MIGRANT WORKERS – AN EVOLVING FIELD

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Introduction

This paper focuses on the temporary migrant workforce and the issues which employment lawyers should be aware of. Many workers on temporary visas must abide by the conditions of their visa as to the work that they do, so their situation is distinct from that of Residents and Citizens. They also pose challenges for employers who can – and do – wrong-foot their management of foreign staff. This can have severe repercussions not just for the worker, but for the employing business.

Migrants now form a significant segment of the New Zealand working population. In the year to June 2018, over 230,000 Work Visas of all types were approved, and as many of them can get 3- or 5-year visas the numbers actually on the job throughout the country can be much higher. Of these, 16.5% obtain Essential Skills visas.[1] Many more, including partners of New Zealanders or of other Work Visa holders, are free to work at anything, anywhere.

The main categories of visas have remained largely the same over the last few years. There have been some major rewrites to address systemic problems, such as the recent streamlining of Post-Study Work Visas available to graduates of New Zealand tertiary export education. However, professional advisers have experienced both changes in the way they need to work (especially the introduction of online applications), and shifts in emphasis on the way that the Instructions are applied. This plays out particularly in the scrutiny being applied to employers, their claims about the conditions under which migrants will work, and their track record, as will be addressed later in this paper.

Sources and Resources

While the Immigration Act 2009 is the core empowering enactment, most immigration practitioners spend their time amid the Immigration Instructions contained in the INZ Operational Manual.[2] Work in this area requires familiarity with the labyrinthine structure of the Manual, and awareness of the influence of disparate policies. For example. While the Essential Skills policy is gathered under Instructions WK, someone managing a visa process needs to take into account *inter alia*:

- Health and character requirements at A4 and A5 respectively;
- The test for an applicant's bona fides at E5 (which can invoke their past history of breaching visa conditions;

[1] W1 – Work Applications Decided (INZ Statistics sourced at https://www.immigration.govt.nz/about-us/research-and-statistics/statistics).

[2] Found at http://www.immigration.govt.nz/opsmanual/index.htm.

- Compliance obligations on employers and the nature of their offers of employment at W2.10;
- The duty of Immigration New Zealand (INZ) to put potentially prejudicial information (PPI) to an applicant at E7.15.

Anyone dealing with employment-based visas including Work Visas and Skilled Migrant Residence applications must have a working knowledge of the structure and taxonomy of the Australia & New Zealand Standard Classification of Occupations (ANZSCO).[3] While most agree (including some in INZ) that the ANZSCO is often an inadequate system for accurately describing jobs, both Essential Skills and Skilled Migrant policy require applicants to demonstrate a "substantial match" between the job they rely upon for their visa, and a single ANZSCO occupation.[4]

In some cases, decisions of the Immigration & Protection Tribunal can be instructive and can assist with advocacy.[5] While the IPT's jurisdiction as to visa decisions is limited to Residence appeals, its dicta about the approach to assessing the "substantial match" test are now directly relevant to classes of Work Visa applications such as Essential Skills.[6] Another example is its observations on INZ's approach to the question of whether the proposed employment is sustainable.[7]

For a formal treatment of the state of New Zealand immigration law, the standard text is that of University of Waikato lecturer Doug Tennent, now in its third edition.[8]

Some of the Changes

New Government: While it is reasonable to say that the policies developed by unelected Government officials tend to follow a fairly consistent track irrespective of who is in Parliament, the switch to a Labour Government introduced new emphases in their implementation. Labour declared a "Kiwis First" philosophy and an agenda to slash the numbers of long-term migrants, although changes in Work and Residence Instructions introduced in May 2017 had already resulted in reductions in job-based Residence applications.

In line with wider concerns about worker rights that have played out in the employment space, INZ along with the MBIE Labour Inspectorate have devoted increasing attention to the conditions under which migrant workers are employed. This includes the introduction of the "blacklist" of employers who have breached various employment enactments such as the Wages Protection Act and the Employment Relations Act.[9] The blacklisting mechanism is discussed in more detail later.

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3 Found at http://www.abs.gov.au/ANZSCO.

4 For Essential Skills visas, see WK 3.5.10; for Skilled Migrant Residence, see SM6.10.5.

5 Found at https://www.justice.govt.nz/tribunals/immigration/immigration-and-protection/decisions/ .

6 See for example WB (Skilled Migrant) [2015] NZIPT 202536 as to the distinction between identifying the skill level of an occupation, and the bare need to perform the Core Tasks for that occupation.

7 For example, VN (Skilled Migrant) [2017] NZIPT 203710 involved a mistaken evaluation of past financial statements as mere forecasts, which amounted to a failure to give the application proper consideration per Instructions A1.5.a. See also VU (Skilled Migrant) [2018] NZIPT 204726 which stresses the sustainability question as being prospective in nature, and thereby reinforced the relevance of forecasts.

