had one pre-school child, had been offered a full-time position as a hotel manager. She accepted the position but indicated that she would need a few days to make babysitting arrangements.

Although the complainant thought the job was hers, the manager who had offered her the position had second thoughts after discussions with the owner of the hotel. The position was subsequently offered to another person apparently less satisfactory for the job.

It transpired that the reason for the complainant's non-appointment was primarily because she was a woman with a young child. The hotel owner admitted that he did not feel that the post of hotel manager was suitable for a woman with a child. The owner argued that the complainant's non-appointment was caused solely by her responsibilities as a parent, and not because she was a woman. Discrimination on the grounds of parenthood is not illegal under the Human Rights Commission Act 1977 (although the Human Rights Act 1993 now expressly includes pregnancy and childbirth within the definition of sex). However, the appointee to the position was a male who also had young children. This

tended to confirm that the complainant's failure to get the job was not because she had a child but because she was a woman with a child.

Because there had been sexual discrimination, remedies involving compensation of almost six months' projected salary were granted, after a significant deduction for child-minding costs. The total was \$17,388.

Marital status

A recent illustration of discrimination on this ground is provided by *Proceedings Commission v NZ Post Limited* ([1992] NZAR 111). NZ Post Limited had a voluntary severance scheme which provided for a payment related to wages, together with a smaller percentage payment for the employee's spouse and for each dependant child. The complainant, who was not married and therefore did not receive the additional payment which married employees received, challenged the legality of the arrangement. It was held that it did amount to discrimination on the grounds of marital status since the complainant did not get the additional payment precisely because of his marital status, ie. the fact that he was not married.

The Tribunal ordered that a declaration that NZ Post Limited had breached the Human Rights Commission Act be made. The complainant was awarded \$1,000 in damages for humiliation, \$1,451 as reimbursement for his legal fees and \$7,500 costs.

Religious or ethical belief

The leading case on discrimination on these grounds is *Human Rights Commission v Eric Sides Motors* ([1981] 2 NZAR 447). The defendant, a service station, advertised for a "keen Christian" to work in the garage. A young man answered the advertisement and during a telephone conversation was asked whether he went to church on Sundays. The applicant indicated that he did not and was told by the proprietor that it was no use coming for an interview.

The case took a rather unusual twist insofar as the defendant proprietor staunchly and vigorously maintained that he had a right to employ only "keen Christians", and that if he was faced with a choice between two applicants, one of whom was a Christian and one who was not, he would always choose the Christian. However he maintained that on this particular occasion he made the decision not to employ the applicant because earlier in the conversation he had ascertained that the applicant had had a large number of jobs in relatively quick succession, and therefore appeared to be a highly unreliable and unsatisfactory employee.

On the evidence before it, the Court found that it was not proved that the applicant's failure to attend church was an operative factor, and therefore it was held that this particular element of discrimination had not been proved. However, while his actions were found to be legally justified, the employer still suffered some expense because of the proceedings. Mr Sides found himself involved in two years of trouble with the press and the Human

Rights Commission, and was ordered to pay the Court costs of the complainant up to \$4,000.

Colour, race, ethnic or national origins

The leading case in this area is *Race Relations Conciliator v Marshall* ([1993] 2 ERNZ 290). The Defendant was a matron of a rest-home who was approached by an employment programme tutor about the possibility of employment for a student. Having interviewed the student, the defendant told the tutor that she found nothing wrong with the student, but that she was apprehensive about how her residents would react to waking up and seeing a dark face looking at them.

The Complaints Review Tribunal found that work had been available for which the student was qualified and that the defendant decided not to employ the student because of her colour and its anticipated effect on the residents. Accordingly, it held that the defendant had breached the Race Relations Act 1971. The Tribunal awarded \$1,500 compensation for the hurt and embarrassment that the student had suffered and the effect on her confidence in herself and her courage in seeking work. The Tribunal noted that the purpose of damages was to compensate the student, not to punish the defendant. An order was also made that the defendant provide a written apology to the student.

