Business Canterbury
Our Chamber of Commerce

Our Weekly News Digest for Employers
Friday, 10 May 2024

In this Issue:

CASE LAW **1**
Employment Court
Employee's arguable case allowed to continue 1
Court overturns Authority's interpretation of payment clause 2
Employment Relations Authority:
Employer Employee owed wages and holidays arrears as company goes into receivership 2
Did failure to act on bullying claims lead to a constructive dismissal? 3
Interim restriction on employee breaching restraint of trade 4
Authority enforces phrasing in employment agreement 5

LEGISLATION **6**
Bills open for Submissions: Seven current bills 6

Case Law

Employment Court: Two Cases

Employee's arguable case allowed to continue

Mr Roberts was a corrections officer at the Department of Corrections (Corrections) from July 2013 and a member of a union, the Corrections Association of New Zealand (CANZ). Mr Roberts claimed that Corrections failed to take steps to ensure his safety between 4 May 2018 and 27 November 2018, breaching its duties under its collective employment agreement. Its failure to acknowledge or remedy his concerns caused him emotional distress. The questions for the Employment Court (the Court) were whether Mr Roberts' claim was blocked by the Accident Compensation Act 2001 (the Act), and whether his claimed emotional harm was technically separate from his personal injury.

The Accident Compensation scheme compensated Mr Roberts for his personal injury. In return, the Act rules that *"no person may bring proceedings… for damages arising directly or indirectly out of… personal injury [that the Act covers]."* Corrections argued that Mr Roberts' personal injury, and the emotional harm of an assault he experienced, were inherently connected. It suggested Mr Roberts' claim for damages for emotional harm was essentially for his personal injury, already covered by the Act. If that were the case, Mr Roberts could not bring proceedings for the emotional harm to get general compensatory damages. Corrections also submitted that if the breach of contract caused any emotional harm, the personal injury overshadowed it.

The Court had to find if there was any reasonable cause of action that allowed Mr Roberts' application to stand or to strike it out. Mr Roberts argued that striking out the proceeding would give employers a perverse incentive not to avoid harm or breaches, because subsequent claims would always be blocked by the Act.

Among other cases, Corrections relied on *Northern Distribution Union v Sherildee Holdings Ltd*. There, the embarrassment and distress were so minimal, if they existed at all prior to the injury, that they could not be the subject of compensation. Mr Roberts argued that it seemed adverse to public policy to close off a means of addressing an employment breach, simply because monetary damages were

minimal.

The Court quoted *Smith v Fonterra Cooperative Group Ltd:* "*Pre-emptive elimination is only appropriate where it can be said that whatever the facts proved, or arguments and policy considerations advanced at trial, a case is bound to fail.*" The Court did not feel Mr Roberts' case was bound to fail. It concluded that Mr Roberts had an arguable case. It was not so untenable as to never possibly succeed. Neither was this case an abuse of process. The Court did not strike out his claim. The Employment Relations Authority could continue on with its preliminary determination of the actual issue. Costs were reserved.

Roberts v The Chief Executive of The Department of Corrections [[2024] NZEmpC 25; 23/02/24; Judge K Beck]

Court overturns Authority's interpretation of payment clause

New Zealand Steel and E Tū were parties of a collective employment agreement (CEA). They ran into issues around the meaning of "*make-up pay*" in the CEA, so the Employment Court (the Court) was tasked with interpreting when it was payable to employees.

In general, make-up pay is an allowance paid to employees in certain circumstances, if they agree to a request to work outside their established ordinary hours. A clause should be interpreted objectively, with the aim to ascertain the meaning that the written agreement would convey to a reasonable person, if they had all the background knowledge reasonably available to the parties at the time. The Court said that the meaning of the clause could be found by reading it in context, focusing on the document as a whole and recognising that collective agreements are "*relational agreements and are the product of compromise and opportunism*".

New Zealand Steel argued that make-up pay only applied to employees working fewer hours per week than their 40 ordinary hours. Employees who agreed to work outside their normal ordinary hours, but still worked 40 hours in the week, should not be compensated. The Employment Relations Authority had agreed with this interpretation. The Court, however, sided with E Tū instead. E Tū felt that if an employee was prevented from working their contracted hours when they agreed to a request from New Zealand Steel, they should still be compensated for their contracted hours.

New Zealand Steel argued that the sole intention of make-up pay was to compensate employees where, because of a requested change in hours, they worked fewer than 40 hours a week. It focused on financial loss and included overtime hours in its assessment of hours worked.

The background here included the parties' custom and practice stemming back to the term's inclusion in a 2011 CEA. In the 2018 CEA negotiations, New Zealand Steel unsuccessfully sought for the clause to be reworded to the very position it was now arguing. The wording instead remained the same. The Court noted that the clause at present did not mention an intention. After looking at this background, the Court decided in favour of E Tū.