8 Tennent, D & Ors, Immigration & Refugee Law (LexisNexis, 3rd Ed, 2017).

9 A recent and high-profile example of this was the ERA award against Burger King which resulted in it being stood down from hiring migrant staff for 12 months, in in August 2017.

Online applications: In 2015 INZ introduced Immigration Online, which has progressively been extended to allow many types of visa applications to be filed electronically.[10] The ability to file group applications, and those based on partnership, was the latest addition in the last couple of months. The main exception at present is Resident Visas, although it is likely that this will come in the next couple of years.

Filing an online application requires a RealMe account. For professional advisers, this usually means entering the required data themselves, after being supplied with information by the client. Recent discussions between industry and MBIE have highlighted practical problems, especially in a practice where multiple practitioners work and staff arrive and depart.

For people from many countries, and for those already in New Zealand, the shift to online applications has obviated the need to supply any physical documents, especially their passport. In parallel with this, INZ has introduced e-visas, and on 4 July 2018 it phased out the issuance of hard-copy visa labels. The e-visa is provided as an emailed document which must be carried by the migrant to establish their right to be in the country.

As in other areas of practice, these initiatives require professional advisers to have robust and comprehensive electronic file systems.

Salary Bands: In August 2017, both the Essential Skills Work Visa and the Skilled Migrant Residence Instructions underwent a significant amendment. For the first time, an assessment of the skill level of jobs is tied to the per-hour wage level on offer. One result of this is that an applicant for Skilled Migrant Residence cannot claim points for their employment unless they are paid above a minimum threshold, currently $24.29 per hour.[11]

For essential Skills Work Visas, the wage rate has the following impacts on applicant entitlements:

Salary p.h.	ANZSCO Skill Levels	Skill Band	Work Visa conditions
Under $20.65	All	Lower-skilled	1 year Dependents get Visitor Visas only
$20.65 - $36.43	Levels 4 – 5	Lower Skilled	
$20.65 - $36.43	Levels 1 – 3	Mid-skilled	3 years
Above $36.43	All	Higher Skilled	5 years

[10] The portal is found at https://online.immigration.govt.nz/igms/online/.
[11] This and other thresholds are reviewed in January each year, and adjusted in line with the CPI.

The greatest effects are felt at each end of the spectrum. Those who are paid enough may qualify for a visa even if their job is ostensibly a low-skill occupation – for example, truck drivers. On the other hand, those accepting an income below $20.65 per hour must apply for a further visa every 12 months, and after three years on such visas they must leave New Zealand for a year before being allowed to come back on such a visa.[12] They have lost their previous ability to support a partner on an open Work Visa, and their children cannot attend school here unless they apply in their own right as foreign fee-paying students.

The skill level associated with the employment, derived from the wage or salary level, is now explicitly recorded as a condition on the migrant's Work Visa. As a consequence, if they are not actually paid at that level for the whole duration of that visa, they can be deemed to be in breach of their visa conditions, which is likely to prejudice their ability to get temporary visas in the future.

Interim Visas: At the end of August 2018 the Government introduced some simple but significant changes to the way that Interim Visas work. An Interim Visa is usually granted automatically when someone applies for a new visa while in New Zealand, and starts the day after the last regular visa expires. It thus preserves their lawful status until a decision is made on the new application. However, if the new application was declined, INZ used to cancel the Interim Visa on the same day. People would suddenly find themselves stranded unlawfully in the country with no regular way to resolve that situation. One solution was to request a visa under s 61 Immigration Act 2009, but Immigration has the power to reject these requests out of hand, and give no reasons for doing so.

From now on, however, Interim Visas are deemed to expire 21 days after the main visa application is declined. The most important result is that visa applicants can apply to have the decline decision reconsidered. People are only entitled to ask for a reconsideration if they still have a visa to be in New Zealand.[13] Under the previous regime this was denied to most of them, because they would become overstayers as soon as the decision was made.

A reconsideration request must be filed within 14 days of receiving notice of the decline decision. As most visa decisions are notified electronically nowadays, it is best to assume that this time runs from the date of the decision letter. It is to be assessed by a visa officer of the same or higher grade than the original decisionmaker. They are obliged to make a de novo assessment based on all information provided, plus new information that may be furnished in the reconsideration application.[14]

Overall, the change marks a significant improvement for migrants who have marginal cases, or who get poor decisions against them. Instead of having to take their chances with a highly discretionary s 61 assessment, they can now require visa officers to apply the existing policy to any reconsideration - as well as consider an exception to Instructions - and they must give a reasoned decision in writing as to why they have made their latest decision.

[12] Instructions WK3.20.5

[13] Immigration Act 2009, s 185

[14] *Park v Chief Executive, Department of Labour* (HC Auckland, 29 May 2006) which considered the equivalent provision in the precursor Immigration Act 1987.