Another case in this area is *Human Rights Commission v McCarthy* ([1983] 3 NZAR 450). The decision arose as a result of a complaint under the Race Relations Act, when employees of a clutch repair garage made particularly derogatory and racially offensive comments to a Samoan customer. The Human Rights Commission successfully brought an action against the employees, the managing director and the company.

The Equal Opportunities Tribunal awarded the complainant \$900. The managing director (the employee who had uttered the most offensive words) was ordered to pay \$500, the company was ordered to pay \$250 and the remaining \$150 was paid by the remaining employee. Special damages for loss of the complainant's wages (\$153.23) and costs (\$1,500) were paid by the defendants in proportions corresponding to their several liability for damages.

Age

This ground of discrimination has been the subject of much public attention, and is currently making up 44 percent of all enquiries and informal complaints to the Commission (Human Rights Commission Newsletter, September 1992: 2). The recent suggestion by the Commission that advertising for a "senior lecturer" amounts to discrimination on the basis of age has been the subject of much controversy. The Commission has also indicated in its publication *Age Discrimination in Employment - Guidelines for Advertisers* that they consider the following to be discriminatory:

Driver: must have at least five years experience.
School leavers required.
Mature and experienced senior salesperson.
Wanted, youthful and energetic person.

Age is a relatively new head of discrimination, having been introduced by Section 3 of the Human Rights Commission Amendment Act 1992, and the first case under the new law has recently arisen. A public sector employer required two 60 year old employees to retire, purely because they had turned 60. In a settlement mediated by the Human Rights Commission the employees received compensation totalling \$26,500.

The new Act goes further than the present legislation by providing that, after 1 February 1999, there will be no age limit beyond which employees can be required to retire. Whether or not an employee's services are retained will depend upon their ability to perform the job.

Employee organisation involvement

As discussed above, this ground of discrimination is not included in the Human Rights Act. Discrimination on this basis can only be remedied by using the personal grievance procedure under the Employment Contracts Act.

An illustration of this form of discrimination is provided by *Otago Hotel IUW v Shiel Hill Tavern Limited* (27 June 1990, CLC 42/90). The complainant was dismissed having been the only employee to participate in a five day strike. The Labour Court held that the employer had discriminated against the complainant by reason of his involvement in union activities and that consequently the complainant's dismissal was unjustified. He was awarded \$2,500 for humiliation, \$2,500 for loss of benefits, \$3,858 wage reimbursement and \$500 costs.

In *New Zealand Merchant Service IUW v Taranaki Harbour Board* (4 October 1990, WLC 71/90) the complainant, a dredgemaster, successfully claimed that he was not appointed to a higher position because the selection panel was biased. It was held that the complainant was discriminated against because of his union activities. The complainant was awarded \$25,000 compensation for injury to feelings and \$45,000 for loss of future earnings.

In *New Zealand Airline Pilots Association IUOW v Air New Zealand* ([1992] 3 ERNZ 73) the grievant succeeded in claiming that he had been discriminated against because of union activities. He had applied for a standards (training) position in respect of a different aircraft type. The employer rejected this application for several reasons including the grievant's union activities, inability to contact him, excessive sick leave and perceived disloyalty. The grievant was engaged in award negotiations as a union representative. He was told by the employer that if he withdrew from his position as a union negotiator he could have a standards position. It was held by the Employment Court that this was just the type of action which the legislation prohibited. In so acting the employer had stepped over the line between acceptable managerial direction and discrimination.

The Court awarded the grievant \$15,798 as lost remuneration and \$10,000 compensation for being disadvantaged by the non-appointment because his future promotion prospects and remuneration increases had been delayed. The Court refused a compensation award for humiliation and distress because of the grievant's "robust and resilient nature in dealings with the employer".

