IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 195
EMPC 2/2020

IN THE MATTER OF	an application for rehearing
BETWEEN	NEWZEALAND FUSION INTERNATIONAL LIMITED (IN ADMINISTRATION) First Applicant
AND	SHENSHEN GUAN Second Applicant
AND	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Hearing:	7 September 2020 (Heard at Auckland)
Appearances:	M Lyttelton, agent for first applicant Second applicant in person R Denmead, counsel for respondent
Judgment:	13 November 2020

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] This judgment deals with an application for rehearing by the abovenamed applicants.

[2] On 11 December 2019 a judgment was issued in respect of proceedings commenced by the respondent Labour Inspector (plaintiff in those proceedings) against the applicants NewZealand Fusion International Limited (NZFI Ltd) and Shenshen Guan (first and second defendants in those proceedings).[1]

[3] In that judgment the following orders were made against the first and second applicants:

> [109] The first defendant has breached the minimum entitlement provisions contained in the Minimum Wage Act by failing to pay minimum wages to the three employees concerned. The first defendant has further breached the minimum entitlements and payment for such entitlements under the Holidays Act for the three employees concerned for holidays and for holiday pay owing at termination of employment for the entire period of employment.
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> [110] The second defendant, Ms Guan, is a person involved in the breaches of minimum standards by the first defendant.
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> [111] Declarations of breach are made against both the first and second defendants.
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> [112] Pecuniary penalties in the sum of $300,000 (at [87](a)) are ordered against the first defendant; pecuniary penalties of $150,000 (at [87](b)) are ordered against the second defendant. These sums are to be paid to the Registrar of the Employment Court, Auckland, within 28 days of the date of this judgment. From the total amount of pecuniary penalties of $450,000, there will be a payment to each employee in the sum of $100,000. The Registrar will consult with the Labour Inspector as to how this payment will be made. The balance of $150,000 will be paid to the Crown.
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> [113] The first defendant must pay Mr Meng the sum of $69,500 by way of compensation order; Ms Xiueli Wang the sum of $69,000 by way of compensation order; and Ms Min Wang the sum of $91,850 by way of compensation order. Leave is reserved to apply further to the Court for consequential orders under s 142J(2) in the event that the first defendant is unable to pay the above amounts ordered against it. The sums referred to in [97](a)–(c) are to be paid to the Labour Inspector within 28 days of the date of this judgment.
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> [114] A banning order is made against each defendant for a period of 18 months commencing 28 days from the date of this judgment on the terms set out at [105] above.
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> [115] Interest is to be paid on the amounts referred to at [107] above, calculated in accordance with the methodology set out therein.
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> [116] Costs are reserved.

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1 *Labour Inspector v NewZealand Fusion International Ltd* [2019] NZEmpC 181, [2019] ERNZ 525.

[4] On 6 January 2020 the applicants filed an application for rehearing in this Court. On 7 January 2020 the applicants filed a notice of appeal in the Court of Appeal against the judgment. The appeal to the Court of Appeal was subsequently withdrawn by the applicants. They indicated to this Court that they wished to proceed with their application for rehearing.

[5] For the reasons set out below, the application for rehearing is declined and it is dismissed.

The application

[6] At the time the application for rehearing was filed, the second applicant, Ms Guan, was the sole director and a shareholder of NZFI Ltd. Martin Lyttelton is now the sole director of NZFI Ltd, and that company is now in voluntary administration pursuant to the Companies Act 1993. The administrator is apparently content to allow the present proceedings to continue and for Mr Lyttelton to represent the company.

[7] The grounds set out in the application for rehearing were as follows:

> 1. The Court in its determination of pecuniary penalties, compensation and banning order did not give consideration or gave inadequate consideration to the genuine and reasonable belief of the applicants that they would have been in breach of New Zealand Immigration and Revenue laws and subject to possible fines or imprisonment had they employed and [paid] wages to the complainants.
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> 2. The Court erred in law in taking into consideration significant inadmissible evidence which harmed the applicants;
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> Section 229(5A) Employment Relations Act 2000 provides;
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> (5A) A person is not excused from answering a Labour Inspector's questions under subsection (1) on the grounds that doing so might expose the person to a pecuniary penalty under Part 9A, but any answers given are not admissible in criminal proceedings or in proceedings under that part for pecuniary penalties"

[8] In affidavits sworn and filed in support of the application by Ms Guan and Mr Lyttelton, the grounds were expanded, although the application was not amended. Ms Denmead, counsel for the respondent, in her submissions summarised the expanded grounds, and I adopt her summary as follows:[2]

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[2] Footnotes omitted.