Pressure Point - Calculating wage rates

As noted above, under the Essential Skills Work Visa regime, the rate of pay is measured per hour, irrespective of whether the employee's income is expressed annually, monthly or in some other way. The rules for calculating remuneration are critical in marginal cases to determining which skill band applies, so that it is worth setting them out in full:[15]

> b. Remuneration will be calculated according to the hours of work stated in the employment agreement.
>
> c. If the employment agreement specifies payment by salary, the payment per hour will be calculated by dividing the annual salary by 52 weeks, followed by the number of hours that will be worked each week.
>
> d. If the employment agreement specifies payment other than by hour (including payment by salary), and the hours of work are variable, an immigration officer may request evidence of the range of hours to be worked in order to calculate the remuneration and determine the skill-band of the employment.
>
> e. Hours of work per week will be considered variable where the employment agreement contains a provision allowing the employer to request or require the employee to work additional hours from time to time.
>
> f. Where evidence of the range of hours is provided in terms of (e) above or where the employment agreement specifies a range of hours, *the maximum hours will be used to calculate the remuneration.*
>
> g. Each hour of work must be paid at or above the remuneration threshold for a particular skill-band, for employment to be assessed as within that skill-band. [italics added]

In job situations where actual hours worked may vary, the use of the maximum likely hours as the basis for calculating the skill level puts the onus upon employers and professional advisers to work together closely and transparently to work out the terms of employment to be offered. Further, as has been pointed out in recent conference presentations by colleagues, the employer and employee must adhere to that hours-and-pay formula strictly, or risk jeopardising both the employee's ability to get further Work Visas, and the employer's record of compliance with employment and immigration law (and thus their ability to access migrant labour in the future).

It may force employers to rethink their workplace practices entirely in order to accommodate the desired migrant, while preserving (if possible) equitable arrangements with other employees. For example, while local staff may have historically come to accept the need to put in some extra time here and there in order to "get the job done", an equivalent migrant worker literally cannot afford to put in more than their contractual hours, and would have to down tools when their stipulated hours are up or risk breaching their visa conditions.[16]

The other policy in which salary calculations loom large is for offers of employment by accredited employers.[17] These can lead to the grant of a 30-month Talent visa, such that the worker can apply for Residence after two years if they remain with that employer. To qualify, they must be paid $55,000 per annum. However, that figure is predicated on the person working a 40-hour week, as specified in the Note to Instructions WR1.10. Obviously, problems can arise if the conditions of work exceed 40 hours, and even if the

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15 Instructions WK3.5.5.

16 See, for instance, Saull, P, *The Move Away from Relevant Experience: Skilled Experience and Remuneration Bands in 2018* (CCH Conference, May 2018). The example is given of a *force majeure* event requiring significant additional time to clear up and restock.

17 Instructions WR1

employment agreement is expressed as being "a minimum of 40 hours per week" without provision for overtime. Even more troubling scenarios develop at the time of applying for Residence. INZ will require production of wage and time records, and evidence of salary actually paid. It is not uncommon for the migrant to be denied Residence because they recorded more than 40 hours per week on some occasions, and in the context of the bare $55,000 salary only. As a result, they are deemed to have been paid less than $55,000 on a *pro rata* basis. Again, it is necessary at the outset to stress to both parties to the employment relationship that they must adhere to the terms of hours and pay, in order to preserve the employee's ability to capitalise on the Work to Residence visa.

Employer Compliance and Visa Applications

It is now not uncommon, in the course of a visa application, for INZ to require the prospective employer to supply evidence of being a good employer. This may include PAYE schedules, time and wage records, and even Health & Safety policies. On occasion this sort of request appears to fulfil a collateral function, because the information may be used to assess whether the company has complied with both immigration and employment law. What starts as a visa application can lead to an investigation by INZ Compliance, and possibly the MBIE Labour Inspectorate.

While the legitimacy of such fishing expeditions is questionable, INZ derives justification from its need to be satisfied that:[18]

> All employers wishing to employ non-New Zealand citizen or residence class visa holders to work in New Zealand must comply with all relevant employment and immigration law in force in New Zealand.

The criteria that may be applied to complete this assessment include:[19]

- paying employees no less than the appropriate statutory minimum wage or other contracted industry standard;
- meeting holiday and special leave requirements or other minimum statutory criteria, such as health and safety obligations;
- only employing people who have authority to work in New Zealand; and
- a "history of compliance with employment law" which covers meeting the requirements of a list of legislation from the Accident Compensation Act 2001 to the Parental Leave and Employment Protection Act 1987.

Visa officers will at times engage in a close examination of the employment agreement provided with an application. Visas may be PPI'd, or even declined, because the agreement contains out-of-date provisions for leave, including parental leave. They may refer to the core requirements for the content of individual employment agreement,[20] and point to a deficiency as evidence that the offer of employment is not acceptable. Those advising employers intending to hire migrants are advised to review not only the currency of the agreements being used by the company, but also the integrity of time and wage records, grievance policies and tax deductions.

