

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 167
3136302

BETWEEN	ASSOCIATION OF PROFESSIONALS AND EXECUTIVE EMPLOYEES INCORPORATED First Applicant
AND	MELANIE GOVENDER Second Applicant
AND	THE SECRETARY FOR EDUCATION Respondent

Member of Authority: Robin Arthur

Representatives: Omar Hamed, advocate for the Applicant
Susan Hornsby-Geluk, counsel for the Respondent

Investigation meeting: 1 and 2 June 2022

Determination: 6 April 2023

DETERMINATION OF THE AUTHORITY

- A. Intern psychologists undertaking practicum placements at the Ministry of Education are employees. Accordingly, where members of the relevant union, their terms and conditions are those set in their union’s collective agreement with the Secretary for Education for the occupational group of “interim psychologist”.**
- B. Melanie Govender is entitled to an assessment of arrears due to her for the period she worked as intern psychologist.**

C. The parties have leave to seek further direction or determination of the Authority if they are unable to resolve quantification of entitlements and arrears of wages arising from the conclusion reached in this determination.

D. Costs are reserved.

Employment Relationship Problem

[1] This determination concerns a dispute between the Association of Professionals and Executive Employees (APEX) and the Secretary of Education about the nature of the arrangements for post-graduate students of educational psychology undertaking a practicum placement with the Ministry of Education as an “intern psychologist”.

[2] The Ministry pays a scholarship to the students for the 40-week placement.

[3] APEX says those students are employees of the Ministry for the period of the placement. It says this employment relationship is apparent from the work the interns are required to do and because the coverage clause of the collective agreement for Ministry field staff (the CA) lists “intern psychologist” as one of the 13 occupational groups covered.¹

[4] Melanie Govender, a member of APEX, undertook a placement with the Ministry as an intern psychologist in 2019, during her second year of post-graduate study. If APEX succeeded in its argument about the nature of the relationship between interns and the Ministry, Ms Govender sought orders for arrears of wages and other benefits she should therefore have received as an employee during her 40-week placement.

[5] The Secretary for Education, as the employer of Ministry staff, denied any employment relationship with intern psychologists such as Ms Govender.² Rather, the Ministry considered its scholarship scheme for interns was primarily for the purpose of helping selected students of educational psychology meet the practicum requirements of their university degree programmes and to assist them complete some steps needed to gain full professional registration as a psychologist. Whatever work the interns did

¹ Ministry of Education, NZEI Te Riu Roa and APEX Multi-Union Collective Agreement for Field Staff from 3 December 2018 – 26 February 2021.

² Public Service Act 2020, s 66(3)

as part of that training was not, in the Ministry's submission, sufficient to make the relationship into one of employment. And, further, the CA coverage clause referring to intern psychologists was said to relate only to a specific category of people who had already been working in the Ministry in some other role before undertaking training to be an educational psychologist. The clause was not, the Ministry said, intended or agreed to cover students on scholarships.

The Authority's investigation

[6] A preliminary issue, raised by the Ministry, of whether the Authority had jurisdiction to determine the status of interns was resolved in an earlier determination.³ It does.

[7] Remaining for investigation and determination were the following issues:

- (a) Was Ms Govender really in an employment relationship with the Ministry?
- (b) As a matter of interpretation and application of the CA, did the phrase "intern psychologist" in the coverage clause, and other references in the CA to that role, apply to people engaged in the activities, and on the basis, that Ms Govender was during her placement with the Ministry?
- (c) If the answer to (a) and/or (b) is yes, was Ms Govender entitled to the terms and conditions applying to interim psychologists in the CA?
- (d) If Ms Govender is found to be entitled to those terms and conditions, should orders be made for the payment of salary, KiwiSaver employer contributions, annual leave and recognition of service?
- (e) Should either party contribute to the costs of representation of the other party?

[8] As part of the arrangements made for the Authority's investigation, the parties were advised that quantification of entitlement and arrears would likely be reserved for them to endeavour to resolve if orders of the type contemplated in paragraph [7](d) above were to be made. They would also be given leave to return to the Authority if they could not resolve those aspects between themselves.

[9] As the matter involved a dispute over the terms of a CA to which another union was also a party, APEX was required to notify the other union of the existence of the

³ *Association of Professionals and Executive Employees v Ministry of Education* [2022] NZERA 121.

dispute.⁴ NZEI was notified but did not seek to be heard or otherwise involved in the Authority investigation.

[10] An investigation meeting was held over two days to consider the identified issues. The following witnesses gave evidence through both written statements and by answering questions from me and the parties' representatives:

- (i) Melanie Govender;
- (ii) Clare Barczak, a former Ministry psychologist who had been an intern in 2014 and supervised interns in 2018, 2019 and 2020;
- (iii) Malcolm Stewart, a clinical psychologist who has supervised intern psychologists in the health sector, served as president of the College of Clinical Psychologists and been involved in an inter-agency group working on developing the Psychology workforce;
- (iv) Terence Edwards, an educational psychologist who had worked for the Ministry, taught on the Massey University educational psychology course and had co-ordinated the university's internship programme, including placements with the Ministry;
- (v) Grant Fraser, an advisor to the Ministry on employment relations and bargaining matters, who had been involved in the latter stages of the bargaining of the 2018-21 CA;
- (vi) Anna Priestley, a Ministry principal advisor and educational psychologist who facilitates a Psychology in Education workforce group and has been involved in the application and scholarship processes of the education psychology programmes at Massey University and Victoria University of Wellington;
- (vii) Fiona Crummey, an educational psychologist and service manager in the Ministry's Auckland office, who has supervised intern psychologists, including Ms Govender; and
- (viii) Joanne Davies, a manager in the Ministry's Auckland office, whose team includes the service managers and the educational psychologists who supervise and support intern psychologists during their placement in the office.

⁴ Employment Relations Act 2000, s 129(2).

