IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CIV-2019-070-001005
[2020] NZDC 12902

BETWEEN	WESTERN BAY OF PLENTY DISTRICT COUNCIL Appellant
AND	COLIN LIMMER First Respondent
AND	NEW ZEALAND KIWIFRUIT GROWERS INCORPORATED Second Respondent

Hearing:	6 July 2020
Appearances:	N Speir & McGrath for the Appellant H Atkins & N Buxeda for the First Respondent H Atkins & N Buxeda for the Second Respondent New Zealand Kiwifruit Growers Incorporated T Gray for the Interested Party Ministry of Business, Innovation and Employment J Hancock for the First Intervening Party Human Rights Commission S Conway for the Second Intervening Party Ministry of Social Development
Judgment:	10 August 2020

RESERVED DECISION OF JUDGE T R INGRAM
[ON SECTION 118 BUILDING ACT 2004]

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[1] The issue in this appeal is whether s 118 of the Building Act 2004, in combination with the applicable human rights legislation, requires the provision of wheelchair access and wheelchair accessible toilet facilities in worker accommodation on a kiwifruit orchard owned by Mr Limmer and situated at Ronalds Lane Te Puke.

[2] On 11 February 2019 the Western Bay of Plenty District Council (WBOPDC), the territorial authority with jurisdiction in the Te Puke area, informed Mr Limmer that consent would be withheld from a proposed change of use for an existing dwelling proposed to be altered for use as orchard worker accommodation, unless wheelchair access and wheelchair accessible toilet facilities were provided. Mr Limmer disputed that outcome, and he applied under s 117 of the Building Act 2004 for a determination of the dispute by the Chief Executive of Ministry of Business, Innovation and Employment (MBIE).

[3] On16 October 2019 a determination was made by the Chief Executive of MBIE that WBOPDC had wrongfully declined consent to the proposed change of use of the existing dwelling. There was an express finding that s 118 of the Building Act 2004 applied to the building in question. There was a further finding that the provision of wheelchair access and toilet facilities for kiwifruit orchard workers was not required, because people with wheelchair access toileting requirements would not be to carry out the hard physical work required on the job, and thus could not be expected to be employed on the job nor accommodated in this building. Those findings are the subject matter of the appeal.

[4] A wide range of interests were represented at the hearing of this appeal, including New Zealand Kiwifruit Growers Incorporated, representing the interests of the kiwifruit industry generally, MBIE, the Human Rights Commission, and the Ministry of Social Development. Broad questions of access to employment for disabled people, and associated Human Rights issues are squarely raised in this case.

[5] Mr Limmer owns an orchard block at 29 Ronalds Lane Te Puke, on the north side of town, where kiwifruit are grown. The property has an existing dwelling, dating from the 1980's. It is surplus to Mr Limmer's residential requirements, and he applied to the WBOPDC for a change of use, proposing to remodel the existing building. There

is a detached three bay garage, with a sleepout built into one end, which he wants turn into residential accommodation for kiwifruit orchard workers.

[6] Mr Limmer proposes to use the facilities primarily to accommodate people employed under the New Zealand Recognised Seasonal Employer (RSE) scheme. That scheme allows workers from the Pacific Islands to come to New Zealand to work in the kiwifruit industry. Employers have certain obligations under the scheme, including the obligation of ensuring that the workers are provided with suitable accommodation. It is anticipated that as many as 14 workers might be accommodated at this site, although 12 would be a more realistic assessment of the usual numbers. Local workers might also be accommodated, and it is anticipated that the accommodation could be provided for up to 11 months in a year.

[7] Mr Limmer proposes to offer employment to workers in only three roles. Picking kiwifruit, which includes crop thinning, pruning vines, and tying vines. Packhouse work is not offered. It is not intended that the facilities have any other use than as accommodation for kiwifruit orchard workers engaged in the specified roles.

[8] The WBOPDC initially determined Mr Limmer's application on the basis that wheelchair accessible toilet facilities are required under s 118 of the Building Act 2004. The 16 October 2019 MBIE determination was essentially based on a finding that any worker who was physically capable of the specified kiwifruit orchard work, would also be capable of using standard toilet facilities. There was an express finding that non-ambulatory wheelchair users would not be physically capable of carrying out the specified work.

[9] The WBOPDC's position on appeal was somewhat more refined than the it may have previously been. Whilst recognising that each case had to be determined on its own facts, and recognising that a single specific determination might have little precedent value, on appeal the WBOPDC sought to advance the proposition that the statutory matrix in which a decision under s 118 is taken necessarily imports an expansive and forward-looking approach to the issues for determination, and must include a consideration of human rights issues.