Sexual harassment

A recent illustration of this form of discrimination is provided by *Fulton v Chiat Day Mojo Limited* ([1992] 2 ERNZ 38). The applicant was employed as a receptionist. When employed she was warned about the "off beat" nature of the workplace sense of humour. During the course of her employment she was induced to page non-existent people with names which amounted to "phonetic obscenities". She complained to her employer about this sexual harassment. The offending staff were spoken to about the behaviour and she was reassured that it would not be repeated.

Soon afterwards the applicant was given a letter by her employer stating some concerns about her work performance. She noted that the sexual harassment had an effect on her work, and her employer suggested that she was over-reacting to a joke. She was asked why she continued with the job, and the following day she resigned.

The Employment Tribunal held that the words complained of constituted sexual harassment as they were of a sexual nature, unwelcome and offensive and were detrimental to her work. However, as the employer had taken all practical steps to prevent the reoccurrence of such harassment the applicant had no personal grievance against the employer.

It was held however, that the applicant was constructively dismissed since the employer made it plain that the jokes were amusing and remained amusing. By condoning the offensive behaviour, even after taking steps to prevent its reoccurrence, the employer effectively told the applicant that she ought to accept such behaviour. In such circumstances her resignation amounted to a constructive dismissal. The complainant was awarded \$3,000 compensation and \$1,250 costs.

In *Proceedings Commission v New Zealand Van Lines Limited* ([1993] 2 ERNZ 112) the grievant was employed by the defendant in one of its branches. Two co-workers subjected her to remarks of a sexual nature and one of the co-workers seized her by the breast on two occasions.

The Tribunal found that the employer had not established a defence under Section 33(3) in that it had not taken such steps as were reasonably practicable to prevent the conduct which occurred. The employer had failed in its obligations to ensure proper supervision through its manager, and to ensure that a climate did not exist which was likely to give rise to discrimination of the sort which occurred. Thus, the Tribunal awarded the maximum amount of damages of \$2,000.

It was also held that, while it was appropriate to suppress the identity of the grievant, such an order should not be made for the employer. While publication of the company's name might have had an adverse impact on its trading reputation, the Tribunal held that "that was

something the company had brought upon itself".

The employer is, in many respects, in a "double jeopardy" situation in respect of allegations of sexual misconduct. Not only must the employer be fair to the employee allegedly being harassed, but it must also be fair to the employee allegedly harassing.

In *B v NZ Amalgamated Engineering Union* ([1992] 2 ERNZ 554) an employer dismissed an employee for misconduct following complaints of sexual harassment from two of his female work colleagues. The incident complained of was an exchange of words between the complainant and Mr B, followed by Mr B taking hold of the complainant around her shoulders, pulling her towards him and attempting to kiss her, or actually kissing her (the facts were in dispute). The words complained of were to the effect that Mr B had seen the complainant with another employee walking arm-in-arm and flirting madly.

Mr B was put on notice of instant dismissal if the allegations were established. The employer undertook an investigation and concluded that the words used were of a sexual nature, the physical conduct was both unwelcome and offensive and that such conduct amounted to sexual harassment. Mr B was accordingly dismissed.

The employee challenged his dismissal and the Employment Tribunal held that the conduct complained of did not amount to sexual harassment within the meaning of the Act. The conduct was offensive and contained a sexual dimension and may even have constituted indecent assault, but the Tribunal found that it had not been established that the conduct was of such a degree as to have had a detrimental effect on the complainant's employment.

The dismissal was found to be both substantively and procedurally unfair. The Court further noted that even if the conduct complained of had amounted to sexual harassment, dismissal would have been an inappropriate form of discipline. This was because there were other options such as a final warning, counselling or opportunity to apologise and some or all of these would have been more appropriate.

The Tribunal made no orders as to remedies. It recommended that Mr B be reinstated and adjourned the hearing to enable the parties to consider and agree upon the terms of reinstatement.

