Business Canterbury
Our Chamber of Commerce

Case Law

Our Weekly News Digest for Employers
Friday, 12 January 2024

In this Issue:

Case Law

Employment Relations Authority: Six Cases

Dismissal of uncommunicative employee found to be fair and reasonable

Mr Mutonhori was employed by the Wairoa District Council (the Council). In April 2022, the Council underwent a biyearly audit of its statutory functions as a building control authority, carried out by International Accreditation New Zealand (IANZ) and the Ministry of Business, Innovation and Employment (MBIE). An insufficient result would have put the Council at risk of losing its ability to act as a building control authority. The senior building compliance officer and the building control authority manager, who reported to Mr Mutonhori at that time, gave evidence that Mr Mutonhori did not take the assessment process seriously, and that he was both dismissive and confrontational.

Mr Mutonhori was also being investigated for refusing to fill in a fringe benefit tax (FBT) form accounting for personal use of a pool car, giving incorrect advice on a public consultation document under the Local Government Act, and receiving concerning verbal feedback from his reporting staff. The Council received a tax bill of $1,400 for Mr Mutonhori's refusal to fill out the FBT form.

An investigation meeting letter was given to him which he then took, highlighted the parts where the letter referred to his staff and then emailed the letter to all regulatory staff at the Council for which he claimed was for "*transparency*". The staff member who gave statements against Mr Mutonhori perceived this as a threat.

After being unwilling to meet with Mr Tipuna, CEO of the Council, to progress matters, he finally met to have the investigation meeting. He did not participate at the investigation meeting and remained silent. After the meeting, a preliminary decision to terminate his employment was provided. Before the final decision could be made, it came to Mr Tipuna's attention that Mr Mutonhori had texted the Mayor about his disciplinary process as he believed the Mayor was Mr Tipuna's boss and the only person who could "*call Mr Tipuna to order*". Mr Mutonhori admitted to sending the text to the Mayor but refused to attend any disciplinary meeting relating to it.

On 3 August 2022, Mr Mutonhori's employment was terminated for breach of "*trust and confidence*". He raised a personal grievance for unjustified dismissal, claimed that the Council breached its good faith obligations and sought reinstatement, lost wages and compensation for hurt and humiliation. The Council opposed the claim arguing that the dismissal was justified, that reinstatement was inappropriate given the structure of the Council. It argued that he should not be compensated for hurt and humiliation as he actively published the details of his disciplinary proceedings himself as part of his mayoral campaign in the local newspaper.

The Authority found that the process the Council undertook was procedurally fair as they gave appropriate notice, put all the concerns to Mr Mutonhori, found concerns were substantiated and allowed him to comment before a decision was made. While there were more concerns raised at the investigation meeting than was identified in the invitation letter, the actions that related to the additional concerns only occurred after the letter was sent. The Authority said that there was no issue with this as concerns were raised promptly as they came to Mr Tipuna's attention. Thus, the dismissal was substantively and procedurally fair and his claim failed.

Mr Mutonhori also raised 16 issues as a breach of good faith by the Council but did not provide evidence to advance any of the claims. He also claimed for missing property, but Council was able to provide an itemised list of property that was returned to Mr Mutonhori, which was detailed and to the point. The claim was also raised beyond the 90-day limit, so the claim was not made out.

Mr Mutonhori also claimed three weeks of wages for being suspended without pay. While he was suspended on pay pending the investigation, he went overseas for three weeks. He claimed Council was aware of the trip, but Mr Tipuna stated that he never applied for leave. The Council relied on a clause in the agreement that gave it authority to put Mr Mutonhori on unpaid leave if he unduly delayed the disciplinary process. The Authority noted that the delay was not of such a length that it could truly be called "undue" and so the Council was ordered to pay him three weeks wages and three per cent for KiwiSaver contributions totalling $8,245.54. No penalty was awarded because that would cause a "*doubling up*" in remedies and the Council did not act wrongfully deliberately.

No compensation was ordered for hurt and humiliation, as it was his own choice to publicly advertise the disciplinary proceeding. Costs were reserved.

Mutonhori v Wairoa District Council [[2023] NZERA 469; 23/08/2023; C English]

Failure to honour commitment to repay debt proves costly

Mr Radovanovich was employed by Pathways Health (Pathways) as a Youth Worker from 4 August 2020 to 12 November 2021. An agreement was reached that Mr Radovanovich would take unpaid leave from 28 June 2021 to 18 September 2021. However, Pathways mistakenly paid Mr Radovanovich the sum of $10,296 gross, which he was not entitled to receive. The debt was acknowledged, and repayments commenced, however Mr Radovanovich resigned before the debt was fully repaid. His final pay included a partial repayment.

