Business Canterbury
Our Chamber of Commerce

Our Weekly News Digest for Employers
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Case Law

Employment Court: One Case

Successful appeal against interim reinstatement order

Mr O'Brien worked as a stevedore for C3 Limited (C3) before his employment was terminated after failing to provide a valid drug test. He challenged C3's decision to terminate his employment and successfully applied to the Employment Relations Authority for interim reinstatement. C3 appealed to the Employment Court (the Court) to reverse the interim reinstatement order.

C3 provided stevedoring services at the Port of Auckland. From a health and safety perspective, the Port is considered a high-risk environment as many different groups work in a restricted space and operate heavy machinery. With that in mind, the Court found drug and alcohol testing to be a critical health and safety measure.

On 27 July 2023, The Drug Detection Agency were engaged to undertake random testing for employees following C3's drug and alcohol policy. Mr O'Brien was randomly selected for testing and was asked to provide a urine sample while under the supervision of a technician. The technician later said that he did not have a clear view of Mr O'Brien when he provided the sample. They said his test cup was just over half full and it did not feel as warm as it should have when it was handed to them. Not only did the thermal strip not activate due to the lower temperature, but it also did not contain the minimum level of creatine required for a valid sample. On 7 August 2023, following a disciplinary meeting held the previous week, Mr O'Brien was dismissed.

The Court considered the parties' submissions and followed the Employment Relations Act requirements relating to interim reinstatements and overruled the decision of the Employment Relations Authority. The Court highlighted Mr O'Brien's safety sensitive role, as well as the fact that the Court was not provided enough expert evidence to ensure that Mr O'Brien could return to the role in a safe and practical way, as strong considerations against interim reinstatement. Therefore, C3 was successful in their claim against full interim reinstatement. Costs were reserved.

Editors' note: In this judgement the Court emphasised the critical importance of health and safety as a strong consideration that pointed away from interim reinstatement.

Employment Relations Authority: Five cases

Employee found to be a permanent worker

Mr Fothergill claimed he was unjustifiably dismissed by E V Charger Solutions Limited (EVC), a week after starting his employment on 6 December 2021. EVC denied that it unjustifiably dismissed Mr Fothergill and claimed he was a casual employee. When Mr Fothergill applied for a position at EVC, Mr Wang, EVC's sole director and shareholder, invited Mr Fothergill to an interview. Mr Fothergill said that during the meeting, he told Mr Wang that he had some limited experience in the electrical work field, and had not been on many work sites, but he was very interested in the position.

Mr Fothergill said the meeting ended with Mr Wang indicating that he was keen to offer him an apprenticeship and would send him a contract. He was told the working hours would be 40 per week, during the hours of 8.00am to 4.30pm each day, Monday to Saturday.

Mr Wang stated that Mr Fothergill told him he had done the Level 3 electrical training, and he understood that as meaning Mr Fothergill had a certain level of capability. Mr Fothergill said he had completed a short electrical course at MIT and had completed Level 2.4 of the course.

The employment agreement recorded Mr Fothergill's position as "*Electrician Apprentice*". It contained a clause that stated, "*The employee will work on a casual "as required" basis with no expectation of ongoing employment*." Mr Fothergill said that while he thought a casual employment agreement with the hours stated in it was unusual, he did not query it and signed the Agreement. The parties decided Mr Fothergill would start work part-time on 6 December 2021 until he commenced full time work on 17 January 2022 Mr Fothergill's part time hours were from 8.00am until 3.00pm Monday to Saturday. Mr Fothergill said that during the first week of work, he worked on different work sites, receiving a message the night before telling him the site location for the following day. Mr Wang was not normally on site and did not supervise his work or provide him with training.

After work on 15 December 2021, Mr Fothergill had a car accident and was taken to hospital. He contacted Mr Wang to let him know. Mr Wang asked if Mr Fothergill was okay, and then proceeded to let him know he was no longer required at work as the other staff were not happy with his performance. Mr Wang stated that there had been issues with Mr Fothergill's performance, and he had spoken to him about these on 7 December 2021, and again on 15 December 2021. The issues were not raised with him formally.