[10] Mr Limmer and the New Zealand Kiwifruit Growers Association have advanced a case based on a narrow consideration of legislation, and the specifics of the limited proposed use building, citing the current state of knowledge about the practical limits of employment of non-ambulatory people engaging in picking, thinning, pruning and tying work in kiwifruit orchards.

[11] The Ministry of Business Innovation and Employment brought a neutral stance to the appeal. Because the decision appealed against is from a determination issued by one of its officers, MBIE sought simply to ensure that all appropriate and relevant material was before the Court.

[12] Similarly, the Human Rights Commission did not seek to advocate for either of the original parties to the litigation, but rather confined their efforts to ensuring that the Court was fully informed about the legislative context, and the prevailing judicial interpretation of that legislation.

[13] The Ministry of Social Development intervened on behalf of the Office of Disability Issues, whose director, Mr Brian Coffee, gave expert evidence on wheelchair design improvements and the implications for disabled workers of technical developments. That evidence had not been adduced before the Determinations Officer, and it was not included in her analysis of the case.

[14] The determination appealed from contained a conclusion that a building used for RSE Scheme seasonal worker accommodation is appropriately assessed as a building coming within the Community Service Classified Use category specified in the Building Code Section A1 3.0.2. No issue was taken with that assessment in argument before me, and I do not address it further.

[15] On appeal, it is my duty to reconsider the matter afresh, and reach my own view on the available material. I am entitled to take into account the determination appealed from, but I must make my own assessment of the issues for determination.

[16] The starting point for this inquiry is the relevant provisions of the Building Act 2004. That statute requires that in the design and construction of buildings,

"reasonable and adequate provision" be made for persons with disabilities to enter and use the building. The principle is specifically covered in s 4(2)(k) which provides:-

> (2) In achieving the purpose of this Act, a person to whom this section applies must take into account the following principles that are relevant to the performance of functions or duties imposed, or the exercise of powers conferred, on that person by this Act…
>
> (k) the need to provide, both to and within buildings to which section 118 applies, facilities that ensure that reasonable and adequate provision is made for persons with disabilities to enter and carry out normal activities and processes in a building…

[17] The principle expressed in s 4(2)(k) is turned into an explicit requirement in s 118, which provides:-

> **118 Access and facilities for persons with disabilities to and within buildings**
>
> (1) If provision is being made for the construction or alteration of any building to which members of the public are to be admitted, whether for free or on payment of a charge, reasonable and adequate provision by way of access, parking provisions, and sanitary facilities must be made for persons with disabilities who may be expected to—
>
> (a) visit or work in that building; and
>
> (b) carry out normal activities and processes in that building.
>
> (2) This section applies, but is not limited, to buildings that are intended to be used for, or associated with, 1 or more of the purposes specified in Schedule 2.

[18] The statutory scheme contemplates a notice of change of use to the territorial authority whenever it is proposed to change the use of an existing building. Section 114 provides: -

> **114 Owner must give notice of change of use, extension of life, or subdivision of buildings**
>
> (1) In this section and section 115, **change the use**, in relation to a building, means to change the use of the building in a manner described in the regulations.
>
> (2) An owner of a building must give written notice to the territorial authority if the owner proposes—
>
> (a) to change the use of a building; or
>
> (b) to extend the life of a building that has a specified intended life; or
>
> (c) to subdivide land in a manner that affects a building…

[19] Section 115 deals with Building Code of Compliance requirements, and relevantly provides: -

> **115 Code compliance requirements: change of use**
>
> An owner of a building must not change the use of the building,—
>
> (a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and
>
> (b) in any other case, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use,—
>
> (i) will comply, as nearly as is reasonably practicable, with every provision of the building code that relates to the following:
>
> (a) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance:
>
> (b) access and facilities for people with disabilities (if this is a requirement under section 118); and
>
> (ii) will, —
>
> (a) if it complied with the other provisions of the building code immediately before the change of use, continue to comply with those provisions; or
>
> (b) if it did not comply with the other provisions of the building code immediately before the change of use, continue to comply at least to the same extent as it did then comply.

[20] It is important to note that the effect of s 115 (b) (i) (b) is that a change of use for a building is **not** permitted unless the territorial authority gives the owner written notice that it is satisfied, on reasonable grounds, that the building in its new use, will comply "as nearly as is reasonably practicable" with every provision of the building code that relates to "access and facilities for people with disabilities (if this is a requirement under s 118)". Section 115 is thus a "gate" through which applications for change of use must pass. The issue of access and facilities for people with disabilities cannot arise in respect of an application for change of use for a building in respect of which s 118 has no application.