A similar case is *NZ Association of Polytechnic Teachers Inc v Nelson Polytechnic* ([1991] 1 ERNZ 662) in which complaints of sexual harassment committed by a temporary tutor were made by students to a supervisor. The tutor was advised of the complaints, but was not told their nature. The supervisor then investigated the complaints with an independent committee. Despite the committee reporting that there was no justification to dismiss the tutor, the supervisor did dismiss him.

The Court held that the dismissal was unjustified because the complaints of sexual harassment lacked detail as to time and place, and were insufficient proof of the alleged misconduct. The grievant was awarded substantial compensation for anxiety, distress and future economic loss of prospects of employment. This amounted to \$30,000 for lost wages, \$25,000 compensation for humiliation etc and \$40,000 compensation for future economic loss. See also *C v L D Nathan & Co Ltd* ([1988] NZILR 304).

Standard of proof

The correct standard of proof in a sexual harassment case is the balance of probabilities. The grievant has to prove that "but for" the sexual harassment the resignation would not have occurred. In *Z v A* ([1993] 2 ERNZ 469) the Court in a case involving a resignation as a result of sexual harassment indicated that what has to be proved to show a constructive dismissal is that there was a breach of duty by the employer, that the employee resigned, and that there was a causal link between the two.

Penalties

Human Rights Act

Failure to appear before the Complaints Review Tribunal, following a summons, or a refusal to give evidence or to produce any relevant document, carries with it liability to a fine not exceeding \$1,500 (s.113).

It is an offence, to unlawfully or wilfully obstruct or hinder the Commission or a Commissioner, or to fail to comply with any lawful requirement, or to make a false or intentionally misleading statement. In such cases a fine of up to \$3,000 may be imposed (s.143).

Employment Contracts Act

Any party who breaches an employment contract or breaches a provision of Parts II, III or IV of the Employment Contracts Act is liable to a penalty under the Act (ss.51-55). In the case of an individual the maximum penalty is \$2,000. For a company it is \$5,000.

A penalty action for breach of an employment contract is commenced by the party affected by the breach in respect of which the penalty is sought (s.53(1)(a)). This contrasts with the Labour Relations Act 1987 which required penalty actions to be brought by either the union or employer party to the collective instrument or in the case of a breach of the Act by the Labour inspector. Any penalty ordered is paid into Court and then to the Crown Bank Account (s.54).

Because the parties are required to bring penalty actions at their own suit they are not cost effective particularly when the payment is made to the Crown and not to the individual although there is provision under the Act to pay a whole or any part of the penalty to any person (s.54(2)). An indication of the level of penalties imposed has been recently provided by the Employment Tribunal in *Young v Haunui Farm (1985) Ltd* (unrep., AET 288/93, 14 October 1993) where the respondent employer had a penalty imposed in the sum of \$150.00 for failing to provide, upon request, a copy of the wage records relating to the applicant.

Because of the quasi criminal nature of penalty proceedings the maximum penalty is reserved for only the most serious cases. The criminal burden of proof applies in penalty

actions. This effectively means that there are two proceedings, with different standards of proof required, possibly heard at the same time. The Chief Judge in *NZ Waterfront Workers Union v NZ Association of Waterfront Employers* ([1989] 3 NZILR 210) doubted whether it was possible for the two proceedings to be heard at the same time. However section 140(d) of the Act which allows the Court or the Tribunal to give such directions as deemed necessary or expedient may well allow joinder to consider both proceedings at the same hearing.

Higher awards?

There is no doubt that the passing of the Human Rights Act has indicated a new commitment to the prevention of discrimination in New Zealand. The Act sends a clear message to both employers and the Courts that discrimination in the workplace is unacceptable and will be punished. The raising of the maximum amount of damages from \$2,000 to \$200,000 for humiliation, loss of dignity and injury to feelings certainly gives the Courts the power to be more severe in their orders. Whether the Courts do in fact raise the average award given to grievants remains to be seen.