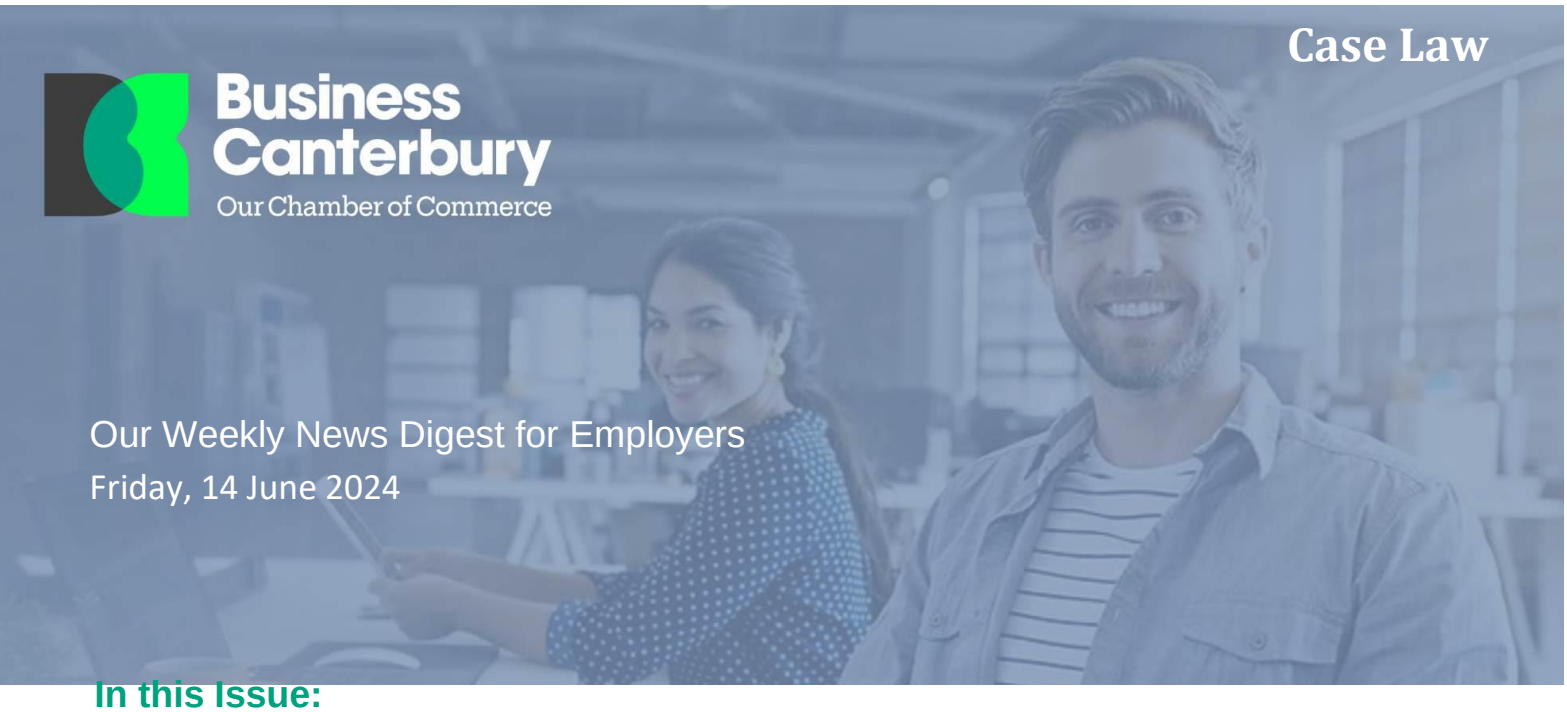

Business Canterbury
Our Chamber of Commerce

Our Weekly News Digest for Employers
Friday, 14 June 2024

In this Issue:

Case Law

Employment Relations Authority: Five Cases

Employer takes justified actions in investigation

Ms Kitto was employed by APL Kwikform Pty Limited (Kwikform) as a branch co-ordinator. She became concerned that her manager was not properly accounting for cash payments and raised the issue with Kwikform's New Zealand general manager. She felt her manager later began to harass her, targeting her for whistleblowing on the cash payments.