3. The grounds of the application have been expanded in the affidavits of Shenshen Guan sworn on 6 January 2020 and Martin Lyttelton sworn 19 June 2020 as follows:

   a) The workers were volunteers; and

   b) The Respondent withheld evidence from the Court regarding grace periods granted to accommodation operators and members of the Willing Workers on Organic Farms ("WWOOF") movement for offering travellers free beds in exchange for unpaid labour which should have also been granted to the Applicants.

[9] These further grounds were pursued by both Ms Guan and Mr Lyttelton in their written and oral submissions presented when the application for rehearing was heard. I infer that they were asserting that this further evidence is fresh new evidence which could not, with reasonable diligence, have been discovered prior to the hearing.

The opposition

[10] The respondent Labour Inspector filed a notice of opposition through counsel at a time when the sole grounds for the application for rehearing were those contained in the application itself. The grounds put forward for opposing the application were as follows:[3]

3 The grounds on which the Respondent opposes the making of the order sought in the rehearing application are as follows:

   3.1 The grounds advanced in support of the application for rehearing allege that the Judgment contains errors of law. Those points of law are also advanced in the Notice of Appeal filed with the Court of Appeal on 7 January 2020.

   3.2 Clause 5 of the Third Schedule of the Employment Relations Act relates to rehearing and confers on this Court a general discretion to order a rehearing and in the meantime stay proceedings.

   3.3 Section 214AA of the Employment Relations Act 2000 provides a specific process for a party to a proceeding for a declaration of breach, pecuniary penalty order, compensation order, or banning order under Part 9A of the Act who is dissatisfied with a decision of this Court to appeal to the Court of Appeal. That appeal does not require leave and can be in respect of a question of fact or law or both.

   3.4 This Court has previously held that where there is a specific process available to address dissatisfaction with a judgment, a party should not invoke the exercise of a general power to achieve the same result.

   3.5 In this instance another specific process (appeal) is available and has been exercised.

   3.6 There are no other reasons warranting rehearing of this matter.

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[3] Footnotes omitted.

3.7 Accordingly, the appropriate way to deal with this matter is by way of appeal.

[11] In an affidavit affirmed on 2 July 2020 and filed with the Court on 3 July 2020 Melissa Ann MacRury, a Labour Inspector, responded to the further matters which were contained as grounds in the affidavits of Ms Guan and Mr Lyttelton. She set out evidence as to why the respondent does not accept the contention that the employees in the present case were volunteers or that the Labour Inspector withheld evidence from the Court as alleged.

Legal principles applying to application for rehearing

[12] The Court's power to order a rehearing is contained in cl 5 of sch 3 to the Employment Relations Act 2000 (the Act). That clause reads as follows:

> **5 Rehearing**
>
> (1) The court has in every proceeding, on the application of an original party to the proceeding, the power to order a rehearing to be had upon such terms as it thinks reasonable, and in the meantime to stay proceedings.
>
> (2) Despite subclause (1), a rehearing may not be granted on an application made more than 28 days after the decision or order, unless the court is satisfied that the application could not reasonably have been made sooner.
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> (3) The application—
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> (a) must be served on the opposite party not less than 7 clear days before the day fixed for the hearing; and
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> (b) must state the grounds on which the application is made.
>
> (4) Those grounds must be verified by affidavit.
>
> (5) The application does not operate as a stay of proceedings unless the court so orders.
>
> (6) The rehearing need not take place before the Judge by whom the proceedings were originally heard.

[13] The principles applying have been the subject of a number of decisions of this Court.[4] Previous case law was summarised in a succinct statement of principle by Judge Ford in *Davis v The Commissioner of Police* where he stated:[5]

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4 See *Yong (T/A Yong and Co Chartered Accountants) v Chin* [2008] ERNZ 1 (EmpC); *Idea Services Ltd v Barker* [2013] NZEmpC 24; *Davis v The Commissioner of Police* [2015] NZEmpC 38, [2015] ERNZ 27; *Lewis v Greene* [2005] ERNZ 142 (EmpC); *Robinson v Pacific Seals New Zealand Ltd* [2015] NZEmpC 84, [2015] ERNZ 720; *New Zealand Nurses Organisation v Waikato District Health Board* [2016] NZEmpC 89.

