Employer Bulletin

Our Weekly News Digest for Employers

Friday, 15 December 2023

In this Issue:

Case Law

Employment Court: Two Cases

Labour Inspector's actions found to be correct

On 23 November 2020, Caisteal An Ime Ltd (Caisteal) and a Labour Inspector (the Inspector) entered into an enforceable undertaking under the Employment Relations Act 2000 (the Act). The undertaking contained an acknowledgement by Caisteal that certain employment standards had been breached. Eight breaches were identified. Caisteal was to notify all current and previous employees that an audit was being conducted to determine whether the company had met its statutory obligations in relation to each of them. Any sums owing was to be paid by 5pm on 1 March 2021 and the Labour Inspector advised accordingly.

A disagreement emerged as to whether Caisteal had satisfied the enforceable undertaking by providing the required evidence of compliance. On 30 March 2021, the Inspector issued a notice to Caisteal under the Act. Under that notice, the company was required to forward to the Inspector copies of wages and time records kept pursuant to the Act, holiday and leave records kept pursuant to the Holidays Act 2003, and employment agreements for the approximately three years the company had been operating. This information was to be supplied to the Inspector by 30 April 2021.

Caisteal failed to provide the requested information and the Inspector sought a compliance order from the Employment Relations Authority (the Authority) along with penalties. The Authority upheld the Inspector's request for a compliance order. Caisteal was ordered to provide the requested information within 28 days and further ordered to pay a $7,500 penalty to the Crown.

Caisteal challenged the determinations in the Employment Court (the Court). As relief, it sought to have the Authority's determinations set aside, a stay of the Authority's orders, to impose a penalty on the Inspector and compensation for "hurt and humiliation" allegedly caused by the Inspector's actions. Caisteal alleged breaches of the Act, the Official Information Act 1982 and the Privacy Act 2020.

Caisteal considered it had completed all of the work required by the enforceable undertaking and had been fully cooperative with the Inspector. A number of criticisms were levelled at the Inspector which the Court described as attributing poor-quality behaviour to the Inspector or, perhaps, more broadly to the Ministry of Business, Innovation and Employment. The Court found there was no evidence that the Inspector's actions in investigating Caisteal's business before negotiating the enforceable undertaking, or afterwards, resulted in allegations made by her or anyone else that were false, malicious or vexatious. Caisteal's evidence did not explain those allegations and nothing said by the company or the Inspector could support them.

The Court observed that the difficulty confronting the company's case was straightforward. First and foremost, the Inspector's notice issued in March 2021 complied with the Act. She was entitled to seek the documents in the notice. Doing so was part of performing her statutory function and exercising her powers and none of the arguments put forward by Caisteal explained why she was not entitled to use them. The Court ruled that the Inspector did not breach their statutory functions, misuse their powers or otherwise act inappropriately.

The Court ruled there was no basis for Caisteal to refuse to comply with the Inspector's notice under the Act and the penalty imposed by the Authority was ruled to be appropriate. The challenge to the Authority's determinations was unsuccessful and was dismissed.

The Court ruled Caisteal must comply with the notice of 30 March 2001 by an agreed timeframe and pay the penalty owing by 28 August 2023. The Court found the Inspector was entitled to costs. The parties were encouraged to come to an agreement.

Caisteal An Ime Limited v Labour Inspector of The Ministry of Business, Innovation and Employment [[2023] NZEMPC126; 14/08/2023; Judge K G Smith]

Employment Court affirms dismissal was substantively justified

Ms Robertson worked for IDEA Services Limited (IDEA) as a permanent support worker before she was dismissed for serious misconduct. It was alleged Ms Robertson had verbally abused and slapped the person she had been caring for (the Client). She filed personal grievances for unjustified disadvantage and unjustified dismissal which the Employment Relations Authority (the Authority) dismissed. She appealed that decision to the Employment Court (the Court) which focused solely on the issue of whether she was unjustifiably dismissed. While a fair process was followed, she challenged that the dismissal was not substantively justified.