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18 Instructions W2.10.5

19 Instructions W2.10.5 and W2.10.15.

20 As given at s 65 Employment Relations Act 2000.

When an existing visa holder applies for a further visa, the employer may well be asked to supply PAYE records to demonstrate that the worker was being paid in a manner consistent with the terms of the employment agreement supplied with the previously visa application. The employee will also have to furnish an IRD Summary of Earnings, and even their bank statements, to show that they have indeed been paid as stated.

For the purposes of this paper, a *migrant worker* is taken to mean a person on a temporary visa or (depending on the context) potentially a person in New Zealand unlawfully. Persons with an immigrant background, but who hold New Zealand citizenship or a resident visa, are not considered in this instance.

Offences and Duties

Employers face very real duties and risk management issues in relation to the employment of migrant workers. The changed landscape can best be illustrated by reference to the (now repealed) Immigration Act 1987 (as amended).

The old legislation enacted, in section 39, that:

> **39 Responsibility of employers**
>
> (1) Every employer commits an offence against this Act who allows or continues to allow any person to undertake employment in that employer's service knowing that the person is not entitled under this Act to undertake that employment.
>
> (1A) Every employer commits an offence against this Act who, without reasonable excuse, allows a person who is not entitled under this Act to undertake employment in the employer's service to undertake that employment.
>
> (1B) For the purposes of subsection (1A), it is a reasonable excuse for allowing a person who is not entitled under this Act to undertake employment in an employer's service to undertake that employment that the employer concerned did not know that the person was not entitled to undertake that employment, and holds a tax code declaration—
>
> (a) that states that the person is entitled under the Immigration Act 1987 to undertake employment in the employer's service; and
>
> (b) that was signed by the person before or when that employment began.
>
> (1C) Except as provided in subsection (1B), for the purposes of subsection (1A), it is not a reasonable excuse for allowing a person who is not entitled under this Act to undertake employment in an employer's service that the employer did not know that the person was not entitled under this Act to undertake that employment.

Then, as now, the legislation created two separate offences. They were then framed as knowingly employing a person not entitled to work in New Zealand and doing so "without reasonable excuse". The "without reasonable excuse" offence was only created in 2003, as a result of the Immigration Amendment Act 2002.

Reasonable excuse, in turn, was defined (exclusively) by an employer having obtained a signed tax code declaration from the migrant worker prior to employment commencing.

Absent of proof of actual knowledge (never an easy thing to prove) an employee's self declaration was all that was needed for an employer to have a very strong defence to a charge of having employed an unlawful worker.

The maximum penalties were fines of $50,000 and $10,000 respectively, introduced by the Immigration Amendment 2002. There was no sentence of imprisonment available in relation to offending by employers as such.

A Strict Liability Offence "with Teeth"

When the situation under the 1987 Act is contrasted with the approach under the current legislation, the Immigration Act 2009 (the Act) it will be seen that this is now much much more demanding. The Act still creates two offences (now in s 350), and again, it proscribes the employment of a person knowing he or she is not entitled to work, and doing so otherwise than with knowledge.

However, s 350 (3) and (4) now essentially reverse the allocation of risk, by specifically enacting that unless the employer did not have actual knowledge *and* "took reasonable precautions and exercised due diligence" they do not have a defence to the lesser charge. Section 350(1)(b) creates an effective strict liability offence.

Section 350 requires setting out in full:

> **350 Offences by employers**
>
> (1) Every employer commits an offence against this Act who—
>
> (a) allows or continues to allow any person to work in that employer's service, knowing that the person is not entitled under this Act to do that work; or
>
> (b) allows a person who is not entitled under this Act to work in the employer's service to do that work.
>
> (2) Subsection (1)(a) applies whether the person commenced work in the employer's service before or after the commencement of this section.
>
> (3) It is a defence to a charge under subsection (1)(b) that the employer—
>
> (a) did not know that the person was not entitled to do the work; and
>
> (b) took reasonable precautions and exercised due diligence to ascertain whether the person was entitled to do the work.
>
> (4) Except as provided in subsection (3), it is not a defence to a charge under subsection (1) (b) that the employer did not know that the person was not entitled under this Act to do that work.
>
> (5) A charge alleging an offence against this section may specify any day on which it is alleged the person was working for the employer, and need not state the day on which that work is alleged to have commenced.
>
> (6) For the purposes of this section, an employer is treated as knowing that an employee is not entitled under this Act to do any particular work if, at any time in the preceding 12 months (whether before or after the commencement of this section), the employer has been informed of that fact in writing by an immigration officer.
>
> (7) No employer is liable for an offence against this section in respect of any period during which the employer continues to allow any person to work in the employer's service in compliance with the minimum requirements of any employment agreement (within the meaning of the Employment Relations Act 2000) relating to the giving of notice on termination of employment.

