The uneasy interplay between employment law and immigration law

Immigration law and employment law are becoming increasingly intertwined

Heather Collins & Elly Fleming

The increasing convergence of employment law and immigration law, and recent developments in both areas, is being keenly felt by New Zealand employers as they navigate an ever-changing landscape of rules.

For many, it's not a comfortable space. Employment legislation doesn't always fit with the immigration rules and their application, and this can be challenging for employers to interpret and comply with.

The two areas of law are often at odds with one another. On the one hand, employment law is concerned with setting out rights and protections for employers and employees, including from discrimination. On the other, immigration law prescribes when and how a non-citizen can work in New Zealand, with Immigration New Zealand (INZ) monitoring and enforcing immigration rules. A failure to meet an employer's obligations can result in exposure to the risk of personal grievances or action by the Labour Inspector. At the same time, failure to follow immigration rules can result in INZ taking action against employers and migrant workers.

The two areas of law most commonly intersect when work visas tie migrant workers to employers, including the Accredited Employer Work Visa (AEWV). From our experience, due to the power inequality within the specific employment relationship (alongside other factors), there is a generally reduced willingness from migrant employees to complain about employment law violations.

In our view, practitioners need to be conscious of the vulnerability of migrant workers when providing advice and mindful of the potential conflicts of interest when acting for employers, by helping with their accreditation and job check applications, and migrant workers by helping with their AEWV application.

Heather Collins

Elly Fleming

Terminating employment

Employers need to navigate how they can best preserve the employment of migrant workers with valuable skills while complying with their obligations under both employment and immigration legislation. In short, an employer cannot simply dismiss a migrant employee when they no longer hold a visa. But the employee cannot perform duties either, and the employer can't simply hire someone else until they have fully discharged their obligations. This creates a complex dilemma for the employer.

Recent employment cases address some of these clashes between policy and law. The case of *Dilshaad Gill v Restaurant Brands Limited* [2021] NZEmpC 186 illustrates the importance of getting expert advice on immigration law and employment law. This case is still relevant in the new context of the AEWV.

Cookie-cutter contracts

It's important for practitioners to consider work visa requirements and the potential residence pathways for migrant employees when preparing individual employment agreements (IEA), to ensure immigration instructions are considered.

This requires tailored clauses to be included in an IEA to prevent costly employment issues. Specific employment requirements prescribed in immigration instructions should be incorporated. In addition, clarity within the IEA about the process to follow in the lead-up to and expiration of the migrant's work visa is also beneficial to both the employer and the employee.

Discrimination risk

Under the Human Rights Act 1993 and Employment Relations Act 2000, employers are not, with few exceptions, allowed to

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discriminate against personal qualities such as age, ethnicity, gender, disability or marital status, or the fact that a worker holds a visa. But immigration law at its core is discriminatory in nature – creating a divide along personal qualities of individuals.

Discrimination issues can arise as early as the pre-employment stage. This is seen in *Goel v Barron* [2022] NZHRRT 28.

In this case, Ritesh Goel expressed an interest in working for Peter Barron, the director of Performance Cleaners, in a three-minute phone call. The Human Rights Review Tribunal ruled Performance Cleaners had unlawfully discriminated against Goel in ruling him out as an applicant for employment because of his visa status.

Payment disparity

Employers (and their lawyers) are best placed to brace themselves for a greater risk of claims of discrimination from New Zealand citizen and resident employees who learn they are being paid less than AEWV holders performing the same role.

Immigration settings require accredited employers to pay some migrant workers at least the median wage, which means they could earn more than New Zealand workers. This could be seen as a disadvantage or discrimination based on citizenship/resident status.

Without knowledge of both areas, lawyers may give incorrect or incomplete advice and risk running into conflicts of interest

Advice to practitioners

It's crucial for practitioners to maintain a holistic perspective, considering the potential implications of both immigration and employment laws on their clients.

While immigration lawyers may have a general understanding of employment law, there are risks associated with providing advice outside of their primary area of expertise.

Instead, we suggest immigration lawyers and advisers refer to employment law specialists for more accurate and tailored advice. Likewise, employment lawyers and advocates should refer matters to immigration lawyers or advisers when such expertise is required.

In Employment Relations Authority proceedings involving migrant workers, it can be helpful to engage immigration specialists as expert witnesses to address pertinent questions concerning immigration rules.

The way forward

There is a pressing need for policymakers to take a more integrated approach between immigration rules and employment law. It's equally important that the advice provided to employer and migrant employee clients alike is across both areas, to avoid potential pitfalls when two pieces of a legal jigsaw puzzle don't fit neatly together. ■

Heather Collins and Elly Fleming are associates at Pitt & Moore