[11] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. While the extensive written and oral evidence of the witnesses, relevant background documents and the thorough submissions of counsel have been closely considered in preparing this determination, it has not recorded all evidence and submissions received. This determination has been issued outside the usual statutory period as the Chief of Authority decided exceptional circumstances existed for the delay.⁵

The intern programme and Ms Govender's experience of it

[12] The wider context in which this dispute arose involves four parties – the individual intern psychologists, the Ministry, the universities and the Psychologists Board. The various arrangements between those parties, and the documentation of various obligations or commitments each party bore in some degree to the other parties, were canvassed in the evidence given about the training, registration and employment of psychologists. APEX and the Ministry each pointed to various aspects of those arrangements as supporting their analysis of whether or not intern psychologists on scholarship placements were really employees.

[13] The Ministry employs educational psychologists to work as part of its specialist services for schools.

[14] Someone wanting to gain full professional registration with the Psychologists Board as an educational psychologist must first complete a Masters degree in psychology, a postgraduate diploma in educational psychology and at least 1500 hours of supervised practice.

[15] In order to fulfil its own staffing needs, and to contribute to maintaining and developing the educational psychology workforce generally, the Ministry co-operates with the Psychology faculties of three universities that provide suitable educational psychology programmes – that is Massey University, Victoria University of Wellington and the University of Canterbury. The Ministry's co-operation includes providing a practicum placement programme that enables selected students to receive their required 1500 hours of supervised practice.

⁵ Employment Relations Act 2000, s 174C(4).

[16] Faculty panels select the students for the placement programme. Ministry representatives sit on those panels but the university representatives on them have the final say on whether a student is to be recommended to the Ministry as someone suitable to offer a placement.

[17] The placement provides the selected students with access to an amount and kind of case work that the university courses require them to carry out in order to complete written assignments about the application of theory and analysis to actual cases involving children in schools. The Ministry supports those students in completing those academic requirements by providing supervisors to give the required number of hours of supervised practice to the intern psychologists during their placement. The supervisors are educational psychologists working for the Ministry. The Psychologists Board requires them to supervise interns as part of its processes to assess whether the student has, by the completion of their post graduate diploma course of study and the placement, met the standards necessary for registration as an educational psychologist.

[18] A small number of students selected for the placement programme are Ministry employees who have taken leave from other roles in the Ministry to train as an educational psychologist. The Ministry pays those students a salary from the scale set in the CA for the occupational group of “intern psychologist”. In the five years from 2018 to 2022 six intern psychologists were employed and paid on that basis.

[19] In the same period the Ministry provided intern scholarships to 120 other educational psychology students who were selected for a place in its practicum programme.

The scholarship arrangement

[20] Students confirmed by the faculty panel as suitable for an internship placement are sent a letter of offer by the Ministry. The student must be enrolled in the post graduate diploma course and be registered with the Psychologists Board as an intern psychologist. The board’s registration process includes providing references and passing a Police check.

[21] The scholarship, as it was offered to Ms Govender in late 2018, was for the amount of \$25,000 to paid in two instalments during her 40-week placement in 2019 –

the first half in February and the second by September. The second instalment was conditional on confirmation at that time of her “academic and placement progress”.

[22] Other conditions set in the offer said she would be provided with access to cases and supervision in order to meet her course requirements, must pay back all or some of the scholarship grant already paid if she withdrew from study part way through the course, and was responsible for passing her course of study and paying her fees for Psychology Board registration.

[23] Another important benefit of the internship, set out in the letter offer, was the prospect of being “considered” for a permanent job with the Ministry:

At the end of your internship, and subject to meeting three eligibility requirements, you will be considered for employment as an educational psychologist with the Ministry, if suitable vacancies are available.

The three eligibility requirements are:

- successful completion of the internship
- achieving academic and psychologist board requirements
- satisfactorily completing the intern psychologist performance review process.

[24] The letter also set out “an expectation” that someone offered a position as an educational psychologist at the end of their internship “will work for the Ministry in this capacity for at least two years”.

[25] It also stated that anyone currently employed by the Ministry was not eligible for the scholarship and, if they became employed by the Ministry, they would no longer be eligible to receive financial support through the scholarship. Although not stated in the letter, this appears to be an indirect reference to the fact that the CA covers intern psychologist who are employees of the Ministry and includes a salary scale for them.

Course requirements

[26] What the university faculties and the Ministry wanted and expected out of the internship programmes they had developed over the years were fulsomely documented.

[27] Using the example of Ms Govender, who was enrolled in the Massey University course, those requirements were set out in a memorandum of understanding between the university and the Ministry, an Internship Handbook and in an internal guideline

that the Ministry provided to service managers of the educational psychologists appointed to supervise the interns during their placement.

The memorandum of understanding

[28] The Ministry's memorandum with Massey University noted that satisfactory completion of the psychologists' qualification required "a practicum placement of 1500 hours working of supervised practice by psychologists". While the Ministry would negotiate with the university "around the nature of the intern's practice experience while on placement" the memorandum stated that "sole responsibility and authority for the programmes of work, the relationship and for the conduct of interns while working the Ministry's clients lies with the Ministry". The Ministry also required interns to comply with its policies on privacy, health and safety, informed consent and conduct.

[29] The memorandum committed the Ministry's appointed supervisors to be available for supervision sessions of at least two hours a week with each intern and "to observe the intern in a range of settings and to demonstrate assessment, intervention methods and other professional skills as required". The supervisors must provide interns with feedback on their casework and projects and edit and countersign all correspondence, case notes and reports prepared by the intern. The supervisors were also required to regularly collaborate and communicate with university staff over the intern's performance and progress.

[30] The memorandum set corresponding obligations on the intern to take part in the required planning and casework and to participate in the supervision process.

[31] Support to be provided to them by the Ministry was stated to include:

- Providing office space and facilities to carry out internship work
- Specifying interns' responsibilities for attending office meetings
- Recognising internship tasks as 'full time' work
- Actively involving the intern in professional and administrative processes that would advance their knowledge and understanding of the Ministry's workings
- Providing access to a diverse range of cases and projects required to fulfil university requirements.

[32] The latter point was particularly important to the Ministry's case as it said all those arrangements were for the primary purpose of enabling the intern to carry out the practical assignments needed to complete their university course requirements. APEX said it indicated that interns were, in reality, working in the same way as other employees of the Ministry.