Following mediation to resolve the matter of the debt, the parties entered into a Record of Settlement (the Settlement) dated 10 May 2022, pursuant to the Employment Relations Act 2000 (the Act). Clause 2 of the Settlement set out "*The parties agree that the total amount owing by Mr Radovanovich is $6,115.47 and that this will be paid by regular fortnightly instalments, with 24 payments of $250 per fortnight and in the fortnight after the last payment a final payment of $115.47. The first payment starting on 26 May 2022, by direct credit to Pathways account.*" Clause 3 of the Settlement required that on or before 17 May 2022, Mr Radovanovich would provide written confirmation that he had set up an automatic payment to make the required payments.

Following the signing of the Settlement, no automatic payment was set up by Mr Radovanovich and no repayments were made. Pathways made numerous efforts to communicate with Mr Radovanovich without success. Pathways sought a compliance order from the Employment Relations Authority (the Authority) for the debt to be repaid. Pathways also submitted a claim for a penalty for breaches of the Settlement and a claim for costs and disbursements.

Mr Radovanovich was personally served with two sets of documents setting out the claims of Pathways. Two affidavits of service were provided to the Authority confirming the documents had been served to Mr Radovanovich. The Authority concluded that Mr Radovanovich had decided not to participate in the process of the Authority.

Pathways provided the Authority with detailed information of their efforts to resolve this matter, which included communications with Mr Radovanovich and seeking the intervention of the mediator who signed off on the Settlement. Mr Radovanovich had made promises to make repayments following the signing of the Settlement, but these had not been carried out.

The Authority found that Mr Radovanovich failed to take his legal obligations under the Settlement seriously. It was therefore necessary and appropriate to order Mr Radovanovich to fully comply with all of the terms of Settlement the parties signed on 10 May 2022 within 28 days of the date of the Authority's determination. The Authority also ordered that interest be payable from 26 May 2023 (being the date by which all of the payments under the Settlement should have been completed) until the full amount outstanding had been repaid, including all interest.

If the Authority's compliance order was breached, then Pathways could apply to the Employment Court to exercise its powers under the Act. That could include sentencing the person in default for a term of imprisonment not exceeding three months, ordering a fine not exceeding $40,000, and/or sequestering property of the person in default.

The Authority found that Mr Radovanovich's actions were the antithesis of good faith conduct and undermined one of the primary objectives of the Act, which was to encourage the use of mediation to solve employment problems. The Authority considered that a globalised total penalty of $6,000 should be imposed on Mr Radovanovich for all of his breaches of the Settlement, with $4,000 payable to Pathways and the balance payable to the Crown.

Mr Radovanovich was further ordered to pay Pathways $3,500 towards their legal costs and $377.74 as reimbursement for disbursements.

Pathways Health v Radovanovich [[2023] NZERA 452; 17/08/2023; R Larmer]

Assumption of an employee's resignation leads to unjustified dismissal

Mr McCollum was employed by Annex Group Limited (Annex) from November 2020 as a labour hand, until he was made redundant on 19 January 2022. Mr McCollum argued he was unjustifiably dismissed and disadvantaged by Annex deciding to make his position redundant without undertaking due process.

In January 2021, Mr McCollum signed a letter of offer for a permanent position with hours of work being from 5.30am-2.30pm. On 10 November 2021, staff were told that due to a downturn in business their hours of work would be changed from 22 November 2021. Mr McCollum's hours would be changed to 8.30am-4.30pm. Mr McCollum alleged there was no consultation at all about the change of hours. He said he was presented with a variation to his employment agreement two days later and asked to sign it, which he did not do. He raised his concerns with Annex, but the matter was not resolved.

On 12 November 2021, another employee, in a similar role as a finisher, retired. Annex decided to merge the roles of a finisher and labourer into one. Annex offered the role to Mr McCollum.

On 6 December 2021, Annex wrote to Mr McCollum stating, "*with staff retirement and general downturn in business it has been a management decision for your role within the company to be made redundant effective on 23rd December 2021*". Mr McCollum stated he was completely shocked and was never consulted about the decision.

On 12 December 2021, Mr McCollum wrote to Annex requesting information regarding the redundancy, however no information was provided. On 21 December 2021, Annex requested to meet with Mr McCollum. At this time, Mr McCollum was on sickness and bereavement leave and was unable to respond.