The first issue the Employment Relations Authority (the Authority) considered was whether Mr Fothergill employment was casual in nature. Mr Fothergill confirmed that he understood that he was being offered casual employment when he signed the employment agreement, and that work would only be offered as and when it was available. His hours were agreed on prior to him starting work. The Authority found there was a consistent number of hours to be worked, with consistent start and finish times. EVC did not operate a roster system, however, Mr Fothergill received a text message each evening telling him the location of the work site for the following day. The Authority found that work was allocated in advance and there was a regular pattern of work. At the time of the job interview Mr Fothergill understood the job was for continuous employment. The Authority found there was a mutual expectation of ongoing employment. The employment relationship was more consistent with a continuous or permanent employment arrangement rather than with a casual arrangement. The Authority held that Mr Fothergill was a permanent employee with EVC.

Mr Fothergill was dismissed from his employment with EVC on 15 December 2021. The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. EVC did not hold a formal disciplinary process with Mr Fothergill in respect of performance concerns. Further, Mr Fothergill was not aware that his continued employment would be in jeopardy as a result of any performance concerns. The Authority found that

there was a lack of substantive justification for the dismissal and there was no procedure followed prior to the dismissal. Mr Fothergill was unjustifiably dismissed by EVC.

Mr Fothergill said he did not seek alternative employment until June 2022 but continued with his prior part-time employment in a pizzeria until he obtained permanent employment. Employees are under an obligation to mitigate their loss, and Mr Fothergill did not start to seek alternative employment immediately.

In these circumstances, the Authority considered it appropriate to award Mr Fothergill what he would have earned in the period between his dismissal from EVC and starting full-time employment on 13 June 2022, less what he earned at the pizzeria. EVC was ordered to pay Mr Fothergill the sum of $4,490.13.

The Authority accepted that Mr Fothergill felt distressed and betrayed by the ending of his employment with EVC which he believed to have been the start of a career in electrical services. EVC was ordered to pay Mr Fothergill $8,000 for hurt and humiliation. Costs were reserved.

Fothergill v E V Charger Solution Limited [[2023] NZERA 614; 19/10/23; E Robinson]

Employee unjustifiably dismissed

Mr Sargison claimed he was unjustifiably dismissed by Bine and Co limited (Bine and Co) trading as 'The Slip Inn'. Mr Thomas, the sole director and shareholder of Bine and Co, said that Mr Sargison was on a 90-day trial period when he was dismissed and disputed that Mr Sargison was unjustifiably dismissed. Mr Sargison sought compensation for hurt and humiliation, loss of remuneration and a contribution towards his costs.

In November 2022, Mr Thomas met with Mr Sargison about a role at The Slip Inn that he had applied for. On 26 November 2022, Mr Sargison was provided with an employment agreement. On 30 November 2022, both Mr Sargison and Mr Thomas signed the agreement. Although the agreement provided for employment to commence on 28 November 2022, Mr Sargison's first rostered shift commenced on Thursday 1 December 2022. Mr Sargison's regular rostered shifts were Thursdays to Sundays.

On 17 December 2022, Mr Thomas was unwell, so he organised for his father, Mr Michael Thomas, to be the Acting Duty Manager in his absence. Mr Thomas returned the next day on 18 December 2022. When Mr Sargison arrived for his shift, Mr Thomas asked to speak to him. Mr Thomas raised several issues with him including that he had been "*lazy*" the evening prior and that he did not do what was "*expected of him*".

Mr Sargison says he was not given a chance to explain himself and was told to get out using explicit language and that Mr Sargison and his family were "*no longer welcome*" at The Slip Inn. Mr Thomas denied using those words but did not dispute that he dismissed Mr Sargison that day without notice.

Mr Sargison submitted that the 90-day trial period in the agreement was not valid because the employment agreement was signed on 30 November 2022 after employment had commenced on 28 November 2022. Mr Sargison claimed that even if the 90-day trial period was valid, the requirement of providing one week's notice was not complied with when Mr Sargison was dismissed without notice hence Bine and Co could not rely upon the protection of the trial provision in the agreement.

Mr Thomas submitted that he had written '*28 November 2022*' as the intended commencement date as a "*simple courtesy*" to let Mr Sargison know that he would be considered for rosters later in the week. However, Mr Sargison was not rostered on until 1 December 2022, a day after the employment agreement was signed. As such the 1 December 2022 should be considered his start date of employment.