[21] In this context, the application of Section 118 turns on the phrase "building to which members of the public are to be admitted, whether for free or on payment of a charge". That phrase is to be construed by reference to Schedule 2 of the Act, which contains an extensive, but not exhaustive, list of general publicly accessible buildings, as follows.

> **Buildings in respect of which requirement for provision of access and facilities for persons with disabilities applies**
>
> The buildings in respect of which the requirement for the provision of access and facilities for persons with disabilities apply are, without limitation, as follows:
> (a) land, sea, and air passenger transport terminals and facilities and interchanges, whether wholly on land or otherwise:
> (b) public toilets wherever situated:
> (c) banks:
> (d) childcare centres and kindergartens:
> (e) day-care centres and facilities:
> (f) commercial buildings and premises for business and professional purposes, including computer centres:
> (g) central, regional, and local government offices and facilities:
> (h) courthouses:
> (i) Police stations:
> (j) hotels, motels, hostels, halls of residence, holiday cabins, groups of pensioner flats, boarding houses, guest houses, and other premises providing accommodation for the public:
> (k) hospitals, whether public or private, and rest homes:
> (l) medical and dental surgeries, and medical and paramedical and other primary health care centres:
> (m) educational institutions, including public and private primary, intermediate, and secondary schools, universities, the New Zealand Institute of Skills and Technology and its Crown entity subsidiaries, and other tertiary institutions:
> (n) libraries, museums, art galleries, and other cultural institutions:
> (o) churches, chapels, and other places of public worship:
> (p) places of assembly, including auditoriums, theatres, cinemas, halls, sports stadiums, conference facilities, clubrooms, recreation centres, and swimming baths:
> (q) shops, shopping centres, and shopping malls:
> (r) restaurants, bars, cafeterias, and catering facilities:
> (s) showrooms and auction rooms:
> (t) public laundries:
> (u) petrol and service stations:
> (v) funeral parlours:
> (w) television and radio stations:
> (x) car parks, parking buildings, and parking facilities:
> (y) factories and industrial buildings where more than 10 persons are employed:
> (z) other buildings, premises, or facilities to which the public are to be admitted, whether for free or on payment of a charge.

[22] Does Mr Limmer's proposed use of the building in question fall within the parameters of Schedule 2? And if not, is it nevertheless a building to which members of the public are to be admitted, whether for free or on payment of a charge, as S118 specifies? A previous MBIE determination (2008/111) had concluded that accommodation for seasonal orchard workers falls within the ambit of s118 (1) as a

"hostel" under Schedule 2 (j), and that determination was cited and applied in the determination appealed from. Is that assessment correct?

[23] It will be immediately obvious that the building uses specified in the Schedule 2 list appear to be predicated very largely upon general public access to the building. There is a very noticeable omission of any reference to agricultural worker accommodation, including shearers quarters, and horticultural seasonal worker accommodation. The group of facilities specified in Schedule 2 most nearly apt to describe seasonal agricultural and horticultural workers is Schedule 2 (j), which specifies "hotels, motels, hostels, halls of residence, holiday cabins, groups of pensioner flats, boarding houses, guest houses, and other premises providing accommodation for the public."

[24] Of the facilities listed in Schedule 2 (j), only "hostels", and "boarding houses" could conceivably be construed as possibly having some application to seasonal horticultural and agricultural workers' accommodation. A boarding house provides accommodation for any member of the public who seeks it, with the owner or owner's agent present in a supervisory capacity. The proposed use of this building cannot reasonably be described as a "boarding house".

[25] A hostel, at least in modern New Zealand parlance, is "a house of residence for students, nurses etc", according to the New Zealand Oxford Dictionary. Youth hostels are for travellers, and open to all who seek accommodation. A general distinguishing feature of hostels, as opposed to other types of accommodation, is that they have a usually resident supervisor, perhaps a matron or housemaster, who exercises a measure of discipline and behavioural control over the residents.

[26] Could shearer's quarters properly be described as a hostel? The answer is obviously not. Shearers are usually a group of self-disciplined workers, resident in the quarters without supervision, sometimes for days, and infrequently for weeks or months.