5 Footnotes omitted.

> [11] On the face of it, this provision grants the Court a broad unqualified discretion in relation to rehearing applications but, as with any such general discretion, it must be exercised judicially according to principle.
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> [12] The authorities show that some special circumstance must be found to exist to warrant the ordering of a rehearing. It would be an impossible burden on this Court if a rehearing under cl 5 could be obtained merely by request and there is a strong countervailing public interest consideration in having finality to litigation.
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> [13] Traditionally, rehearings have been ordered when the integrity of a judgment has been placed in issue by some special and unusual circumstance. Examples include the discovery of fresh or new evidence, that could not with reasonable diligence have been discovered prior to the hearing, which is of such a character as to appear to be conclusive: *Hardie v Round*. A similar situation, albeit less common, may arise where a significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended: P*orts of Auckland Ltd v New Zealand Waterfront Workers Union* and *Yong (T/A Yong and Co Chartered Accountants) v Chin*. Other special and unusual circumstances will no doubt arise and each will fall to be considered on a case-by-case basis. The threshold test to be applied is whether the applicant can establish a real or substantial risk of a miscarriage of justice if the judgment is allowed to stand.
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> [14] The rehearing jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court or providing a backdoor method by which unsuccessful litigants can seek to re-argue their case.

[14] In *Brown v Adams t/a Untouchable Hair & Skin* Judge Corkill summarised the burden on an applicant as follows:[6]

> [23] In summary, an application for a rehearing must clear a significant threshold. Is there a risk that a miscarriage of justice has occurred? And it is well established that a rehearing will not be granted simply to give an unsuccessful party the opportunity to repeat his or her case. The public interest requires that there must be an end to litigation.

[15] The Court has a discretion whether or not to order a new trial where fresh evidence is sought to be introduced. Lord Denning, in *Ladd v Marshall* applied the following test:[7]

> … first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the results of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

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6 *Brown v Adams t/a Untouchable Hair & Skin* [2015] NZEmpC 190 (footnotes omitted).
7 *Ladd v Marshall* [1954] 3 All ER 745 (CA) at 748.

[16] Of particular relevance in the present case is Judge Couch's judgment in *Yong*.[8] In that case, as with the present, there had been simultaneous filings of an application for rehearing to the Court as well as an application to the Court of Appeal for leave to appeal. Judge Couch dealt with the approach to an application for rehearing in matters where a right of appeal is available. In addition, and in that context, he also dealt with the approach to be taken where, as in the present case, the application for rehearing alleges an error of law.

[17] As to the law in general relating to an application for rehearing under cl 5 of sch 3 to the Act, Judge Couch stated as follows:

> [12] On its face, this provision confers on the Court a general discretion to order a rehearing and associated stay of proceedings. As is the case with all such general discretions, however, it must be exercised judicially and according to principle. The scope of the power must be determined in the context of the Employment Relations Act 2000 as a whole and in light of the principles applicable to courts of record generally.
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> [13] The provision by the Crown of courts of civil jurisdiction reflects the public interest in having an orderly means of resolving disputes between individuals. In discharging that role, the courts strike a balance between doing justice in individual cases, bringing disputes to an end and providing certainty of law. These interests are often in conflict and each must, at times, give way to the others. Thus, the public interest in justice requires the provision of rights of appeal in most cases even though this is contrary to the public interest in prompt resolution of disputes. Equally, the need for finality in litigation requires that rights of appeal be limited.
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> [14] A key aspect of our legal system reflecting the need for finality of litigation is that the judgments of courts are final and binding on the parties in all but a very few circumstances. This principle is reflected in the doctrines of res judicata and functus officio. These provide that, once judgment has been given, the parties may not litigate the matter again and the judge cannot change the result.

[18] As to the situation where appeal rights are available as they are in the present case, Judge Couch stated as follows:

> [23] The fourth process available to deal with perceived injustice in a judgment is an order for rehearing. This is a step which no court will take lightly as it involves setting aside a judgment which would otherwise be binding and compelling the parties to engage again in the trial process which they were entitled to regard as over.
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> [24] It will be apparent from this analysis that the scheme of the Employment Relations Act 2000 is to provide two specific processes to address dissatisfaction

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8 *Yong*, above n 4.

with a judgment: appeal and judicial review. In addition the Act provides a general power to order a rehearing and the Court has an inherent power of recall.