The Client had high complex needs due to an intellectual disability and had been receiving support from IDEA for several years. He suffered from post-traumatic stress disorder and had difficulty communicating and required a high level of daily support on a one-on-one basis. A feature of the Client's needs included that when he felt unsafe, he entered what was described as a "*heightened state*", whereby his behaviour drastically deteriorated. For reasons related to his experiences in the past, the Client associated certain things like ambulances, police officers, and hospitals as places of safety. Ms Robertson was specially trained to identify potential triggers that might cause the Client to enter a heightened state, the stages he might progress through, and the steps that ought to be taken to keep the Client safe. Ms Robertson also had a safety plan which detailed the behaviours the Client might exhibit while in a heightened state.

Those behaviours included pinching, biting himself or others, throwing objects, hitting things, or rushing to people as if to attack them. Those actions were described as a compulsion brought on by the heightened state rather than intentional bad behaviour.

On 26 August 2020, Ms Robertson began her shift caring for the Client at his home. However, when she arrived, his behaviour immediately started to deteriorate. While Ms Robertson was making his bed, the Client slapped her posterior and began to cry. When asked why he had done that, he said his tooth hurt and said he wanted to go to the hospital. The Client then started tipping over furniture. Ms Robertson tried to calm him down by leaving him alone which did not work. Two police officers were called to the Client's home. The purpose was not to restrain or arrest him but to help calm him down. That also did not work. Ms Robertson described the time at the Client's home as extremely difficult and distressing. The decision was made to bring the Client to the hospital. Once they arrived, Ms Robertson and the Client were sent to wait in the Whānau Room. A few minutes later, the Client came towards Ms Robertson and reached out to grab her. That was when Ms Roberston slapped the Client. She said she had intended to "*slap his hand away in self-defence*". The incident was then reported to IDEA, who after following an investigation and disciplinary process, decided to dismiss Ms Robertson.

The Court had to decide whether IDEA's decision to dismiss Ms Robertson was what a fair and reasonable employer would have done in all the circumstances. The Court focused on the fact that Ms Robertson was an experienced and well-trained support worker. She had understood how to properly manage the Client when he entered a heightened state.

The Court pointed out that when IDEA arrived at their decision to dismiss, they focused solely on the events in the hospital and discounted the difficulties Ms Roberston dealt with earlier in the day. It found that even though IDEA focused solely on what occurred at the hospital, their decision was nevertheless justified. The Court found that when Ms Robertson slapped the Client, he had at that time come down from his heightened state, likely because he had been brought to a hospital.

Ms Robertson tried to argue IDEA's findings in relation to the situation, and the decision to dismiss, was coloured by the fact that another employee at IDEA had filed a police report relating to the event. The Court rejected that argument saying IDEA had correctly focused on Ms Robertson's conduct which was not a matter of dispute. The Court ultimately decided IDEA had satisfied the substantive justification test regarding their decision to dismiss Ms Robertson.

Robertson v IDEA Services Limited [[2023] NZEmpC 145; 01/09/23; Judge K G Smith]

Employment Relations Authority: Four Cases

Deductions made from final pay without consent deemed unlawful

Mr Maheno was employed by Carrington Resort Jade LP (Carrington), until his resignation. After not receiving his final pay, Mr Maheno contacted Carrington where he was told that deductions had been made from his pay and that the amounts in total were more than owing to him in wages and holiday pay. The deductions were $994.95 for the purchase of work clothes and $2,760 for costs incurred from the hire of a cherry-picker.

Mr Maheno's employment agreement contained a general deductions provision however, he contended it was not observed and consequently the deductions were made in breach of the employment agreement. A further claim of Mr Maheno arose from his efforts to obtain records from Carrington to show what had happened to his final pay.

In written directions given on 6 September 2022, the Employment Relations Authority (the Authority) ordered the parties to attend mediation within 30 days. On 7 November 2022, the Authority was advised that Mr Maheno attended mediation on 3 October, but Carrington did not. Carrington claimed the

unjustified disadvantage grievance was not raised within 90 days of the deductions from Mr Maheno's wages, the action Mr Maheno complained of in his grievance. Recovery of wages and penalty claims can be raised independently of a personal grievance.