Ms Kitto went on paid leave with Kwikform's approval and it engaged an outside investigator to conduct an investigation. Attempts were made during the investigation process to return Ms Kitto to work without success. She ultimately resigned before the investigation was concluded. After her resignation, she raised grievances alleging constructive dismissal and disadvantages throughout the events that occurred.

Ms Kitto's first disadvantage claim was that Kwikform took too long to respond to her complaints. Kwikform's reason was that senior staff members had pre-existing travel commitments and another staff member was unwell. Kwikform advised Ms Kitto of this at the time. In the end it engaged an investigator about 14 days after her complaints were made. The Employment Relations Authority (the Authority) did not consider this a disadvantage.

Kwikform allegedly did not adequately support Ms Kitto's return to work. She had advised Kwikform that she would return to work on both 16 and 27 June 2022, but did not on both occasions. She said she did not wish to return to work, even though Kwikform was actively negotiating with her lawyer to do so at the time. Her contradictory actions and evidence caused this claim to be unsubstantiated.

Ms Kitto argued that she was disadvantaged in that the investigator gave her name as the whistleblower to her manager. The Authority did not find this to be the case. The manager disclosed to the investigator that two other managers told him that Ms Kitto was the whistleblower. The Authority found they did not say this in the first place. Moreover, the way Kwikform responded did not cause any change to her employment status nor warrant any criticism.

Ms Kitto also felt Kwikform should have directed a specific employee to speak to the investigator. The Authority found firstly that Ms Kitto raised this claim after she resigned, so she did not experience this disadvantage during the employment relationship. Secondly, the colleague fundamentally could not be compelled to engage with the investigator if he did not wish to.

Finally, Ms Kitto claimed she should have been consulted about the final investigation report and Kwikform's next steps, despite it being completed after she resigned. The Authority found that once she left, any recommendations or actions arising from the report would not affect her.

The Authority was asked to consider whether the cumulative disadvantage claims lead to a constructive dismissal. At the time of her resignation, nothing about Kwikform's actions indicated a serious breach of duty or that Kwikform was not intending to honour the ongoing employment relationship. Rather, as Ms Kitto herself stated in her in-person evidence, she did not wish to return to work. The Authority found that there was no breach of duty by Kwikform, or any conduct that was sufficiently serious to make Ms Kitto's resignation reasonably foreseeable. Her claim of constructive dismissal did not succeed.

Two penalty claims were also dismissed. The first was that Kwikform had not engaged in mediation until the Authority directed them to. This was found to be a reasonable action. Second was that Kwikform should have shared correspondence between the investigator and their legal counsel. The Authority noted that such correspondence had legal privilege. No remedies were ordered and costs were reserved.

Kitto v APL Kwikform Pty Limited [[2024] NZERA 75; 09/02/24; C English]

Redundancy found to be not genuine

Ms King was the sole director and shareholder of Queenstown Local Laundry Services Limited (Queenstown Laundry). She was also friends with Ms Chandler who she employed as a laundry supervisor and delivery driver until 21 March 2022. Following the decrease of business from COVID-19, Ms King unilaterally reduced Ms Chandler's hourly rate. This caused a rift in their relationship and ultimately, Ms Chandler was constructively dismissed. Ms Chandler raised a personal grievance at the Employment Relations Authority (the Authority) for unjustified dismissal. She claimed lost wages, wage arrears and compensation for hurt and humiliation.

