

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA765/2023
[2026] NZCA 33**

BETWEEN KEVIN BREEN
Appellant

AND PRIME RESOURCES COMPANY
LIMITED
Respondent

Hearing: 30 October 2025

Court: French P, Thomas and Whata JJ

Counsel: S R Mitchell KC, J M Roberts and M M Weatherall for Appellant
K F Radich as counsel to assist the Court
G V A Iddamalgoda for New Zealand Council of Trade Unions |
Te Kauae Kaimahi as Intervener

Judgment: 24 February 2026 at 11.30 am

JUDGMENT OF THE COURT

A We answer the question of law as follows:

Did the Employment Court err in its construction and application of s 103(3) of the Employment Relations Act 2000?

Yes.

B The appeal is allowed and the decision of the Employment Court declining jurisdiction to hear the appellant’s personal grievance is set aside.

C The matter is remitted to the Employment Court for determination of the appellant’s personal grievance.

D The respondent must pay the appellant costs calculated on the basis of a standard appeal, band A. We certify for two counsel.

E The order as to costs made in the Employment Court is set aside. Costs in the Employment Court are to be determined by that Court in light of this judgment.

REASONS OF THE COURT

(Given by French P)

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Introduction

[1] Should the personal grievance claim Mr Breen brought against his employer have been brought instead as a dispute? Under the Employment Relations Act 2000 (the Act), the answer to that question depends on whether the conduct Mr Breen was complaining about was an action “deriving solely from the interpretation, application, or operation” of his employment agreement.¹ The answer is important to Mr Breen because the remedies available to him under the Act differ depending on which category of claim it was.

[2] The issue arose in the following context. Mr Breen filed what he described as a “disadvantage claim” against his employer Prime Resources Co Ltd (the company).

¹ Employment Relations Act 2000, s 103(3).

He contended that his employment had been affected to his disadvantage as a result of certain actions taken by the company. That is a type of personal grievance commonly called a “disadvantage grievance”, or an “unjustified action grievance”.² Both shorthand expressions are used in this judgment.

[3] Mr Breen’s personal grievance claim was filed in reliance on s 103(1) of the Act. Section 103(1) defines what constitutes a personal grievance by listing various types of claims. Included in the list at s 103(1)(b) is a claim:

that the employee’s employment, or 1 or more conditions of the employee’s employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee’s disadvantage by some unjustifiable action by the employer; ...

[4] The term “unjustifiable action” as it appears in s 103(1)(b) is circumscribed by s 103(3). That subsection provides that for the purposes of a disadvantage grievance:³

... unjustifiable action by the employer does not include an action deriving solely from the *interpretation, application, or operation*, or disputed interpretation, application, or operation, of any provision of any employment agreement.

[5] In this judgment, we use the shorthand terms “jurisdictional bar”, or “exclusion”, when referring to this provision.⁴

[6] The phrase from s 103(3) that we have italicised is substantially the same phrase used in another part of the Act to define who may invoke the Act’s disputes procedure. Section 129 provides that the disputes procedure may be invoked by any person bound by an employment agreement, or by a party to an employment agreement, “[w]here there is a dispute about the interpretation, application, or operation” of the employment agreement in question.⁵

² Section 103(1)(b).

³ Emphasis added.

⁴ It has also been described in the case law as a “proviso” or “exclusionary qualification”: see, for example, *Matthes v New Zealand Post Ltd (No 3)* [1992] 3 ERNZ 853 (EmpC) at 871; and *Heenan v Ministry of Agriculture and Fisheries* EmpC Christchurch CEC16/91, 8 November 1991 at 27.

⁵ Section 129(1). One difference between the wording of s 129 and s 103(3) is that s 129 refers to a dispute about the interpretation “of an employment agreement”, whereas s 103(3) refers to the interpretation of “any provision of any employment agreement”.

[7] As we shall later explain in more detail, Mr Breen’s personal grievance claim was initially filed in the Employment Relations Authority (the Authority). The Authority upheld the claim and awarded compensation to Mr Breen for hurt and humiliation.⁶

[8] The company, however, successfully challenged that decision in the Employment Court, which dismissed Mr Breen’s claim for lack of jurisdiction.⁷ Relying on s 129 (the dispute provision), and the jurisdictional bar, Chief Judge Inglis held that instead of bringing a personal grievance claim, the correct and only available process for Mr Breen to have followed under the Act was to invoke the dispute procedure.⁸

[9] The Court’s ruling on jurisdiction meant Mr Breen was not entitled to the monetary compensation awarded to him by the Authority. Compensation is not available under the dispute procedure.⁹

[10] Dissatisfied with this outcome, Mr Breen sought and obtained leave to appeal to this Court.¹⁰ His main contention is that although the interpretation of a provision in his employment contract was an important feature of his claim, correctly analysed, the unjustifiable action(s) he was alleging did not derive *solely* from the interpretation or disputed interpretation of that provision. The Judge is said to have failed to give proper effect to the word “solely”, and as a result reached the wrong outcome.

⁶ *Breen v Prime Resources Co Ltd* [2022] NZERA Auckland 285 [ERA determination] at [58]–[62]. The payment of compensation for humiliation, loss of dignity and injury to the feelings of the employee is an available remedy for a personal grievance by virtue of s 123(c)(i) of the Employment Relations Act.

⁷ *Breen v Prime Resources Co Ltd* [2023] NZEmpC 199, [2023] ERNZ 816 [EmpC determination] at [27] and [29].

⁸ At [25]. The Judge did not foreclose the possibility that Mr Breen could have brought a claim under the Wages Protection Act 1983: see at [26].

⁹ As noted in the Employment Court decision, the relief in a dispute is a declaration which can then be used to commence further proceedings such as a breach of contract claim, a compliance order application and/or a penalty action: see at [9].

¹⁰ See Employment Relations Act, s 214(1)–(3); and *Breen v Prime Resources Co Ltd* [2024] NZCA 223 at [18].

[11] The formal question of law in respect of which Mr Breen has been granted leave to appeal to this Court is therefore whether the Employment Court erred in its construction and application of s 103(3) of the Act.¹¹

[12] Unlike Mr Breen, who was represented by Mr Mitchell KC, the company did not have counsel representing it on the appeal. Its managing director Mr Chung was granted leave to file written submissions on behalf of the company, but not to appear at the hearing.¹² The Court, however, appointed Ms Radich to assist the Court as contradictor.¹³ The Court also heard from Mr Iddamalgoda, counsel for the New Zealand Council of Trade Unions | Te Kauae Kaimahi, which was granted leave to appear as an intervener.¹⁴

[13] As will become apparent, the amount of money at stake is very modest. However, counsel for Mr Breen and the New Zealand Council of Trade Unions both contend that the Employment Court decision under appeal represents a major departure from existing case law, and that, if allowed to stand, it will significantly undermine the enforcement, and hence the protection, of employment rights.

[14] They further contend that this has in fact already started to happen. We were told that recent determinations of the Authority, citing the Employment Court decision in this case, are applying the jurisdictional bar in circumstances where it would not have been applied before.¹⁵ In their submission, the jurisdictional bar created by s 103(3) must be construed narrowly. Otherwise, they say, it will create a perverse incentive on the part of employers to create a dispute in order to avoid a personal grievance.

[15] Ms Radich, on the other hand, described the Chief Judge’s decision as a “very conventional” and appropriate application of the jurisdictional bar. The decision

¹¹ *Breen v Prime Resources Co Ltd*, above n 10, at [18].

¹² *Breen v Prime Resources Co Ltd* CA765/2023, 25 October 2024 (Minute of Katz J) at [5(d)(iii)].

¹³ *Breen v Prime Resources Co Ltd* CA765/2023, 22 November 2024 (Minute of Katz J) at [3].

¹⁴ At [2].

¹⁵ See, for example, *Donnelly v Fire and Emergency New Zealand* [2024] NZERA Wellington 572 at [25]–[27]; *Kruger v Jollybikes Ltd* [2024] NZERA Auckland 537 at [47]; *Chand v Rohits Civil & Infrastructure Ltd (in liq)* [2025] NZERA Auckland 574 at [34]; *Hutt v Fire and Emergency New Zealand* [2025] NZERA Christchurch 301 at [66]–[68]; *Du Fall v Mokoia Intermediate School Board* [2025] NZERA Auckland 381 at [23]–[26]; and *Do v Urbanstra Ltd* [2025] NZERA Auckland 608 at [21].

was, in her submission, consistent with the Act and the case law. Ms Radich further contended that it could just as easily be argued that a narrow interpretation of the jurisdictional bar would have the potential to emasculate the disputes procedure which was plainly not Parliament's intention. She also countered suggestions that a narrow interpretation would incentivise employers to contrive disputes by pointing out that a wide interpretation would incentivise employees to dress up a dispute as a personal grievance by strategically raising other factually unsustainable allegations of unjustifiable actions.