The Wages Protection Act 1983 (the Act) limits the ability of an employer to deduct money from wages including holiday pay. The Act permits an employer to make deductions when a worker has given written consent. Carrington's statement in reply said that the deduction was "*notified and agreed*", and that Mr Maheno "*did not contest or dispute his final pay being deducted*", and he had been "*told*" a deduction would be made.

The Authority accepted the unchallenged evidence of Mr Maheno that he was not consulted about any deductions to be made from his final pay. The deductions were therefore not authorised by the Act. The lack of consultation before the deduction was made could not be undone then, but in final submissions Mr Maheno accepted that any wages awarded to him by the Authority could be reduced by $994.95, to recognise that he now had the items and can use them. The deduction for the additional cherry-picker hire costs seemed equivalent to disciplinary action for performance or conduct. Unless there was an agreement to do so, it would be unreasonable for an employer to deduct money from wages as a disciplinary measure.

When Mr Maheno resigned, he did not give the required contractual period of one month's notice but gave only two weeks' notice. Under the employment agreement, Carrington had "*reserved*" a right to deduct a day's salary for each day not worked during the notice period. In its statement in reply, Carrington did not make a claim or counterclaim to recover or set-off any pay in lieu of notice. It confirmed it had not done so because the deductions made by it had left Mr Maheno's final pay with a negative balance. This was a situation Carrington brought on itself by making those deductions unlawfully.

The Authority found that the deducting of money from Mr Maheno's pay was an unjustified action to his disadvantage in his employment or terms of employment. The actions of Carrington were not those a fair and reasonable employer could have carried out. As it was not an unjustified dismissal grievance, the level of compensation sought of $25,000 by Mr Maheno was too high. The Authority considered a penalty of $4,000 for a breach of the Act was appropriate. Of this, $2,000 was to be paid to Mr Maheno. The Authority found that Carrington failed to produce wage and time records when requested. Carrington was ordered to pay Mr Maheno final wages of $505.41, holiday pay of $2,840, compensation $4,000 and penalties $3,000. Carrington was ordered to pay to the Authority for payment into a Crown Bank Account; $5,000. For a half day investigation meeting the tariff costs are $2,250. This was raised to $3,750, which Carrington was ordered to pay Mr Maheno to cover Mr Maheto's legal costs. Carrington had to also reimburse Mr Maheno the fee for lodging his claim in the Authority of $71.56.

Langford Maheno v Carrington Resort Jade LP [[2023] NZERA 445; 15/08/2023; A Dumbleton]

Mandatory COVID-19 vaccination policy led to unjustified dismissal and compensation payout

Mr Collier commenced employment with Damar Industries Limited (Damar) in May 2011 as a quality control officer. At the time of his dismissal in January 2022, he was also a health and safety representative.

After the onset of COVID-19, Damar voluntarily closed for several weeks but because it was classified as an essential service it was able to re-open and continue operations. In November 2021, following a risk assessment, Damar began consulting with staff about the vaccination. Mr Collier provided feedback advising he did not think the risk assessment had given an accurate measurement of the potential for COVID-19 to catch and spread in the workplace. He also had reservations about how the vaccination may impact on his health.

In December 2021, Damar confirmed to staff that vaccination was mandatory. Mr Collier chose not to be vaccinated so was given notice of his employment being terminated. While working out his notice period, he decided to get the vaccination and returned to work on 17 January 2022. Mr Collier agreed to four conditions set by Damar for his return. These were that he must receive his second vaccination on or before 2 February 2022, a mask must be worn at all times, a one metre social distance must be maintained at all times during working hours and separate lunch breaks and segregation for other staff members was required during breaks.

On 19 January 2022, Mr Collier was observed sitting close to a colleague and not wearing a mask. He was asked to move, which he did. Mr Collier sought clarification about the matter as he felt that social distancing was still acceptable for work bubbles. Before he received a response, he was again observed sitting with colleagues the following day. That afternoon, he was invited to an investigation meeting, scheduled for Friday, about the Wednesday incident. Shortly after receiving this letter, Mr Collier claimed that Mr Thomson, a senior member of staff, forcefully spoke to him and Mr Collier considered this to be bullying behaviour. Another letter was presented to Mr Collier on Friday morning advising him that the investigation meeting would now also include the Thursday incident.