Ms Chandler disputed the unilateral change in her employment agreement and the parties went to mediation. This concluded with continuing animosity between the parties. Both had different opinions about what was discussed. Ms Chandler felt that Ms King had agreed to stop pressuring her to work on Saturdays, that a KiwiSaver issue had been rectified and that there would be a shorter notice period if Ms Chandler were to resign. In contrast, Ms King claimed that Ms Chandler signalled an intention to resign in the near future. Ms King also discussed the reduction in work available due to a lack of overseas visitors.

On 28 September 2021, Ms King tried to end Ms Chandler's employment by texting, "*In light of last weeks meeting. Shall we make it two weeks' notice from today*". Ms Chandler wrote, "*No I will let you know when".* Ms King quickly responded, *"That won't work sorry, I can't afford to keep you on. I will write out a formal letter then,"* and then, *"You made it clear you did not want to work for me. So, that actually works out well"*.

Ms Chandler went on leave for a work-related injury and upon her return, Ms King made another dismissal threat. Ms Chandler was then diagnosed with vertigo and went on sick leave. Ms King took the view that Ms Chandler was stringing out her sick leave, indicated that her actions were not in good faith and that she would not be paying her anymore sick leave. Ms Chandler did not return to work and was paid two weeks' notice.

Ms King claimed she made Ms Chandler redundant, but the Authority found this was not genuine. She did not have a genuine need to make Ms Chandler redundant. The correspondence discussing their disputes pointed to a mixed ulterior motive: the personal relationship between Ms King and Ms Chandler had significantly deteriorated and Ms King could not wait until Ms Chandler found alternative employment. Queenstown Laundry did not enact a fair process prior to the dismissal.

Ms Chandler was unjustifiably dismissed and entitled to thirteen weeks' lost wages of $13,325, wage arrears of $25,000 and compensation of $20,000. The Authority let Queenstown Laundry pay this in instalments due to poor finances. Costs were reserved.

Chandler v Queenstown Local Laundry Services Limited [[2024] NZERA 83; 14/02/24; D G Beck]

Casual employee found to be permanent and unjustifiably dismissed

Ms James began working for Tauranga Birthing Centre Limited (the Birthing Centre) on 21 July 2021 as a midwife. During one of her shifts, she was asked by a colleague to assist with a difficult birth. Afterwards, the mother made a complaint against Ms James alleging she carried out two medical procedures without her consent. On 4 November 2021, the Birthing Centre invited Ms James to a meeting to discuss the complaint. Ms James was upset by the accusation and felt her job was in jeopardy. She left the meeting believing her employment had been terminated. On the other hand, her manager thought she had resigned.

Ms James applied to the Employment Relations Authority (the Authority) arguing she had been unjustifiably dismissed. She sought lost remuneration and compensation for hurt and humiliation. The Birthing Centre argued that Ms James had resigned on her own accord instead of being dismissed. It also alleged that Ms James was a casual employee and so it was under no obligation to offer her continuous work. It also argued that regardless, Ms James contributed to the situation she found herself in, and so should not have been entitled to remedies.

First, the Authority had to determine whether Ms James was a casual employee. The Birthing Centre argued it offered Ms James a casual position as stated in the letter of offer and Schedule A of the agreement, which dealt with employment status. However, in the Schedule A document, the options under employment status for permanent full time, permanent part time, fixed term, and casual had all been struck out. It also found that her agreement had no other provisions specifying that it was casual employment, or that Ms James would only be engaged on an as-required basis. It contained provisions that were fundamentally inconsistent with what a casual agreement would have included. Annual holidays were not paid on a pay as you go basis. There was a probationary period clause, a notice period of 4 weeks and redundancy and confidentiality provisions. Even though the Birthing Centre argued that it was a mistake for Ms James to have been given the contract she had, and asked the Authority to read into it provisions that would have made it a casual agreement, the Authority declined to do so. It ultimately decided that she was a permanent employee.

Second, the Authority had to determine whether Ms James had been unjustifiably dismissed. It looked at what followed from the 4 November 2021 meeting. At that meeting, Ms James spoke with Ms Deas, her manager. She said she was led to believe that her employment had been terminated. Following the meeting, she received an email from the Birthing Centre saying she had been suspended. The email contained no explanation as to what that meant.