[33] As an incidental point in passing, I record that the Ministry witnesses said references to 'work', in these documents and their evidence, meant the work of a student to meet university course requirements and not necessarily work in the sense of tasks or duties carried out by an employee.

The intern handbook

[34] An Internship Handbook issued to interns by the university repeated requirements set in the memorandum. Interns were also told they were required to work and keep a log of at least 37.5 hours a week to meet the Psychologists Board's requirement of 1500 hours of supervised practice during their 40-week placement. Supervised practice was described as a process in which the intern moved from greater to lesser reliance on the supervisor and progressively took responsibility for their own decision-making and action.

[35] The handbook also reminded them of the legal requirements of registration as an intern psychologist and to be guided in what they did by both the Psychologists and the university's codes of ethics.

[36] Responsibilities listed included placement supervisors arranging ten to 12 "different pieces of work" for the intern and for the intern to "consult with [their] supervisor about issues pertaining to stress, time management, conflicting roles and casework coverage as appropriate".

[37] Under a heading referring to providing access to a diverse range of case and projects "as required to fulfil university requirements", the handbook said:

The manager and supervisor will ensure that the intern has exposure to a diverse range of case work (age and nature of presenting concerns) in order to meet the programme and NZ Psychologist Board requirements. There are times when an intern has completed the work with the client but the case cannot be closed as further work is required. Handover processes for this should be clear.

[38] The handbook included a template for a case report to be submitted to meet university course requirements for showing application of theory to practice. It also included information sheets and consent forms to be given to parents, teachers and principals which explained and gave permission for a named child to take part in casework or a “training assignment” being undertaken by the intern as part of their assessment requirements for postgraduate studies.

Information for service managers

[39] The information guideline issued to service managers noted the Ministry was the largest employer of educational psychologists and invested in “the development of this specialist workforce by providing placement and supervision opportunities for intern psychologists”. It described the pathways to internship as “via the scholarship process” for non-Ministry staff or, for Ministry staff, by enrolling in the post-graduate educational psychology course and then being appointed or seconded to a fixed-term position as an intern psychologist. For existing Ministry staff, the guideline said that “position must be based on the intern psychologist job description and the terms and conditions of that position in the [CA]”.

[40] It also provided some more detailed directions about what the service manager and the intern’s supervisor were expected to arrange. This including discussing days of attendance with the intern; providing the intern with information about attending work meetings; providing the intern with a computer, login, desk space and access to a Ministry vehicle; “recognising internship tasks as ‘full time’ work, i.e. interns will be in the practice placement setting four days per week”; ensuring the setting was “a learning experience with adequate time allowed for university attendance and self-directed learning”, which could include negotiating study time for the intern such as one day a week studying from home.

The experience of Ms Govender and Ministry supervisors and managers

[41] By the time of the Authority investigation meeting Ms Govender was working as an educational psychologist employed by the Ministry. She had successfully completed the internship programme in 2019, including its university course and the process to become registered as a psychologist. As promised in her scholarship letter of offer the Ministry had then considered her for appointment to an available position as an educational psychologist. She was offered and accepted such a position.

[42] Recalling her year as an intern Ms Govender described completing a Ministry induction programme, the same as that used for new employees, and being expected to be at work between 8.30 or 9 am and 4 or 4.30 pm, with any absences needing to be discussed with her manager.

[43] She said she was allocated ten cases during her placement, mostly involving primary school boys with extreme behaviours. After contacting the school and family, an initial meeting was arranged for each case to discuss why the school had sought support for the child. This involved contact with the child's family, the teacher and learning support staff at each school. She said another psychologist or supervisor attended two of those initial meetings with her but the other eight she did on her own.

[44] Those meetings were followed by returning to the school to do three or more observations of around one hour each. From that work she would prepare an assessment and propose strategies for discussion with the school and family.

[45] Her assessment reports formed part of the university course work she had to submit during the placement. Ministry witnesses said those reports included a level of analysis of the application of theories and methodologies to the practical situation, along with reflections about those experiences, that were more detailed than the types of assessments that educational psychologists who had completed their qualifications and were working for the Ministry would typically do. Ms Govender, however, disagreed saying her experience of what was required of her during her internship was "exactly what I do now as an educational psychologist".

[46] She referred to a video titled "Internships – learning and improving through practice" on the Ministry's website promoting the career option of working for the Ministry as an educational psychologist. Its video showed an intern saying she was doing "everything a registered educational psychologist would do but we've got the bonus of having supervision and someone checking what we do". A supervisor also shown in the video says "as the year goes on, what we tend to notice is that as the skills of the intern develop, and they become more confident in their practice and their decision making, the role of the supervisor changes and more control is given over to the intern to make decisions."

[47] Ms Govender estimated that 75 to 80 per cent of her activities during the placement period were what she called “Ministry-related” with other time spent on preparing reflections for her university course, attending internal meetings and other time “not directly related to cases”. She said she also spent time at home, outside of office hours, preparing course work which was “purely university”.

[48] Ms Barczak, who had been both an intern and a supervisor, described the cases assigned to interns as “regular cases” that came through the usual pathway of referrals from schools seeking Ministry assistance. She said interns completed the same case work cycle as a psychologist would. In her description the process of consultation, assessment, observation, analysis and reporting (including preparing, if appropriate, an intervention plan) that an intern carried out was the same as a fully registered psychologist would follow.

[49] She identified two major benefits for the Ministry from the intern programme. Firstly, she said each intern took 10 or more cases off the Ministry’s waiting list and, secondly, interns who were later employed as psychologists had a “head start” as they were already familiar with the Ministry’s work and how it was carried out.

[50] Ms Crummey, who had supervised Ms Govender and other interns, had a strongly different description of the nature of the cases assigned to interns and the value of their work to the Ministry. Some cases referred to an intern were not ones a Ministry psychologist would typically pick up but were really only taken by the service and given to an intern because they met the intern’s course requirements. She also said supervisors “expend more time and attention supervising the intern to do the work than would have been the case had we just done it ourselves”.