Factual background

[16] Mr Breen was employed by the respondent company in April 2021 as general manager and head of sales and marketing. The company is a property developer in Auckland, and Mr Breen's primary role was to sell 92 apartments off a plan.

[17] Under the terms of a signed written individual employment agreement, the company agreed to pay Mr Breen an annual salary of \$150,000, payable on the first day of each month. The agreement further stated that it was expected Mr Breen would be working for around 50 hours a week.

[18] Relevantly for present purposes, the agreement also contained the following provisions under the heading "Remuneration (Salary)":

- 4.2 You will not be paid for the hour you are not working because of your personal matter or ACC etc. Your holiday and sick leave shall not be applied to this clause.
- 4.3 Prime Resources shall be entitled to make a rateable deduction from your remuneration for the hours you have not worked as specified in clauses 4.2 set out above, which will be reflected with your wage calculation each month.

[19] Some four months after Mr Breen's employment had commenced, the New Zealand Government imposed a lockdown in Auckland due to the COVID-19 pandemic. On 17 August 2021, Mr Breen notified Mr Chung that he would continue to work during the lockdown, including by contacting customers and dealing with all incoming calls, email and text communications and inquiries from potential customers.

[20] On 1 September 2021, Mr Chung emailed Mr Breen in relation to the August pay. The email stated that in accordance with cl 4.2 of the employment agreement Mr Chung “need[ed] to deduct your absence hours of work” which, Mr Chung went on to say, he estimated as being 75 hours, resulting in a reduction of \$4,326.75. The email also stated that the company had unfortunately been unable to obtain a wage subsidy from the Government, but that it might try next time. The email concluded by asking Mr Breen to let Mr Chung know if he was happy with the calculation and that on receipt of his confirmation the money would be transferred to his account.

[21] Although Mr Breen responded immediately by saying he did not agree to any deduction and that he expected to be paid his full salary, the company went ahead anyway and made a reduced payment.

[22] Over the ensuing days, there was an exchange of emails in the course of which Mr Breen forwarded Mr Chung information from the Government regarding employer obligations during the lockdown, claimed that cl 4.2 of the employment agreement did not apply and also claimed that, in any event, he had worked the contractual hours. For his part, Mr Chung claimed the reduced payment was based on “what I believe is fair as per the employment agreement”.

[23] Mr Breen’s wife was terminally ill and his salary was their only source of income. As a result of the deductions, he had difficulty meeting his commitments and, among other things, had to make a hardship application to his bank in order to stop scheduled loan payments. He advised Mr Chung of these difficulties, and raised the possibility of a personal grievance.

[24] On 30 September 2021, following mediation, the company confirmed it would pay the August shortfall as well as the full salary for both September and October, which it later did.

The decision of the Authority

[25] On 1 November 2021, Mr Breen filed a statement of problem in the Authority claiming he had been unjustifiably disadvantaged as a result of the company failing to

pay his salary in full on the due dates during the lockdown period. Shortly after filing the claim, Mr Breen resigned.¹⁶

[26] The Authority held an investigation on 15 June 2022, at which Mr Breen represented himself, and the company was represented by counsel. The company contended that it made the late payments in August and September based upon a genuine understanding that it was entitled to withhold payment.¹⁷

[27] In its subsequent decision, the Authority made the following findings:

- (a) Mr Breen’s evidence that he had worked the full complement of hours during August was accepted.¹⁸ Although the number of emails to which Mr Breen was responding may have been lower than expected, he had been working properly, carrying out tasks on other aspects of his role. There was no definite evidence to suggest otherwise, and no evidence he had taken any “ACC” or “personal” time.¹⁹
- (b) A COVID-19 lockdown was not within the “etc” of cl 4.2 because it was not of the same character as the other specified matters, namely “personal matter[s] or ACC”.²⁰ The lockdown was beyond Mr Breen’s control, it was not personal to him, and he was not receiving any salary payments from another source.
- (c) Mr Breen did not have an unjustifiable disadvantage grievance in relation to the September payment.²¹ During September, Mr Breen had not acted in good faith. Despite claiming he was ready and available to work, he had stopped responding to client emails and, in any event, had been paid in full on the correct date.

¹⁶ There is a suggestion in Mr Chung’s evidence filed before the Employment Court that Mr Breen was terminated due to “redundancy”, which we note would not be a resignation.

¹⁷ ERA determination, above n 6, at [2].

¹⁸ At [46].

¹⁹ At [46]–[47].

²⁰ At [48]. Although the Authority did not express its finding on this point in quite these terms, it is the gist of the finding.

²¹ At [51]–[56].

- (d) Mr Breen had suffered stress, hurt and humiliation as a result of the late payment for August and was entitled to compensation in the sum of \$2,000 under s 123(1)(c)(i) of the Act.²²

The hearing in the Employment Court

[28] In July 2022, both Mr Breen and the company filed proceedings in the Employment Court. Mr Breen challenged some of the factual findings made by the Authority as well as the quantum of the compensation award, which he sought to be increased to \$20,000. For its part, the company filed a cross-challenge claiming it was entitled under the agreement and common law to reduce Mr Breen’s remuneration. It also claimed the Authority had erred in finding that Mr Breen had worked full time in August.

[29] The hearing of the challenge and cross-challenge was held on 13 June 2023. Evidence was given by Mr Breen and Mr Chung. In evidence, Mr Chung contested Mr Breen’s claim that he had worked more hours in August than Mr Chung had estimated and had continued to work around 50 hours per week. Mr Chung accepted he had never asked Mr Breen what work he had done in August before making his calculation. He agreed that the calculation was a “best guess” based on the number of emails to which Mr Breen was responding, and that it was an assumption that all of Mr Breen’s work was captured by the emails.

[30] Mr Chung also testified he had concerns about the financial impact of the lockdown on the company and about Mr Breen’s work performance not only in August but in the period prior to that.

[31] During the hearing, the company raised for the first time the jurisdictional point at the heart of this appeal, namely that the company’s purported unjustifiable action derived solely from the interpretation of the employment agreement and could not, therefore, be the subject of a personal grievance.²³

²² At [61]–[62].

²³ EmpC determination, above n 7, at [6].

[32] The hearing was adjourned to allow amended pleadings to be filed. It subsequently resumed in September 2023 when counsel made submissions on the question of jurisdiction.

The Employment Court judgment

[33] In her decision, the Judge referred to both the text and the purpose of the relevant statutory provisions. She observed that Parliament had clearly intended to draw a distinction between a dispute and a personal grievance, the deliberate distinction being reflected in the fact of different provisions in the Act relating to each type of claim, including in particular different procedures and different remedies.²⁴

[34] The Judge also referred to a number of previous decisions to demonstrate the variety of circumstances in which the jurisdictional bar has been applied.²⁵ One of the decisions referred to was *Cruickshank v Alliance Group Ltd*,²⁶ which, the Judge said, contained an analysis she had found “helpful”.²⁷

[35] We pause here to interpolate some detail about the *Cruickshank* decision. Decided in 1992, it was a case regarding the seasonal layoffs of two nurses employed at a meat works under an award (the occupational health nurses award), as well as individual employment contracts. The nurses, through their union, raised personal grievances, and also sought, if necessary, an adjudication on the issues in a disputes setting. The two sets of proceedings which were under the Employment Contracts Act 1991 were heard together at the one hearing before the Employment Tribunal.

[36] The Tribunal held that seasonal layoffs were not permitted under the award and therefore any condition purporting to allow suspension in the individual employment contracts was impermissible.²⁸ The Tribunal also found that the employer had, however, genuinely believed that the layoffs were permitted and that its actions had been taken pursuant to the mistaken interpretation.²⁹ The Tribunal concluded that, in

²⁴ EmpC determination, above n 7, at [9] and [23].

²⁵ At [16]–[24].

²⁶ *Cruickshank v Alliance Group Ltd* [1992] 3 ERNZ 936 (EmpC).

²⁷ EmpC determination, above n 7, at [24].

²⁸ *Cruickshank v Alliance Group Ltd* [1992] 1 ERNZ 187 (ET) at 192.

²⁹ At 194.

those circumstances, the disadvantage grievances had been disposed of,³⁰ by the operation of the disputes procedure, because the action complained of was solely an action deriving from the disputed interpretation of the contractual documents.³¹ The jurisdictional bar applied, and that meant the personal grievances could not be pursued.