Following a brief investigation meeting on Friday, an adjournment was called until Monday. At the Monday meeting, Mr Collier was advised that his employment was being terminated for breaches of the code of conduct specifying refusal to obey lawful and reasonable instructions, and refusal to observe health and safety procedures.

Mr Collier sought a ruling through the Employment Relations Authority (the Authority) claiming that, without justification, Damar dismissed him and also disadvantaged him by imposing a COVID-19 vaccination policy and by harassing and abusing him. He sought lost wages and compensation.

In consideration of the mandatory vaccination policy, the Authority took evidence from Mr Cosman, an expert in health and safety. Mr Cosman was of the view the risk assessment undertaken by Damar was inadequate and had an element of predetermination. The Authority agreed. The Authority also found that the conclusion expressed by Damar, that it had no option but to introduce mandatory vaccination, was unsupportable. There clearly were options but these were not considered sufficiently or at all and hence Mr Collier was found to have been unjustifiably disadvantaged by Damar.

Regarding the bullying and harassment complaint, the Authority found that the contact made by Mr Thomson on its own was not an unjustified action causing disadvantage to Mr Collier in his employment. His behaviour was not extreme, persistent, or repeated. The Authority found this personal grievance was not established.

Regarding the decision to terminate Mr Collier's employment, the Authority determined Damar had not conducted a sufficient investigation. The short notice and haste of the discipline meeting was not considered reasonable. Damar had not considered Mr Collier's length of service, his good record, and the availability of suspension from the workplace for the short period of about nine days until he was due to have a second vaccination dose. The Authority found that Damar had not justified the dismissal of Mr Collier.

Its actions, in conducting a disciplinary inquiry which concluded with the summary dismissal of Mr Collier, were not what a fair and reasonable employer could have done in all the circumstances. The Authority held that Mr Collier contributed towards the actions leading to his employment being terminated as he could have done more to clarify whether bubbles were still in operation at his workplace and, having raised the issue after the Wednesday incident, could have waited for a response from the company before sitting with others on the Thursday. To settle the disputes Damar was ordered to pay to Mr Collier a total of $21,850 compensation and a total of $11,400 as lost wages. Costs were reserved.

Collier v Damar Industries Limited [[2023] NZERA 433; 10/08/2023; A Dumbleton]

Employee proved not to be independent contractor

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, meaning he would not be paid his salary over that time. 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 two of the settlement set out that the parties agree the total amount owing by Mr Radovanovich was $6,115.47 and that it would be paid by regular fortnightly instalments, with 24 Payments of $250 per fortnight and a final payment of $115.47 and the first payment starting on 26 May 2022. Clause three 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 ruling from the Employment Relations Authority (the Authority). It sought a compliance order for the debt to be repaid, 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 the 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 has been repaid, including all interest.

If the Authority's compliance order is breached, then the Applicant may apply to the Employment Court to exercise its powers under section 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 observed Mr Radovanovich's actions were the antithesis of good faith conduct and undermined one of the primary objectives of the Act, which is to encourage the use of mediation to solve employment problems. There were found to be no mitigating factors. 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. $4,000 was payable to Pathways with the balance of $2,000 being 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]

Failure to honour commitment to repay debt proves costly

Ms Branford worked for The Pho House Limited (Pho House) from 1 June 2022 until her dismissal on 11 July 2022. In 2022, Pho House started trading as the Zeke Café. Ms Branford was notified of her dismissal by an email from "*Zeke Management*" in reliance on a trial period in her employment agreement. Ms Bradford claimed that her trial period was invalid and her dismissal unjustified.

Pho House sent Ms Branford an employment agreement around 2 May 2022. The agreement made reference to a 90-day trial period. The trial period started when she commenced work and permitted Pho House to dismiss Ms Branford by giving the period of notice detailed in Schedule 1. However, seemingly accidentally, there was no Schedule 1. There had been no discussion between the parties about when the trial period would finish or how long the notice period was.