Although the employment agreement stipulated a commencement date of 28 November 2022, it also stated that the 90-day trial period would start "*from the first day of work*". There was no evidence of any pre-work training or induction taking place prior to the first rostered shift. The Employment Relations Authority (the Authority) found that both parties intended for Mr Sargison to begin work on 1 December 2022, therefore Bine and Co had a valid 90-day trial provision in place. However, the Authority went on to explain that an employer cannot rely on a 90-day trial provision to restrict a claim for unjustifiable dismissal when there was a dismissal without notice.

Mr Thomas stated that soon after hiring Mr Sargison, it became apparent to him and other kitchen staff that Mr Sargison was lacking in kitchen skills and not meeting performance expectations. However, at no stage during Mr Sargison's employment did he raise these concerns in a constructive manner with him. Instead, upon receiving complaints from Mr Michael Thomas about Mr Sargison, Mr Thomas dismissed Mr Sargison immediately and did not give him a reasonable opportunity to respond to his concerns.

The Authority did not find that Bine and Co substantiated any of the allegations against Mr Sargison. They did not prove a fair and reasonable employer would genuinely believe that serious misconduct occurred.

Dismissing an employee without notice is not a justified response to performance or misconduct concerns. Dismissal for poor performance or misconduct must also be on notice. The Authority found that the summary dismissal was substantively and procedurally unjustified.

Following his dismissal, Mr Sargison sought reasons for his dismissal, but Mr Thomas did not respond to the request. The Employment Relations Act 2000 requires an employer to provide a written statement of the reasons for the dismissal within 14 days of the request being received, where an employee has made such a request within 60 days after the dismissal.

Mr Sargison's counsellor provided the Authority with a letter setting out her professional opinion that the dismissal and the manner in which it occurred had a negative impact on Mr Sargison's wellbeing and mental health. The Authority ordered Bine and Co to pay Mr Sargison $15,000 compensation for hurt and humiliation.

Mr Sargison provided evidence supporting his efforts in looking for other work from 27 February 2023. He found employment 25 weeks following the dismissal. The Authority did not consider it appropriate to award 25 weeks of lost wages due to the gap between dismissal and Mr Sargison's job hunting. Accordingly, the Authority ordered Bine and Co to pay Mr Sargison $6,784.83 for three months of lost wages. Costs were reserved.

Bine & Co Limited v Sargison [[2023] NZERA 627; 25/10/23; D Tan]

Penalty for breaches of employment standards

Mr Ling claimed he was unjustifiably dismissed by SDCIC NZ Construction Limited (SDCIC) and was owed unpaid salary and holiday pay. He also claimed that SDCIC breached the duty of good faith it owed to him under the Employment Relations Act 2000 (the Act) and that the Second Respondent, Mr Wu, was also liable as a person involved in the breaches.

SDCIC was incorporated in 2018. It had a contract to carry out a project involving construction works on the site of a hotel in Auckland. There were four directors who were sent from China to manage the project, a management team of 10 including the four directors, and approximately 40 construction workers. On 18 March 2020, Mr Wu became the sole director of SDCIC.

In May 2018, Mr Ling was employed as a full-time safety manager on a fixed term agreement with an annual salary of $90,000 per annum. In February 2020, the construction project ceased and SDCIC were instructed to leave the hotel site. Mr Ling said at the point the project ended abruptly, he and several other employees were owed wages and holiday pay. He said he received his salary in December 2019 but was not paid for January and February 2020.

Most of the SDCIC employees were dismissed but Mr Ling and a couple of other employees continued in employment. The Employment Relations Authority (the Authority) found that SDCIC continued employing Mr Ling after February 2020. It retained him to sell off the SDCIC vehicles and fund paying the remaining employees. However, after June 2020, Mr Ling received no salary payments, and he was not provided with ongoing work by SDCIC. The last date Mr Ling received any form of payment from SDCIC was on 8 June 2020. Mr Ling contacted Mr Wu about his unpaid salary and holiday pay but received no response.