[37] The appeal to the Employment Court by the meat company was confined to the issue of whether the company was legally entitled to seasonally layoff the nurses.³² The Employment Court found that the Tribunal had erred in its legal analysis of the effect of a seasonal layoff,³³ which in turn had impacted on its analysis of the contract documents. The Judge, Judge Palmer, remitted the matter back to the Tribunal for reconsideration in light of the Court's clarification of the correct legal position.³⁴

[38] As for the personal grievances, although the report of the Employment Court decision shows one of the nurses as the appellant, the judgment itself records that the only appellant was the employer. That is to say, there was no cross appeal regarding the application of the jurisdictional bar. As a result, Judge Palmer did not consider the jurisdictional bar in any depth other than to say that he could not presently perceive that the Tribunal's view on the personal grievance would be any different as a result of the reconsideration,³⁵ and that he agreed with the Tribunal's conclusion that, in the circumstances, the personal grievance rights were not exercisable.³⁶

[39] Applying the analysis referenced in *Cruickshank* to Mr Breen's case, the Chief Judge said, led to the following:³⁷

[25] ... The actions complained of (reduction in pay and late payment) were allegedly contrary to the provisions of the employment agreement and were unjustified. However, the company's actions were based on a genuine interpretation of cl 4 of the employment agreement. The company's interpretation may well have been wrong (a point I do not need to decide), but the claim was an action deriving solely from a disputed interpretation of an

³⁰ The nurses' personal grievance claims included unjustifiable "dismissal", as well as unjustifiable "disadvantage": see at 193.

³¹ At 194.

³² *Cruickshank v Alliance Group Ltd*, above n 26, at 937.

³³ The Court found the Tribunal had mischaracterised the seasonal layoffs as a "suspension", whereas the correct legal characterisation was a "termination", coupled with a reemployment obligation: see at 949–950.

³⁴ At 961–963.

³⁵ At 956.

³⁶ At 955–957.

³⁷ EmpC determination, above n 7.

employment agreement. Therefore, the dispute procedure applied, and no grievance based on disadvantage arose.

[40] In light of this conclusion, the Judge found it was not necessary for her to consider the company's cross challenge.³⁸

[41] We should signal at this point that it is unclear to us whether the Judge's reference to the actions being "unjustified" in the paragraph quoted above was simply a statement about Mr Breen's claims (that is, *allegedly* unjustified), or whether it was a finding by the Judge that the actions complained of were in fact unjustified. If the latter, then it would be a finding that was not dependent on the company's interpretation of cl 4.2 being wrong, but based on an unspecified something else. We say the finding cannot have been dependent on the interpretation being wrong because, in the same paragraph, the Judge also expressly states it was not necessary for her to decide whether the company's interpretation was right or wrong.

[42] The Judge made two further observations.

[43] First, she addressed an argument raised by Mr Breen's counsel that the company's actions could not be said to derive solely from the interpretation or application of the contract because it also engaged a claim under the Wages Protection Act 1983.³⁹ The Judge rejected this argument on the grounds that no separate or connected claim had been brought against the company under the Wages Protection Act, so the dispute remained contractual in scope.

[44] Secondly, in the context of costs, the Judge acknowledged the merits of Mr Breen's claim, which she described as "compelling".⁴⁰ In the absence of a jurisdictional bar, it was likely, she said, that she would have dismissed the company's challenge to the Authority's finding of a disadvantage grievance and would have upheld Mr Breen's challenge to the Authority's determination on relief.

³⁸ At [28].

³⁹ At [26].

⁴⁰ At [30].

The legal background to s 103

[45] In undertaking our own analysis of s 103, we have found it helpful first to examine the evolution of the jurisdictional bar through various iterations of employment legislation as well as some of the case law.

[46] For convenience, at this juncture we set out the full text of the two key provisions, s 103(1)(b) and (3):

103 Personal grievance

(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee’s employer or former employer because of a claim—

...

(b) that the employee’s employment, or 1 or more conditions of the employee’s employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee’s disadvantage by some unjustifiable action by the employer; ...

(3) In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.

Disputes

[47] We begin with disputes procedures, which preceded the statutory concept of a disadvantage personal grievance by some 76 years.

[48] Hardly surprisingly given the context, the word “dispute” has featured in all the employment legislation from 1894 onwards.⁴¹ The definition of “dispute” has varied over the years, but a consistent theme is the drawing of a distinction between disagreements arising in negotiations or bargaining for new terms and conditions, and disagreements about the interpretation, application or operation of the employment contract once settled. The first is about fixing the terms and conditions of employment and the second about enforcing them once agreed.

⁴¹ Beginning with the Industrial Conciliation and Arbitration Act 1894.

[49] The difference between the two types of disputes was at one point expressed as a difference between a “dispute of interest”, and a “dispute of rights”. Under the Labour Relations Act 1987, s 186(b) stated that disputes of rights “are confined to disputes over questions of interpretation, application, or operation of registered awards and agreements”. The distinction between the two types of disputes was important for several reasons affecting, for example, the right to take industrial action, and the jurisdiction of statutory bodies.

[50] In continuing for over a century to legislate for bespoke disputes procedures as a means of resolving disagreements arising during the currency of a concluded agreement, it is reasonable to assume that the various parliaments have all been of the view that the availability of orderly and fair processes is conducive to good industrial relations and prevents disruption to productivity.

[51] Up until 1991 both types of dispute procedures were confined to registered collective agreements. That is to say, none of the statutory procedures for creating employment agreements or interpreting them were available for individual agreements.

[52] That changed with the enactment of the Employment Contracts Act in 1991, which discontinued the terminology of disputes of interest and disputes of right. Instead, it differentiated between “[b]argaining” provisions and “dispute” provisions, the term “dispute” simply denoting a disagreement about the “interpretation, application or operation of an employment contract”.⁴²

[53] The current Act (that is, the Employment Relations Act 2000) did not reinstate the distinction between disputes of rights and disputes of interest. And like the Employment Contracts Act, the disputes procedure is limited under s 129 to what was previously the main type of dispute of rights, namely a “dispute about the interpretation, application, or operation of an employment agreement”.

[54] The phraseology “interpretation, application, or operation” is of course also used in the jurisdictional bar at the heart of this appeal. The only difference is that the

⁴² Employment Contracts Act 1991, s 2 definition of “dispute”.

jurisdictional bar refers to the interpretation, application and operation of “any provision of any employment agreement”,⁴³ whereas s 129 uses the phrase of “an employment agreement”.

[55] The word “dispute” has been held to require the existence of an actual disagreement,⁴⁴ and a dispute as to the “interpretation” of an award or agreement has been said to encompass disagreements regarding the meaning of words or phrases.⁴⁵

[56] Historically, courts dealing with dispute procedures have struggled with the extent (if any) to which the words “application” and “operation” were intended to overlap with “interpretation”.

[57] In one case, it was said that the word “operation” had a wide connotation.⁴⁶ However, in two decisions of a full Court, one of the Labour Court,⁴⁷ and another of the Employment Court,⁴⁸ it was said to be doubtful that either “application” or “operation” added anything of significance to the definition of dispute. Instead, it was suggested that the words might simply refer to the scope of the award itself as it operates. By the scope of the award itself, we understand the courts to have been referring primarily to issues about the coverage of the award — that is, which class of workers did it apply to and to what work, issues about whether the award was still in force, and the relationship of its rights and obligations with statutory rights and obligations. It was also tentatively suggested that the word “operation” might mean the application of the award in specific fact situations.⁴⁹

[58] In the second of the two full Court decisions, it was further stated that the words “application” and “operation” may not achieve very much beyond making it plain that the disputes jurisdiction is wide enough to encompass any difficulty that arises under

⁴³ Employment Relations Act, s 103(3).

⁴⁴ *Julian v Air New Zealand Ltd* [1994] 2 ERNZ 612 (EmpC) at 627–628. The term was also helpfully discussed in *Kaipara District Council v McKerchar* [2017] NZEmpC 55, [2017] ERNZ 243 at [206]–[208], albeit in a different context.

⁴⁵ John Hughes *Mazengarb’s Employment Law* (online looseleaf ed, LexisNexis) at [ERA129.5.1].

⁴⁶ *Air NZ Ltd v NZ Airline Pilots Association* [1988] NZILR 769 (LC) at 772. According to Keith J, in a separate judgment in *Canterbury Spinners Ltd v Vaughan* [2003] 1 NZLR 176 (CA) at [24], the word “operation” appeared to be unique in the statute book.

⁴⁷ *Feltex Furnishings etc v NZ etc Woollen Mills etc IUOW* [1989] 2 NZILR 360 (LC).

⁴⁸ *Julian v Air New Zealand Ltd*, above n 44.

⁴⁹ *Feltex Furnishings etc v NZ etc Woollen Mills etc IUOW*, above n 47, at 364.

a contract.⁵⁰ The Court also spoke of the words being intended to forestall an argument that the interpretive function is very narrow and could only be available if the contract itself has application or has been shown to be operative.

[59] According to the author of *Mazengarb's Employment Law*:⁵¹

Disputes as to the application of the agreement might once have covered a range of issues given the complicated structure of awards and agreements and the technical rules governing union coverage. They must now be largely confined to determining the parties to a document and — possibly overlapping with “interpretation” — the relevance of provisions in an agreement to specific fact situations.