The CEA's make-up pay was ruled payable where, at the request of New Zealand Steel, an employee worked outside their ordinary hours of work; and as a result, could not complete their ordinary hours. New Zealand Steel then had to pay make-up pay for the ordinary hours not worked, even if the employee still worked to meet their contracted hours. Costs were not sought.

E Tū Incorporated v New Zealand Steel Limited [[2024] NZEmpC 29; 26/02/24; Judge J C Holden]

Employment Relations Authority: Four Cases

Employee owed wages and holidays arrears as company goes into receivership

Ayden Trading Limited (Ayden) employed Mr Singh as a lawnmower and gardener. He worked for Ayden from 1 March 2021 to 17 July 2022 with Ms Ure, sole director and shareholder. Mr Singh said he was not paid holiday pay or final wages on termination of his employment. He also sought other wage arrears, public holiday arrears, interest, and reimbursement of the Employment Relation Authority's (the Authority) filing fee. He asked for the Authority to issue a penalty for Ayden's failure to keep and provide wage and time records, and another based on his individual

employment agreement (the agreement) contradicting requirements in the Holidays Act 2003. Finally, he asked for Ms Ure to be named as a person involved in the breaches and therefore also liable.

Mr Singh mostly worked by himself mowing lawns and completing other gardening maintenance services. He did not have a roster or set permanent days when he could expect work. The agreement did not specify work days or have an availability clause. Ms Ure sent Mr Singh a list of tasks through Google Worksheets.

Generally, work commenced at 8:00am and roughly finished at 4:00pm but varied on account of the nature of the work. The agreement established that a workday would be no more than 10 hours. Mr Singh said that he often worked on the weekend, with his workdays and hours fluctuating. Due to the outside nature of the role, if the weather was bad, Mr Singh could not work. If he could not complete his work during the week, he was regularly instructed to finish on the weekends.

As a result of this, Ayden at times provided Mr Singh fewer than his guaranteed hours of work, then only paid for the hours he worked. Mr Singh also said he was not permitted to work on public holidays that fell on a weekday.

The Authority investigated Mr Singh's claims and found all of these issues in his favour. The Authority also considered penalties for the four types of breaches due to their high potential liability. However, the focus was on Mr Singh receiving wage and holiday pay arrears and Ms Ure indicated Ayden was going into receivership. The Authority declined penalties in order to prioritise Mr Singh's wage and holiday arrears.

The Authority ordered Ayden to pay Mr Singh the wage arrears of failing to pay his guaranteed hours, totalling $4,391.95. It ordered one week's annual holiday pay of $840, and Mr Singh's annual holiday entitlements Ayden owed at the end of employment, totalling $3,486.75. It also ordered the payment of Mr Singh's public holiday arrears of $2,499, the payment of interest and the Authority's filing fee. It named Ms Ure as a person involved in the breaches by Ayden, so she was liable for these breaches if Ayden defaulted in its payments. Costs were reserved.

Singh v Ayden Trading Limited [[2023] NZERA 695: 22/11/23; S Kennedy-Martin]

Did failure to act on bullying claims lead to a constructive dismissal?

Hospitality Services Limited (HSL) employed Ms Joo as a food and beverage attendant at the Grand Millennium Auckland Hotel, from 16 September 2022 until her resignation on 8 February 2023. While employed, Ms Joo raised a personal grievance of bullying by her co-workers. Upon the termination of her employment, she raised a further grievance that HSL constructively dismissed her. HSL said it had not taken any unjustified action to Ms Joo's disadvantage and she resigned. Both parties alleged the other breached the duty of good faith. The matter came before the Employment Relations Authority (the Authority).

On 4 December 2022, *"the hot water incident"* took place. Ms Joo alleged that while staff were emptying water into a sink, a co-worker deliberately poured hot water on her, causing burns. An investigation found no evidence of any injuries and HSL considered that no disciplinary action or procedural change was required. Ms Joo criticised the outcome and alleged the investigation was biased against her. The Authority did not agree and found HSL's actions were those of a fair and reasonable employer.

On 6 January 2023 in *"the coffee lid incident",* a co-worker threw a metal lid, striking Ms Joo's wrist. Afterward, Ms Joo left work on special leave for much of the time up to her resignation. HSL held another investigation and the co-worker underwent a disciplinary process. It did not share the outcome with Ms Joo.

HSL wrote to Ms Joo rejecting that it had not done enough to investigate the bullying concerns, and that it had not created a safe workplace for Ms Joo. HSL argued it did not need to disclose the disciplinary action taken against the co-worker in the coffee lid incident. The letter set out concerns HSL had about Ms Joo's behaviour and that upon her return to work HSL would undertake a disciplinary investigation. Noting that both parties had concerns, HSL suggested mediation as a possible way forward.

