Latest cases on CALD parties in litigation and lessons from the Court of Appeal in *Zheng*

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An analysis of recent cases confirms that culturally and linguistically diverse (CALD) parties in the courts do raise unique issues and challenges, and that counsel need to do more to overcome language and cultural differences to ensure equal access to justice and a fair trial. Judges are still being left to their own devices in navigating languages and cultures they have little or no familiarity with. The result is that judges are thrown back onto the New Zealand cultural norms they are familiar with.

The cases show us the importance of judges being alive to unconsciously applying traditional New Zealand culturally familiar frameworks to make sense of what the parties are saying and doing, and to assess credibility, especially when counsel fail to adduce evidence about cultural context and the meaning of foreign words where the parties' dealings are not in English. This may impact what the judge expects to see and how they interpret what certain behaviours mean about intention.

Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study (*CALD Parties in the Courts*)[1] analysed many of the relevant cases until October 2019. What follows is an analysis of some recent key cases since 2020 and the lessons they have to teach us about dealing with the challenges CALD parties raise in litigation.

I have written previously on CALD parties before the Employment Relations Authority (ERA).[2] While there are obvious differences between the ERA and civil courts (the key difference being the inquisitorial mode of inquiry), learnings from the civil courts are still highly applicable to the Employment Court and to the employment law context. ERA Members have reported a high proportion of cases in Auckland in particular involving CALD employers and employees. Many are recent migrants who do not speak English fluently or at all and/or who have limited understanding of New Zealand employment law and practice.[3]

Lessons from the Court of Appeal in *Zheng v Deng*

All cases can experience the common situation of lay people using particular words in an imprecise manner,[4] but there are additional challenges that arise for judges and counsel with CALD parties appearing before the courts. As the Court of Appeal said in the recent case of *Zheng v Deng*:[5]

> The parties' records and correspondence are largely in Mandarin Chinese. The terminology and business structures they adopted reflect linguistic and cultural frameworks that do not always align neatly with English language terminology, or with New Zealand legal concepts and accounting conventions. The High Court was confronted with a case in which the familiar language and trappings of partnership — for example, a written partnership agreement, partnership financial statements prepared in accordance with relevant accounting standards and conventions, and a partnership bank account — were absent. That absence ... led the Judge to the conclusion that there was no partnership.

Zheng concerned an appeal against the judgment of the High Court[6] that the parties were not in a partnership for the purpose of carrying out a business. The Court of Appeal declared that there was a partnership, that an account should be taken of the partners' mutual dealings, and that any balance payable by one partner to the other should be ascertained and paid.

1. Mai Chen *Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study* (Superdiversity Institute for Law, Policy and Business, November 2019) [*CALD Parties in the Courts*].
2. Mai Chen "CALD parties before the Employment Relations Authority" (2020) 939 LawTalk 52.
3. Chen, above.
4. *Zheng v Deng* [2020] NZCA 614 at [64].
5. At [3].
6. *Zheng v Deng* [2019] NZHC 3236.

This case is currently being appealed to the Supreme Court.[7] The appeal to the Supreme Court was not a surprise, nor were the "big face" concerns expressed by counsel on behalf of Mr Zheng "that the credibility finding [by the High Court below] in relation to his client be addressed by this Court, because it affects Mr Zheng's reputation".[8]

However, the Court of Appeal judgment in this case is nevertheless instructive for other judges and lawyers about how to ensure equal access to justice for CALD parties, and what counsel need to do to be effective in representing their CALD clients. In particular, the following lessons can be derived:

1. Simple translation may not be enough. Judges may need, and counsel must be prepared to adduce, additional culturally contextual evidence about the meaning of non-English words.
2. Lawyers and judges must be conscious and cautious when dealing with common English-language concepts that do not easily translate into the cultural worldview of the CALD parties before the court or their different understanding of the law based on their country of origin.
3. Ensuring access to justice for CALD parties may require more inquiry into the facts than usual in our adversarial court system.
4. Lawyers should obtain expert evidence from those with fluency in the first language of the CALD parties if all the documentation is in that language.
5. To successfully adduce evidence from witnesses overseas, counsel must assess the reasonable practicality of them returning to New Zealand to give evidence in person, or giving evidence by video link from overseas. Counsel must substantiate with evidence any assertion to the court that neither option is reasonably practicable, or risk that witness's evidence being ruled inadmissible.