Mr Ling did not resign but submitted that he had been constructively dismissed. However, he did not provide evidence he raised a personal grievance with SDCIC until 22 June 2022. The personal grievance was raised significantly outside of 90 days and therefore outside of the statutory time limit. However, that did not preclude him seeking remedies for his other claims on wages and holiday pay, which had a 6-year limitation.

The Authority found SDCIC owed fours week's salary payment for his notice period and unpaid wages for the period from January until August 2020. It also owed annual leave entitlement for his full employment with SDCIC.

The Authority considered whether Mr Wu should be ordered to pay Mr Ling outstanding wages and statutory entitlements. Mr Wu was the sole director of SDCIC during the latter part of Mr Ling's employment and the person responsible for the operation of SDCIC. As such, he was responsible for all the breaches which occurred and of which he was notified. If SDCIC was unable to, or failed to pay Mr Ling, Mr Wu would be liable to pay the ordered payments.

The Authority determined the breaches of minimum employment standards should be considered as a global penalty of one breach. It ordered SDCIC to pay a penalty of $40,000 of which $4,000 was to be paid to Mr Ling. Costs were reserved. SDCIC was ordered to pay Mr Ling $6,923.07 for the unpaid notice period, $56,080 of unpaid salary and $15,200 as unpaid annual leave.

Ling v SDCIC NZ Construction Limited [[2023] NZERA 622; 24/10/23; E Robinson]

Employee unjustifiably constructively dismissed

Ms Anderson was employed by Glenfield College Board of Trustees (the Board) as the director of international students from September 2018 until her employment ended in January 2021. Ms Anderson raised a personal grievance for unjustified constructive dismissal and claimed compensation for humiliation, loss of dignity and injury to feelings, redundancy compensation and wage arrears for reduced hours. The Board said Ms Anderson was not unjustifiably constructively dismissed and it complied with its contractual and statutory obligations.

Ms Anderson was employed in a permanent, full-time role under an individual employment agreement. This was based on the terms and conditions of the Support Staff in Schools' Collective Agreement 2017–2019 (the SSCEA 2017-2019). In December 2020, Ms Anderson resigned from her employment by letter, in which she also raised a personal grievance for unjustified constructive dismissal. By that stage Ms Anderson had been on sick leave since 27 October and she continued on sick leave until her notice period expired on 15 January 2021. The medical certificates provided to the Authority recorded Ms Anderson was on sick leave due to work related stress.

Ms Anderson said two alleged breaches by the Board led to her resignation. The first was a reduction in her hours of work and pay by 50 per cent without her agreement, breaching her employment agreement. The next was responding to the concerns she raised in a highly personal and emotive manner.

On 11 September 2020, the Board wrote to Ms Anderson confirming its preliminary view, as set out in a variation proposal letter dated 5 August, to reduce her hours of work to 21 hours per week and her pay proportionately. The letter set out the reasons for the decision including the significant reduction in international student numbers consequent to the COVID-19 pandemic response and that the situation was unlikely to improve in the foreseeable future, causing a decline in the school's income from international students. The letter also recorded the reduction did not reflect Ms Anderson's performance or commitment to the school and the Board hoped her hours and pay would increase when pandemic response restrictions eased. The variation was to come into effect from 12 October 2020. Ms Anderson did not consent to the reduction in hours and pay.

The Board relied on the variation mechanism set out in a clause of the SSCEA to vary Ms Anderson's hours of work and/or weeks per year without ending the employment relationship and declaring her position redundant.

The Employment Relation Authority (the Authority) said the Board's interpretation and application of the relevant provisions was not one reasonably open to it. The SSCEA 2017–2019, on which Ms Anderson's individual employment agreement was based, expired and a new collective employment agreement was negotiated. The new collective employment agreement, the SSCEA 2019–2022, contained the amendment the Board relied on. The SSCEA 2019 – 2022 was not the collective employment agreement on which Ms Anderson's individual employment agreement was

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based. There was no mechanism in Ms Anderson's individual employment agreement to substitute some or all of the terms and conditions in the SSCEA 2017-2019 for the SSCEA 2019–2022.

The Board committed a major error in representing to Ms Anderson that the SSCEA 2019–2022 was relevant to the employment relationship. Ms Anderson had concerns about the Board's ability to vary her employment agreement including its purported contractual basis. The Board failed to take the reasonable steps open to it which may have alerted it to its error, including contacting the union to understand its view.

