Employer Bulletin

Our Weekly News Digest for Employers

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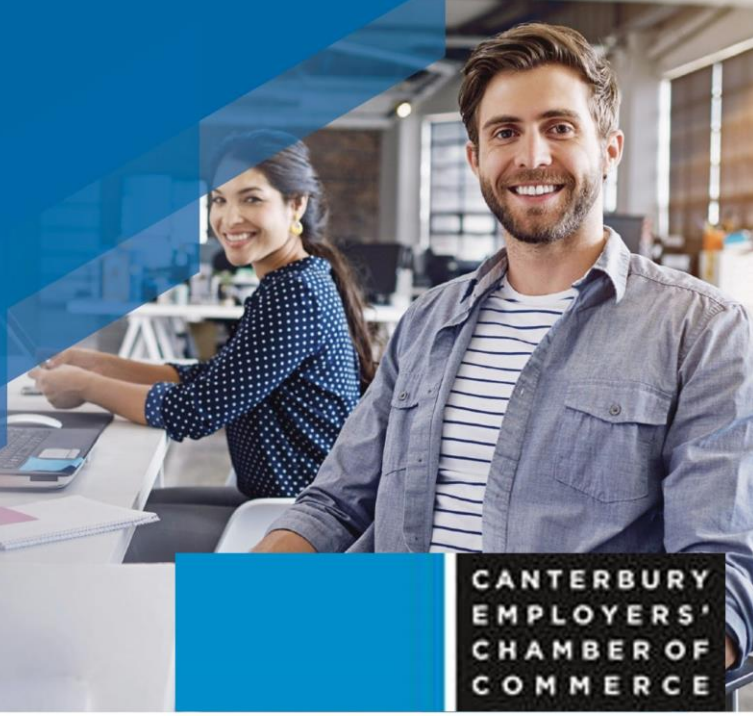

CANTERBURY EMPLOYERS' CHAMBER OF COMMERCE

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Case Law

Employment Relations Authority: Six Cases

Recommendation made for payment to former employee

Mr Smith was employed as a civilian member of the New Zealand Defence Force (NZDF) as a research and development lead. Following a fixed term of employment, he became a permanent employee in 2017 until he resigned in early 2023.

In July 2022, Mr Smith applied to the Employment Relations Authority (the Authority) for an investigation and resolution of two problems arising from the employment. He claimed a failure of the Chief of Defence Force (CDF) to give him an annual performance review in each year of service and a failure to pay him a 'Loyalty Payment' of $1,000 upon completing four years' service, while remaining a contributing member of the New Zealand Defence Force KiwiSaver scheme (NZDFKS). He later lodged an amended statement of problem seeking an order that CDF pay a penalty for the breach of good faith through failing to deliver annual performance reviews and for CDF to make a $1,000 Loyalty Payment to him.

Ms Poulter, for NZDF, gave evidence about the remuneration review conducted by CDF as of 1 July each year. She said a remuneration review did not necessarily lead to a pay rise and could simply confirm that pay had been commensurate with performance for the assessment period. Mr Smith had difficulty with getting a review over several years and felt he may have missed out on a pay rise through a breach of a condition of his employment. The Authority accepted from the evidence of Ms Poulter, that this was unlikely in the circumstances. He did receive increases in most years and in other years there may have been little movement across the board for other employees. Although there was a breach of the employment agreement, from the evidence it seemed unlikely that the breaches resulted in financial disadvantage to Mr Smith. The claim for a penalty was not brought within the required 12-month period so it could not succeed. No order was made against CDF in relation to the failure to provide a remuneration review.

The Authority found that the intent was clear in Defence Force Order 3 (DFO 3), that contributory service to establish eligibility for an incentive payment was to be measured by the number of years over which an employee contributed by having a deduction made from their remuneration, through the NZDF payroll. Using that measurement, Mr Smith was not eligible to receive the four-year Loyalty Payment in 2020.

NZDF provided its own KiwiSaver scheme and promoted it by offering $1,000 Loyalty Payments after one, four and seven years of contributing membership. Early in his employment, after Mr Smith had transferred his existing KiwiSaver account to NZDFKS, he began making contributions to that scheme through NZDF payroll. Later, he decided he would pay directly from his bank account and was doingThe Authority found that the intent was clear in Defence Force Order 3 (DFO 3), that contributory service to establish eligibility for an incentive payment was to be measured by the number of years over which an employee contributed by having a deduction made from their remuneration, through the NZDF payroll. Using that measurement, Mr Smith was not eligible to receive the four-year Loyalty Payment in 2020.