Section 357 enacts that the maximum penalty for an offence under s 350(1)(a) is a fine not exceeding $50,000. An offence under s 350(1)(b) – the strict liability offence – attracts a maximum fine of $10,000.

There is, however, also an aggravated offence created by the Act in s 351 (set out in the appendix), the exploitation of an unlawful or temporary worker. Exploitation may consist of a serious failure to pay holiday pay, or serious breaches of the Minimum Wage Act 1983 or the Wages Protection Act 1983.

Significantly, the maximum penalty for exploitation of an unlawful worker is a term of imprisonment of seven years.

Case law on employer offences and penalties

A review of District Court decisions shows that penalties imposed for breaches of s 350(1)(b) generally ranged from "convict and discharge" up to $2,000 per charge. The exception to that approach in *MBIE v Singh* is discussed further below. An average penalty would appear to be in the range of about $1,000. As far as is possible to establish, all prosecutions brought under s 350(1)(b) were resolved by guilty pleas.

Penalties for a breach of s350(1)(a) ranged generally from $5,300 to $3,500. It appears there may be some scope to negotiate the reduction of charges from s 350(1)(a) to s 350(1)(b) in a plea bargain, depending on the strength of the evidence of the employer's actual knowledge.

The case of *Ministry of Business, Innovation & Employment v Tranzkell* [2017] NZDC 15307 Black DCJ, 11 July 2017, is the only available decision that did not proceed by guilty plea. Facing a charge under s 350(1)(a) the defendant company unsuccessfully sought to argue first that there existed a requirement for MBIE to warn the employer prior to prosecuting the offence, secondly that knowledge had not been proven to the requisite degree, and lastly that the charge should fail because of the large date range in the charging document.

The first defence was based on a provision contained in the Immigration New Zealand Operational Manual suggesting that a warning ought to be given prior to instigating prosecution. However, the court held that the material provision in the Operational Manual was not an "immigration instruction" as defined in s 22 of the Act but merely a policy guideline. The legislation did not make a warning mandatory. The second defence failed on the facts (based on admissions by a company official to immigration officers during an interview). The third and last defence was simply not accepted as material.

Ministry of Business, Innovation & Employment v Singh [2018] NZDC 10376 O'Driscoll DCJ, 11 June 2018, is an unusual case because here both the employer company and its sole director and shareholder had been charged jointly under s 350(1)(b) of the Act. The defence had sought a discharge without conviction following a guilty plea. The court was not prepared to grant that discharge, and determined as its starting point a fine of $8,000. It was not prepared to give any credit for lack of previous convictions due to the length of the offending (four years). Applying a 25% discount for the guilty plea, the fine ultimately imposed was $6,000 to be shared equally by the company and its director. This case does appear to be an "outlier" as far as the level of the fine is concerned.

In *Ministry of Business, Innovation & Employment v P2J Construction Ltd*, District Court Manukau, McIlraith DCJ, 7 September 2017, CRI-2017-092-003303 the court accepted that the usual starting point for fines under s 350(1)(b) was between $2,000 and $3,000 and under s 350(1)(a) between $5,000 and $7000. However, various discounts (for guilty pleas and other mitigating factors) are usually granted.

In that case, the defendant company had been previously warned, had been convicted of two charges of employing unlawful workers in 2016, and had admitted 6 charges of knowingly employing unlawful workers and 11 charges of doing so without having taken reasonable precautions to establish their entitlement to work. Had the usual starting points been applied without discount, the total fine would have amounted to $75,000. However, applying the totality principle and taking into account various mitigating factors including, in this instance, the company's difficult financial position, the total fine imposed was $20,000 payable at the rate of $4,000 over five years.

Exploitation offences resulted in significantly more severe sentences. The "high water mark" may be seen in *R v Ali* [2016] NZHC 3077, Heath J, 15 December 2016. Here the defendant had faced 57 charges including people trafficking, aiding and abetting a person to breach a condition of their visa, and exploiting unlawful employees. At the inception of trial guilty pleas were entered to some of the charges, the rest were defended over 18 sitting days before a jury. Trafficking carries a maximum penalty of 20 years imprisonment. The defendant was sentenced to nine and a half years imprisonment for the trafficking charges, five years on the exploitation charges and three years on the other Immigration Act charges, to be served concurrently. Reparation of $28,167 was also ordered.

At the lower end of the spectrum, in *R v Kurisi* [2017] NZHC 62, Mr Ali's co-offender (to whom various mitigating factors, including seriously poor health, applied) was sentenced to 12 months imprisonment and $55,000 reparation.

The Due Diligence Obligation – possible pitfalls

Clearly the Act imposes an obligation on employers to take reasonable precautions and exercise due diligence in the employment of migrant workers.