[27] Would the proposed use of this building for seasonal orchard workers' accommodation involve a resident onsite supervisor, or owner's agent? That possibility is not suggested in any of the material available to me. Absent the

supervision element ordinarily found in accommodation conventionally described as a hostel, and giving due weight to absence of any reference in Schedule 2 to agricultural and horticultural worker accommodation, including shearers quarters, I am not persuaded that the reference in Schedule 2 to a "hostel" is an accurate characterisation of the proposed use of Mr Limmer's building. It is more accurately characterised as worker or employee accommodation, in my view.

[28] In so concluding, on my view of the facts of this case, I respectfully differ with that specific conclusion reached in the determination under scrutiny (though not its outcome). The previous determination given under 2008/111 in respect of orchard worker accommodation held that building to be a hostel, but the decision turned on its own facts, and is not the subject of this appeal.

[29] The use of a building for agricultural and horticultural worker accommodation does not imply, or even suggest, access and accommodation for the general public, or any member of the public. No-one would suggest that the general public can expect access to shearers' quarters, for example, either for accommodation or otherwise at all. The conclusion that the omission of "agricultural and horticultural worker accommodation" from Schedule 2 was a deliberate legislative choice would thus seem compelling, because access to such accommodation is in practise limited to workers employed to carry out specific agricultural or horticultural work.

[30] In this legislative context, the words "the public" cannot mean "any person" without further limitation, because the categories specified in Schedule 2 would be otiose, and s 118 would be of universal application. Every building would be caught, a construction of the statute that would obviously be inappropriate and thus unavailable.

[31] The proposed use of this building is limited to workers employed to carry out specific and closely defined horticultural work. Such workers are accordingly a separate, distinct and easily identifiable group, defined by the nature of their employment, and their status as employees. The group is small, at up to a dozen, and admission to the building in its proposed use is unquestionably specific to their employment status.

[32] In this specific legislative context, there is nothing revealed in any of the material available to this Court, to support a conclusion that "members of the public" are to be admitted to this accommodation block. I am not persuaded that Mr Limmer's building is appropriately categorised as a building "to which members of the public are to be admitted".

[33] The broad interpretative preference in favour of expanding the range of buildings with appropriate disabled access mandated in s 4 (2) does not apply, because at s 4 (2) (k), that provision is explicitly limited to "buildings to which section 118 applies". Human rights legislation and a UN convention cannot displace the legislative balance of competing rights and interests imposed by the plain wording of ss 2 and 118 of the Building Act 2004. Those provisions specify and delineate a limited class of buildings in respect of which disabled access is required. S 118 is thus the keystone underpinning the Building Act 2004 requirements for the provision of disabled access to and use of buildings.

[34] On this analysis of the Building Act 2004, s 118 has no application to Mr Limmer's proposed change of use, because I am satisfied that the proposed use does not meet the description of a "hostel" or "boarding house" under Schedule 2, and the proposed use will not involve the admission to the building of "members of the public". The consequence of this conclusion would be that there is no requirement for the provision of access and facilities for persons with disabilities in this building, and no reason for WBOPDC to decline the change of use application on such grounds.

[35] Although for different reasons, on this narrow approach to the interpretation of the Act, the determination given must be upheld, and the matter remitted to the WBOPDC for consideration in light of this ruling.

[36] Despite this determinative finding, in deference to the detailed arguments addressed to me by Counsel, I nevertheless address the issues raised in a broader legal and factual context. If I am wrong in the conclusion reached about the non-application of s 118, and assuming then that the building in its proposed use does come under the umbrella of s118, the core issue would be whether the building, in its proposed new use, will comply with the provisions in the building code in the absence of proper

access and facilities for people with disabilities. In this case, that determination is a mixed question of fact and law as to what would amount to "reasonable and adequate provision" by way of "sanitary facilities for people with disability in this building under the proposed change of use".

[37] In addition to the above cited set of statutory parameters, the issue must also be assessed by reference to the applicable provisions of the Human Rights Act 1993, the New Zealand Bill of Rights Act 1990, the cases decided thereunder, the New Zealand Disability Strategy 2016-2026, and the applicable UN Convention on the Rights of Persons with Disability.

[38] Section 23 of the Human Rights Act 1993 outlaws discrimination, and at s 21(1)(h) it defines the prohibited grounds of discrimination as including disability, which in turn means:-

(i) Physical disability or impairment:

(ii) Physical illness:

(iii) Psychiatric illness:

(iv) Intellectual or psychological disability or impairment:

(v) Any other loss or abnormality of psychological physiological or anatomical structure or function:

(vi) Reliance on a guide dog, wheelchair or other remedial means:

(vii) Presence in the body of organisms capable of causing illness.