[60] That does not, however, entirely account for two decisions of this Court which addressed the meaning to be given the words “application” and “operation” in the context of resolving issues as to whether a particular provision in an agreement was an agreement to agree, and therefore outside the disputes jurisdiction, or a provision that created rights which were legally enforceable.

[61] In *Timbercraft Industries Ltd v Otago and Southland Federated Furniture etc IUOW*,⁵² this Court confirmed there was jurisdiction under the Labour Relations Act disputes procedure to determine the amount of redundancy compensation payable to two workers. The workers were employed under an award which provided for a four week notice period in the event of a redundancy, the expressed purpose of the notice period being to enable negotiations to take place with the union about compensation. Negotiations had taken place, but no agreement had been reached. The employer then unilaterally made a payment which it considered fair and reasonable.

[62] This Court concluded that the dispute was about both the interpretation and the application of the award.⁵³ It required an interpretation, namely whether anything more than negotiation was contemplated by the award and, if so, what. With the interpretation having been held (by the Labour Court) to be that, once negotiations had

⁵⁰ *Julian v Air New Zealand Ltd*, above n 44, at 633.

⁵¹ Hughes, above n 45, at [ERA129.5.2].

⁵² *Timbercraft Industries Ltd v Otago and Southland Federated Furniture etc IUOW* [1990] 2 NZILR 626 (CA).

⁵³ At 631.

failed, either party could invoke the disputes procedure to determine the amount,⁵⁴ the dispute then required the award — as interpreted — to be applied to the two workers, and to be rendered operative by a determination of how much money should be paid to them.⁵⁵

[63] The same approach was considered by this Court, in the later decision *Canterbury Spinners Ltd v Vaughan*, to be applicable under the current Act’s definition of dispute in s 129.⁵⁶ Like *Timbercraft*, the *Canterbury Spinners* case also concerned the use of the disputes procedure to determine the level of redundancy compensation payable to an employee employed under the terms of a collective employment agreement.⁵⁷ The judgment suggests that the process of reaching agreement on the financial consequences of a clause providing for an otherwise unspecified level of reasonable redundancy would be one of applying or operating the term or condition.

[64] In none of the cases discussed above, was the application of the jurisdictional bar under s 103(3) an issue.

Disadvantage grievances

[65] Disadvantage grievance claims first appeared in the Industrial Conciliation Act 1954 by way of amendments to that Act in 1970.⁵⁸

[66] The 1970 amendments provided for two types of personal grievance, namely wrongful “dismiss[als]”, and “other action” (meaning actions other than dismissal) taken by the employer during the employment which affected an employee to their disadvantage.

⁵⁴ See *Otago & Southland Federated Furniture etc IUOW v Timbercraft Industries Ltd* [1988] NZILR 1334 (LC) at 1342–1344.

⁵⁵ *Timbercraft Industries Ltd v Otago and Southland Federated Furniture etc IUOW*, above n 52, at 631.

⁵⁶ *Canterbury Spinners Ltd v Vaughan*, above n 56. But the decision was considered not applicable under the Employment Contracts Act, due to s 46 of that Act: see at [23] and [39].

⁵⁷ The collective employment agreement in question had expired and therefore the employment agreement was technically an individual employment agreement based on the provisions of the expired collective agreement: see at [27].

⁵⁸ See Industrial Conciliation and Arbitration Amendment Act 1970. See also *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245 at [17]; and Gordon Anderson “The Origins and Development of the Personal Grievance Jurisdiction in New Zealand” (1988) 13 NZJIR 257 at 259–261.

[67] From the outset, Parliament was concerned to delineate the respective spheres of the disadvantage grievance jurisdiction, and the more established disputes procedure.

[68] The 1970 amendments addressed the relationship between the two by imposing a qualification on the scope of the disadvantage grievance to the effect that the action complained of must “not [be] an action of a kind applicable generally to workers of the same class employed by the employer” (the generic exclusion). Under the award system then in operation, awards typically contained classifications of workers, which accounts for the reference to “workers of the same class”.

[69] Secondly, the 1970 amendments included the terms of a specimen clause setting out a disputes procedure which parties were empowered to insert in awards and collective agreements (referred to as instruments). The specimen clause contained wording to the effect that the disputes procedure was only to apply to a dispute between the parties bound by the instrument concerning: (a) the interpretation of the instrument; or (b) any matter (not being a personal grievance) relating to matters dealt with in the instrument and not specifically and clearly disposed of by its terms.

[70] Both these provisions — the generic exclusion and the specimen clause — were repeated in the subsequent Industrial Relations Act 1973.

[71] The effect of those provisions was that while disputes procedures and personal grievances procedures retained exclusive areas of operation there also remained the possibility of concurrent actions, subject always to the overriding generic exclusion.

[72] In 1987, the Industrial Relations Act was replaced by the Labour Relations Act. The latter Act retained compulsory unionism and the primacy of registered collective agreements. With some exceptions, access to the personal grievance procedure also continued to be confined to union members. However, the types of justiciable personal grievances were expanded to include sexual harassment, discrimination, and duress in addition to the established categories of dismissal and disadvantage grievances. The disadvantage grievance no longer involved “other action” but just “action”. For the first time, the word “unjustifiable” was applicable to both dismissal and action claims.

[73] It is noteworthy that, although the new types of personal grievances also related to conduct during an ongoing employment relationship, none of them was made subject to the same jurisdictional bar that applied to disadvantage grievances.⁵⁹ That has never changed. Presumably that is because of their greater specificity and because they are inherently less likely than disadvantage grievances to encroach on disputes territory.

[74] Significantly for present purposes, a number of changes were also made to the definition of a disadvantage grievance.⁶⁰ It was now defined as a claim:⁶¹

That the worker's employment, or one or more conditions thereof, is or are affected to the worker's disadvantage by some unjustifiable action by the employer (not being an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any award or agreement); ...

[75] The key changes were:

- (a) the requisite disadvantageous effect could now be to one or more conditions of the worker's employment;
- (b) as mentioned, the requisite action must now be an "unjustifiable" action; and
- (c) the generic exclusion was replaced with a provision excluding actions deriving solely from the interpretation, application or operation of any provision of any award or agreement.

[76] Accompanying these changes was a statement in the objects clause relating to personal grievances that "[p]ersonal grievances are distinguishable from disputes of rights by their subject-matter and not by the number of workers affected".⁶²

⁵⁹ Other than a requirement that the employee must make a choice between pursuing a personal grievance or making a claim under the then Human Rights Commission Act 1977 or the Race Relations Act 1971, as the case may be.

⁶⁰ The Labour Relations Act 1987 also changed the scope of the definition of a dispute of rights. A dispute of rights was defined in s 2 simply as "a dispute concerning the interpretation, application, or operation of an agreement or award".

⁶¹ Labour Relations Act, s 210(1)(b).

⁶² Section 209(b).

[77] As a result of the latter provision, Judge Travis held in *NZ Resident Doctors' Assn v Waikato Area Health Board* that the fact the grievant was one of 120 doctors impacted by a decision to stop providing them with free meals did not of itself prevent what was a test case being brought as a personal grievance.⁶³

[78] However, the subject matter of the claim was held to preclude a personal grievance, at least in relation to a period of employment where there was an award in force containing an express provision for free meals which the employer breached.⁶⁴ In relation to this period, the Employment Court would not countenance arguments raised for the purpose of the personal grievance about the manner in which the change was introduced, failures to contact the doctor personally, and allegations the employer knew it was breaching the award, all of which were relied upon by the union as taking the case outside the jurisdictional bar. The Court found there was no substance in the arguments either as a matter of fact, or law. The claim, it was held, solely depended upon the provisions of the award, and therefore did not constitute a personal grievance.

[79] A different view seemed to be taken of the period after the award expired and the contractual obligation to provide free meals came to an end.⁶⁵ In relation to this period, the Court was prepared to accept the possibility of a personal grievance. The point of distinction between the two periods of employment appears to be the absence of an express contractual provision in the second period. At the time, there was authority the disputes provision could only apply to express terms and conditions.⁶⁶

[80] Even so, other than a conclusory statement quoting the wording of the jurisdictional bar, the judgment does not explain why, as a matter of law, aspects of the employer's breach of contract were automatically outside the scope of a personal grievance. It seems odd that personal grievance remedies for the employee were

⁶³ *NZ Resident Doctors' Assn v Waikato Area Health Board* [1992] 1 ERNZ 582 (EmpC) at 590.

⁶⁴ At 590–591.

⁶⁵ As suggested, this was confirmed in a decision of the High Court: see *Mawson v Auckland Area Health Board* [1991] 3 NZLR 599 (HC) at 609.