Establishing the entitlement to work of New Zealand citizens and resident visa holders (who may be immigrants in the broader sense of that word) is relatively straightforward. Moreover, an employer would be entitled to rely on the fact that such status is permanent, barring deprivation through the legal process as a result of fraud or criminal offending. In that event, the entitlement to work still remains until the person is served with a deportation order, that is, at the very end of the deprivation process.

Establishing the nature of the entitlement to work of migrant workers on a temporary visa can be a more difficult task. It requires a basic understanding of the visa categories, and perhaps most importantly, it is time sensitive: employers need to have systems in place that trigger a review of employees' entitlements to work, to ensure that their visa status has been extended, and remains appropriate for the employer and the specific contractual arrangements with the employee.

Immigration New Zealand operates "visa view"[21] an online service that enables employers to check the entitlement of potential migrant workers. It is suggested here that the employers' due diligence processes during recruitment should contain a mandatory step of checking *visa view*, and recording the result on the personnel file (presumably by filing a print out).

It is important for employers to be aware that work visas granted under the partnership category and the "open post study work visa" stream, do not limit the migrant worker as to occupation, location, employer or the nature of the contract. They can be engaged on a contract for services, as well as a contract of service.

Migrant workers on a work visa granted under the essential skills category, however, are strictly limited to work for a named employer, in a specified role and location. Moreover, recent iterations of the Immigration New Zealand *Operational Manual* now clarify that this category does not allow self employment (ie work on a contract for services) see "Acceptable employment" WK3.5 c.

An employer seeking to change the nature of the contract with an essential skills work visa holder, and to make them a contractor, would be at risk of the employing the worker in breach of their visa conditions, and would themselves be offending against (at least) s 350(1)(b) of the Act. If the worker were able to claim that their contractor status deprived them of holiday pay or resulted in remuneration significantly below the minimum wage entitlement, there would be the additional risk of the employer having committed the aggravated offence under s 351 (exploitation).

Working Holiday Visa holders are also subject to certain (but greatly varying) limitations. What makes this category difficult is that different schemes exist for different nationalities, with different maximum durations and varying entitlements regarding the length of work for one employer. For example, Brazilian nationals may be granted work visa for 12 months, but can only work for the same employer for a period not exceeding three months. Malaysians only get 6 months working holiday visas, but are not limited in how long they work for a single employer within that period. Germans, by comparison, are able to obtain 12 months working holiday visas but are not subject to any time limit per employer.

Student visa holders may also be allowed to work. Most student visas impose limits on the permissible number of hours per week during term time (usually 20 hours for students attending tertiary courses), and allow full time work only during the summer holidays or "scheduled term breaks". Employers must take care to ensure that a student employee is not inadvertently exceeding their hours, becoming an unlawful worker and leading to the employer incurring criminal liability.

Immigration New Zealand and "Blacklisted Employers"

Compliance with employment and immigration legislation is becoming an increasingly critical aspect of business management. Immigration officers are known to hold a single instance of an employer having employed an unlawful worker to amount to a poor record of compliance with immigration and employment legislation, leading to that employer being unable to continue employing additional migrant workers. In the writer's experience,

[21] https://www.immigration.govt.nz/about-us/our-online-systems/visaview.

this may relate to as minor a breach as a student visa holder exceeding their permissible hours of work during a few weeks.

In many industries, the (in)-ability to recruit migrant workers, has the capacity to seriously affect profitability and even viability of a business.

The Immigration and Protection Tribunal has repeatedly had to issue decisions clarifying how Immigration New Zealand ought to assess instances of non-compliance. In *RE (Skilled Migrant)* [2018] NZIPT 204563 (23 April 2018) a decision by the Tribunal's chair, P Spiller DCJ, found that:

> [36] Second, Immigration New Zealand's decision is contrary to the clear line of Tribunal authority that not every breach of employment laws, however unintentional, necessarily amounts to a history of noncompliance (see *JL (Skilled Migrant)* [2016] NZIPT 202940; and *OK (Skilled Migrant)* [2016] NZIPT 203148). In *HD (Skilled Migrant)* [2015] NZIPT 202764, the Tribunal (differently constituted) stated at
>
> [37]: "to determine whether any non-compliance amounted to not having a history of compliance, a number of factors should be examined, including, the reasons behind any non-compliance and the seriousness of it, whether other employment law requirements had been breached, whether or not the non-compliance had been rectified, and the effect of the non-compliance on the appellant or other employees."
>
> [37] In the appellant's case, his employer provided evidence as to the reasons behind the apparent noncompliance with the Immigration Act, and the steps taken to ensure future compliance. Further, there was no evidence that any other statutory requirements had been breached, or that the apparent noncompliance was serious in itself or had negative effects on the appellant or other employees. However, it was not apparent that Immigration New Zealand took these factors into account when assessing whether the employer had a history of compliance.

The need for decisions of this nature clearly demonstrates a risk that even single instances of inadvertent non-compliance will be held against an employer (and any immigration applicant seeking to rely on an offer of employment from that employer).