[51] Ms Davies, similarly, said scholarship interns were not treated as an extra resource to get through the Ministry’s ‘business as usual’ work – that is referrals to its psychology services. Tasks undertaken by interns “contribute to getting through our broad BAU” but “especially where the intern is fresh from university”, she said the same task would “take significantly less time to be completed by a fully qualified and experienced psychologist”. She also described cases assigned to interns as being more for the purposes of meeting their university requirements, focusing on individual children. However she said not a lot of the Ministry psychologists’ work was directly with children. It was not like private child psychology. Rather their work was primarily

with teachers and parents, building capacity to support the child. She summarised her view of the intern placement programme as being that “interns need us more than we need them”. She described the value of interns to the Ministry “from an operational, BAU perspective” as “mainly just of benefit to the intern as a student”. However she described the “bonus” for the Ministry in helping students successfully complete their studies was “that we can then recruit new and fully qualified psychologists to fill whatever vacancies we might have”.

[52] Ms Priestley acknowledged the question of how much of what interns did was for their own study purposes rather than contributing towards the Ministry’s work was difficult to answer. She said the arrangement was of mutual benefit to all parties so it was not possible to draw a clear line between what exactly related to the intern’s study and the Ministry’s caseload. However what interns did was “100% study related” because the placement enabled them to complete the 1500 hours of practical experience required by the university. She described the emphasis on case work about individual children as reflecting university requirements rather than the Ministry’s current approach of focussing more broadly on work that benefited communities and addressed group needs and systems rather than individual cases. She was not able to identify any real difference in what was required of a Ministry-employed intern psychologist, on a salary but carrying out the same course-related requirements during their placement, compared with a scholarship intern.

Legal principles

[53] The outcome in this case turns on whether the arrangements made and the relationship between the interns and the Ministry met the definition of “employee” in s 6 of the Act:

6 Meaning of employee

- (1) In this Act, unless the context otherwise requires, employee—
 - (a) **means any person of any age employed by an employer to do any work for hire or reward under a contract of service;** and
 - (b) includes —
 - (i) a homemaker; or
 - (ii) a person intending to work; but
 - (c) excludes a volunteer who —
 - (i) does not expected to be rewarded for work to be performed as a volunteer; and
 - (ii) receives no reward for work performed as a volunteer; and
 - (d) ...

(1A) ...

- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the court or the Authority—
 - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[54] The emphasis throughout is on the real nature of the relationship, with the inquiry focussed on the specific facts of what was arranged and what was done by the parties. Their own descriptions of the situation are not to be treated as determinative. As explained by the Supreme Court in *Bryson v Three Foot Six Limited* (emphasis added):⁶

“All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. **How their relationship operates in practice is crucial to a determination of its real nature.** “All relevant matters” equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law.

[55] Here this includes considering whether what the interns did was “work”, whether the scholarship they were paid was a form of hire and reward for work and whether those arrangements amounted to a contract of service. At issue within those questions was whether those arrangements were for the primary purpose of completing training rather than carrying out the work and, if so, whether that precluded a finding that there was an employment relationship.

[56] Other cases may provide useful instances of applying relevant principles but relying on detailed factual comparisons with other cases previously decided under s 6 of the Act has been described as misplaced and unhelpful.⁷

⁶ *Bryson v Three Foot Six Limited* [2005] NZSC 34, at [32].

⁷ *Franix Construction v Tozer* [2014] NZEmpC 159, at [41].

[57] In *Below v The Salvation Army New Zealand Trust* two cadets in a two-year residential training and study programme sought findings they were employees. They had to pay fees for the training but for their first year received a StudyLink grant paid by the government and for their second year were paid a scholarship of the same value by the Salvation Army. The Court noted the range of outcomes in cases on this sort of issue depended on the relevant statutory context and the particular circumstances:⁸

At one end of the spectrum, it is unlikely that persons who [counsel] described as being “mere students” would be employees, having regard to the real nature of the relationship. At the other end of the spectrum, a person who has been engaged in a work/pay bargain, including one who is undergoing training and is subject to close supervision and assessment, may well be an employee. The Court has to decide in a given case where the circumstances lie on the spectrum. The assessment is one of fact and degree.

[58] Trades apprentices, junior doctors and law clerks were given as examples of people under training and close supervision who could, in fact, be working as employees.

[59] The judgment in *Below* also referred to two cases evaluating the statutory context and particular circumstances: *New Zealand Educational Institute v Director-General of Education* and *Wiltshire Police Authority v Wynn*.

[60] In the *NZEI* case the Court of Appeal found trainee teachers sent, as part of their course, to observe and practise teaching in schools for 400 hours were not employees.⁹ Its decision, made in 1981, concerned the application of particular provisions of the State Services Conditions of Employment Act 1977, in effect at that time. While the court found a primary school teacher at a training college and under bond was not under a contract of service, the decision described the words employment, employer and employee as expansive and the sense in which they are used as depending upon the context and manner of their use.

[61] The court’s judgment in *NZEI* also referred to a “helpful” distinction made in the English Court of Appeal’s decision in *Wiltshire Police Authority v Wynn* about training and work arrangements.¹⁰ Issued in 1980, the English court’s decision said that where teaching and learning was the primary purpose, and the work done was secondary to that purpose, the arrangement should not be treated as a contract of service (that is

⁸ *Below v The Salvation Army New Zealand Trust* [2017] NZEmpC 87 at [76].

⁹ *New Zealand Educational Institute v Director-General of Education* [1981] 1 NZLR 538.

¹⁰ *Wiltshire Police Authority v Wynn* [1981] QB 95 (EWCA) at 109.

an employment relationship). Where the work done was the primary purpose of the arrangements between the parties, with learning of a trade or other skills being secondary, the trainee was an employee. The case concerned a police cadet whose training involved going to police stations “to see how things are done” and sometimes assisting with minor tasks such as holding a tape measure at scenes of traffic accidents. The cadet was found to be neither an apprentice nor an employee. Under the particular police and employment legislation in place then, she was therefore not entitled to go to an industrial tribunal to pursue her claim of unfair dismissal.