On 10 January 2022, Mr Polzleitner, Annex's director, emailed Mr McCollum and stated that as he had not heard from him, he assumed that Mr McCollum would have been restarting work when Annex resumed business on 10 January 2022. On 13 January 2022, Mr Polzleitner emailed Mr McCollum again asking for Mr McCollum to confirm whether he would accept the new position. Mr Polzleitner concluded that Mr McCollum's failure to return to work or engage with Annex's meeting requests meant he had resigned. Mr Polzleitner confirmed his understanding by a letter to Mr McCollum dated 19 January 2022.

Mr McCollum stated that Annex's failure to undertake a fair and reasonable process, including the failure to adequately consult with him over the proposal to make his role redundant in December 2021, unjustifiably disadvantaged his employment.

There was some limited consultation with staff, including Mr McCollum, on the economic consequences COVID-19 had on the business. However, crucially, there was no discussion with Mr McCollum regarding the merger of his role with the role of finisher and there was no mention of redundancy.

The integrity of consultation depends on the key components of a composite process being present together. Inadequate information, or insufficient time, or consultation on only part of the employer's plans, will by themselves be defects tending to undermine the entire process.

The Authority held that Mr McCollum was not adequately consulted on the impact that the reduction of business would have on his role and the proposal to make his role redundant. The Authority found that Mr McCollum was disadvantaged by Annex's unjustifiable actions set out above.

It was accepted that Annex had considered other options of redeployment for Mr McCollum into the new merged position of labour hand and finisher and offered to transition him into the new position. However, the new role was subject to a vaccination mandate and therefore was not on terms and conditions that were similar to his current role. Mr McCollum did not want to be vaccinated. Annex's failure to complete a fair process was not what a fair and reasonable employer could have done in the circumstances. Annex failed to meet the requirements of the Act, meaning its action was unjustified and breached his employment agreement.

Annex did not retract its decision to make Mr McCollum's position redundant as of 23 December 2021. However, it did continue to pay him into January 2021. Annex instead dismissed him on 19 January 2022 when Mr Polzleitner alleged that Mr McCollum had resigned. Mr McCollum did not resign and nor was he paid his contractual entitlement of one week's notice.

The Authority found that Mr McCollum's dismissal for redundancy was unjustified and his personal grievance for unjustifiable dismissal succeeded.

Following his dismissal, Mr McCollum was unemployed despite reasonable attempts to find employment. McCollum was awarded three months' salary as reimbursement of wages, being $11,520.00, and holiday pay of $921.60.

Mr McCollum gave evidence about the effects on him of Annex's decision to dismiss him and the process leading up to that decision. The Authority ordered Annex to pay Mr McCollum compensation of $15,000.

Mr McCollum was also entitled to recover one week's salary in lieu of notice. Interest was to be calculated by Annex using the Civil Debt Interest Calculator. Costs were reserved.

McCollum v Annex Group Limited [[2023] NZERA 459; 18/08/2023; A Gane]

Dismissal following a failed drug test found to be procedurally unfair

Mr Hadfield started working for Atlas Concrete Limited (Atlas) under a collective employment agreement as a truck driver from February 2016 in its depot at Takapuna, Auckland. He was subject to random drug and alcohol testing as he was in a safety-sensitive role. After failing a urine drug test, he was dismissed for serious misconduct as stated in

their drug and alcohol policy updated in 2020 (the Policy). He raised an unjustified disadvantage for his suspension without pay and an unjustified dismissal.

The incident relating to serious misconduct was on 31 May 2021, where after a delivery he returned to the site where he was selected to undergo a drug and alcohol test. He signed a consent form and did the test. The test was found to be not-negative and Mr Hadfield immediately apologised and agreed he messed up to Mr Walker, his boss. He explained that he had an argument with his wife on Saturday, went to a party, got drunk and smoked cannabis and then woke up on a bench in Sandringham.

Before investigating, he was suspended without consultation for two weeks without pay. Mr Hadfield's sample underwent laboratory testing which confirmed a positive cannabis test result for a high amount of cannabis in his system. After the investigation and disciplinary process, he was dismissed for serious misconduct for breach of the Policy.

The Policy contradicted the collective employment agreement in some instances. In one clause, the Policy stated that an employee would be suspended "*without pay*" if they had a not-negative test while the results were confirmed. While his collective employment agreement stated that in the same instance, he would be suspended "*on pay*". At no stage was First Union, a party to the collective employment agreement, provided the Policy nor were they consulted or asked to comment on it. The Policy did not supersede the right to be paid, especially when First Union did not support or agree to the amendment.

In assessing whether Mr Hadfield was disadvantaged for being suspended without consultation, the Authority found that a fair and reasonable employer could have suspended an employee in the same circumstances without consultation as he had a not-negative test result and occupied a safety-sensitive role. Thus, his claim for unjustified disadvantage for the suspension was not advanced but he was financially disadvantaged so the Authority awarded compensation for this.