⁶⁶ See, for example, *New Zealand Railways Corp v Federated Cooks & Stewards IUOW* [1989] 2 NZILR 471 (LC) at 476. See also *NZ Resident Medical Officers Assn v State Services Commission* [1989] 2 NZILR 917 (LC) at 923–924.

unavailable when the employer was in breach, but available when the employer was not.

[81] Unfortunately, the legislative materials leading to the enactment of the Labour Relations Act do not contain any explanation for the various changes of statutory wording identified at [74] to [76] — including, in particular, the insertion of the word “solely” as an element of the jurisdictional bar.

[82] We consider it reasonable, however, to assume that, viewed as a package, the various changes were intended to enlarge the scope of the personal grievance jurisdiction by, inter alia, reducing the scope of the jurisdictional bar. That was certainly the view of the Labour Court in *Airline Stewards & Hostesses of NZ IUOW v Air New Zealand Ltd*.⁶⁷

[83] The unjustifiable action alleged in that case was the employer’s failure to promote its longest serving female cabin crew member to the role of chief purser. The Court acknowledged that the case would likely involve detailed consideration of the promotion provisions in the relevant collective agreement, but held that the jurisdictional bar did not apply because the claim included an allegation of disparity of treatment.⁶⁸ The claim did not thus depend solely on the interpretation, application or operation of the award, but was dependent in part on the failure to treat the air hostess in the same way as 17 other crew members.

[84] In relation to the jurisdictional bar, the Court also made the following general observations. It noted there were many classes of actions,⁶⁹ including personal grievances, in which mediators and the Court, in particular, were called upon to reach definitive conclusions as to the interpretation, application or operation of the provisions of awards and agreements.⁷⁰ The Court went on to say that in the case of a personal grievance purportedly brought as a disadvantage grievance, the significant word which acted to transform what might otherwise be a personal grievance into a

⁶⁷ *Airline Stewards & Hostesses of NZ IUOW v Air New Zealand Ltd* [1990] 1 NZILR 1027 (LC).

⁶⁸ At 1035–1036.

⁶⁹ The others mentioned were actions for the recovery of penalties and wages, as well as demarcation disputes.

⁷⁰ At 1035–1036.

dispute of rights was the word “solely”.⁷¹ The Court, rightly in our view, clearly saw the addition of this word as narrowing the reach of the jurisdictional bar.

[85] This judgment was delivered before *Resident Doctors’ Assn*, but the latter does not refer to it.

[86] In another Employment Court decision, *Heenan v Ministry of Agriculture and Fisheries*, decided under the Labour Relations Act, the Court declined to consider invoking the jurisdictional bar without having first heard evidence bearing on general allegations of unfairness and breach of the obligation to be a good employer under the State Sector Act 1988.⁷² After hearing the evidence, the Court found the employer had acted appropriately and fairly throughout. As a result, the personal grievance was reduced to contentions about whether certain action was a legitimate exercise of the employer’s legal rights under a particular clause, and whether another particular provision in the contract was applicable. That meant, in the view of the Court, that the personal grievance claim derived solely from the disputed interpretation, application or operation of the contract provisions and could not therefore proceed.⁷³

[87] Finally, the jurisdictional bar under the Labour Relations Act also featured in a decision of this Court in *Watties Frozen Foods Ltd v United Food & Chemical IUOW of NZ*.⁷⁴ When the employer decided to contract out its cafeteria operation, one of the staff asked to be made redundant. The employer refused and arranged a job for the staff with the contractor, giving the staff member an option of transferring back to a job with the employer after three months. The staff member subsequently took up this option and was re-employed on factory duties but these proved beyond her physical capabilities.

[88] This Court held that an employer’s refusal to accept that a worker is redundant, if unjustifiable and the cause of disadvantage, was capable in law of giving rise to a personal grievance.⁷⁵

⁷¹ At 1036.

⁷² *Heenan v Ministry of Agriculture and Fisheries*, above n 4, at 6.

⁷³ At 26–27.

⁷⁴ *Watties Frozen Foods Ltd v United Food & Chemical IUOW of NZ* [1992] 2 ERNZ 1038 (CA).

⁷⁵ At 1041.

[89] In 1991, the Labour Relations Act was in turn replaced by the Employment Contracts Act. The 1991 Act made radical changes to the employment landscape, abolishing compulsory unionism, and creating a more contract-centred approach, giving statutory recognition for the first time to individual employment agreements and allowing all employees to bring personal grievances.

[90] However, the wording of the jurisdictional bar remained the same as it had appeared in the Labour Relations Act, other than references to “any provision of any award or agreement” being replaced with “any provision of any employment contract”.⁷⁶ The statement in the objects clause that subject matter, rather than numbers of affected employees, was the distinguishing factor between disputes and personal grievances, was also preserved.

[91] Three of the five decisions cited by the Judge in the present case were decided under the Employment Contracts Act. One of those decisions was a decision of this Court in *Auckland College of Education v Hagg*.⁷⁷ *Hagg* concerned a disadvantage grievance brought by a lecturer who was employed on a two-year fixed term contract, and who argued that when a tenured position arose he should have been appointed to it. The Employment Court had held that the applicant had a reasonable expectation of ongoing employment because the employer had twice assessed his suitability for the job. This Court overturned that decision. The grounds for doing so included its view that the non-appointment was an action that derived solely from the interpretation, application or operation of the employment agreement, or its disputed interpretation, application or operation.⁷⁸ The Court reasoned that, from the employer’s perspective, having regard to its obligations under the State Sector Act, it had no legal option but to allow the fixed term contract to expire and then advertise the position.

[92] The other two decisions decided under the Employment Contracts Act were both decisions of the Employment Court: *Cruickshank*,⁷⁹ and *Matthes v New Zealand Post Ltd (No 3)*.⁸⁰ It will be recalled that *Cruickshank* concerned seasonal layoffs and

⁷⁶ Employment Contracts Act, s 27(1)(b).

⁷⁷ *Auckland College of Education v Hagg* [1996] 2 NZLR 402 (CA).

⁷⁸ At 407.

⁷⁹ *Cruickshank v Alliance Group Ltd*, above n 26.

⁸⁰ *Matthes v New Zealand Post Ltd (No 3)* [1992] 3 ERNZ 853 (EmpC).

an obiter statement which endorsed the Employment Tribunal's application of the jurisdictional bar.

[93] *Matthes* concerned four personal grievances brought following New Zealand Post's restructuring of a mail centre. The four cases appear to have been test cases, so in that sense were generic. A collective agreement provided for voluntary severance if other options, which included relocation to a new position, were not clearly practicable. The plaintiffs indicated a preference for voluntary severance but were allocated positions in the new structure. It was alleged that the four employees had been unjustifiably disadvantaged by the employer's actions in refusing them voluntary severance. It was also alleged that New Zealand Post had breached its statutory obligation to be a good employer.

[94] New Zealand Post contended that the jurisdictional bar prevented the disadvantage grievances from proceeding. Its counsel accepted that the essence of the jurisdictional bar was the word "solely" and that, if contrary to his other submissions, the Court was persuaded to go outside the provisions of the contract and impose obligations of procedural fairness, then the jurisdictional bar would not apply.⁸¹

[95] The Court held that because the plaintiffs' case put the duties of fairness and being a good employer in issue, and the application of the contract to the personal circumstances of the plaintiffs, the jurisdictional bar did not apply and the actions complained of could be brought as personal grievances.⁸² That was so despite the claim having many characteristics of a dispute of rights.

[96] In coming to this conclusion, Judge Travis derived support from the decision of this Court in *Watties*, discussed at [87] to [88]. Although the Court in *Watties* had not been required to examine the jurisdictional bar, Judge Travis considered the decision to be significant because not only did it concern similar facts, this Court had also shown a preparedness to examine the effects of the employer's decision on the individual workers.⁸³ In the case before him, to resolve the matters in issue it would

⁸¹ At 870.

⁸² At 871.

⁸³ At 873.

be necessary to consider the meaning of the contract, how the procedure was carried out and how the requirements of the contract were applied or not applied to individual workers.

[97] We pause here to interpolate that this approach seems contrary to the Judge's own previous decision in *NZ Resident Doctors' Assn*, under the Labour Relations Act. In that case, it will be recalled, the Court had refused to countenance arguments about how the decision had been applied to individuals.

[98] Ultimately, in *Matthes*, the actions of New Zealand Post were found to be justified in terms of the relevant contracts and all the personal grievances were rejected, save for the claims brought by one employee whom the Judge found had been treated in a procedurally unfair manner.