Mr Smith told the Authority he did not dispute the meaning of DFO 3. His problem was that he was simply unaware of its existence, despite making reasonable efforts to find out the rules or requirements. The Authority found in the circumstances that the separate documentation or publication of the rule to some extent hindered Mr Smith from obtaining relevant information about an important aspect of his employment. The NZDF was not as open and communicative as it could have been with Mr Smith about the full extent of the scheme and its conditions. That failure was a breach of the good-faith duty imposed on parties not to mislead or deceive each other or do anything likely to mislead or deceive each other. The Authority considered it was likely that if the DFO 3 criterion had been referred to outside of the intranet, in places such as the NZDFKS Guide, Mr Smith probably would have seen it and become better informed of the Loyalty Payment eligibility requirements.

The Authority considered five potential avenues of remedies available under the Employment Relations Act: dispute, penalty, personal grievance, wage arrears and compliance. However, the Authority found that none of the remedies considered were available to Mr Smith on the facts of the case. The fundamental problem remained that whether classed as wages or anything else, the money was not payable because the DFO 3 condition of payment was not met. The real problem in the case was that Mr Smith was not made aware, and did not become aware early on, of DFO 3.

Bearing in mind the status of a Defence Force Order, the CDF was urged by the Authority to stand by the representation made in DFO 3, that NZDFKS incentive payments will be applied equitably and fairly for all members of the NZDF who belong to the NZDFKS.

In summary, no orders were made against CDF, but a recommendation was given for a Loyalty Payment to be made by CDF to Mr Smith.

Smith v Chief of Defence Force [[2023] NZERA 371; 13/07/2023; A Dumbleton

Claim for unjustified constructive dismissal upheld

Ms Hunter was employed by Medina Trading Ltd, which trades as Hotel DeBrett in Auckland (the Hotel), as a junior housekeeping supervisor between September 2019 and December 2020. Her employment agreement stated she was required to work an average of 40 hours per week. Ms Hunter took her claims to the Employment Relations Authority (the Authority) alleging she was the victim of bullying and harassing behaviour by the housekeeping manager and that her complaint to the General Manager was not taken seriously. Ms Hunter also alleged she was unjustifiably and constructively dismissed. Further claims were advanced for wage arrears and alleged breaches of the Holidays Act 2003 (the Act).

On 17 March 2020, Ms Hunter was challenged by the housekeeping manager about having a coffee while she was expected to be working. Ms Hunter felt that she was yelled at and complained to the general manager. An investigation was initiated by the general manager. However, this was not concluded, partly because of the COVID-19 level four lockdown and Ms Hunter being on annual leave.

The Authority identified two issues with the March 2020 coffee incident. First, Ms Hunter was not given an opportunity to comment on the statement of the two witnesses. Second, Ms Hunter was not advised of the outcome of the investigation. The Authority found that Ms Hunter's personal grievance concerning the handling of the coffee incident complaint was established on the facts. The effects of this on Ms Hunter was that she legitimately felt that her complaint was not properly resolved.

The Authority then considered a matter of alleged racism, arising from a WhatsApp message from the house keeping manager to Ms Hunter. The Authority, while noting it was unprofessional and inappropriate, found the comment was a spontaneous expression borne out of frustration with another employee, rather than rooted in ignorance and racism.

The Authority reviewed two instances of alleged sexual harassment by the house keeping manager. The first instance was not proven on the balance of probability, while the second was more representative of a reminder about appropriate work attire.

Ms Hunter raised several concerns about alleged workplace bullying. The Authority only found grounds for one event being substantiated. In this instance, the house keeping manager had used an emoji in a disparaging manner when referring to Ms Hunter within a Facebook Messenger post to the house keeping team.

In October 2020, the Hotel wrote to Ms Hunter alleging serious misconduct. This concerned allegations of taking an unauthorised break and not completing her required work duties to a satisfactory standard. The Authority ruled that these events did not meet the threshold for being considered serious misconduct.

In considering Ms Hunter's claim for 10 hours per week in wage arrears, the Authority ruled that despite offering her hours in the restaurant and bar, the Hotel consistently fell short of providing Ms Hunter with an average of 40 hours of work per week, resulting in Ms Hunter being owed wage arrears.

The Authority noted that Ms Hunter was required to work to her roster, which included TBA shifts. This meant that she was required to be available to work for the whole day but with no obligation on the Hotel to provide her with any work. The Authority ruled that Ms Hunter should receive some compensation in recognition that her time had value.

With regard to obligations under the Act, the Authority ruled that the Hotel failed to provide Ms Hunter with rest breaks and meal breaks in accordance with the Act.