[39] At s 29, the Human Rights Act 1993 adds a gloss of "reasonableness" to qualify various exceptions to prohibited discrimination. The section provides:-

29 Further exceptions in relation to disability

(1) Nothing in section 22 shall prevent different treatment based on disability where—

(a) the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities; or

(b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.

(2) Nothing in subsection (1)(b) shall apply if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

(3) Nothing in section 22 shall apply to terms of employment or conditions of work that are set or varied after taking into account—

(a) any special limitations that the disability of a person imposes on his or her capacity to carry out the work; and

(b) any special services or facilities that are provided to enable or facilitate the carrying out of the work.

[40] Section 35 provides a further general qualification on these exceptions, couched in terms of "unreasonable disruption" to the activities of the employer, as follows:-

35 General qualification on exceptions

No employer shall be entitled, by virtue of any of the exceptions in this Part, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.

[41] The Human Rights Act 1993 Act covers discrimination in access to places and facilities at s 42 and 43. Section 42 provides:-

42 Access by the public to places, vehicles, and facilities

(1) It shall be unlawful for any person—

(a) to refuse to allow any other person access to or use of any place or vehicle which members of the public are entitled or allowed to enter or use; or

(b) to refuse any other person the use of any facilities in that place or vehicle which are available to members of the public; or

(c) to require any other person to leave or cease to use that place or vehicle or those facilities,—

by reason of any of the prohibited grounds of discrimination.

(2) In this section, the term **vehicle** includes a vessel, an aircraft, or a hovercraft.

[42] Section 43 again incorporates exceptions based on "reasonableness" to the general rule of non-discrimination, although subsection (3) specifically excludes s 118 of the Building Act 2006 from the operation of subsection (2), but not subsection (4). S 43 provides:-

43 Exceptions in relation to access by the public to places, vehicles, and facilities

(1) Section 42 shall not prevent the maintenance of separate facilities for each sex on the ground of public decency or public safety.

(2) Nothing in section 42 requires any person to provide for any person, by reason of the disability of that person, special services or special facilities to enable any such person to gain access to or use any place or vehicle when it would not be reasonable to require the provision of such special services or facilities.

(3) Nothing in subsection (2) limits section 118 of the Building Act 2004.

(4) Subject to subsection (5), nothing in section 42 shall apply where the disability of a person is such that there would be a risk of harm to that person or to others, including the risk of infecting others with an illness, if that person were to have access to or use of any place or vehicle and it is not reasonable to take that risk.

(5) Subsection (4) shall not apply if the person in charge of the place, vehicle, or facility could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

[43] Housing and accommodation is covered at s 53, which makes prohibited discrimination unlawful either in relation to the right to occupy any residential or business accommodation, or in relation to invitees of the occupants of any residential or business accommodation. A further disability exception is covered in s 56, which

deals with the risks of harm to others caused by a disability, again couched in terms of reasonableness, mitigation and risk assessment.

[44] Turning to the New Zealand Bill of Rights Act 1990, s 6 of the Act requires that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other meaning. Section 19 of the Bill of Rights Act provides for freedom from discrimination, providing that "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993".

[45] New Zealand is also a signatory to the United Nations Convention on the Rights of Persons with Disabilities, which requires in article 27 that states recognises the rights of persons with disabilities to work, and requires signatory states to promote employment opportunities and career advancement for persons with disabilities in both the public and private sector. There is a specific obligation to ensure that reasonable accommodation is provided to persons with disabilities in the workplace (article 27(1)(i)). The New Zealand Disability Strategy 2016-2026 prioritises access for disabled people to "all places…with ease and dignity".

[46] These provisions are properly construed as being subject to appropriately justified, and therefore reasonable exceptions. A balancing of competing interests and legislative objectives is inherent in the determination of such an issue, whether by a proportionality assessment or other analysis.

[47] Against that legislative and treaty background, the New Zealand Courts have made it abundantly clear that mere lip service to the creation and implementation of these rights and obligations will not suffice. When considering these matters, it is clear from the decision of the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Limited*[1] that the statutory meaning is to be ascertained both from the text and the purpose of the legislation. The immediate and general legislative context are relevant, as are the social, commercial or other objectives of the enactment.

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1 *Commerce Commission v Fonterra Co-operative Group Limited* 2017 NZC 36

[48] The issue of discrimination was front and centre in the well-known decision of *NZCA and Ministry of Health v Atkinson*[2]. The Court there pointed out that differential treatment of a person or group may be discriminatory if it imposed a material and more than trivial disadvantage on the person or group differentiated against. An assessment of differential treatment is made by analysis under s 5. As to whether the treatment amounts to a reasonable limitation, that in itself requires assessment of the link between the purpose of the policy and an assessment of overall proportionality. To meet that test, the outcome must fall within a range of reasonable alternatives.