[99] Turning finally to the current Act. As mentioned, it did not reinstate the dispute of interest and dispute of rights distinction. Instead, it introduced a new overarching concept of an "employment relationship problem", defined in broad terms as including a personal grievance, a dispute and any other problem relating to or arising out of an employment relationship but not including any problem regarding the fixing of new terms and conditions.⁸⁴

[100] The Act's s 103(1) definition of personal grievance contains the most extensive list to date of the various types of claims that may amount to a personal grievance. In addition to claims concerned with dismissal, disadvantageous action, discrimination, sexual harassment and duress, the list has been further expanded to include: adverse treatment of persons affected by family violence; racial harassment; disadvantage arising from deficiencies in the employment agreement consisting of non-compliance with statutory requirements regarding matters such as hours of work, shifts, availability, and secondary employment; breach of statutory provisions relating to the employee's right to refuse to perform certain work, or relating to the cancellation of shifts; adverse conduct relating to health and safety; and retaliatory conduct, or the threat thereof, related to whistleblowing.

⁸⁴ See Employment Relations Act, s 5 definition of "employment relationship problem".

[101] The wording of the jurisdictional bar remains materially the same as it was under the Labour Relations Act, and Employment Contracts Act, save that the exclusion is now contained in a discrete subsection, and not part of the main definition of a disadvantage grievance. The bar still only applies to disadvantage grievances.

[102] Significantly, by way of a 2011 amendment,⁸⁵ a new provision, s 103A, was added. Section 103A relevantly provides that for the purposes of a disadvantage grievance, the question of whether an action was justifiable must be determined on an objective basis,⁸⁶ with the test being whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.⁸⁷

[103] Section 103A also stipulates, in subs (3), the factors the court must consider when applying the justification test. In the context of a disadvantage grievance, the relevant factors can be paraphrased as whether the employer, before taking action against the employee:

- (a) sufficiently investigated any allegations against an employee;
- (b) raised the concerns they had with the employee;
- (c) gave the employee a reasonable opportunity to respond to the concerns;
and
- (d) genuinely considered the employee's explanation;

[104] Section 103A expressly states that this list, which by its nature appears primarily targeted at disciplinary action,⁸⁸ is not exhaustive.⁸⁹

⁸⁵ Employment Relations Amendment Act 2010.

⁸⁶ Section 103A(1).

⁸⁷ Section 103A(2).

⁸⁸ As this Court has previously observed: see *FGH v RST* [2023] NZCA 204, [2023] ERNZ 321 at [31]–[32].

⁸⁹ Section 103A(4).

[105] There have been relatively few Employment Court decisions which have considered the application of the jurisdictional bar as it appears under the current Act.

[106] One of the two cases cited in the decision under appeal was a 2007 decision, *Red Beach School Board of Trustees v New Zealand Education Institute (Inc)*.⁹⁰ That case concerned the grading of six teacher aides under a collective employment agreement which provided for three grades A, B and C, with C being the highest. The agreement listed the criteria for each grade which referenced matters such as the nature of the work being done, as well as the aides' responsibilities, experience, and their contribution to the teaching programme. Remuneration was tied to the grades.

[107] In a disputes proceeding brought by the relevant union, the Authority held that under the agreement the teacher aides should have been graded B, instead of A.⁹¹ The Authority also considered that the teacher aides would have a valid personal grievance as the employer had been unable to justify its grading decisions which had disadvantaged them. The Authority went on to say it was now over to the teacher aides, and their union, to decide what further action they might wish to take.

[108] On the employer's appeal to the Employment Court, Judge Couch heard evidence about the work done by each of the teacher aides. Then, after construing various terms in the agreement and applying them to the facts, he agreed the correct grade was B.⁹²

[109] As regards the Authority's statements about the personal grievance, Judge Couch set these aside for reasons that included the Authority's failure to consider the jurisdictional bar.⁹³ At the same time, however, the Judge was not

⁹⁰ *Red Beach School Board of Trustees v New Zealand Education Institute (Inc)* EmpC Auckland AC13/07, 20 March 2007.

⁹¹ *New Zealand Educational Institute (Inc) v Board of Trustees - Red Beach School* ERA Auckland AA437/05, 7 November 2005 at [47]–[48].

⁹² *Red Beach School Board of Trustees v New Zealand Education Institute (Inc)*, above n 90, at [104].

⁹³ At [108]–[110].

prepared to make a declaration that the jurisdictional bar precluded any personal grievance. That was because:⁹⁴

... s 103(3) only relates to actions of an employer deriving “solely” from the interpretation, application or operation of an employment agreement. Thus, if any of the teacher aides could establish by evidence that Red Beach School was motivated in its grading decisions by any other factor, there may be scope to pursue a personal grievance notwithstanding s 103(3).

[110] The other s 103(3) decision cited in the judgment under appeal was *Clarkson v Department of Child Youth and Family Services*,⁹⁵ decided in 2004, and described by Chief Judge Inglis in the present case as possibly evidencing “a broader, more contextual, approach”.⁹⁶

[111] *Clarkson* involved a protracted and factually complex dispute (using the word “dispute” in the ordinary sense of meaning an argument), spanning several years, and arising from a decision to reassign Mr Clarkson to a new role within the Department after the unit he had been working in was disbanded.

[112] The Authority took the view that, in order to resolve the employment relationship problem, it needed to interpret the contract and determine whether the employer had applied it properly.⁹⁷ The matter should, it concluded, be heard as a dispute, and not a personal grievance, in that it arose solely from a dispute about the interpretation, application or operation of the contract.

[113] On appeal to the Employment Court, Judge Goddard was critical of that approach, holding:⁹⁸

... this is precisely the kind of case in which the Authority should have shunned technicalities, including the technicality that the plaintiff’s case may involve construing an employment agreement. As it seems to me, it includes much more than a dispute and does not turn solely upon a disputed interpretation, application, or operation of an employment agreement. What it turns on is how the employer in this case handled the situation that had arisen

⁹⁴ At [113].

⁹⁵ *Clarkson v Department of Child Youth and Family Services* EmpC Christchurch CC9/04, 5 May 2004.

⁹⁶ EmpC determination, above n 7, at [21].

⁹⁷ *Clarkson v Department of Child Youth and Family Services* ERA Christchurch CA73/03, 1 July 2003 at 3–4.

⁹⁸ *Clarkson v Department of Child Youth and Family Services*, above n 95, at 21.

and whether it treated the plaintiff with respect and dignity having regard to the fact that he was a long-standing departmental employee.

[114] Having regard to the various decisions discussed above, we consider that the approach taken in *Clarkson* appears consistent with the weight of authority.

Our analysis

[115] For the reader's convenience, we again set out the full text of the jurisdictional bar:

103 Personal grievance

...

- (3) In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.

[116] As evidenced by counsel's starkly contrasting assessments of the orthodoxy of the Chief Judge's decision in this case,⁹⁹ the interpretation and application of the jurisdictional bar is not entirely straightforward.

[117] As will be apparent, the difficulties include conflicting approaches in the case law, particularly regarding the extent to which the personal circumstances of an individual employee can take the case outside the jurisdictional bar. Also, there is an apparent conflict between the meaning accorded the words "interpretation, application, or operation" as they appear in the jurisdictional bar, and the meaning attributed to the same words as they appear in the definition of a dispute, and in s 129.

[118] At least some of the difficulties appear, in our view, to arise from the Act's continued use of the same or similar phraseology from earlier legislation, without explanation, despite the earlier legislation containing different statutory regimes.

[119] For example, as mentioned, the Labour Relations Act contained materially similar wording to that which currently appears in s 103(3). However the Labour Relations Act did not give statutory recognition to individual employment agreements

⁹⁹ See [13] to [15].

— only registered awards and registered agreements. That in turn meant that where the words “agreement” or “award” were used, it was a reference to a written document, writing being a prerequisite to registration. Hence, the word “provision” in the phrase “interpretation, application, or operation, of any provision of any award or agreement” was understood to be confined to express written terms.¹⁰⁰

[120] In contrast, when individual employment contracts gained statutory recognition under the Employment Contracts Act, it was not mandatory for them to be in writing, unless requested by the employee. While the current Act does require both individual employment agreements, and collective agreements, to be in writing,¹⁰¹ the definition of the term “employment agreement” is not limited to individual and collective employment agreements, with their accompanying written requirements. It is also expressed to include “a contract of service”.¹⁰² In those circumstances, the phrase “any provision of any employment agreement”, as it appears in s 103(3), more readily lends itself to an interpretation that includes oral or implied terms.

[121] Further, in the context of registered awards and collective agreements, the inclusion of the word “application”, as in the phrase “application, ... of any provision of any award or agreement”,¹⁰³ was readily understandable, given the frequency with which issues of coverage and demarcation arose in that context. It is not so understandable in the context of individual employment agreements, apart from issues that may arise about the identity of the employer party to an individual employment agreement,¹⁰⁴ especially in the company group situation. But even then, that is not particularly common.

[122] Compounding these difficulties, where changes have been made over time to the statutory wording, the reason for the change is not always discernible.

¹⁰⁰ See, for example, *New Zealand Railways Corp v Federated Cooks & Stewards IUOW*, above n 66, at 476.

¹⁰¹ Employment Relations Act, ss 54(1)(a) and 65(1)(a).