Lesson one — Need for contextual evidence about the meaning of words

CALD Parties in the Courts states that the translation of documentary evidence from Chinese to English "may distort the meaning and clarity of the document, especially when concepts from one legal culture do not translate well into the other".[9] This increases the importance of the court's reliance on viva voce oral evidence, but "the use of interpreters may also result in the meaning and clarity of oral evidence being distorted".[10]

The Court in *Zheng* echoed this — sounding a "note of caution" about relying on English-language translations when there is a lack of contextual evidence about the meaning of the words in their original language.[11]

Almost all the primary records in that case were in Mandarin. A number of the witnesses also gave their evidence in Mandarin, with the assistance of translators. The Court was reliant on:[12]

> English translations prepared by different people at different times, who may or may not have understood and taken into account the legal nuances of particular words and phrases that they have used.

None of the translators had given evidence about why they used certain terms rather than others in particular documents.

For example, the title of one key agreement was translated as either a "partnership" agreement or a "cooperation" agreement. And the term frequently used to refer to the parties' overall business association ("公司") could be variously translated as "company", "firm" or "enterprise".

In these circumstances, "a high degree of caution" was required before attributing any significance to the precise terms that appeared in the various English translations.[13] There is, the Court said "a real risk of nuances in expression and context being lost in translation".[14]

The Court was conscious that:[15]

> ... language is used in a broader linguistic and cultural setting, by reference to background assumptions about personal and business relationships and the ways in which dealings are normally structured, that the parties will have shared but that the Court may not be aware of or understand.

It was not possible, the Court said, to "attribute any legal significance" to a key term used in the English-language

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7. The Supreme Court has currently received submissions for deciding whether to grant leave to appeal: Courts of New Zealand "Case information summary 2021 — Cases where leave to appeal decision not yet made" (1 April 2021) <https://www.courtsofnz.govt.nz/the-courts/supreme-court/case-summaries/>.
8. *Zheng CA*, above n 4, at [118]. See also *CALD Parties in the Courts*, above n 1, at 19–20, which introduced readers to the concept of "mianzi" or "face"/"saving face", and the idea that a loss in litigation can cause loss of face, value and social credibility.
9. *CALD Parties in the Courts*, above n 1, at [44].
10. *CALD Parties in the Courts*, above n 1, at [45]–[46].
11. *Zheng CA*, above n 4 at [86]–[89].
12. *Zheng CA*, above n 4 at [86].
13. Above.
14. Above.
15. *Zheng CA*, above n 4 at [88].

translation, "in the absence of detailed contextual evidence confirming that the term used had a particular connotation in that context".[16]

It may not be enough to simply offer an English-language translation of information that is key to the theory of a case. Counsel may need to adduce additional contextual evidence in support of a translation. In the absence of such evidence, the court is left to do its best, and the outcome of that may or may not favour the client.[17]

As noted in *CALD Parties in the Courts*, "it is the lawyer's role to communicate their client's case to the judge or jury"; "lawyers need to be doing more and better for their CALD clients",[18] and need to be more proactive in ensuring effective communication with judges.[19]

Lesson two — Eschewing the "familiar language and trappings" of common English-language concepts like "partnership"

Even in a case where the parties speak English, it is well-established that the labels used by participants in a business venture are not determinative as to the nature of that venture.[20] This issue is compounded with CALD parties.

CALD Parties in the Courts introduced readers to the Chinese concept of "guanxi", which refers to Chinese relationships and connections, and can result in Chinese parties completing business transactions without written agreements.[21] Chinese parties are less likely to use written contracts or agreements in their business or familial transactions.[22]

Here the Court thought the Judge at first instance gave too much weight to the use of particular language — or to the absence of particular language — in the dealings between the parties.[23]

The Court of Appeal found that "the absence of particular terminology carries little weight where the parties are dealing with each other in another language" and "the absence of the familiar (English) language of partnership in the translations of the parties' documents and communications tells us little or nothing about the nature of their dealings".[24]

So too, the absence of a formal written partnership agreement, which may well have been seen as unnecessary or inappropriate between friends and close business associates in this particular cultural context, "sheds no light on the nature of their relationship in these circumstances".[25]

The Court concluded:[26]

> The conclusion reached by the Judge [at first instance] about the existence of a partnership was founded on a number of errors of law in relation to the indicia of partnership, and the perceived incompatibility of corporate and partnership relationships between these men. It was also founded on inferences drawn from the language used by the parties and their business practices, which lacked a robust foundation. If those misconceptions are put to one side, the evidence that there was a partnership is in our view compelling.