[25] As a matter of principle, where a specific process is available, a party should not seek to invoke the exercise of a general power to achieve the same result. The general power should be reserved for those cases in which no other process is available. Thus, where a party is dissatisfied with a judgment of the Employment Court on grounds which may be the subject of an appeal under s214 of the Employment Relations Act 2000 or an application for judicial review under s213, the Court should be very reluctant indeed to entertain an application for rehearing on those grounds.

[26] Looking at the issue as a matter of practicality and fairness leads to the same conclusion. If the grounds for the application are that the judgment contains errors of law, the application itself effectively becomes an opportunity for the applicant to have a rerun before the same court of the argument unsuccessfully presented at trial. Such a process imposes an unfair burden on the respondent and, given that the judge hearing the application would usually be the trial judge, is likely to be futile. Equally, it would be unrealistic to expect a judge to deal dispassionately with an application for rehearing based on grounds that he or she had conducted the trial unfairly or behaved improperly.

[27] This conclusion is also consistent with the history of cases in which an order for rehearing has been made. By far the most common ground is that new evidence has been discovered which is material and which could not have been given at trial. In such cases, no right of appeal or review is available. It has only been in exceptional circumstances that any court has entertained an application for rehearing on grounds that the judgment contained an error of law.

[28] The one case in the employment jurisdiction in which that was done is *New Zealand Waterfront Workers Union v Ports of Auckland Limited* [1994] 1 ERNZ 604. In that case, the matter at issue was a dispute about the interpretation and application of the provisions of several collective employment contracts. For that reason, an appeal against the initial decision of Colgan J was precluded by s 135 of the Labour Relations Act 1987. A full Court subsequently heard and granted an application for rehearing on grounds that certain provisions of the Holidays Act 1981 had not been properly taken into account. It is clear from its decision, however, that the full Court was very much influenced by the fact that no other process was available to address what it perceived to be the possibility of a miscarriage of justice. Another unusual feature of that case was that the Employment Tribunal had remitted the matter to the Court for hearing so that Colgan J's decision was effectively at first instance.

[19] These principles bear effectively on three matters which are now the subject of the application for rehearing. First, the application seeks that the Court re-traverse evidence as to the belief of the applicants that they would have been in breach of New Zealand immigration and revenue laws if they had employed and paid wages to the complainants. Secondly, it alleges the Court erred in law by admitting into evidence, in breach of s 229(5A) of the Act, statements made by Ms Guan to the Labour Inspector. Thirdly, the affidavits effectively allege there is new evidence which could not have been

obtained by reasonable diligence before the hearing. This relates to the claim that the workers involved in this case were volunteers and that the Labour Inspector withheld evidence from the Court relating to grace periods granted to other accommodation operators where backpackers and other peripatetic travellers were offered free accommodation in exchange for unpaid labour. This evidence is alleged to be contained in media articles which apparently came to the attention of the applicants only following the judgment issued on 11 December 2019.

Conclusions

[20] The first ground of the application for a rehearing relates to Ms Guan's assertion that because of New Zealand immigration and revenue laws, she would have laid herself and the first applicant open to fines or imprisonment if she employed and paid wages to the complainants in this case. The submission contains an inference that this gives her a defence to what she and the company in fact did to the employees who provided services to her and her company over lengthy periods. The submission defies logic. More importantly, the submission that the point was not given consideration or given inadequate consideration is not correct. It was firmly considered in the judgment and rejected. This, however, cannot be a ground for a rehearing. It falls within the category of an attempt to relitigate an issue already the subject of the judgment. If the applicants consider there is a point to be made, it is a matter for appeal and not rehearing.

[21] The second ground contained in the application is an allegation that the Court erred in law in taking into consideration inadmissible evidence in breach of s 229(5A) of the Act. The wording of the section is set out at [7] of this judgment.

[22] The statements which Ms Guan made to the Labour Inspector during inquiries being made into the complaint were in evidence. They were not produced in evidence during the course of the hearing itself. They were contained in the agreed bundle of documents. The applicants consented to the documents being contained in the bundle and did not raise any objection to admissibility.

[23] In addition to issues of waiver which arise, for example by analogy applying s 65 of the Evidence Act 2006, several other points arise concerning the statements. The

statements themselves are exculpatory, apart from statements made by Ms Guan on the requirement of payment of a bond, which had been charged to the complainants in China. The issue of the bond, which might be equated to charging a premium for employment, was not pursued by the Labour Inspector in any event. The judgment does not take issue with this decision, although Chief Judge Inglis expressed some doubt as to the grounds for not pursuing it. Accordingly, no prejudice arose to the applicants as a result of the statements being in evidence. In finding against the applicants, the judgment primarily relied upon evidence presented at the hearing itself, including Ms Guan's own evidence.