It is noteworthy in this instance that only resident visa applicants have the ability to appeal against a decision by Immigration New Zealand. Applicants for a work visa have no appeal right to the Immigration and Protection Tribunal. While under certain circumstances they can seek reconsideration by Immigration New Zealand, this often proves to be an insufficient remedy to correct erroneous decisions by an immigration officer.

An employer blacklist (called the "non compliant employer list") was implemented by Immigration New Zealand and took effect from 1 April 2017. It sets out stand down periods preventing an employer from recruiting migrant labour for periods of between six months to two years, depending on the severity of the breach.

The material provisions are contained in Appendix 10 of the Operational Manual (set out in the appendix to this paper) which defines that "an employer is non-compliant when they have been issued with an infringement notice by a labour inspector, or had a penalty ordered against them by the Employer Relations Authority or the Employment Court for employment standards-related breaches."

There are two points to note: first, this blacklist does not relate to immigration law breaches, but only to breaches of the various employment statutes (relating to minimum wages, holiday pay etc.).

Second, there is an advantage to the predictability resulting from the list, in that it puts an endpoint to the ineligibility to recruit migrant workers; at least, an employer can make a sound argument that, the stand down period having expired, they ought to be able to support visa applications by migrants again.

Conversely, with immigration law breaches whether established in court by way of conviction, or (perhaps more often) "found" by immigration officers as a result of reviewing PAYE records of visa applicants and comparing them with their work visa entitlements, there is no such end point. Immigration officers are known to hold single instances of a breach (often inadvertent), minor breaches or historical breaches against a potential employer (and against migrant worker applicants with no responsibility at all for the employer's earlier failures).

Ensuring a good compliance record is therefore of great importance to employers, in particular if they rely on migrant labour to remain competitive.

Illegality of employment and the employer's good faith obligation

Employers are obviously required to deal with migrant workers in good faith. Despite the otherwise strict nature of the offence provision in the Act, it carves out an exception to ensure that employers meet their contractual obligations to the benefit of employees.

Relevantly, s 350(7) enacts:

> (7) No employer is liable for an offence against this section in respect of any period during which the employer continues to allow any person to work in the employer's service in compliance with the minimum requirements of any employment agreement (within the meaning of the Employment Relations Act 2000) relating to the giving of notice on termination of employment.

In *Whanau Tahi Ltd v Dasari* [2016] NZEmpC 120, the employer unsuccessfully sought to justify termination of Mr Dasari's employment in reliance on the doctrines of frustration of contract and illegality (under s 350 of the Act). While the decision could be seen to rest on its particular and somewhat complicated facts, the proposition of law emerges that an employer cannot rely on illegality arising from s 350 of the Act to justify termination of an agreement, if the employer had notice of the requirement to support an application for a work visa (or, here, a variation of conditions application) and had assured the employee that such support would be given at the time of entering into the agreement. In other words, an employer cannot first promise to support an employee's application to obtain the requisite entitlement to work, and – having changed its mind about this support or the employment – rely on the absence of an entitlement to work as basis for termination.

Judge Perkins specifically held:

> Conclusions
>
> [63] Applying these principles to the dual pleadings in the present case, the tests for holding that the employment agreement was frustrated or void for illegality are simply not met. Whanau Tahi in this particular case fails to meet the high threshold required to prove that performance had become impossible. There is nothing contained in the Immigration Act expressly providing that a breach of its terms renders an employment agreement illegal. Nor is there anything contained in that Act from which such an implication could be made.

> [64] The facts of the matter disclose that even after Whanau Tahi became aware of the potential difficulties under the Immigration Act it continued to keep Mr Dasari in employment. The indications that its employees received from Immigration New Zealand were to the effect that no difficulty was anticipated in having Mr Dasari's visa changed. If it was necessary for Whanau Tahi to comply with further requirements of Immigration New Zealand, and there was no evidence that it was so required, then it could easily have carried out those compliance requirements. This is not a case where the performance of the employment agreement was either frustrated or was or became illegal.
>
> […]
>
> [66] Even if the employment agreement was an illegal contract this would be an appropriate case, in view of the circumstances, to adopt s 7 of the Illegal Contracts Act 1970 to validate the contract and grant relief to Mr Dasari. This is appropriate because of the conduct of Whanau Tahi. If Whanau Tahi had breached the provisions of the Immigration Act, which is far from clear, that would not be sufficient to deprive Mr Dasari of his rights and entitlements as a matter of equity and justice.

What remains unclear is how far an employer's obligations extend. For example, if an employer knows that a currently employed migrant worker's essential skills work visa will expire shortly, and that worker has a permanent employment agreement, can that employer decide not to support the worker's new visa application? That application would require the co-operation of the employer, who must advertise (and potentially list with Work & Income) the vacancy that would arise if the employee was unable to obtain the requisite visa. Only if the "labour market test" is met, ie once Immigration New Zealand is satisfied that there is a labour shortage to be filled by the employment of the migrant worker, can it grant the visa applied for. The employer would thus have the ability to frustrate an employee's work visa application.