When the various matters noted above were considered cumulatively, the Authority found these to be reasonably sufficient to justify Ms Hunter's decision to leave her employment at the Hotel. The claim of unjustified constructive dismissal was established on the facts.

Looking at matters holistically, the Authority was satisfied that Ms Hunter suffered humiliation, loss of dignity, and injury to feelings resulting from her work situation at the Hotel. The Authority ordered the Hotel to pay Ms Hunter the sum of $16,000 for humiliation, loss of dignity and injury to feelings. The Hotel was also ordered to pay Ms Hunter $3,774.73 plus interest in wage arrears, $205.81 plus interest as compensation for being available and $6,080 in lost wages. The Hotel was further ordered to pay Ms Hunter $2,500 for failure to provide rest and meal breaks, with an additional $500 payable to the Crown. Costs were reserved.

Hunter v Medina Trading Limited T/A Hotel DeBrett [[2023] NZERA 374; 17/07/2023; P Fuiava]

Flawed redundancy process leads to upholding of unjustified dismissal claim

Mr Kereopa-Rerekura was employed to work as a security guard at a nightclub operated by Cruz Bar Limited (Cruz Bar) from 12 August 2020 until March 2022. In early March 2022, Mr Kereopa-Rerekura had to isolate because of a family member

contracting COVID-19. He contracted it himself and when he was ready to return to work, another family member contracted COVID-19 so he had to continue to isolate.

Initially, Cruz Bar advised Mr Kereopa-Rerekura that his employment was terminated due to abandonment. However, when Mr Kereopa-Rerekura had to continue to isolate, he was advised he was made redundant. Mr Kereopa-Rerekura raised a personal grievance questioning the procedural fairness of the redundancy, claiming lost wages and compensation.

On reviewing the matter of Mr Kereopa-Rerekura's employment being terminated without notice, the Employment Relations Authority (the Authority) found Cruz Bar did not act in a way that a fair and reasonable employer could have done in the circumstances at the time. It ran a flawed consultation process including failing to provide information in support of their proposal and did not give consideration to redeployment options. The Authority also noted that Mr Kereopa-Rerekura's role continued after he left, which supported the claim that the role was not genuinely disestablished. The Authority ruled that Mr Kereopa-Rerekura was unjustifiably dismissed.

The Authority ordered Cruz Bar to pay Mr Kereopa-Rerekura $1,893.86 for lost wages, $1,458.00 for lack of notice period and $15,000.00 in compensation under the Employment Relations Act 2000. Costs were reserved.

Kereopa-Rerekura v Cruz Bar Limited [[2023] NZERA 376; 17/07/2023; A Baker]

Labourer found to have been unjustifiably dismissed due to predetermination

Mr Maguire was engaged by Concrete Limited t/a Concrete Unlimited (Concrete Ltd) as a labourer from early December 2021, until he was summarily dismissed on 23 February 2022. The dismissal arose from a 21 February 2022 meeting with the Berketts, the owners of the company.

Mr Maguire had been asked to attend this meeting to discuss some concerns the company held about his time management. While the facts were disputed, the reason given for dismissal was Mr Maguire's allegedly threatening behaviour at this meeting.

Mr Maguire raised a personal grievance with Concrete Ltd on 17 April 2022, alleging he had been unjustifiably dismissed. The matter came before the Employment Relations Authority (the Authority) for consideration. Mr Maguire sought lost wages and compensation. Concrete Ltd denied unjustifiably dismissing Mr Maguire, asserting the basis of his employment was casual and that he either resigned by conduct before he was dismissed or was later justifiably dismissed for serious misconduct.

Firstly, the Authority needed to ascertain Mr Maguire's employment status. It was noted he signed an independent contractor agreement in December 2021, although he neither formed a company nor submitted any invoices. He only used tools provided by Concrete Ltd. In January 2022, Mr Maguire signed an agreement to become a casual employee. However, from his perspective, little changed aside from a small drop in his wages. Mr Maguire held the view that he was always an employee.

The Authority found that Concrete Ltd exercised absolute control over allocation of timing and work and where it was to be performed, they set remuneration at a fixed hourly rate, controlled information available on jobs and communication with clients. He was supplied with equipment and, when on the job, was working alongside other employees of Concrete Ltd. To a client, he would be indistinguishable from those employees. Taking into account the totality of the relationship and how it operated and the objective of the Employment Relations Act 2000 (the Act), the Authority concluded the real nature of Mr Maguire's initial engagement, up to 20 January 2022, was as an employee and not an independent contractor.