[49] It is clear from *Northern Regional Health Authority v Human Rights Commission*[3] that an analysis of a situation which may directly or indirectly discriminate must take into account the principles espoused in the conventions and covenants. It is clear that differential treatment of disabled people would be seen as discriminatory, unless there is good reason for a policy or a practice. Good reason can be established where there is a genuine need for a particular enterprise to operate a specific policy or practice.

[50] *Smith v Air New Zealand Limited* [4] dealt with the issue of prima face discriminatory treatment. The Court pointed out that "the statutory language could be decisive". The Court further held that an evaluative analysis of the proportionality or reasonableness of the proposal needed to take into account the overall benefits and costs.

[51] Against that background, I turn to assess the competing considerations. Accepting the overall proposition that every industry, including the kiwifruit industry, should be held to a standard that excludes discrimination on the ground of disability, it is clear that reasonable and proportionate exceptions to that rule are permitted across the full range of statutes and instruments operative in this area of the law. What would constitute a reasonable exception to the proposition that accessible toilet facilities should be provided for wheelchair bound workers? Could an inability to safely and

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2 *NZCA and Ministry of Health v Atkinson* 2012 NZCA 184
3 *Northern Regional Health Authority v Human Rights Commission* (1998) 2 NZLR 218
4 *Smith v Air New Zealand Limited* 211 NZCA 20

economically carry out the work suffice to exclude people with such disabilities from this specific type of employment?

[52] On behalf of the Office of Disability Information, expert evidence was called to the effect that standing wheelchairs are now available. It was said that either now, or in the reasonably foreseeable future, wheelchair bound people might well be able to carry out the physical labour expected of employees resident at Mr Limmer's proposed facility. That evidence was not however based on any expertise in orchard operations, and was largely concerned with wheelchair design improvements, and the increasing pace of change in this area of engineering.

[53] It is necessary therefore to address the realities of the kiwifruit industry and its general operation in the Bay of Plenty, in order to assess whether there is a realistic possibility that a wheelchair bound person could undertake such work now, or at any time in the reasonably foreseeable future. The relevant factors are many, and they include the nature of the work, the hours and circumstances in which the work must be carried out, the occupational safety and health requirements for induction training and worker supervision, and the variable terrain and working conditions that kiwifruit workers engaged in picking, pruning and tying must meet.

[54] Orchard work in the kiwifruit industry is not easy. The physical dexterity and balance requirements of the work are substantial. Picking is hard physical labour involving reaching, balancing, stretching, and carrying loads of ten to twenty kilograms for distances of up to 100 or more metres all day long. Pruning and tying work does not involve heavy weights, but it does require physical dexterity, hand-eye coordination, agility, balance and strength. Could a worker so disabled as to require wheelchair access to a toilet realistically expect to safely and economically carry out such work?

[55] The time constraints relating to the picking of the kiwifruit crop in New Zealand are not widely known outside the kiwifruit industry. Picking dates cannot be organised weeks or months in advance, and orchardists have no ability to control picking dates. If fruit are intended for export, as is the case with almost all of the Bay of Plenty crop, control of picking dates is surrendered by the orchardist to Zespri and

the packhouses. The dates for picking any particular block of kiwifruit are ascertained by reference to sampling and crop readiness data across a number of orchards, and the factors to be considered include the weather, the availability of labour, the availability of packing capacity in the local packhouses, trans-shipping and shipping requirements, and road transport availability.

[56] The whole kiwifruit industry operates on a "just in time" basis in relation to picking, packing and transport of export fruit, and it is a vastly more complex and sophisticated operation than it might appear to someone without a working knowledge of the industry. The "just in time" allocation of picking labour is of immediate relevance to the determination of the issue in this case, because of the occupational safety and health requirements that every worker be appropriately inducted for the work they are required to undertake at each orchard. Each orchard is different, and the induction required for one block on an orchard may not be identical to the induction required for a different block on the same orchard, let alone on a different orchard.

[57] Compliance with occupational safety and health requirements is now a very significant aspect of orchard management, as the penalties for any breach can range between several hundred thousand and 1.5 million dollars. (For a more detailed exposition of the kiwifruit industry's operational matrix see *WorkSafe v Athenberry Holdings Limited* [2018] NZDC 9987).