The Authority found that Ms Joo's resignation was not a foreseeable reaction when HSL had proposed mediation and did not pressure her to return to work. The Authority found that resignation brought the employment relationship to an end, prematurely and unnecessarily. HSL also had the right to raise its concerns with Ms Joo about her alleged behaviour and this could not be considered as contributing towards a constructive dismissal.

The Authority found that the incidents, and other events Ms Joo complained of, did not reach the point of unjustifiable disadvantage. HSL investigated these matters and addressed them reasonably.

The Authority considered three claims for breaches of good faith. Ms Joo asserted she was disadvantaged by not learning of the disciplinary outcome of the coffee lid incident. The Authority disagreed. Ms Joo had no right to know the outcome of another employee's disciplinary process. HSL did enough by advising Ms Joo that the matter had been dealt with. There was also contention on whether Ms Joo had received a copy of her employment agreement. The Authority did not come to a definitive conclusion, but when tied back to Ms Joo's complaints, she was not disadvantaged by any inability to read the printed words of the employment agreement.

The Authority concluded that Ms Joo did not establish personal grievances for constructive dismissal or unjustified disadvantage.

Joo v Hospitality Services Limited [[2023] NZERA 715; 29/11/23; A Dumbleton]

Interim restriction on employee breaching restraint of trade

Mr Hill signed an employment agreement (the Agreement) on 18 May 2017 to work for Cookright Filtering Services Limited (Cookright) as the Nelson area manager/operator. He serviced cooking oil filtering, collection of waste oil, cleaning of frying vats plus overheads, and general kitchen cleaning. The agreement contained restraint of trade clauses. These broadly stated that he was not to operate or work for a business carrying out similar services to Cookright for two years after his employment ended, within a radius of 100 km of any Cookright Franchise operation. For the same period, he was not to provide or offer similar services to Cookright customers.

Mr Hill resigned on 24 April 2023 and gave notice until 29 July 2023, more than the required 60 days in the agreement. Cookright agreed to the extended notice period. After his extended notice was agreed to, Cookright alleged that Mr Hill had been offering his services to an existing customer, which he denied. Subsequently, on 23 June 2023, Cookright chose to pay Mr Hill in lieu of notice. After Mr Hill left, Cookright raised concerns about missing company property, and that at least seven customers indicated they no longer required Cookright's services. Cookright was also concerned about Mr Hill allegedly working for a company in the same industry, A1 Vat Services.

Cookright raised a claim with the Employment Relations Authority (the Authority) seeking interim orders to prevent Mr Hill from working in competition with Cookright, and an order to uphold the restraint of trade provisions in the Agreement. Cookright also brought a substantive claim against Mr Hill seeking permanent restraining orders, orders for the return of property or compensation for loss, and damages associated with alleged breaches of duties including breaches of restraining clauses. It also sought a penalty against A1 Vat Services for aiding Mr Hill's breaches of restrictive clauses in the agreement.

Mr Hill denied he acted in competition, or offered or provided similar services to Cookright, for his own business. He acknowledged actions he performed as an employee of A1 Vat Services after he was paid in lieu of notice. Mr Hill also said the restraining clauses in the Agreement were unenforceable. The Authority considered only the interim order and left the restraint of trade issue for later.

Mr Hill said he was only a commercial cleaner and the restraint of trade provision could not reasonably apply to him. The Authority disagreed. Based on Mr Hill's own submissions to the Authority, he was more than just a commercial cleaner; he had significant knowledge and experience in the industry. For this reason, Cookright had an arguable case that it had a proprietary interest to protect.

The Authority considered the balance of convenience, where it compares the impact on the parties of granting, versus refusing to grant, an order. The Authority found the balance of convenience weighed towards Cookright. It

demonstrated potential financial losses and an arguably understandable concern, that Mr Hill would arguably continue to use his knowledge of the Cookright customer base to establish one of his own.

The Authority felt the overall justice favoured Cookright for it to make the interim orders. While it noted that Mr Hill felt strongly about a restriction on his ability to work, his statements appeared inconsistent with the reality of the situation. The restrictions related to just the role he played for Cookright, not the wider hospitality industry that he had many years of experience in. The Authority measured the overall justice and reduced the interim orders' length of time and additional breadth of customer base, to what would be a reasonable timeframe for Cookright to re-establish its customer base with a replacement manager. The justice focused on a time-limited proprietary interest to protect and legitimise commercial competition.

The Authority ordered that until 30 June 2024, Mr Hill was not to directly or indirectly carry on, or be interested in any capacity, including employment, in any business similar to Cookright's, within 100 kilometres of its base in Richmond, Nelson. Mr Hill was not to carry out services including employment of the type provided by Cookright, for specific customers in the Nelson, Marlborough, and Tasman region. The criteria for these customers was if Mr Hill engaged with them for Cookright in the six months before the end of his employment. Finally, Mr Hill was not to offer his own services including employment of the type provided by Cookright, to any of these customers. Costs were reserved pending the outcome of the main case.