The Authority then assessed whether a fair and reasonable employer could have dismissed an employee in the circumstances. Under the collective agreement, returning a not-negative drug test was not considered to constitute serious misconduct but it was considered serious misconduct if the employee "*attended work under the influence of drugs or alcohol"*. Atlas occupied the view that the two were synonymous with each other. But in the meeting, First Union said that urine tests for THC-acid did not test impairment or if the employee was intoxicated. Expert witnesses at the authority investigation all agreed that while "*under the influence*" and "*impairment*" were not synonymous, they would not get into a car knowing that the driver had a not-negative drug test.

The Authority said it was clearly reasonable for Atlas, as many New Zealand employers in safety-sensitive industries do, to rely on urine testing as it did. Only a negative test result could confidently conclude that he was not impaired. It is important not to lose sight about why these tests are undertaken – for safety reasons. Atlas had a duty to eliminate risks to health and safety, so far as reasonably practicable, and it did. The dismissal was substantively justified.

It was not procedurally justified as the dismissal letter did not indicate that Mr Walker had given any consideration to Mr Hadfield's explanation of why there was cannabis in his system. No alternative disciplinary options were considered and there was no offer of a rehabilitation programme as mentioned in the Policy.

For remedies, he was awarded wage arrears of $7,310.10 and compensation of $16,000, for hurt and humiliation for suspension and dismissal. Twenty per cent of this was reduced for his contribution. Costs were reserved.

Hadfield v Atlas Concrete Limited [[2023] NZERA 470; 23/08/23; S Blick]

Personal relationship problems blur employment relationship, resulting in disadvantage

RDJ and ZEL as a couple jointly owned SGF for several years. RDJ left after they separated in 2016 but returned as a property manager from 4 November 2019. He resigned on 3 March 2021 amid the deterioration of interpersonal relations.

During his notice period, ZEL instructed an employee to reject RDJ's family violence leave application. Another employee delivered ZEL's trespass notice when at RDJ's residence to collect work property. RDJ lodged a personal grievance for constructive dismissal and unjustified disadvantage, seeking the lost wages for a successful family leave application, and compensation for hurt and humiliation.

Following the 2016 separation, ZEL transferred ownership of SGF to a trust and remained as a one per cent shareholder and its sole director. RDJ returned to SGF as an employee after ZEL experienced mental health issues. In October 2020, ZEL moved cities and took her youngest daughter with her. RDJ successfully applied for the child to return to Hamilton. Over the next months they disputed care arrangements. Meetings about this on 4 November 2020 and 11 November 2020 became heated, with both parties shouting, and ZEL assaulting RDJ's new partner. The meeting on 11 November 2020 was during work. An HR consultant for SGF recommended ZEL keep work strictly professional, which she heeded, and RDJ experienced no more issues, specifically, with work matters. When ZEL reassigned a client of RDJ based on a complaint, RDJ replied with "*Sweet thanks, not a problem*".

RDJ resigned on 3 March 2021. On 17 March 2021, he emailed his direct manager, Mr F, that he would take family violence leave until the end of his notice period on 31 March. "*Due to ongoing issues that directly involve the managing director of [SGF],*" he could not discuss the leave with her. Mr F asked for proof; RDJ described incidents and provided some proof, including his spouse's injury from the 2020 meeting. He said he could explain his application to a third party but did not believe ZEL could handle the issue fairly and impartially. Despite this, ZEL directed Mr F's email responses, and Mr F again wrote that he required proof.

On 18 March 2021, SGF arranged with RDJ to collect his work phone and car. While at his house, one of the employees, ZEL's spouse, also served RDJ with a trespass notice from the address which was both ZEL's private residence and SGF's offices.

On 30 March 2021, RDJ had received no further response on his leave request. When he emailed Mr F to ask, ZEL emailed back that she now fully managed SGF, which was not true. She had asked Employment New Zealand and police and determined RDJ did not meet the criteria for family violence leave. SGF instead logged it as unpaid sick leave.

RDJ submitted that ZEL's behaviour aimed to deliberately coerce resignation and breached SGF's duty to treat him fairly. He felt it was foreseeable he would resign from the situation, causing constructive dismissal. The Authority found the pair's various types of relationships had blurred boundaries. It felt it unproven that ZEL's acts deliberately incited him to resign. RDJ felt the work issues became resolved and expressed no concerns with the customer complaint. His issues were unrelated to SGF's acts. SGF therefore did not unfairly dismiss RDJ.