[58] In order for a disabled person in a wheelchair to be properly inducted into the work at a specific orchard, it would be necessary for that person's physical abilities and disabilities to be assessed by a competent and qualified abilities assessor. That physical assessment would in turn need to be addressed by an appropriately qualified wheelchair expert capable of making an appropriate assessment of the individual's ability to use the specific wheelchair proposed to be used, to carry out the relevant task or tasks on each specific block on each orchard. That would necessarily involve an assessment of ground conditions, including access conditions, canopy height and the nature and condition of the canopy support structures for each block. The cost of assessment would be considerable.

[59] The inevitable and variable time constraints, variable weather and ground conditions, coupled with varying packhouse and shipping requirements for various fruit types, all make an orchard worker's physical fitness, dexterity and flexibility, fundamental to the job. The hazards of kiwifruit work include a substantial risk of slipping and falling, the risks inherent in the use of sharp tools, and stretching whilst using such tools, and all the risks that go with the movement of agricultural machinery, trucks, tractors and forklifts used to move bins of fruit.

[60] An appropriate induction programme would need to be prepared for the specific worker for each specific orchard, with varying conditions applicable in many cases to each specific block of kiwifruit. Given that gangs of labourers are moved from block to block and orchard to orchard on a daily, and sometimes hourly basis, it is difficult indeed to see that there is a realistic possibility that any employer in the kiwifruit industry could presently even contemplate the employment of a wheelchair bound worker for any of the tasks of thinning, picking fruit, pruning or tying vines, in an economically efficient and safe manner. Occupational safety and health considerations are fundamental, and the induction requirements for a wheelchair bound worker could not realistically be carried out in an economically practical timeframe in most cases.

[61] Turning to the possibility that some technical developments may make standing wheelchairs practical, there is no evidence available to establish that such wheelchairs currently have any practical use in the variable climatic and terrain conditions to be found across the kiwifruit industry in the Bay of Plenty. In the absence of evidence from an industry expert with appropriately detailed knowledge of current kiwifruit industry standards and orchard working conditions and practises, a conclusion that a wheelchair dependent worker could realistically accomplish any of the tasks required could be no more than speculation.

[62] Against that background, I turn to a proportionality assessment. I am satisfied on the material available to me that there is currently no realistic prospect that anybody who requires the use of wheelchair capable toilet facilities could presently, or in the foreseeable future, carry out thinning, picking, pruning or tying work in the kiwifruit industry in the Bay of Plenty. I accept and agree with the observations in the decision

appealed from that the work to be carried out by workers occupying the proposed premises is simply too physically demanding for a wheelchair bound person to cope.

[63] That conclusion is reinforced by the matrix of constraints under which the industry carries out its business, which require a mobile workforce to be available to move at short notice, and to undergo a health and safety induction into the work on each block of kiwifruit, sometimes several times per day. The available information would not support a conclusion that there is presently any foreseeable future prospect that a wheelchair bound worker could be physically capable of carrying out the work required in an economically efficient, and importantly, a safe manner.

[64] A suggestion was made that an ambulant person with other disabilities might be able to physically carry out such work, but might nevertheless benefit from having the enhanced toilet facilities that a wheelchair bound worker would need. Those disabilities might include people with such chronic diseases as Crohn's disease, and/or other conditions for which a colostomy bag may be required. It was also suggested that persons with anxiety conditions who had need of a comfort dog might also benefit from enhanced toilet facilities.

[65] Whilst I accept that wheelchair access toilets may be of some benefit to such persons, there was no evidence that it is necessary for such persons to have access to anything other than standard toilet facilities. For workers with a dog, the dog could conveniently be tethered outside the building for a few minutes as required. People with colostomy bags can have their needs met with standard toilet facilities.

[66] Insofar as ambulatory persons with disabilities are concerned, I accept that it is conceivable that such persons might indeed obtain employment in the industry and carry out picking, pruning and tying work. There is however no material available to establish that such persons must necessarily be precluded from the work by limitations attaching to non-wheelchair access toilet facilities.

[67] I do not overlook the "forward looking" approach to disability issues that can be discerned both in the legislative provisions and the cases referred to. I am however satisfied that any worker who is incapable of using ordinary toilet facilities would also

be incapable of safely and economically carrying out the work of kiwifruit picking, pruning and vine tying, now and for the foreseeable future.

[68] A further issue for consideration is whether or not s 118 requires that appropriate sanitary facilities be provided for persons with disabilities who might be expected to visit the building. In that regard, it is necessary to determine under s 118 whether people with disabilities may be expected to visit and carry out normal activities and processes in the building.

