Business Canterbury
Our Chamber of Commerce

Our Weekly News Digest for Employers
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Case Law

Employment Relations Authority: Five cases

Invalid trial period leads to unjustified dismissal

Mr Scott worked for E Cycles NZ Limited (ECNZL) from 3 May to 4 June 2021. He said his employment ended by ECNZL director, Mr Hoff-Nielsen, dismissing him during a heated discussion about work issues. Mr Hoff-Nielsen said he considered Mr Scott had resigned on 4 June by "*abandoning the workplace*" after their discussion. In a letter he sent to Mr Hoff-Nielsen the following week Mr Scott raised a personal grievance in which he said he had been "*fired on the spot"* with no warning. He said a trial period in his written employment agreement did not apply because he had been working for ECNZL before he signed the agreement. He identified various other shortcomings in the work arrangements over the previous five weeks.

At the Employment Relations Authority (the Authority), Mr Scott said he complied with an instruction Mr Hoff-Nielsen gave him on 4 June to backdate his signature on a copy of his employment agreement to 28 April 2021. He claimed Mr Hoff-Nielsen then raised concerns about Mr Scott's work that led to a heated discussion which Mr Scott said ended with Mr Hoff-Nielsen telling him "*just finish the day and then you're done*". He said he asked, "*are you firing me*" and Mr Hoff-Nielsen had replied "*yes*". Mr Scott said he then left the premises. Mr Scott sought findings that he was unjustifiably dismissed and orders for ECNZL to pay him lost wages and compensation for distress caused by dismissal.

The Authority found that the available evidence supported a conclusion that the employment agreement between Mr Scott and ECNZL was not completed until 4 June 2021, five weeks after he started working for the company. This was contrary to Mr Hoff-Nielsen's claim that Mr Scott had signed his employment agreement on 28 April 2021, before his first day of work in early May. This meant the trial period clause was invalid. It did not satisfy the statutory requirement that an employee must sign the employment agreement containing the trial period before they start work. As there was no valid trial period, Mr Scott could pursue his personal grievances.

Regarding the dismissal, Mr Hoff-Nielsen said he did not dismiss Mr Scott on 4 June. He said Mr Scott had become angry during their discussion and walked out. He said he expected Mr Scott to come back. Mr Scott said that after Mr Hoff-Nielsen had responded "*yes*" to his question about being fired, Mr Scott said, "*I'll just leave now then*" and Mr Hoff-Nielsen replied "*ok*".

The Authority looked at what was said and done in the correspondence that followed this conversation to resolve the conflicting evidence. Mr Scott's clear belief that he had been fired was reflected in his messages to the operations manager later in the day in which he described himself as having been fired without warning. Whereas Mr Hoff-Nielsen's claim that he expected Mr Scott to come back was not consistent with his response that evening to Mr Scott's email which stated he "*understood our employment agreement to be terminated effective immediately*" and advised when Mr Scott's last pay would be made. Therefore, the Authority concluded that Mr Scott's description of events of being sent away after a heated conversation was the more likely explanation of what happened that day. Consequently, the Authority found that ECNZL had not acted as a fair and reasonable employer in the circumstances due to its failure to give Mr Scott the opportunity to comment on any concerns raised and to consider any such response. Therefore, Mr Scott was found to have been unjustifiably dismissed.

The Authority awarded Mr Scott lost wages of ten weeks' ordinary remuneration which amounted to $7,962.50. It awarded this after accounting for limited mitigation efforts and the prospect that the employment may not have lasted much longer anyway as Mr Scott was unhappy with the dysfunctional employment relationship.

The Authority also ordered ECNZL to pay Mr Scott $15,000 in compensation for the humiliation and injury to his feelings caused by his unjustified dismissal. Costs were reserved.

Nick Scott v E Cycles NZ Limited [[2023] NZERA 527; 15/09/23; R Arthur]

Non-compliant availability clause causes unjustified disadvantage

Ms Bell worked as a graphic designer for Inkdrop Limited (Inkdrop) between February 2018 up to February 2020, when her resignation took effect. The company had a system in place whereby for every hour worked overtime, staff were paid time off in lieu (TOIL) on an as you go, one to one, or second-for-second basis. During the course of Ms Bell's employment, she regularly worked overtime in excess of her weekly work hours. Inkdrop kept a time off in lieu (TOIL) log of her overtime which recorded that from 2 April 2018 to 21 February 2020 (a period of 98.57 weeks) Ms Bell worked an additional 254.21 hours over and above her usual hours of work. On average, this equated to an additional 2.57 hours of work per week or a 40.07-hour work week instead of the agreed 37.5 hours. There were two occasions during her employment that her wages fell below the minimum applicable wage.