Lawyers and judges must be conscious and cautious when dealing with common English-language concepts that do not translate easily into the cultural worldview of the particular CALD parties that are before the court.

Lesson three — Focus on the substance of the parties' arrangements as revealed by their conduct over time

What to do if judges and lawyers cannot safely rely, or at least rely exclusively, on the traditional trappings of common English-language concepts like "partnership"?

The Court in *Zheng*, in the absence of "expert evidence about relevant cultural factors", did:[27]

> ... the best we can to be sensitive to the importance of social and cultural context and, in particular, to be cautious about drawing inferences based on our preconceptions about "normal" or "appropriate" ways of structuring and recording business dealings.

Instead the Court focused on "the substance of the parties' arrangements as revealed by their conduct over time".[28]

As I have noted previously:[29]

> The investigative nature of the ERA under s 157 of the Employment Relations Act 2000 ("ER Act") gives it a degree of flexibility in "resolving employment relationship problems by establishing the facts and making a

16. *Zheng CA*, above n 4 at [106].
17. See further *Yuen-Kuen Sun v Chin-Chen Sun* [2020] NZHC 2414 at [33]-[34].
18. *CALD Parties in the Courts*, above n 1, at [40].
19. *CALD Parties in the Courts*, above n 1, at [47].
20. *Zheng*, above n 4, at [105].
21. *CALD Parties in the Courts*, above n 1, at [31].
22. *CALD Parties in the Courts*, above n 1, at [33].
23. *Zheng CA*, above n 4, at [105].
24. *Zheng CA*, above n 4, at [107].
25. *Zheng CA*, above n 4, at [108].
26. *Zheng CA*, above n 4, at [122].
27. *Zheng CA*, above n 4, at [89].
28. Above.
29. Chen, above n 2.

> determination according to the substantial merits of the case, without regard to technicalities", which is well-suited to addressing the issues and challenges CALD parties can raise.

ERA Members already make use of this flexibility in making determinations to resolve employment relationship problems.[30]

However, it is different from the adversarial role courts (including the Employment Court) traditionally play in New Zealand. While it is for the parties to adduce the relevant evidence in a case, judges retain a residual role, and may need to be more willing to admit evidence in cases with CALD parties, due to the paucity of contemporaneous documentary evidence that is a common feature in disputes between CALD parties, and where viva voce evidence has been adduced through interpreters.[31]

Lesson four — Obtain expert evidence from those with fluency in the first language of the parties if all the documentation is in that language

Expert evidence is likely to be more valuable if the expert is fluent in the language spoken by the parties and reflected in the documentation. The Court noted that some of the accounting issues in this case were best determined by an expert accountant, and that fluency in Mandarin would be a "significant advantage" for that person.[32] The only accountants asked to depose expert evidence in this case do not appear to have been fluent in Mandarin.[33]

Lesson five — How to successfully adduce evidence from witnesses overseas

At first instance, the High Court was not satisfied that there would be undue expense and delay if two witnesses in China had to testify, and ruled that the evidence of both was inadmissible.[34] The reason was that there was no submission or evidence provided about the practicality of each returning, or giving evidence by video link from China. The High Court said "overseas video links are now used frequently in the High Court in both civil and criminal trials".[35] The High Court went on to say:[36]

> In *Solicitor General v X*, the Court of Appeal held a Chinese national was not unavailable to give evidence merely because he was in China and did not wish to come here. The Court said assessment of reasonable practicality required it to know "what steps had been taken to secure [the witness's] attendance at trial, whether in person, or by some technological means, such as video link". The learned authors of *Mahoney on Evidence* observe *Solicitor General v X* "seems to suggest that the difficulty involved in organising the technological means for an overseas witness … will not, without more, be enough to render a person unavailable under s 16(2)(b) [of the Evidence Act 2006]". I agree.

Therefore, to successfully adduce evidence from witnesses overseas, counsel must assess the reasonable practicality of them returning to New Zealand to give evidence in person, or giving evidence by video link from overseas. Counsel must substantiate with evidence any assertion to the Court that neither option is reasonably practicable, or risk that witness's evidence being ruled inadmissible.