The Authority then needed to determine if the work was of a casual nature. After consideration of all the factors, the Authority found, by a narrow margin, that the employment was not genuinely casual as it was ongoing and there was an expectation created by Concrete Ltd that Mr Maguire make himself ready for work when available as opposed to the work being of an inherently casual nature.

While there was some contention about witness statements from the 21 February 2022 meeting, and whether the decision to terminate Mr Maguire's employment was predetermined, the Authority considered it more likely than not that the Berketts resolved to dismiss Mr Maguire for him not turning up for work on the Friday prior to the meeting, coupled with emerging difficulties they had identified in his timekeeping and this was communicated at the 21 February meeting before Mr Maguire reacted.

The Authority found the manner of the dismissal was more than likely pre-determined and abrupt with no opportunity for Mr Maguire to obtain representation and have input into the dismissal decision. Section 103A of the Act and good-faith considerations were absent in the decision to dismiss. The procedural defects were significant, including not affording Mr Maguire an opportunity to meet further and discuss potential reasons for dismissal as outlined in the dismissal letter. Overall, the Authority found Mr Maguire did not engage in misconduct sufficiently serious to warrant consideration of a sanction of summary dismissal before he was dismissed at the 21 February meeting. The dismissal in the circumstances was substantively unjustified due to relatively minor timekeeping issues.

Concrete Ltd was ordered to pay Mr Maguire $2,700 gross lost wages, $324 holiday pay on the lost wages and $10,000 compensation without deduction pursuant to the Act. Concrete Ltd was also directed to calculate holiday pay over the entire length of Mr Maguire's engagement and pay out the sum determined. Costs were reserved.

Maguire v Concrete Limited T/A Concrete Unlimited [[2023] NZERA 377; 18/07/2023; D Beck]

Breach of Employment Agreement leads to payout for Employee for Hurt and Humiliation

Mr Crudis worked as a farm hand and then farm and herd manager for Wharrie Farms Limited (Wharrie Farms). His employment ended by way of redundancy on 31 May 2021 because the farm was sold. The directors of Wharrie Farms were Mr and Mrs Wharrie, until January 2021 when Mrs Wharrie became the sole director. Mr Crudis said the way in which he was treated by Wharrie Farms, after Mr Wharrie left the farm in 2021, caused him to be disadvantaged in his employment, breached his employment agreement and the good-faith obligations on employers. This included being demoted between February and May 2021, dealing with a vehicle as if Mr Crudis had stolen it from Wharrie Farms, arranging for the sale of calves belonging to Mr Crudis, refusing to provide information to identify missing calves belonging to Mr Crudis, paying final wages excessively late and refusing to compensate Mr Crudis for additional hours worked during calving in spring 2020.

Mr Crudis' employment with Wharrie Farms spanned approximately 15 years, with some breaks in between. On 8 June 2020, Mr Wharrie, acting on behalf of Wharrie Farms, entered into a two-year fixed-term employment agreement with Mr Crudis. The 2020 employment agreement described Mr Crudis' position as both herd manager and farm manager. It was varied and several handwritten amendments to the terms were present. The stock allowance of 110 weaner bull calves was to help Mr Crudis build up funds to eventually purchase his own herd.

Mr Crudis said that by January 2021, while he was still the herd and farm manager, Mrs Wharrie started to treat him more like a farm hand. He felt he was treated like a newbie. Mr Slabbekoorn was appointed as the farm manager in January, something Mr Crudis says he was not informed about. From the list of duties Mr Slabbekoorn recorded, there was an overlap with Mr Crudis' role as herd and farm manager. It was clear from Mrs Wharrie's evidence that she did not accept Mr Crudis had the required skills and abilities despite the role description in the employment agreement. Mr Wharrie gifted a Land Rover to Mr Crudis before he left the farm in January 2021. Mrs Wharrie disputed this as it had been her understanding it belonged to Wharrie Farms. The Employment Relations Authority (the Authority) found that a fair and reasonable employer could be expected to deal with employees in good faith and to resolve disputes in a way that was responsive and communicative.

Mrs Wharrie again said she was unaware of the arrangement between Wharrie Farms and Mr Crudis in respect of Mr Crudis rearing calves, despite it being in the employment agreement. Mr Wharrie had created a list of National Animal Identification and Tracking (NAIT) numbers showing those owned by Mr Crudis and it was signed and dated. Mr Crudis had also received earlier calves to rear – the list recorded 131 bobby calves gifted by Wharrie Farms to Mr Crudis. Mr Crudis' evidence was that the calves were sold without his knowledge although he admitted signing a bank transfer form in April with Mr Lissington (Mrs

Wharrie's stock agent). The fact Mr Crudis had cancelled the first stock truck Mr Lissington arranged meant the Authority preferred Mr Crudis' evidence because that was consistent with him changing his mind.