[62] Application of principles developed in relation to specific statutory provisions, in the particular circumstances of a case, and whether here or overseas, needs to be considered with some caution.¹¹ The *NZEI* and *Wiltshire Police* cases were decisions about particular statutory provisions as they were more than 40 years ago. And, in New Zealand, the distinction between contracts of apprenticeship and contracts of service for people working as they learnt a trade, was removed by legislation that declared training contracts and apprenticeship training agreements are part of a trainee’s or apprentice’s employment agreement.¹²

[63] In considering the arrangements made with the intern psychologists, assessment of the following factors may be useful in determining whether they were doing “work” of the nature referred to in s 6(1)(a) of the Act:¹³

- (a) the constraints placed on the freedom the intern would otherwise have to do as she or he pleases;
- (b) the nature and extent of responsibilities placed on the person; and
- (c) the benefit to the Ministry of having the intern perform the role.

[64] In *Idea Services Limited v Dickson* the Court of Appeal described those three factors as appropriately reflecting the wide variety of work that can be undertaken and the circumstances in which it may take place. The Court also acknowledged “the fact that what people ordinarily consider to be work has changed and will change over time”.¹⁴ It echoed an observation made by that Court’s judgment in *NZEI*, some 40 years earlier, that the tests and indicia of whether an employment relationship existed

¹¹ *Humphreys v Chief Executive of the Ministry of Health* [2021] NZEmpC 217 at [119].

¹² Industry Training and Apprenticeships Act 1992, s 3, now Education and Training Act 2020, s 362.

¹³ *Idea Services Limited v Dickson* [2011] NZCA 14 at [7].

¹⁴ *Idea Services*, above n 12, at [9].

had and would change over time as part of “the evolution of a more sophisticated society”.¹⁵

Evaluation

[65] For reasons which follow I have concluded the real nature of the relationship between intern psychologists on scholarships and the Ministry is one of employment. From that conclusion it follows that interns are entitled to the terms and conditions of other employees working in the same position. The measure of those terms and conditions are established by the provisions made in the CA for the occupational group of “intern psychologist”. Wages, leave entitlements and the value of other provisions due as arrears to Ms Govender, and by implication other interns in the same situation, should be calculated on the basis that she was working on what was, in effect, a fixed-term employment agreement for the period of the placement. The value of the scholarship paid to her in 2019 should be taken as part payment of the amounts now due to be calculated and paid to her as arrears.

The real nature of the relationship

[66] Concluding that intern psychologists are employees as well as students completing their studies may disrupt assumptions that have operated about those practicum arrangements for some time. It is, however, consistent with the direction of travel apparent in many employment law cases in recent years where assumptions about what is work, what is employment and what it is worth have been unpicked and overturned.¹⁶ People who have to sleep over at their workplace are now recognised as not just resting but also as working.¹⁷ People at home but ‘on call’, and who must be ready to hurry in to their workplace at a moment’s notice, are now acknowledged as working.¹⁸ The assumption that certain categories of work or occupation are ‘naturally’ worth less than others has been debunked by the development of pay equity principles and legislation.¹⁹ Labour Inspectors have successfully sought penalties against employers who treated some time trainees or ‘interns’ spent in the work place as for

¹⁵ *NZEI*, above n 9, at 539.

¹⁶ See *Humphreys*, above n 11, at [104]. Under appeal: see *Director-General of Health v Peter Humphreys* [2022] NZCA 92.

¹⁷ *Idea Services*, above n 13,.

¹⁸ *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127.

¹⁹ *Terranova Homes & Care Limited v Service and Food Workers Union & Kristine Bartlett* and Equal Pay Amendment Act 2020.

‘training purposes’ only and did not pay them for those hours.²⁰ Similarly, long-held categorisation of some work arrangements as being mutually agreed “contracting” or merely volunteering, rather than employment, have been re-examined and found to be incorrect.²¹

[67] As noted in the Employment Court’s judgment in *Humphreys v Chief Executive of the Ministry of Health* there is a developing understanding of what constitutes work and “a discernible move away from a perception that a worker is working only when they are doing something regarded by the employer as active and productive”.²²

[68] And even where some principles are said to be more certain, such as the distinction between employment and training described in the *Below* case, case law has carefully acknowledged work arrangements may fall along a spectrum so that assessment of the facts in any one case may lead to a conclusion a person in training and under close supervision is being paid for their work and is really in an employment relationship. As is well accepted in other occupations, whether it be some medical students in hospital placements or apprentice chefs in a kitchen, their activity may be both training and employment, and are not seen solely as one thing or the other.

Elements of employment

[69] In this case, whether the arrangements for the practicum placement and what Ms Govender was required to do during it met the Act’s definition of an “employee” has been considered in answer to the following questions:

- (i) Was what she did ‘work’ because of the constraints on her, the responsibilities placed on her and the benefit to the Ministry of her performing the role of an intern psychologist?
- (ii) Did she work for hire or reward?
- (iii) Did the arrangements amount to a contract for service (including whether a primary purpose of completing study requirements fundamentally negated the existence of an employment relationship)?

²⁰ *A Labour Inspector v Woop Limited* [2023] NZERA 126 at [78]-[80] and *A Labour Inspector v Avondale Community Pharmacy Limited & Ors* [2019] NZERA 214.

²¹ *E Tū v Raiser Operations BV & Ors* [2022] NZEmpC 192 and *Courage v Attorney-General & Ors* [2022] NZEmpC 77.

²² *Humphreys*, above n 11, at [105].

What Ms Govender did was work

Constraints

[70] Ms Govender was expected to be at the Ministry's offices during ordinary business hours and while there, or out visiting schools, to follow relevant policies about what she did and how she did it, such as the privacy and safety policies covered in the induction process at the beginning of her placement. They were the same constraints as applied to others recognised as employees.

[71] The Ministry's arrangements with the university for her placement clearly stated its sole authority over her work and conduct. Ms Govender was, by the terms of that arrangement, to answer to the relevant Ministry staff for the case work she was assigned. She could not do as she pleased in conducting interviews and observations or writing reports.