Lessons from other recent cases

Reviewing issues that have arisen in other cases helps counsel to predict and take preventative steps to stop problems from eventuating during the hearing, and undermining their client's right to equal access to justice and a fair trial.

Recent employment law cases highlight the most basic and important lesson — that access to justice depends on CALD parties and the courts being able to communicate with, and understand, one another. It is particularly important because CALD parties often choose to represent themselves.[37]

For example, in *Labour Inspector of Ministry of Business, Innovation and Employment v New Zealand Fusion International Ltd*, the Employment Court noted that "it is important that those affected by employment breaches understand the way in which the Court deals with them".[38] The Court directed the Labour Inspector to provide a translation of the judgment in Mandarin to the complainants so they could fully understand the Court's reasoning and orders.[39]

In *Zhang v Telco Asset Management Ltd*,[40] the Employment Court considered an application to challenge a decision of the ERA out of time. The fact that English was the applicant's second language, and he had difficulty using it,

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30. Chen, above n 2.
31. *CALD Parties in the Courts*, above n 1, at [49].
32. Zheng CA, above n 4 at [129].
33. *Zheng CA*, above n 4 at [41], where one of the accountants giving evidence noted that "*one of [his] team … can read Mandarin*".
34. *Zheng HC*, above n 6, at [156].
35. *Zheng HC*, above n 6, at [154].
36. *Zheng HC*, above n 6, at [155].
37. *CALD Parties in the Courts*, above n 1, discusses self-represented litigants at 87 and 160–163.
38. *Labour Inspector of Ministry of Business, Innovation and Employment v New Zealand Fusion International Ltd* [2019] NZEmpC 181 at [1].
39. Above.
40. *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 22.

"assume[d] some relevance".[41] Despite "extensive efforts", the applicant had been unable to obtain legal assistance, and had to prepare the statement of claim himself.[42] He had difficulty in doing so, and needed time to organise English words so as to make his points.[43] The Court was "largely satisfied with the explanation proffered" by the applicant,[44] and determined the application in his favour.

Outside the employment law context, the recent High Court case of *Zespri International Ltd v Shanghai Neuhof Trade Co Ltd* provides an example of the Court's approach to reconciling inconsistent evidence.[45] As noted in *CALD Parties in the Courts*, a lack of contemporaneous documentary evidence can lead to reliance on viva voce evidence, which may be challenging to weigh when translated into English.[46] The issue is exacerbated when the evidence presented at trial is "diametrically opposed".[47]

The Court in *Zespri* identified inconsistencies in the written and oral evidence and submissions of one witness for whom English was a second language. Importantly, the Court was cautious about inferring any intent to deceive in these circumstances. The conflicts, while unsatisfactory, were explicable: the witness "does not speak English and it must be a possibility that issues have been lost, or at least confused, in translation".[48]

Where to from here and the Equal Treatment Bench Book

Courts are increasingly dealing with CALD parties,[49] and unless courts, judges and lawyers make the necessary accommodations, those parties risk being denied justice. Judges and lawyers must be aware, and try to overcome, the unconscious bias that arises through the uncritical application of New Zealand cultural frameworks and norms. It is not just about language difference, as important as this is.

At a systemic level, the development of appropriate resources, like the *Equal Treatment Bench Books* in England, Scotland, Australia and the United States of America, can assist judges to address the issues which arise when presiding in cases involving CALD parties.[50]

The London Judicial College of England and Wales has just published a new edition of its *Equal Treatment Bench Book* (ETBB),[51] which includes expanded guidance for judges in English and Welsh courts and tribunals on dealing with cultural and ethnic differences. Its introduction states that more than compliance with a prevailing legal framework, "The profound desire of the team responsible for this revision is that all those in and using a court leave it conscious of having appeared before a fair-minded tribunal."[52]

Master Victoria McCloud — who was a member of the committee that reviewed the ETBB — shared her insights and reflections on the ETBB at a recent presentation hosted by New Zealand Asian Lawyers and the New Zealand Law Society.

Master McCloud emphasised that the fundamental starting point for the revised ETBB was fairness, not in the sense of something you are, or something you do to someone else, but in the sense of something you do *with* someone else — a mutually respectful exercise. It necessitates judges involving others, or at least putting themselves in the shoes of others.