¹⁰² Section 5 definition of “employment agreement”, para (a).

¹⁰³ Labour Relations Act, s 210(1)(b).

¹⁰⁴ See, for example, *Pilgrim v Attorney-General (No 2)* [2023] NZEmpC 227, [2023] ERNZ 1020 at [15]–[16], [36], [40] and [41]; and *E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192, [2022] ERNZ 966 at [83], [87], [90] and [93].

Unfortunately, as mentioned, this is so in regard to the insertion of the critical word “solely”, the legislative materials being silent as to why that was done.

[123] The fact of different legislative regimes also means that some caution needs to be applied when considering the case law. There appear to have been relatively few cases dealing with the jurisdictional bar under the current Act, and certainly none from this Court. The decision of this Court in *Hagg*,¹⁰⁵ cited by the Judge, predates the current Act and is of limited assistance because it was focused on the State Sector Act. As for the earlier decisions of the specialist courts and institutions, they understandably did not engage in close textual analysis or detailed reasoning, with outcomes tending to be a matter of impression.

[124] In our view, the guiding principle must be to interpret and apply s 103(3) in a way that both gives effect to the word “solely” and which also renders the distinction between disputes and disadvantage grievances meaningful. After all, Parliament has chosen to continue with a jurisdictional bar, thereby clearly signalling that it views a discrete disputes procedure as important, and that it wishes to avoid it being swallowed up by the disadvantage grievance jurisdiction.

[125] With that guiding principle in mind, we make the following points:

- (a) The descriptive label a party puts on their proceeding is not determinative. The general principle of substance prevailing over form applies. Thus, as the Chief Judge noted, the fact Mr Breen’s proceeding was in the form of a personal grievance was not determinative.¹⁰⁶
- (b) The fact that the interpretation of a contractual provision is an issue in the proceeding cannot of itself trigger the jurisdictional bar. Apart from anything else, such an approach would be to ignore the word “solely”.
- (c) By use of the word “solely”, the legislation expressly allows for disadvantage grievances and disputes to be concurrent causes of action.

¹⁰⁵ *Auckland College of Education v Hagg*, above n 77.

¹⁰⁶ EmpC determination, above n 7, at [17].

What is precluded by the jurisdictional bar are coextensive causes of action. To put it another way, “solely” means that, for a disadvantage grievance to be available, there must be something more than a disputed interpretation, application or operation of a provision in the employment agreement.

- (d) “Deriving from” in its ordinary dictionary meaning, as the present participle of “to derive”, means “originat[ing] *from*”,¹⁰⁷ “aris[ing] from”,¹⁰⁸ or the “source or origin [of]”.¹⁰⁹ It thus clearly denotes a requirement that there must be a causal link or connection between the action complained of and the interpretation, application or operation of the provision in the employment agreement.
- (e) At first blush, the repetition of the words “interpretation, application or operation” with the addition of the word “disputed” would seem superfluous. If there was not a dispute, why would the dispute procedure be even in contemplation? However, in our view, the addition allows for the possibility that the employer’s interpretation may be wrong, thus making clear that the fact of a wrong interpretation is not in itself sufficient to displace the jurisdictional bar. To put it another way, there has to be more than an employer persisting with what is (unknown to the employer at the time) a wrong interpretation and taking action in reliance on it.
- (f) Whether an action derives from the interpretation, application or operation of a provision must be viewed objectively in the sense that, if the employer did not genuinely believe in the interpretation it professed to adopt, and/or was motivated by an improper motive in taking the action it did, then the derivation of the action was not the interpretation, application or operation of the provision within the

¹⁰⁷ Lesley Brown (ed) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) vol 1 at 649 (emphasis in original).

¹⁰⁸ Graeme Kennedy and Tony Deverson (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 292.

¹⁰⁹ *Collins English Dictionary* (14th ed, HarperCollins Publishers, Glasgow, 2023) at 540.

meaning of s 103(3). Contrary to a submission made by Ms Radich, we consider that Parliament could never have intended to preclude a personal grievance in such circumstances.

- (g) The ordinary meaning of the word “interpretation”, when used in the context of a contractual provision, is about discerning its proper meaning.¹¹⁰
- (h) While the construction of “interpretation” is straightforward, like other courts before us, we have found ascribing a distinct meaning to the words “application” and “operation” problematic. The three words are separated by commas and the disjunctive word “or” is used. Yet as a matter of language, the words are often interchangeable.
- (i) An interpretation exercise, in the nature of things, does not usually occur in a vacuum, but rather in relation to a factual situation, especially when there are competing interpretations. Thus, in the present case, the interpretation exercise requires consideration of whether the “etc” in cl 4.2 of the employment agreement includes a Government ordered lockdown. An action based on the view that the clause did cover it would be an action deriving from that interpretation. But it could also just as aptly be described as an action deriving from the “disputed ... application” of the provision as well as the “disputed ... operation” of it, using those words in ordinary parlance. Seen in that light, the words “application” and “operation” add little to the word “interpretation”.
- (j) In another broader sense however, given the contractual nature of the employment relationship, almost every work-related action taken by an employer in relation to their employee(s) is capable, in common parlance, of being described as the disputed application or operation of a provision in the employment agreement.

¹¹⁰ Bryan A Garner (ed) *Black's Law Dictionary* (12th ed, Thomson Reuters, St Paul, 2024) at 977.

- (k) Taken to its logical conclusion, a broad interpretation of “application” and “operation” would therefore preclude a personal grievance where the challenge to the meaning of the clause is combined with a complaint about the manner of its implementation. It would also preclude a personal grievance where the disadvantaged employee is not challenging the meaning of the particular clause at all, but is instead claiming that the employer’s unfair or unreasonable application or use of it in their personal circumstances makes the action unjustifiable. Disparity of treatment cases are a good example of that category of claim.¹¹¹
- (l) Such far-reaching consequences could not in our view have been intended which strongly points against a broad interpretation of the words “application” and “operation”. It would result too in giving little or no effect to the word “solely”, it would blur the well accepted distinction between the availability of a power and its exercise, and it would leave little room for a disadvantage grievance.
- (m) Indeed, if a broad interpretation of “application” and “operation” were applied for the purpose of the jurisdictional bar under the current Act, it would arguably make an even greater inroad into the disadvantage grievance jurisdiction than it would if it had been adopted under some previous legislative regimes because of the current proliferation of individual employment agreements.
- (n) Further, as demonstrated by our review of the cases, the weight of authority regarding the jurisdictional bar, both before and after the abolition of registered awards and registered collective agreements, does not support a broad interpretation of “application” and “operation”.

¹¹¹ See, for example, *Airline Stewards & Hostesses of NZ IUOW v Air New Zealand Ltd*, above n 67, at 1035–1036.

- (o) Accordingly, in order to give effect to Parliament’s intention, we consider that while the words “application” and “operation” should not be treated as entirely surplus for the purposes of s 103(3), they must bear a limited meaning closely allied to “interpretation”, with the primary purpose of their inclusion being to clarify its scope.
- (p) In our view, “application” and “operation” are intended to make it clear that issues such as those about the identity of the parties to the employment agreement, the availability of a power under the contract, whether a particular provision is actually operative as a matter of law, and the relationship between a provision in the agreement and a statutory provision, are capable of triggering the jurisdictional bar. It is impossible to capture all possible scenarios, and this list of issues is not intended to be exhaustive. But, in our view what the words “application” and “operation” will not cover are issues about the implementation of the provision, once interpreted, so as to preclude a personal grievance if the way in which it is implemented otherwise meets the prerequisites of a disadvantage grievance.
- (q) In coming to that conclusion, we are mindful that the words “application” and “operation” must be intended to have the same meaning for the purpose of the jurisdictional bar as they do for the definition of dispute under s 129. Yet two earlier decisions of this Court discussed at [61] to [63] appear to have attributed a wider meaning to the words “application” and “operation” in the dispute context than we have decided should be adopted in the present case.¹¹²
- (r) However, neither of those decisions had occasion to consider the jurisdictional bar because there was never any question of a possible personal grievance claim. They were also very different sorts of cases. In both cases, the reason the dispute procedure was held to be available was because the interpretation of the contract provision itself was held

¹¹² *Timbercraft Industries Ltd v Otago and Southland Federated Furniture etc IUOW*, above n 55; and *Canterbury Spinners Ltd v Vaughan*, above n 56.

to mandate the outcome. In those circumstances, we do not consider that either decision precludes the interpretation that we favour of s 103(3).