Responsibilities

[72] The Ministry's closing submissions accepted that interns undertook work, through casework, which otherwise would have done by existing Ministry staff.

[73] In this way the interns bore the same responsibilities as others about whom there was no dispute that such activity was work. While interns' responsibility for the conduct of that work was directly to the Ministry, it was also indirectly to the school principals, teachers, learning support staff, parents and other caregivers that an intern interacted with in dealing with the referrals they were assigned. Dealing with those people in the school environment, where they had turned to the Ministry for help because of a difficult situation and were seeking guidance and support to resolve it, is an important responsibility. The diligent attention of the intern in carrying out interviews, observations and preparing a report that might identify some useful interventions or support is a responsibility greater than attending merely to gather data or other material for use in a university assignment. It involved meeting a responsibility of the Ministry to the school who had made the referral. It was recognised as work if someone who was employed as an educational psychologist was doing it. There was nothing about nature and extent of that responsibility that was lessened if it were carried out by an intern, albeit with the benefit of supervision to ensure it met suitable standards.

[74] Similarly, the Ministry's evidence did not establish any significant difference between how such work was conducted by interns, on scholarships, and those interns who had previous service in some other role with the Ministry and were paid on the CA's salary scale for an intern psychologist. Its submissions accepted there was no material difference between what each category of intern psychologist did. Ministry witnesses suggested those salaried interns may have skills and experiences developed from their previous service which enabled them to more deftly develop their capabilities in the intern role. However there was nothing in their evidence that established any fundamental difference between the activity and tasks carried out by scholarship interns – not seen by the Ministry as employment – and the salaried interns who, by virtue of being employed under the CA terms, were accepted as carrying out work in their roles.

Benefit

[75] The Ministry, relying on the evidence of Ms Crummey, Ms Davies and Ms Priestly, submitted that the time and effort expended in supervising the work of interns, along with interns having to spend more time on their cases due to their inexperience and needing to prepare their university report assignments, “effectively neutralised” any service-related value or benefit to the Ministry.

[76] The Ministry relied on a passage in an Employment Court case, about the somewhat different context of a short work trial, that considered the difference between training and work and how an assessment of “economic benefit” to the employer could help draw a meaningful line. The following passage was cited as authority for the proposition that an employment relationship will only exist if an employer gains an economic benefit from an individual's activity (emphasis added):²³

Where the reasonableness line is likely to be crossed most commonly and “work” may be engaged in, for which there may be a requirement for payment as well as where other incidents of an employment relationship arise, is **where the employer gains an economic benefit from the employee's activity**. In this case, for example, the defendant performed a number of the range of tasks which would have been undertaken by her had she continued to work for the plaintiff. Although **the economic or other business or operational benefit** to the employer may not have been optimal at that point due to the need for the defendant to be shown what to do and to develop the necessary skills, the defendant was nevertheless performing work for the plaintiff and contributing to its business.

²³ *The Salad Bowl Limited v Howe-Thornley* [2013] NZEmpC 152 at [27].

[77] Although obiter, the principles canvassed in that passage do not, in my assessment, support the Ministry's proposition or accord with its own evidence.

[78] While the Ministry submitted that any value to it from the number of cases actually cleared by the interns' work was neutralised by the time spent in supervising that work, its own rationale for the internship programme identified a wider, longer and more strategic benefit for the investment of the supervisors' time and the cost of the scholarships. The Ministry had, some time ago, identified the need to grow its own stock of potential recruits as educational psychologists and, as part of its leadership role in the education sector generally, to contribute to greater numbers of educational psychologists being trained and available to work in other organisations and sectors. It had in mind therefore an "operational benefit", as referred to in the passage above, that was wider than an immediate and narrow cost-benefit analysis. In that way, the Ministry's activity and motivation fell comfortably into the principle expressed in that passage that while the economic benefit might not immediately be optimal, the longer-term "operational benefit" of developing interns' necessary skills meant they were nevertheless performing work for the Ministry and contributing to its business.

The work was done for reward

[79] The terms of the scholarship, offered and accepted, established the work to be done during the placement was done for reward. The reward was not solely the scholarship amount offered. Its value enabled interns to meet living costs during the 40-week period where the demands of their placement meant they could not do other jobs to generate income.

[80] Two other elements of what was provided by the placement also had a tangible value amounting to reward for the effort required.

[81] The first was the value of the supervision provided by educational psychologists assigned to each intern by the Ministry. The supervision enabled the interns to meet requirements of the university and the Psychologists Board that their work during the practicum be supervised. It was a valuable commitment of time and effort not readily available elsewhere.

[82] The second was the prospect of employment by the Ministry, if the internship was completed successfully. While it was not a promise of employment, the Ministry's promise to *consider* employing the intern was something of value.

[83] The character of the reward of the scholarship amount as comprising a "work/pay bargain" was clear not only from the general requirements on the intern to attend work and to follow Ministry directions but also from the specific term of the scholarship about the consequences of an intern withdrawing partway through the internship. In those circumstances the terms allowed the Ministry to require part or all of the scholarship grant to be repaid.

The arrangements made amounted to a contract for service

[84] The Ministry, in closing submissions, accepted the process of offer and acceptance for the intern scholarship indicated an intention between the parties to enter some kind of contractual relations. It asserted this amounted to no more than a mutual intention to create the means for interns to complete their studies by providing access to the practical experience and supervision required by their universities and the Psychologists Board. In its submission those arrangements showed no intention to create an employment relationship.

[85] Turning to assessing "all relevant matters" under the s 6 test, the express written terms of the scholarship offer letter did not frame or describe the relationship as being one of employment. However the contents of the memorandum, the handbook and the supervisors' guide, along with the evidence of Ms Govender and Ms Barczak, indicate the relationship in practice operated with expectations of attendance and compliance with directions that were more like an employment relationship.

[86] The common law tests concerning the degree of control and integration of a person within an organisation, along with an assessment of the 'economic reality' of the arrangements, are helpful but do not fully resolve the issue of whether the interns were in an employment relationship while on placement in the Ministry.