Material that is new to this edition of the ETBB includes:

- the impact of the COVID-19 pandemic on different groups and how to conduct remote hearings (on audio or video platforms) fairly;
- Welsh/English bilingualism and the right to speak Welsh in courts and tribunals in Wales;
- overhaul of the section which is now called "trans people";
- assisting a litigant who has difficulty reading or writing;
- expanded disability glossary of terms (especially in relation to medical disabilities);
- confidence in the courts of minority communities, and detail about how different religions prefer to take oaths in court.

Master McCloud's presentation cited that UK judges are finding the guidance in the ETBB invaluable. In particular,

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41. At [13].
42. At [30].
43. At [25].
44. At [51].
45. *Zespri International Ltd v Shanghai Neuhof Trade Co Ltd* [2021] NZHC 168.
46. *CALD Parties in the Courts*, above n 1, at [365].
47. *CALD Parties in the Courts*, above n 1, at [367].
48. *Zespri*, above n 45, at [103]-[104].
49. In the 2018 Census, 27.4 per cent of people were not born in New Zealand (up from 25.2 per cent in Census 2013); 15.1 per cent of New Zealand's population identified as Asian (up from 11.8 per cent in Census 2013), 7.4 per cent identified as Pacific (a small increase from 7.4 per cent in Census 2013) and 70.2 per cent identified as New Zealand European (a decrease from 74 per cent in Census 2013). See Statistics New Zealand "New Zealand's population reflects growing diversity" (23 September 2019) <www.stats.govt.nz>.
50. *CALD Parties in the Courts*, above n 1, at [161].
51. Judicial College *Equal Treatment Bench Book* (Judicial College, London, 2021) <https://www.judiciary.uk/announcements/equal-treatment-bench-book-new-edition/> [ETBB].
52. Above, at 2.

Lord Wilson of the Supreme Court relied on excerpts from the ETBB in *Serafin v Malkiewicz*:[53]

> Every judge will have experienced difficulty at trial in divining the line between helping the litigant in person to the extent necessary for the adequate articulation of his case, on the one hand, and becoming his advocate, on the other. The Judicial College, charged with providing training for the judges of England and Wales, has issued an Equal Treatment Bench Book. In chapter one of the edition issued in February 2018 and revised in March 2020, the college advises the judges as follows:
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> "8. Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure about which they may have no knowledge. They may well be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.
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> ...
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> 59. The judge is a facilitator of justice and may need to assist the litigant in person in ways that would not be appropriate for a party who has employed skilled legal advisers and an experienced advocate. This may include:
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> ...
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> • Not interrupting, engaging in dialogue, indicating a preliminary view or cutting short an argument in the same way that might be done with a qualified lawyer."

Master McCloud also cited other cases that other Courts and Tribunals had used in the ETBB,[54] such as *UA v Her Majesty's Revenue and Customs (TC)*[55] where the Tribunal stated:

> Similar cultural differences apply in the context of relationship breakdown and divorce. In general, social attitudes to relationship breakdown are far more relaxed than they used to be, and in many communities the stigma that historically attached to divorce has all but disappeared. But this trend is by no means universal. As the Judicial College's Equal Treatment Bench Book (revised March 2019) observes, "there are many different views on the acceptability of divorce in different cultures" (at paragraph 110).

Master McCloud says that this case reminds us that making fact-findings based on what is unlikely or "inherently improbable" can be unreliable. Particular care should be taken where the evidence refers to communities with customs and circumstances which are very different from those experienced by the judge. It is important to be alive to cultural differences.

Master McCloud, who was the youngest person ever appointed Master in the United Kingdom, and only the second woman, as well as the first Judge appointed from the transgender community, also talked about the unique experience of being both an "insider" and an "outsider" in the legal system — of the need to be fair to other outsiders, while being one of them. This highlights the need for the ETBB to be written from the perspective that the "outsider" in this context may not always be the plaintiff or the defendant — they could also be the judge, counsel or witnesses.

Master McCloud emphasised that unconscious bias training and experiential learning are essential, especially for judges (and practitioners) who are not "outsiders". Master McCloud also discussed the need for an ETBB to be situated in a broader framework that facilitates accountability and measurability of equal treatment. This requires both qualitative and quantitative research and analysis of the extent to which courts and tribunals are achieving fairness and equal treatment.