The Birthing Centre then ceased contact with Ms James until she received her final pay. The Birthing Centre claimed that at the meeting, Ms Deas was led to believe that Ms James had decided to resign. However, she never used the word *"resignation"* either during the meeting or in response to the follow up email. Further, the Birthing Centre could not explain why it did not seek clarification on whether Ms James had resigned. It could have asked directly or messaged Ms James later but did neither. The Authority concluded it was at the Birthing Centre's initiative to end her employment, meaning she had been unjustifiably dismissed.

The Authority decided Ms James was entitled to $12,944.60 in lost remuneration, representing the remainder of the rostered shifts she would have worked had she not been dismissed. She was also awarded $17,000 as compensation for hurt and humiliation. Costs were reserved.

James v Tauranga Birthing Centre Limited [[2024] NZERA 101; 23/02/24; C English]

Employee not given written extension of fixed term agreement

Ms Saleem was employed as an intern pharmacist by Musselburgh Pharmacy (2021) Ltd (MPL) from April 2021 on a fixed term arrangement to cover the period until she sat the Pre-Registration Assessment Board assessment (the Assessment), which would enable her to practice as a registered pharmacist. Ms Saleem said as part of an extension

to her fixed term, MPL unconditionally offered her a position, commencing once she passed the Assessment. MPL ultimately terminated her employment claiming that her employment agreement expired four weeks after she had re-sat the Assessment. Ms Saleem raised a personal grievance for unjustified dismissal.

MPL verbally extended Ms Saleem's employment on 19 June 2021 so she could re-sit the Assessment. The terms of the extension were not formalised in writing. During the extended period of employment, Ms Saleem was involved in a car accident which restricted her ability to work. She said MPL had not supported her during this time.

Ms Saleem's fixed term agreement was due to end on the earlier of 25 June 2021, or 4 weeks after Ms Saleem received her results for the Assessment. The reason for Ms Saleem's employment ending on either of those dates was that MPL would no longer have work for an intern pharmacist. The Employment Relations Authority (the Authority) found that MPL had not offered Ms Saleem a permanent pharmacist role after Ms Saleem successfully completed the Assessment.

The law on fixed term employment agreements requires that the agreement state in writing the way in which employment would end, and the reasons for it ending in that way. A fixed term employment agreement is not immediately invalidated by the fact that it is not in writing. However, if it is not in writing, and the employee objects to their employment ending under the fixed term agreement, then the employer cannot say the agreement ended their employment. In this case, Ms Saleem objected to her employment ending and because the fixed term agreement was not in writing, MPL could not say the employment had ended.

The Authority found MPL did not have a substantive reason to dismiss Ms Saleem and had failed to carry out a fair process in coming to its decision. Ms Saleem was sent away from the pharmacy and told that there was no ongoing employment, without consultation and by seeking to rely on an invalid fixed term agreement. The Authority found that MPL unjustifiably dismissed Ms Saleem.

Ms Saleem also claimed MPL inflicted unjustified disadvantage by failing to support her return to work after the car accident. The Authority found no evidence to support this. The Authority ordered MPL to pay $12,000 as compensation for hurt and humiliation. It did not make orders for lost wages as Ms Saleem could not demonstrate a loss of earnings, between receiving ACC payments and obtaining a new job. Costs were reserved.

Saleem v Musselburgh Pharmacy (2021) Ltd [[2024] NZERA 99; 23/02/24; P Van Keulen]

Employee believes Employer was trying to trick them

Manuka Health New Zealand Limited (Manuka Health) employed Mr Kostic as a beekeeper on a working visa from 27 July 2019. He resigned on 27 November 2019 believing that Manuka Health failed to investigate his allegations of workplace bullying. He claimed this caused him unjustified disadvantage. He also made a claim for unjustified constructive dismissal. Finally, he argued that Manuka Health's failure to keep him safe from workplace bullying prevented him from taking reasonable steps to raise concerns about health and safety, which breached the Employment Relations Act and its obligations of good faith. Mr Kostic sought compensatory damages and reimbursement for the costs of his representation.