Cookright Filtering Services Limited v Hill [[2023] NZERA 745; 13/12/23; A Baker]

Authority enforces phrasing in employment agreement

Restaurant Brands Limited (RBL) employed Mr Lino, a student, at a KFC restaurant in Auckland. He commenced work as a team member in March 2022 and worked two fixed shifts each week, on Friday and Saturday. Mr Lino claimed that RBL unjustifiably disadvantaged him, when they did not allow him to work all Saturday shifts as a shift supervisor, on a permanent basis.

KFC restaurant employees are either a restaurant manager, an assistant manager or a team member. Each shift must have a manager on duty: the restaurant manager or an assistant restaurant manager. If neither is working, a team member who has completed a Leading A Shift (LAS) qualification is appointed as shift supervisor for that shift or part of one. Each restaurant must have a team member qualified as a cook available on each shift, to correctly cook the product.

Mr Lino claimed that at a meeting on 22 November 2022, restaurant manager Mr Ali promised him that he could work all his fixed Saturday shifts as shift supervisor. He said Mr Ali then reneged on that agreement, misleading and disadvantaging him as a result.

The employment agreement set out the terms and conditions the parties agreed on. Mr Lino's role was written as team member, and he had qualified as a cook. He also qualified to run a shift as a shift supervisor when he completed the LAS qualification in November 2022. He was then entitled to receiving the LAS allowance when working as shift supervisor. The clause said an LAS-qualified employee "*may be requested by the Employer to temporarily become the Shift Supervisor/Leader for a particular shift/s*".

The Authority found the use of the words 'may' and 'temporarily' conveyed that working as a shift supervisor was not a guaranteed term of employment. There was no written variation. The five shifts Mr Lino worked as shift supervisor did not sufficiently establish a long-running custom and practice, to replace the agreed terms and conditions of employment without such a variation.

Mr Lino may have truly believed Mr Ali promised the Saturday shifts as a permanent shift supervisor, but the Authority found it more likely he was mistaken. There was no requirement that Mr Ali appoint Mr Lino as the shift supervisor on any shift, and Mr Lino had no entitlement to run the shift. The Authority determined RBL did not unjustifiably disadvantage Mr Lino by not providing him with Saturday supervisory shifts on a permanent basis. Mr Lino also claimed RBL discriminated against him in its actions, but could not link this to any of the prohibited grounds of discrimination in legislation, or other evidence.

Moreover, Mr Lino was not treated unfavourably in the rostering of Saturday shift supervisor shifts. He continued to be mostly rostered as the shift supervisor until an assistant restaurant manager was appointed in late February. Ultimately, he worked all Saturday night shifts as shift supervisor except for two. Mr Ali chose another employee to work as Saturday night shift supervisor, because he had been employed 5 years compared to Mr Lino's 8 months and had greater experience. Since Mr Lino was one of the few trained cooks in the restaurant, he could therefore only be utilised as a shift supervisor if another trained cook was available to work in his place.

The Authority determined RBL did not discriminate against Mr Lino. Costs were reserved.

Lino v Restaurant Brands Limited [[2024] NZERA 6; 10/01/24; E Robinson]

Legislation

Note: Bills go through several stages before becoming an Act of Parliament: Introduction; First Reading; Referral to Select Committee; Select Committee Report; Consideration of Report; Committee Stage; Second Reading; Third Reading; and Royal Assent.

Bills open for submissions: Seven Bills

There are currently seven Bills open for public submissions to select committee:

Fisheries (International Fishing and Other Matters) Amendment Bill (15 May 2024)

Te Pire Whakatupua mō Te Kāhui Tupua/Taranaki Maunga Collective Redress Bill (22 May 2024)

Te Korowai o Wainuiārua Claims Settlement Bill (26 May 2024)

Restoring Citizenship Removed by Citizenship (Western Samoa) Act 1982 Bill (31 May 2024)

Contracts of Insurance Bill (3 June 2024)

Te Pire mō Ō-Rākau, Te Pae o Maumahara/Ō-Rākau Remembrance Bill (14 June 2024)

Privacy Amendment Bill (14 June 2024)

Overviews of bills and advice on how to make a select committee submission are available at: https://www.parliament.nz/en/pb/sc/make-a-submission/

The Employer Bulletin is a weekly update on employment relations news and recently published legal decisions. It is EMA's policy to summarise cases that contain legal issues relevant to employers. The purpose of the Employer Bulletin is to provide and to promote best practice in employment relations. If you would like to provide feedback about the Employer Bulletin, contact advice@ema.co.nz

57 Kilmore Street, PO Box 359, Christchurch 8140
Freecall 0800 50 50 96 **Email** info@cecc.org.nz
BusinessCanterbury.co.nz