Ms Anderson was unjustifiably constructively dismissed. The Board failed to correctly apply the parties' employment agreement and implemented the erroneous approach in the face of Ms Anderson's clear and repeated concerns. In such circumstances, Ms Anderson was entitled to form the view her employer had seriously breached the employment agreement and that the breach would continue.

Ms Anderson established her personal grievance and was entitled to remedies. She was also entitled to payment of redundancy compensation because the Board made her position redundant and did not offer her a comparable position within the terms of the parties' agreement. That triggered Ms Anderson's entitlement to redundancy compensation of $36,230.

Additionally, the Board was ordered to pay Ms Anderson $30,000 in compensation, $5,000 for lost wages and $7,188 in wage arrears with interest calculated. Costs were reserved.

Anderson v Glenfield College Board of Trustees [[2023] NZERA 654; 06/11/23; M Urlich]

Personal grievance successfully raised within 90 days

LZG applied to the Employment Relations Authority (the Authority) for findings that he had a personal grievance of unjustified disadvantage, caused by the Department of Corrections (the Department) not doing enough to protect his safety when a prisoner who had previously made threats to harm LZG was being released from prison.

LZG was a corrections officer reported to be involved in seven incidents of prisoner violence in 2016 and 2017, including four where he was assaulted. Reportedly two of those prisoners planned on their release to "pay a visit" to the houses of LZG and another officer. The prisoners were said to have got LZG's home address from documents disclosed to them by Police in criminal cases about assaults on Corrections officers. One of those prisoners, referred to in the rest of this determination as Prisoner A, was serving a sentence for killing a Corrections Officer. His alleged threat was taken seriously.

Around 6 April 2021, LZG found out from work colleagues that Prisoner A was being released from prison. He expected that his managers or Police would have informed him, as it was known that Prisoner A made serious threats towards LZG.

On 8 April 2021, LZG raised the issue with an officer of the Department in an email and in person. They tried to resolve matters without avail. On 22 July 2021, LZG's lawyers raised a personal grievance about the concerns mentioned on 8 April 2021. The Department said the personal grievance was raised out of time. It asked the Authority to find LZG was not entitled to pursue his grievance.

Before the Authority could decide whether the Department did enough to protect LZG's safety, it needed to determine whether a valid personal grievance was raised within 90 days. The cause of action for the grievance was LZG being upset from finding about Prisoner A's release was on 6 April 2021, so the grievance needed to be raised within 90 days from this date. The letter sent by his lawyers on 22 July 2021 was 105 days later which means that this was not raised in time.

While the conversation and email on 8 April 2021 did not explicit say he was raising a personal grievance, it could constitute a personal grievance if a "*claim*" was made, it was clear that his conditions of employment had been affected to his disadvantage, and sufficient information on how the issue could be resolved was provided.

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In the communication on 8 April, LZG express his disappointment in the Department for their failure to notify him of Prisoner A's release and asked for "*some kind of system*" to inform him when "*critical events*" such as prisoner releases occurred. He asked for "*some form of humane response*" from the Department to show his concerns about the safety of himself and his family were taken seriously; and, thirdly, for there to be "*someone*" identified as in charge of his safety and who would be able to brief new managers and other staff about his situation.

LZG's communication on 8 April had the necessary detail and was within the 90-day period. The Authority directed the parties to attend further mediation to resolve matters. Costs were reserved.

LZG and Corrections Association of New Zealand v Chief Executive of the Department of Corrections [[2023] NZERA 680; 17/11/23; 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: Ten Bills

There are currently ten bills open for public submissions to select committee:

Inquiry into the 2023 General Election (15 April 2024)

Parole (Mandatory Completion of Rehabilitative Programmes) Amendment Bill (16 April 2024)

Fast-Track Approvals Bill (19 April 2024)

Budget Policy Statement 2024 (24 April 2024)

Companies (Address Information) Amendment Bill (2 May 2024)

Corrections (Victim Protection) Amendment Bill (6 May 2024)

Report of the Controller and Auditor-General, Making infrastructure investment decisions quickly (8 May 2024)

Regulatory Systems (Primary Industries) Amendment Bill (9 May 2024)

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)

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

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