[87] The Ministry accepted the interns were subject to control capable of indicating an employment relationship. They were required to comply with policies and procedures, work co-operatively with Ministry employees and were closely supervised in what resembled a working day, including in their dealing with schools and families.

However the Ministry said whatever control was exerted was for the purpose of meeting the universities' expectations, not directing the interns as its employees.

[88] Similarly the Ministry accepted the interns were integrated into their teams but said this was part of “an authentic and holistic work experience” required for their course. Externally or objectively observed, an intern working from the Ministry office and arriving on school visits in a Ministry car appeared fully integrated with its operation, in a way consistent with being an employee.

[89] The so-called fundamental or ‘economic reality’ test of whether or not the intern was in business on their own account was of no assistance in assessing the reality of the relationship in the particular facts in this case. It is a measure among the common law tests that may assist in distinguishing an independent contractor from an employee, which was not the issue here.

[90] In the Ministry’s submission the control and integration tests were, at best, neutral as indicators of whether the nature of the work and of the arrangements with the interns were really an employment relationship. On that analysis, the decisive factor was whether the training purpose of the relationship was primary and trumped any secondary benefit that the Ministry gained from the case work carried out by the interns.

[91] It was not a compelling submission for the following reasons.

[92] Firstly, the notion that an activity that is primarily for training purposes therefore, inherently, is not employment is based on a false dichotomy. The distinction is no longer sustainable, if it ever was, with the evolution of a more sophisticated analysis of what work is and how it is valued. The reality of many workplace relationships is that they may be both training and employment at the same time, particularly in situations where an initially time-heavy commitment to training is designed to lead to a ‘tipping point’ where the worker develops their skills and capabilities to work more autonomously and with less supervision. In the case of intern psychologists all witnesses appeared to agree that, at least by second half of their practicum year, interns would be operating at or close to the level expected of a first year educational psychologist, albeit still subject to the supervision expected for the registration process.

[93] Secondly, the supposed “primary training - secondary employment” distinction did not accord with the reality of the relationship with the salaried interns. They were entirely in training and entirely in employment while doing the same Ministry and university work and under the same registration assessment process as the scholarship interns. If the distinction did not apply to the salaried interns, it could not reasonably apply to the scholarship interns.

[94] Thirdly, even if the principle of a stark distinction of *either* training *or* employment had some ongoing application, the nature of the work and obligations of the interns placed them at the ‘employment’ end of the spectrum described in the *Below* case. The payment offered in the scholarship for completing cases assigned was a work/pay bargain, with a long-term operational benefit to the Ministry, even if it considered the immediate annual cost of the value of cases completed compared with time spent on supervision was something of a ‘loss leader’. While the interns were undergoing training and subject to close supervision, what they were doing while learning was what was required of an employee, not a “mere student”.

[95] The contrast between the ends of that spectrum is clear from returning to the example of Cadet Wynn in the *Wiltshire Police* case. The 17-year-old cadet was considered “supernumerary” to the department and, “when out on operational work ... had to sit in the front seat of the car” but might perhaps be allowed to hold the other end of a tape when measurements were being taken.²⁴ The difference between a new constable and a new cadet was described as “that constable is doing police work and [the] cadet is seeing it done”.

[96] Intern psychologists carrying out assigned case work and taking part in other Ministry office activities were not ‘sitting in the car’ or merely seeing what educational psychologists did. They were getting out of the car, going into the operational area of the school and, after initially observing once or twice how it was done, running their referred cases and doing the resulting necessary work.

[97] Assessing all relevant matters, the real nature of the relationship for the work done by the interns was one of employment.

²⁴ *Wiltshire Police*, above n 10, at 658, per Lord Justice Waller.

The terms of the collective agreement apply to all intern psychologists

[98] APEX submitted that, if Ms Govender was found to be an employee during her internship, the terms on which arrears owed to her should be assessed were those set for intern psychologists in the CA. It submitted this followed from the inclusion of interim psychologists in the coverage clause, which did not specify any type of work undertaken in that occupational group or distinguish it as applying only to those who had previously been employed by the Ministry in roles such as Special Education Advisors. The salaried interns were often former advisors who had opted to retrain as educational psychologists as a way of developing their careers in the Ministry or wider education sector.

[99] The CA set a salary rate of \$47,940, as of 1 March 2019, for an intern psychologist. It also included the following term about the basis on which an intern psychologist could be employed:

2.2.8 Appointment to positions of Education Specialist Trainee (EST) and Intern Psychologist

- (a) Subject to the requirements of the Employment Relations Act appointment to both the EST and Intern Psychologist positions will be by way of fixed term appointment.
- (b) Following completion of a recognised Psychologist Internship Programme there is no expectation of ongoing employment past the date specified in the letter of appointment and/or employment agreement.

[100] The Ministry submitted that, if the Authority held there was an employment relationship with the interns, any arrears due should be calculated on minimum statutory rates only because the parties had never intended scholarship interns would fall within the coverage of the CA.

[101] It submitted the salary provision was made on the basis that the interns who would receive it were existing employees effectively being seconded or moved out of a previous role and into a temporary role as an intern during their practicum year. It also submitted that any difference from scholarship interns was justified by “the fact” that existing Ministry employees had skills, experience and knowledge of the Ministry’s ways of working that would enable them to make a potentially broader contribution than scholarship interns.

[102] The Ministry also submitted that salaried interns were, under clause 2.2.8 of the CA appointed to a “position” and it had no such “headcount positions” within its teams of employees to which scholarship interns could be appointed.

[103] There was no helpful evidence about the history of the bargaining at the time that the occupational category of intern psychologist was added to the CA. Mr Fraser, who had been involved in the latter stages of more recent bargaining, offered an opinion on what the clause might mean. APEX referred to unsuccessful attempts in recent bargaining to have the Ministry accept the provisions on intern psychologists should apply to all interns, not just existing Ministry employees. This simply reflected the conflicting, subjective perspectives of the parties. It did not assist in considering how the CA’s words should be interpreted and applied in light of what was a change from the situation at the time of those earlier negotiations, that is the finding made here that the scholarship interns are employees.