In New Zealand, the Institute of Judicial Studies (IJS) is developing an ETBB, to guide New Zealand judges on ensuring equal access to justice. IJS is also training judges to build their cultural awareness and capability when working with CALD parties.

The issues raised by CALD parties are certainly not new in this country. The trail has already been blazed by a court system that has had to evolve to accommodate New Zealand's official recognition of languages and cultures other than English — namely, Māori and New Zealand Sign Language, and Te Tiriti o Waitangi.

For example, the numerous cases heard in the Courts under the Marine and Coastal Area (Takutai Moana) Act 2011, the preamble to which states:[56]

> (4) This Act takes account of the intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga and based on their connection with the foreshore and seabed and on the principle of manaakitanga. *It translates those inherited* rights into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all

53. *Serafin v Malkiewicz* [2020] UKSC 23 at [46].
54. Cases referring to the ETBB include: *Forstater v CGD Europe* ET 2200909/2019, 18 December 2019; *Mx M (gender identity — HJ (Iran) — terminology) El Salvador* [2020] UKUT 313; *CH v SSWP (JSA) (No 2)* [2018] UKUT 320 (AAC) (Upper Tribunal); *A Local Authority v M, F, U, A, B, C, D, E* [2020] EWFC B18 (Family Court); *Rackham v NHS Professionals Ltd* UKEAT/0110/15 (IAC); *X v Y* UKEAT/0302/18/RN; *UA v Her Majesty's Revenue and Customs (TC)* [2019] UKUT 113 (AAC) (Upper Tribunal).
55. *UA v Her Majesty's Revenue and Customs (TC)*, above, at [45].
56. Emphasis added.

the people of New Zealand and the coastal marine environment for future generations.

We need to leverage off this experience and expertise in evolving our courts to successfully deal with the challenges and issues that CALD parties raise for obtaining equal access to justice.

When money won't cut it: non-financial remedies and access to justice


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Non-financial relief, such as interim injunctions, interim reinstatement and compliance orders, are most commonly sought to protect interests that cannot be adequately protected with a damages award. These remedies are often urgent. For these reasons, it is important that access to these remedies is straightforward and transparent, swift and effective.

In this article we outline some basic principles to consider when applying for these types of relief and examine how much access to justice applicants are afforded if they seek urgent non-financial remedies in the Employment Relations Authority (the Authority) and the Employment Court (the Court). We look at access to justice in terms of the Employment Institutions and their systems, and an applicant's ability to achieve their outcomes there.

This article does not examine recent case law, but outlines some tips for how to prepare for and respond to these applications and secure meaningful results.

It is important at the outset to understand the difference between orders for interim injunctions, interim reinstatement and compliance orders. All three require the respondent to do or refrain from doing something, but they apply in different circumstances:

- Compliance orders are not interim orders, they are permanent orders, but can be sought urgently. These orders are only available where there is no dispute over the legal obligations on which compliance is being sought.
- Applicants can seek to preserve the status quo whilst a dispute is being resolved by seeking interim orders. Two common interim orders are:
  a) interim reinstatement (a statutory remedy, set out in s 127 of the Employment Relations Act 2000 (the ERA)); and
  b) interim injunctions (an equitable remedy).
- Other types of interim relief available in the Court include freezing orders and search orders, but these are outside the scope of this article.

Basic principles

Interim injunctions

Interim injunctions and interim reinstatement are interlocutory orders which protect the applicant from prejudice that could arise from the delay between filing a proceeding and the hearing. Strategically, they are often used to bring disputes to an end, as a favourable outcome often leads to settlement.

Interim injunctions are commonly sought in the following situations:

- to stop unlawful strikes, lockouts or picketing;
- to restrain employees from breaching or continuing to breach restraints of trade;
- to prevent the breach or continuing breach of confidentiality obligations;
- to restrain an employer from continuing with or concluding a disciplinary process (less common);[1] and
- to prevent an employer, employee and/or union from breaching an employment relationship obligation.

In these situations, the harm caused by the proposed action or breach going ahead (arguably) cannot be adequately remedied by a retrospective damages award being made in the substantive proceeding. For example, it may be difficult to put a market value on a company's confidential information in a competitor's hands and resulting financial losses would be difficult/impossible to evidence and may take many years to crystallise if an interim injunction is not ordered.

1. *BEO v Vice-Chancellor of University of Auckland* [2020] NZEmpC 84.