[126] Drawing all these threads together, we consider that the correct approach when applying the jurisdictional bar is to ask whether resolution of the claim turns entirely on a finding about the correctness or otherwise of the employer’s genuine interpretation of the provision or provisions in question. If it does, then the jurisdictional bar applies. If it does not, because apart from a wrong interpretation, there is something else capable of satisfying the key elements of a disadvantage grievance (namely an unjustified action, causing disadvantage), then the claim may proceed as a personal grievance. In addition to process issues, the “something else” could also derive from a statutory obligation governing the events in issue that is not a provision of the employment agreement, but which is the basis for a personal grievance.¹¹³

[127] In coming to this conclusion, we have not overlooked Ms Radich’s submission as contradictor that such an approach is both impractical and wrong in principle — wrong in principle because it improperly prioritises a search for a personal grievance, and impractical because the inquiry it requires is time consuming and burdensome.

[128] We disagree. Given Parliament’s use of the word “solely” and the fact the jurisdictional bar operates to exclude what would otherwise be a personal grievance, an inquiry to ascertain whether there exists any other basis for a personal grievance must be precisely what is contemplated. We acknowledge that because of the relative informality of “pleadings” in the employment jurisdiction,¹¹⁴ it may be necessary for

¹¹³ The duty of good faith under s 4 of the Employment Relations Act, for instance, is not usually understood as a term of the contract, but is rather an independent statutory obligation: see, for example, *Johnston v Fletcher Construction Co Ltd* [2019] NZEmpC 178, [2019] ERNZ 498 at [93]–[111]; and *Kazemi v RightWay Ltd* [2019] NZEmpC 73, [2019] ERNZ 113 at [102]. Nor would the good employer obligations that are now found in the Public Service Act 2020 seem to be regarded as contractual in nature: see, for example, *Rennie v Attorney-General* [1998] 1 ERNZ 58 (EmpC) at 81. See also *Commissioner of Police v Campbell* [2000] 1 ERNZ 432 (CA) at [15]–[16].

¹¹⁴ See, for example, *Legal Hub Ltd v Singh* [2025] NZEmpC 183 at [36]–[37]. But it would appear that a greater level of formality is expected for pleadings in the Employment Court: see, for example, *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 92 at [9]–[13].

the Authority or the Employment Court to hear evidence before the jurisdictional issue can be determined, as happened, for example, in *Heenan*.¹¹⁵ But that will not always be the case.

[129] Nor do we accept a further, more fundamental submission made by Ms Radich that the correct inquiry is whether independent grounds for a grievance existed. By an independence touchstone, we understand the argument to be that a personal grievance should only be available where there is an action that had nothing to do with the disputed contractual provision, or the employer's use/implementation of it.

[130] Accordingly, in Ms Radich's submission, the employer's motivation should not be relevant. Nor should process issues. On the facts of this case, her submission is that the jurisdictional bar applies because what Mr Chung was doing was closely linked and connected to the contractual term. He was looking at the contract and saying "I can decide under these terms not to pay the hours you haven't worked".

[131] We accept that the word "application" in its ordinary meaning is capable of encompassing the use or implementation of the clause. However, our survey of the case law on the jurisdictional bar suggests that, with the exception of *NZ Resident Doctors' Assn*, that has rarely been the approach taken to the jurisdictional bar, and for the reasons we have articulated above, it is not in our view consistent with the purpose of s 103(3). We cannot discern any Parliamentary intention to so significantly erode the scope of the disadvantage grievance. Requiring an "independent ground" would also seem to cut across the "solely" requirement which suggests that a combination of grounds is permissible.

Was there jurisdiction to resolve Mr Breen's personal grievance?

[132] Applying the approach we have adopted to the facts of this case, we are satisfied that, correctly interpreted, s 103(3) did not preclude the Judge from proceeding to determine Mr Breen's disadvantage grievance. In our view, the Judge erred by limiting the inquiry to whether the employer's actions were based on a

¹¹⁵ *Heenan v Ministry of Agriculture and Fisheries*, above n 4. See also at [86]

genuine interpretation of cl 4.2, and she thereby failed to give proper effect to the word “solely”.

[133] We acknowledge that Mr Chung cited cl 4.2 from the outset as the basis of the company’s action. However, in our view, while the interpretation of cl 4.2 was an important feature of the case, there was, correctly analysed, something more. The action complained about — the wage deduction — also derived, in a very real and direct way, from the company’s method of calculating the hours worked. Mr Chung’s method of calculation was not sanctioned by the provision. The calculation was extraneous to the clause. It was a unilateral decision made without consultation on the basis of a factual assumption, not an assumption about the meaning of the clause. It was by his own admission a “best guess”. What hours were in fact worked, or not worked, was entirely a factual dispute.

[134] Further, the company did not alert Mr Breen during August about its proposed action. He had no reason to believe that he would not be receiving his full salary on 1 September. It was sprung on him at what was a stressful time. The payment of wages or salary is one of the most fundamental aspects of an employment contract. Despite purporting to seek Mr Breen’s agreement at the last minute, the company went ahead and made a unilateral decision anyway.

[135] It is reasonably arguable that these were not the actions of a fair and reasonable employer and were therefore unjustified within the meaning of s 103A.

[136] To look at it another way, even if Mr Chung was correct that the “etc” encompassed hours not worked during the Government imposed lockdown, that would not dispose of the personal grievance claim.

[137] In addition to the employer’s calculation of the hours worked, counsel for Mr Breen and the intervener both raised the issue of motivation. They pointed to evidence from which an inference could be drawn that the company was motivated to take the action it did (reducing pay), not because of a reduction in the hours worked, but because of concerns about the company’s viability, its failure to obtain a Government wage subsidy and Mr Breen’s work performance.

[138] The Judge, however, found there was insufficient evidence to conclude that Mr Chung's understanding of cl 4 was anything other than genuinely held.¹¹⁶ She was also satisfied that at the time of the events in issue he was not being deliberately disingenuous.¹¹⁷ Those were findings of fact with an evidential foundation which, given this is an appeal on a question of law, should not be disturbed. What we can say is that, if the finding had been that the deductions were made for performance reasons, using cl 4.2 as a pretext, then that would also in our view preclude the application of the jurisdictional bar. We would add that, while genuineness and motivation are closely related concepts, they are not necessarily one and the same thing. A genuine belief that the wording of a clause permitted an action would not preclude a finding it was used in bad faith, as a pretext for some ulterior purpose.

[139] In this appeal, Mr Mitchell also took issue with the Judge's refusal to consider the application of the Wages Protection Act, which it is claimed the company had breached.

[140] Section 5 of the Wages Protection Act provides that a wage deduction may be made with the employee's written consent and that,¹¹⁸ although a general deductions clause in an employment agreement may amount to the necessary written consent, an employer must not make a specific deduction in accordance with such a clause without first consulting the worker.¹¹⁹ Further, by virtue of s 5A of the Wages Protection Act, even if the employee has consented to the deduction, the employer must not action it if the deduction is unreasonable.

[141] As we understand it, the reason for the Judge's refusal was essentially a procedural one based on the unfair prejudice to the company of not having had notice of a claim under the Wages Protection Act in advance of the hearing. We are not minded to interfere with that decision. In any event, the reasonableness and legality of the company's actions are already captured in the personal grievance claim without the need to rely on the express provisions of the Wages Protection Act.

¹¹⁶ EmpC determination, above n 7, at [25].

¹¹⁷ At [15].

¹¹⁸ Wages Protection Act, s 5(1).

¹¹⁹ Section 5(1A).

Costs

[142] The usual rule is that costs follow the event, meaning that the unsuccessful party must pay costs to the winning party. Although the company did not appear at the hearing, we are not persuaded that is a reason to displace the usual rule. It did file extensive written submissions.

[143] We accordingly order that the respondent pay the appellant costs calculated on the basis of a standard appeal, band A. We certify for two counsel.

[144] As regards costs in the Employment Court, although the company succeeded in that Court, the Judge did not award costs in its favour but made an order that costs should lie where they fell.¹²⁰ Her reason for not awarding costs to the company was because of the late stage at which it raised the jurisdictional point. Our decision means of course that it was Mr Breen who should have been the successful party in the Employment Court. Costs in the Employment Court will therefore need to be re-considered in light of this judgment.

[145] Finally, we would like to thank Ms Radich for the assistance she provided to the Court in her role as contradictor. Although ultimately we did not accept the arguments she advanced, it was important in the interests of justice that those arguments be presented for consideration and they were well presented.

Outcome

[146] We answer the question of law as follows:

Did the Employment Court err in its construction and application of s 103(3) of the Employment Relations Act 2000?

Yes.

[147] The appeal is allowed and the decision of the Employment Court declining jurisdiction to hear the appellant's personal grievance is set aside.

¹²⁰ *Breen v Prime Resources Co Ltd* [2024] NZEmpC 27 at [19]–[20].

[148] The matter is remitted to the Employment Court for determination of the appellant's personal grievance.

[149] The respondent must pay the appellant costs calculated on the basis of a standard appeal, band A. We certify for two counsel.

[150] The order as to costs made in the Employment Court is set aside. Costs in the Employment Court are to be determined by that Court in light of this judgment.

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