Mr Kostic and Manuka Health had some issues in the commencement of their employment relationship. Manuka Health had also been consulting with the rest of its staff on a new individual employment agreement (IEA) which contained a probationary period clause for new employees, even though the focus of its changes was an updated renumeration metric. On 11 September 2019, Mr Kostic's representative engaged Manuka Health on issues another represented employee had with the IEA. Amongst this, HR manager Ms Denz had the general manager check that Mr Kostic understood the IEA. Ms Denz wrote in her email that she did *"not want another issue with [Mr Kostic]"*. The Employment Relations Authority (the Authority) felt Manuka Health was alert to the need to communicate clearly with Mr Kostic, and that it knew he was anxious to ensure his employment was correct.

On 13 September, Mr Blignaut, the regional manager, presented Mr Kostic with a proposed new IEA with his signature on it. He told Mr Kostic to take the proposed IEA away and that he could get advice but said, *"Trust me, don't worry about this"*. Mr Kostic contacted his immigration adviser who noted the probationary period in it was not consistent with the conditions of his work visa. Mr Kostic was alarmed that the proposed IEA appeared to be

significantly different from his current IEA, that this difference had not been pointed out to him and that Mr Blignaut had had said to *"trust [him]"*.

Mr Kostic discussed this concern with Manuka Honey. His representative also raised it as a specific issue on 21 September 2019. The letter sought an apology from Mr Blignaut for claiming there was *"no trick"* in it. On 24 September 2019, Ms Denz sent a proposed variation which walked back the new renumeration system. She told the representative to contact her if he had any questions but did not receive a reply. Mr Kostic resigned after this. He said he did not like how other co-workers undergoing disputes were being treated and felt Manuka Honey's actions placed his visa status under threat.

Mr Kostic raised a personal grievance on 21 September concerning the proposed IEA and Manuka Honey's communications on it. He felt the matter was handled so poorly, and communications were so misleading, that it undermined his confidence that his employer would treat him fairly and reasonably. He said it related to the bullying he and other employees had experienced at Manuka Honey.

The Authority found the inclusion of the probationary period in the proposed IEA was a mistake rather than a trick to undermine a migrant worker's visa conditions. As soon as the mistake was drawn to Manuka Honey's attention, it took reasonable steps to address the issue by proposing a variation. It found subsequent discussions focused on the mistake. As a result, Mr Kostic did not raise his bullying concerns in such a way that Manuka Honey could investigate them. The Authority did not find he experienced unjustified disadvantage or breach of good faith.

Mr Kostic sent his personal grievance for unjustified constructive dismissal on 16 June 2020, which was 90 days after his final day meaning he did not raise it in time. Finally, the Authority found Manuka Honey had not prevented Mr Kostic from raising health and safety concerns, because he did not raise any concerns in the first place. Costs were reserved.

Kostic v Manuka Health New Zealand Limited [[2024] NZERA 110; 26 February 2024; M Urlich]

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: Eight Bills

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

Local Government (Water Services Preliminary Arrangements) Bill (13 June 2024)

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

Privacy Amendment Bill (14 June 2024)

Inquiry Into Climate Adaptation (16 June 2024)

Resource Management (Extended Duration of Coastal Permits for Marine Farms) Amendment Bill (16 June 2024)

Resource Management (Freshwater and Other Matters) Amendment Bill (30 June 2024)

Residential Tenancies Amendment Bill (3 July 2024)

Oranga Tamariki (Repeal of Section 7AA) Amendment Bill (3 July 2024)

Regulatory Systems (Primary Industries) Amendment Bill (8 July 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