[24] These proceedings not only covered claims for pecuniary penalties, but also claims for banning orders and compensation to the complainants for wages and holiday pay owing to them for the performance of their duties during employment with the first applicant. In quantifying such claims, the Labour Inspector would have had regard not only to documents recovered during the course of investigation, including available wage, time and holiday records, but also statements and explanations, which would logically be required from the employer relating to such records. An issue therefore may arise as to the effect of the application of s 229(5A) as to the extent to which statements made to the Labour Inspector might be admissible in respect of those other matters.

[25] These are legal issues which cannot be dealt with by simply ordering a rehearing. They are matters more appropriately dealt with on appeal. This is the very type of situation covered by Judge Couch in *Yong*.[9] In the present case the applicants have a general right of appeal by virtue of s 214AA of the Act. They do not need to seek leave. This is not a situation similar to that occurring in the *Ports of Auckland v New Zealand Waterfront Workers Union* case, when no process other than rehearing was available.[10] Accordingly, this is not an appropriate matter for a rehearing but should be dealt with on an appeal.

[26] As far as the third ground is concerned, it relates to the assertion that the media articles are new evidence which could not have been obtained without reasonable diligence for use at the trial. Mr Lyttelton in his submissions refers to the documents as evidence of the existence of "undisclosed authoritative decisions". The articles on a

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9 *Yong*, above n 4.

10 *New Zealand Waterfront Workers Union v Ports of Auckland Ltd* [1994] 1 ERNZ 604 (EmpC).

proper analysis show nothing of the kind. Rather than simply alleging decisions by the Labour Inspectors to excuse accommodation operators where, in return for short term accommodation, work is provided on a very temporary basis to backpackers and itinerant travellers, the documents show that the Labour Inspectors regarded the practice as a clear breach for which enforcement action was likely. In any event, the argument which is being run by the applicants in respect of these documents as a ground for a rehearing is simply not tenable. As Ms Denmead submitted, all the evidence referred to is information that was publicly available before the case was heard. It could have been easily located had the applicants wished to use it at the hearing.

[27] The situation involving the complainants in the present case where they were recruited in China, came to New Zealand and worked for the first applicant for substantial periods of time without payment of wages or holiday pay, is totally different from the situations referred to in the media articles. The draconian provisions of pt 9A of the Act had by this stage been introduced in circumstances where the Legislature in parliamentary materials had expressed concern at the abuse of migrant workers in the way that the first applicant did in this case. It introduced a regime incorporating substantial pecuniary penalties, banning orders and the ability of the Court to remedy the abuse by awards of compensation.[11]

[28] The third ground was of course belatedly raised by the applicants. It was not included in the application originally filed. It was filed at a later time. Applying the test laid down by Lord Denning in *Ladd*, it cannot be shown that the evidence of the media articles could not have been obtained with reasonable diligence for use at the trial.[12] Even if it had, it could not, against the circumstances of the introduction of new penalties for such abuses, have an important influence on the results of the case. Certainly the fact of some grace period being accorded to accommodation operators for allowing itinerant travellers to be granted accommodation in return for work over a matter of days, if that in fact occurred, does nothing to ameliorate the applicants' actions. No real or substantial risk of miscarriage of justice has been established by the applicants if the judgment is allowed to stand. Quite the contrary is the case where the applicants perpetrated

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[11] Discussed in *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514; *Labour Inspector v Daleson Investments Ltd* [2019] NZEmpC 12, [2019] ERNZ 1; *Labour Inspector v Parihar* [2019] NZEmpC 145, [2019] ERNZ 406.

[12] *Ladd v Marshall*, above n 7.

longstanding abuse on migrant workers who suffered substantial personal distress as a result of the actions.

[29] The application for rehearing is declined and it is dismissed.

Costs

[30] Costs should follow the event and the respondent is entitled to an award of costs against the applicants. If the parties are unable to agree on the quantum of such costs, then submissions will be required. The respondent is then required to file and serve a memorandum of submissions by 4 pm on 23 November 2020. The applicants will then have 14 days from the date of such filing and service of the respondent's submissions to file submissions in response. The issue of quantum of costs will then be decided.

ME Perkins
Judge

Judgment signed at 12.30 pm on 13 November 2020