Mr Crudis said he worked extra hours during the 2020 calving season that he was not compensated for. Mr Crudis claimed he worked 65 hours per week during calving. The employment agreement provided for a 40-hour week. To ensure compliance with minimum standards, it is appropriate that Mr Crudis receive payment for an additional 25 hours a week for 12 weeks at the minimum wage.

Wharrie Farms was unable to justify its actions in relation to the treatment of Mr Crudis as a farm hand. It appeared that the non-acceptance of Mr Crudis and his role, despite the plain words in the employment agreement, led to additional failures to constructively engage with Mr Crudis regarding multiple issues that arose between them during the period the farm was being prepared for sale. Wharrie Farms accepted that two calves were unaccounted for and Mr Crudis contested that it was eight. The Authority concluded that four calves remained unaccounted for and Wharrie Farms had to pay Mr Crudis the value of those four calves calculated in accordance with the average amount received on 21 May 2021 for 112 calves sold at the Feilding livestock market.

The Authority awarded Mr Crudis $20,000 as compensation for hurt and humiliation payable by Wharrie Farms. Payment for four calves in the sum of $1,443.56 and minimum wage arrears in the amount of $6000 were also awarded to Mr Crudis, payable by Wharrie Farms. Costs were reserved.

Crudis v Wharrie Farms Limited [[2023] NZERA 388; 20/07/2023; SK Martin]

Procedural flaw leads to established claim for unjustified dismissal

NHW was employed by SBK on a full-time basis in July 2019. His position in his employment agreement was described as a driver and plant operator who was also required to carry out work as a linesman and related duties. The two directors of SBK are NHW's mother and stepfather. NHW had a history of mental health issues due to circumstances in his childhood and was frequently given time off work to deal with these challenges.

In November 2020, following an incident at SBK, and a subsequent conversation about communication issues, NHW attended a church-based family relations programme for men. His photo appeared on the programme's Facebook page and one of his sisters made a comment which NHW took objection to. The comment was not approved by the programme's administrator. NHW then posted objectionable comments on the whanau page on the social-media platform Viber. Shortly after this time, NHW applied for, and was given, paid sick leave.

On 7 December 2020, NHW was invited to a meeting with SBK, largely to discuss the incident in November. SBK advised that the use of the family surname in the Viber posting affected the business and those working in it. Also raised at the meeting were issues of verbal abuse and threatening behaviour towards the company directors. The meeting did not go well and NHW left the meeting without any agreements or outcomes being reached. NHW remained on paid sick leave pending the outcome of an investigation.

On 11 December 2020, SBK wrote to NHW advising him his employment had been terminated due to ongoing verbal abuse and threatening behaviour, which the company considered serious misconduct. The directors decided to take this action without any further meeting with NHW or providing any opportunity for written comment or feedback about the prospect of dismissal. The directors felt fearful of how a further meeting may play out after the last one and they were concerned about how NHW may react. A fortnight later, NHW raised a personal grievance for unjustified disadvantage and unjustified dismissal.

In considering the matter, the Employment Relations Authority (the Authority) applied the statutory test of justification. This test asked whether what SBK did when addressing concerns with NHW's behaviour, and how it did so, were "*what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*".

The Authority took note of the concerns of the company directors about fears of verbal abuse and threatening behaviour that may have occurred in a further meeting. The Authority felt that, despite this, SBK could have given NHW an opportunity to comment before confirming their decision to terminate his employment. The company could have sent a letter, email or text asking for his comment before confirming a final decision. It would have been an opportunity for NHW to consider his own position, possibly get legal or other professional advice and to propose some alternative that may have addressed their legitimate concerns about his conduct and to draw clearer lines about what was reasonably expected of him in his working relationships with them. The Authority felt this was more than a minor defect in the process followed and found that NHW had established a personal grievance for unjustified dismissal.

The Authority found that NHW was entitled to compensation for lost wages and hurt and humiliation. In considering the appropriate remedies, the Authority noted that NHW had significantly contributed towards the situation that led to his personal grievance. The Authority found that a reduction of one third was appropriate and this should apply to both remedies, reducing the lost wages award to $9,706 (less any applicable tax) and the compensation award to $8,000, without further deduction. Costs were reserved.

NHW v SBK [[2023] NZERA 380; 18/07/2023; R Arthur]

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: One Bill

There are currently no Bills open for public submissions to select committee:

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