[104] It was a situation where the CA term had to be objectively interpreted and applied from an assessment of plain meaning of the words themselves. On that reading it was clear the parties intended and agreed to include employees working as intern psychologists within the coverage of the CA and for those employees to be paid the relevant salary rate and other terms provided in their agreement. They agreed to coverage of a type of work and a rate of pay for that work. While those who immediately qualified for those payments were existing employees, there was nothing from that plain reading that indicated the parties intended anyone else in an employment relationship with the Ministry would be excluded from that coverage and resulting terms.

[105] The fact that the Ministry appointed existing employees to “positions” as intern psychologists when they were approved to pursue that career development, and had not created “headcount” positions for scholarship interns, simply reflected how it chose to organise matters and not what this determination has found to be the reality of the relationship involved.

[106] The notion that the availability and rate of the salary for existing employees training as interim psychologists was related to their likely better skills, experience and knowledge was subjective, speculative and not apparent from a plain reading of the terms of the CA. It also assumed that scholarship interns, necessarily, did not have

other skills, knowledge and previous experience that would be of at least similar value to that suggested to be held by the salaried interns.

[107] Rather, a plain reading of the terms suggested that the parties had intended and agreed a rate and other terms for an employee in the occupational category of interim psychologist. It was not intended to exclude employees who had not served in some other role or position for the Ministry prior to becoming an intern psychologist.

Ms Govender is entitled to an assessment of arrears

[108] On the findings reached in this determination Ms Govender was entitled to an assessment of arrears on the basis that she was an employee while working as an intern psychologist in 2019 and she was entitled to be paid under the relevant terms of the CA.

[109] There were four points of dispute raised in the Ministry's submissions in the event that the relationship with the scholarship interns was found to be one of employment and the CA terms were held to apply to them.

100 per cent of salary due

[110] Firstly, the Ministry submitted that any calculation of arrears due should be made on the basis that Ms Govender was entitled to only 80 per cent of the salary rate. This was said to be appropriate because she, like other interns, had spent some time during her 1500 hours placement attending block courses and working on assignments that were said to have provided no benefit to the Ministry. The Ministry also relied on a reference in Dr Stewart's evidence to instances where interns employed elsewhere were "often paid as 0.8 FTE, recognising that a day a week is spent on solely study related activity".

[111] There was no evidence that the salaried interns' payments were reduced to 80 per cent of the scale rate. If that is correct, so that the Ministry effectively includes a paid study leave element for those salaried interns, there is no basis for calculating amounts due to Ms Govender on any less than 100 per cent of the salary rate.

Holiday pay to be calculated at 8 per cent of gross

[112] Secondly, Ms Govender's claim regarding annual holiday entitlements was linked to her current annual leave entitlements as an educational psychologist. The Ministry correctly submitted that any arrears due for holiday pay should be calculated on

the basis that Ms Govender was employed as an intern psychologist in 2019 for a term that started in February and ended in November. Her annual leave entitlement should have been calculated and paid at the end of that term at the rate of eight per cent of gross earnings. Her subsequent employment as an educational psychologist from December 2019 onwards was a new and separate appointment, not continuous with her previous intern role for the purposes of annual leave entitlements.

[113] In its closing submissions the Ministry conceded a separate point about Ms Govender's service as an intern psychologist being recognised for the purposes of a service recognition clause in the CA, which relates to some other service entitlements in her current role as educational psychologist. It accepted that if the CA was found to apply to her, the relevant clause would apply. In that light, no specific finding on that point was needed.

KiwiSaver contribution to be made to fund

[114] Thirdly, the Ministry submitted Ms Govender should not receive a sum equivalent to a three per cent KiwiSaver employer contribution. It said there was no evidence she contributed to or even wished to contribute to a qualifying fund during the period of her placement. While that may be correct, it must in part at least be because the Ministry did not treat her as an employee and did not ask if she was enrolled for KiwiSaver or wanted to be. The amount that could have been paid in 2019 should be calculated and paid to Ms Govender's fund now, if she has one. A cash payment is not appropriate if she does not have a fund.

Calculation of arrears to account for scholarship payments already made

[115] Fourthly, the Ministry submitted calculation of arrears due should take account of the amount paid to Ms Govender as a scholarship in 2019. Due to an increase implemented part way through 2019 by the Ministry, Ms Govender was in fact paid \$27,500, not the initially offered amount of \$25,000.

[116] APEX opposed the offsetting of the scholarship amount paid against what is now owed in arrears of wages and holiday pay. It, in effect, said interns should now get the total salary they were due for the 40-week placement on top of the scholarship amount they were paid at the time.

[117] Although the statutory and case law advanced in support of that proposition has been considered in preparing this determination, it cannot survive the common sense and equitable conclusion that this would amount to “double dipping” and an unjustified windfall.

[118] Rather, Ms Govender and other interns should be seen as entitled to the full payments of salary, holiday pay and other benefits that they would otherwise have received if the Ministry had correctly identified them as employees at the time of their placement. What they did receive in scholarship instalments then has to be taken as part-payment of that entitlement.

[119] The Ministry should now calculate and pay the difference owing to Ms Govender. In closing submissions it indicated a net amount of around \$5,189 would be owed to her in salary arrears. Amounts due for holiday pay and KiwiSaver contributions, calculated on gross figures, would be additional.

[120] Leave is reserved for the parties to seek further direction or determination from the Authority should they not be able to resolve any difficulty with quantifying and paying the amounts due.

Costs

[121] Costs are reserved. This proceeding was underway before the Authority published its most recent practice note regarding costs, on 29 April 2022. There may, therefore, be some question about the application of the now published prevailing presumption that parties bear their own costs in disputes about the interpretation and application of collective agreements. Costs were, however, reserved in respect of an earlier determination about the Authority’s jurisdiction so an application for costs may arise if the parties cannot resolve at least that aspect between themselves. If an Authority determination is needed, any party seeking costs should lodge and serve a memorandum within 28 days of the date of issue of this determination. The other party has 14 days from the date of service to lodge a memorandum in reply.

Robin Arthur
Member of the Employment Relations Authority