The writer's view is that the employer, acting in good faith, has to do what is needed to support the work visa application. Yet, there is to our knowledge no caselaw available on this point.

Employment lawyers will be well aware that s 66 Employment Relations Act 2000 imposes restrictions on the imposition of fixed term agreements. It is questionable, in the migrant worker context, whether the expiry of a work visa amounts to "genuine reasons based on reasonable grounds" (required by s 66(2) of that Act) for an employer to impose a fixed term. However, fixed term agreements based on the end of the worker's current work visa seem to be widespread in some industries (aged care and disability services being one). Indeed, many workers have serial fixed term agreements to coincide with a succession of temporary visas.

The writer's view is that the reason for the fixed term must be related to the employment, not the personal characteristics of the employee[22] such as their temporary entitlement to work. If that view were correct, imposing a fixed term on the basis alone that the employee has a temporary visa, may not be permissible. Again, however, there appears to be no decision by the Employment Relations Authority or the Employment Court exactly on this point.

[22] *Yuan Cheng International Investment Group Ltd. v Buer* [2006] 3 NZELR 543, 20 September 2006 (Travis J) and *Canterbury Westland Free Kindergarten Assoc. V NZ Educational Institute* [2004] 1 ERNZ 547, 24 June 2004, (Goddard CJ). The court found section 66(2) exists for the protection of the employee.

Appendix

Immigration New Zealand Operational Manual Appendices[23] - Appendix 10 - Rules for non-compliant employers

a) The Labour Inspectorate maintains a list of non-compliant employers in accordance with the rules set out in the table below.

b) An employer is non-compliant when they have been issued with an infringement notice by a labour inspector, or had a penalty ordered against them by the Employment Relations Authority or the Employment Court for employment standards-related breaches.

c) An immigration officer should rely on the list of non-compliant employers maintained by the Labour Inspectorate as evidence of whether or not the employer is a non-compliant employer under these rules.

Enforcement action	**Stand-down period**
Infringement notice	• 6 month stand-down for a single infringement notice. • Each subsequent infringement notice incurs a further stand-down of 6 months. • The maximum stand-down for multiple infringement notices issued at one time is 12 months.

Penalties ordered by the Employment Relations Authority or by the Employment Court for employment standards-related breaches	**Penalties**
	• 6 month stand-down when the total amount of penalties ordered in a case is up to and including $1,000 for individuals and companies.
	• 12 month stand-down when the total amount of penalties ordered in a case is:
	  • over $1,000 but less than $10,000 for individuals
	  • over $1,000 but less than $20,000 for companies.
	• 18 month stand-down when the total amount of penalties ordered in a case is:
	  • $10,000 and above, but less than $25,000, for individuals
	  • $20,000 and above, but less than $50,000, for companies.
	• 24 month stand-down when the total amount of penalties ordered in a case is:
	  • $25,000 and above for individuals
	  • $50,000 and above for companies.

[23] https://www.immigration.govt.nz/documents/ops-manual/appendices.pdf

Declaration of Breach ordered by the Employment Court and any subsequent order of pecuniary penalties	• 12 month instant stand-down when Declaration of Breach issued, adjusted up to 24 months if a pecuniary penalty is issued following a Declaration of Breach Pecuniary penalties are those penalties ordered under section 142E of the Employment Relations Act 2000 (against a person in respect of whom the court has made a declaration of breach).
Banning Order	• 12 month stand-down from recruiting migrant workers for employers incurring a banning order of less than 5 years, to be added at the end of the ban period. • 24 month stand-down from recruiting migrant workers for employers incurring a banning order of 5 years and over, to be added at the end of the ban period.

Notes:

- The Employment Relations Authority and the Employment Court may take the approach of looking at the totality of penalties for a group of breaches without necessarily identifying a penalty for each breach. In this situation, the stand-down periods are set according to the total dollar amount for penalties ordered for a case in relation to breaches of employment standards.
- If an individual or company incurs several penalties in one authority determination or court judgement they will only get up to the maximum of 24 months stand-down period at that time. However, the individual or company will be subject to another stand-down period after this if further non-compliance results in enforcement action that triggers another stand-down.
- Employment standards related breaches are breaches of any of the following:
  - the requirements of any of sections 64, 69Y, 69ZD, 69ZE, and 130 of the Employment Relations Act 2000
  - the requirements of sections 63A and 65 of the Employment Relations Act 2000
  - the provisions of the Equal Pay Act 1972
  - the minimum entitlements and payment for those under the Holidays Act 2003
  - the requirements of sections 81 and 82 of the Holidays Act 2003
  - the minimum entitlements under the Minimum Wage Act 1983
  - the provisions of the Wages Protection Act 1983

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