[69] On the information presently available to me, I can see no reason for a wheelchair bound person to be visiting this kiwifruit worker's accommodation block. I am satisfied that under the proposed use, such a person would not work in the building, nor on the block, and they would not be attending for the purpose of "carrying out normal activities and processes in that building". The building is intended to be purely an accommodation block, so the normal activities would be the employee occupants sleeping, eating, and engaging in some indoor recreation.

[70] In relation to this specific building, and its intended use, and given its location, I have no reason to suspect that a wheelchair bound person would have any reason to attend. That is particularly so when it is borne in mind that RSE scheme workers from the Pacific Islands are intended to be the predominant occupants, and they are required to be physically fit to obtain entry to the program.

[71] A further point raised was the question of whether the building, once consented for the proposed use for kiwifruit worker accommodation, would then have a blanket exemption from the requirements of ss 114 and 115, even if the building is removed to another location, perhaps to another territorial authority area of jurisdiction. I do not regard that proposition as being in accordance with the law as presently written.

[72] Any change of use of this building, even if it was simply from one of the uses recognised in Schedule 2 to any other such use, is necessarily caught by the provisions of ss 114 and 115, and potentially thus by s118. A change of use from a childcare centre to a daycare centre, or from a Courthouse to a Police station, is indubitably a change of use, and caught within this statutory web. A change of use for a building which is

not subject to s 118 would necessarily be caught by ss 114 and 115, if the proposed new use is caught by s118. Every change of use must pass though this legislative gate, and a decision must be made in each case as to whether on the known facts s 118 applies.

[73] I place some weight on the absence of any reference in Schedule 2 of the Building Act 2004 to any agricultural worker accommodation. Whilst not singularly decisive, the absence of any such reference in the Schedule points to the conclusion that there are types of employment which, in view of a basic requirement for hard physical labour, are simply not practicable for people with sufficient physical disability to require wheelchair access for toilet facilities. That conclusion accords with the scheme of a piece of legislation designed to advance the objective of making proper provision for people with disabilities, whilst also recognising that reasonable exceptions are required.

[74] Optimism about future technological developments cannot realistically overcome the requirement to assess what is reasonable in the specific circumstances. The costs of consenting and building the facility are immediate, and a relevant factor. Ramps, door widening and remodelling the toilet will have a cost. Those costs are real, while any possible benefit can only presently be hypothetical. Imposing a requirement that this building be altered and a specific toilet facility be built for a hypothetical worker, who by definition cannot presently meet the physical requirements for employment in the specific role proposed, would in my view constitute the very definition of a disproportionate, and therefore unreasonable requirement.

[75] I am thus satisfied that a requirement to provide wheelchair access toilet facilities for the kiwifruit orchard worker accommodation proposed in this building is simply unreasonable, and it would be wholly disproportionate for such a requirement to be imposed under s118.

[76] Despite the provision of the additional material from the intervenors in this case, I am not persuaded that the determination appealed from is erroneous in the proportionality assessment made. I have reached my own independent view, and I respectfully agree with the careful legal and factual analysis upon which that

determination is based. I am satisfied that the determination made fully accords with the requirements imposed by the Human Rights Act 1993, the UN United Nations Convention on the Rights of Persons with Disabilities, and the Bill of Rights Act 1986, and does not derogate from the New Zealand Disability Strategy 2016-2026. For those reasons, the appeal must be dismissed.

[77] The determination appealed from pointed out, correctly in my view, that the determination was specific to the particular building at its specific location, and the proposed use specified by Mr Limmer. It necessarily follows that a determination of this kind, in these circumstances, can have little precedent value. Whilst I accept that the parties, and the intervenors, have sought guidance on some important legal issues in bringing this appeal, the very nature of the statutory matrix in which this case has been advanced means that not a great deal of precedent value can attach to a case of this kind.

[78] Such precedent value as may attach to this decision could only be to the extent that this Court recognises that there can be some types of horticultural and agricultural work, of which kiwifruit picking, pruning and vine tying, and perhaps shearing, are examples, which cannot presently, or for the foreseeable future, be determined to be safe and practicable employment options for people who are wheelchair bound. It follows that a requirement for wheelchair accessible toilet facilities in accommodation for workers engaged in comparable work of an equally physically demanding nature, might in appropriate cases be found to either slip through the legislative net of s 118 of the Building Act 2004 as a justified exception on reasonableness grounds, or perhaps to lie entirely outside the operation of s118, as I have concluded is the case here.

[79] The appeal is dismissed, and the matter is remitted to the Western Bay of Plenty District Council for re-consideration in light of this ruling.

T R Ingram
District Court Judge