After a period, Ms Branford stopped getting paid. She enquired about this and was informed that the contract had missing information and she needed to sign an additional section of the contract. On around 7 or 8 June 2022, Pho House provided another version of the employment agreement. The second agreement was signed on 9 June 2022 by both parties. It included a Schedule 1 which contained a trial period. It did not specify when the trial period ended or what the notice period for a termination during the trial period was. The provision in the second agreement was still not adequate as it did not include when the trial started and finished. Further, Ms Branford was already an employee at the time she signed the second agreement. This prevented the trial period from being effective.

The Employment Relations Authority (the Authority) was not satisfied that Ms Branford was covered by a valid trial period in her employment with Pho House. Having concluded that she was not employed under a valid trial period, Pho House had to justify its dismissal of her in the usual way.

Ms Branford's first agreement contained no identified hours, as the Schedule where the hours would have been detailed was not attached to the agreement. The second agreement specified in Schedule 1 that Ms Branford's weekly hours were 15 to 25. In later weeks, Ms Branford was rostered for 15 hours a week. Given that the agreement specified a range of hours, the Authority considered that the bottom end of the range should be the minimum number of hours she was entitled to. Pho House admitted the reduction in hours was largely because of concerns about Ms Branford's work. On about five separate occasions, Ms Branford was late for work. Ms Nguyen, a shift manager, felt awkward about discussing Ms Branford's performance with her and instead reduced her work hours. Ms Branford enquired about her hours with the management team but felt like she was brushed off.

Ms Nguyen acknowledged that she had not raised performance concerns with Ms Branford. Ms Nguyen told the Authority that she was non-confrontational and wanted to create a safe environment where staff felt happy and at ease. The Authority accepted this was genuinely felt but it created a situation where the final outcome for Ms Branford came as a shock.

Ms Branford was rostered to work on the morning of 11 July 2022 but on the night of 10 July, she received an email telling her that Zeke Café had made a decision to terminate her employment effective from 11 July 2022. The reason given was that her performance was not satisfactory.

Ms Branford responded "*No worries at all. I will bring my uniform in tomorrow morning*". The relatively accepting response was explained by Ms Branford as a result of her panic and not knowing what to do. She did not receive any pay in lieu of notice.

The Authority held the dismissal was not the action a fair and reasonable employer could have taken and did not meet good faith obligations. Pho House unjustifiably dismissed Ms Branford.

Ms Branford sought 13 weeks of lost wages. However, she had been able to obtain other work relatively promptly. The claim was based on Ms Branford receiving the top end of the 15-to-25-hour range. The Authority held there was no requirement to pay the top range, instead lost wages were to be calculated on the average hours, being 18.72 hours.

Ms Branford was entitled to two weeks of wages before she got other work, totalling $793.72. She also received 11 weeks' worth of wages which was $141.06. This was the difference between the average Pho House rate and the average rate in her new job totalling $1,551.66. Ms Branford was awarded $12,000 compensation under the Act.

Ms Branford acknowledged that her five episodes of lateness over a four-week period was a lot. She was never warned that her lateness was problematic but that quantity over a short period of time could be regarded as reproachable. A deduction of 10 per cent of remedies was made for contribution regarding the lateness making the compensation $10,800 without deduction. Costs were reserved.

Branford v The Pho House Limited t/a Zeke [[2023] NZERA 427; 09/08/23; N Craig]

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

AdviceLine Hours – Christmas & New Year 2023 - 2024

This is the last issue of the Employer Bulletin for 2023. The first issue in the New Year will be 12 January 2024. Have a safe and enjoyable holiday period. We look forward to your continued membership, support, and readership in 2024.

AdviceLine will be closing for the holiday period at 5pm on 22 December 2023 and will reopen at 8am on 3 January 2024.

Please see here for our guide to public holidays for the Christmas and New Year period 2023 – 2024.

AdviceLine will be operating at the following hours after the New Year period:

Wednesday 3 January – Friday 5 January	8am – 5pm

Monday 8 January - Friday 12 January	8am – 6pm

AdviceLine will return to normal operating hours from Monday 15 January 2024.