The Authority still found RDJ experienced unjustified disadvantage. SGF did not observe appropriate boundaries between it and personal matters. It unfairly pressured RDJ into discussions that should have been outside of work hours, breaching its duty of fair treatment, and should not have served personal notices during a work-related matter. Regardless of whether ZEL correctly interpreted the family violence leave, a reasonable employer should not have put her in the position to make or communicate the decision. Even in a small business, a more detached or third party should have decided instead of the alleged perpetrator.

The Authority assessed that family violence leave should be assessed with a low bar of broad proof, and not rely on fault. Hence, it found a reasonable employer would have approved the leave. It ordered SGF to pay the full entitlement at $2230.80. RDJ also experienced temporary financial distress, while he arranged to return to his previous job instead of being on leave. The delay and eventual refusal of his application worried him, and he experienced the unfair

treatment of the unjustified disadvantages. The Authority awarded compensation of his hurt and humiliation at $7,000. Costs were reserved.

RDJ v SGF [[2023] NZERA 462; 21/08/2023; R Arthur]

Claim upheld for unjustified dismissal

Ms Grant worked as a housekeeper for Carrington Resort and Carrington Holiday Park (Carrington companies) at different intervals between October 2019 and May 2022. Although the Carrington companies are separate businesses, they are closely associated. From the perspective of the Carrington companies, Ms Grant was a casual employee.

While cleaning one of the large Carrington Resort houses on 12 and 13 May 2022, Ms Grant was approached by the General Manager, Mr Tan, who expressed his concern at the time taken to do the necessary cleaning. Mr Tan subsequently withheld Ms Grant's wages while he undertook an investigation. On 18 May 2022, Mr Tan approved the wage payment. Ms Grant made several attempts to meet with Mr Tan, which were rebuffed. On that same day, Ms Grant and her partner approached Mr Tan and requested a meeting. He refused. What subsequently followed was described as a heated exchange of words.

Mr Tan agreed to meet with Ms Grant the following Friday and then asked her and her partner to leave the property. That same day a letter of termination, without explanation, was prepared, along with a trespass notice. These were delivered to the wrong address initially before the error was corrected.

Ms Grant raised a personal grievance alleging unjustified dismissal and seeking arrears for public holiday and annual leave entitlements. She named the Carrington companies in her complaint along with Mr Tan.

The first matter the Authority considered was whether Ms Grant was a casual employee. Although records for one year of the work history were incomplete, the Authority observed there was evidence that strongly indicated that Ms Grant worked each week for at least four days a week with a roster produced, in advance, for staff. On the basis of this evidence, the Authority found that, for the length of her employment with the Carrington companies, Ms Grant was a part-time permanent employee. The Carrington companies had correctly remunerated Ms Grant for public holidays, however an order was made by the Authority for the payment of annual holiday payments.

Regarding the dismissal process, the Authority observed that no discernible disciplinary process was followed. The dismissal seemed to be a spontaneous action, taken without consultation, warning or notice of any kind. The Carrington companies could have investigated any concerns they may have held and raised these with Ms Grant and genuinely considered her feedback. Viewed objectively, there was little if anything about the dismissal that resembled the actions of a fair and reasonable employer. The Authority found that Ms Grant had established a personal grievance for unjustified dismissal.

Mr Tan felt that the behaviour of Ms Grant and her partner was threatening and abusive. The Authority did not agree.

The Authority felt it was appropriate to impose a penalty on the Carrington companies and Mr Tan for obstructing and delaying the process of the Authority. The Carrington companies had not provided wage and time information along with other requested information. Mr Tan also failed to attend a scheduled meeting with the Authority for the purpose of reviewing evidence. The Authority ordered a $10,000 penalty was appropriate with $6,000 being payable to the Crown and $4,000 payable to Ms Grant.

In summary, the Authority ordered Carrington Resort to pay Ms Grant compensation of $29,000 for hurt and humiliation, lost wages of $9,123.83, $1,828.73 in annual holiday pay, interest on lost wages and annual holiday pay from 30 November 2020, and a penalty of $1,500. It was also ordered to pay a penalty to the Crown of $2,500.

Carrington Holiday Park was ordered to pay Ms Grant annual holiday pay $1,443.60, interest on annual holiday pay from 19 December 2021 and a penalty of $1,500. It was also ordered to pay a penalty to the Crown of $2,500. Mr Tan

was ordered to pay a penalty to Ms Grant and the Crown of $1,000 each. The Carrington companies and Mr Tan were ordered to pay Ms Grant the filing fee of $71.56.

Grant v Carrington Resort Jade LP and Ors [[2023] NZERA 485; 29/08/2023; A Dumbleton]

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: Zero Bills

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