After resigning from the company Ms Bell raised a personal grievance alleging unjustified disadvantage in that she was required to work in excess of her standard hours of work in breach of the Employment Relations Act 2000 (the Act) and without reasonable compensation for her availability, a breach of the express health and safety obligations of Ms Bell's individual employment agreement with the company, constructive and unjustified dismissal, and a claim for penalties for various breaches of the Minimum Wage Act 1983, the Holidays Act 2003 for unpaid holiday pay, the Wages Protection Act 1983, for an unlawful deduction, and a penalty under the Act for a breach of the employment agreement in relation to portfolio rights.

As part of Ms Bell's exit from the business, Ms Ryan (the company owner) agreed to provide her with a written reference and that she would also seek permission from Inkdrop's clients for Ms Bell to be able to include in her portfolio of works some of the projects that she had been involved in. A written reference was provided but after Ms Bell had raised her personal grievance, Ms Ryan changed her mind about providing her with access to any of Inkdrop's intellectual property and retracted the reference.

In consideration of the allegation of unjustified disadvantage the Employment Relations Authority (the Authority) found that Ms Bell's employment agreement required her to make herself available to accept any work the company made available. The availability provision was not compliant with the Act as it did not specify the period of time Ms Bell was to make herself available nor did it set out any reasonable compensation for time worked over and above her

usual working hours. The Authority found that Ms Bell was entitled to a payment for the non-compliant provision with this being significantly reduced because of Ms Bell's willingness to work extra hours and failing to adequately raise her concerns with Inkdrop. The Authority found that Ms Bell was disadvantaged by having an employment agreement that was not in accordance with the Act. The situation affected her personal relationship with her partner. The grievance was found to be established.

The Authority found that compensation for loss of dignity and injury to feelings was appropriate under the Act. The Authority found that Ms Bell's mixed messages about her work availability made a significant contribution towards her grievance so a significant reduction in compensation was warranted.

The Authority did not accept that Inkdrop had breached health and safety provisions in Ms Bell's employment agreement. While she did work long hours these were largely around busy times, and her TOIL log was actively being managed by Inkdrop.

Regarding the claim of constructive dismissal, the Authority noted there was only one instance in 2019 where Ms Bell raised concerns about her work hours. Cumulatively considered, Inkdrop could not have reasonably foreseen that requiring Ms Bell to work the overtime hours she did, would result in her having no other choice but to resign. The claim was not made out.

The Authority found that Inkdrop should pay a penalty for a breach of the Minimum Wages Act. The two instances of when Ms Bell's wages fell below the minimum wage were combined into one breach. Having regard to the record of Inkdrop and that the issue is one of negligence rather than deliberate intent, the penalty was significantly reduced.

In consideration of intellectual property rights, the Authority found that the decision not to provide Ms Bell with samples of the graphic design work she had been involved in was a decision that fell within the range of what a fair and reasonable employer could have done in all the circumstances. The same could not be said about the decision to withdraw the work reference. The Authority found that Ms Bell was unjustifiably disadvantaged and was entitled to compensation for loss of dignity and injury to feelings.

Inkdrop was ordered to pay Ms Bell $1,000 in availability compensation under the Act, interest on $1,000 from 21 February 2020 to the date of payment, compensation for loss of dignity and injury to feelings in the total amount of $7,000, a penalty of $1,000 and the filing fee of $71.56. Costs were reserved.

Bell (née) Melville v Inkdrop Limited [[2023] NZERA 533; 18/09/23; P Fuiava]

Candidate's progression to pre-employment check was not an offer of employment

Ms Ross applied to be an Emergency Medical Assistant (an Assistant) with The Priory in New Zealand of the Most Venerable Order of the Hospital of St John of Jerusalem (St John), in July 2019. She progressed past the interview but was not given the role for medical reasons. Ms Ross felt St John confirmed her employment, and that when it did not employ her, it either unjustifiably dismissed her or withdrew an offer she had accepted. She applied to the Authority which considered if she was an employee or a person intending to work.

Safety concerns within St John regarding single-crewed ambulances led it to implement the Assistant role to create double crews. The Assistants are often tasked with transporting vulnerable and critically ill patients. They are trained in basic emergency skills and assist with patient assessment, treatment, transport, or referral. Meanwhile, Ms Ross recalled a conversation with St John in 2017 where if she obtained a Bachelor of Health Science majoring in Paramedicine (BHSc) alongside other criteria, it would automatically employ her.

In 2019 St John actively recruited for Assistants, led by Ms Smith. Ms Ross had clinical placements with St John through her university and applied at two St John branches in July 2019. The recruitment panel discussed start dates and location during the interview. Ms Ross's clinical placement preceptor, who was on the panel, and the hiring manager, both supported her moving to the next stage.

Ms Smith emailed Ms Ross to take necessary pre-employment checks including a health check, a process she used for all her candidates during the recruiting drive. This email stated, "*As part of the recruitment process, you have progressed to the health check stage of your application…Please note it is a requirement to work and/or volunteer with St John and that full clearance will not be granted until such time that the St John Pre-employment Health Questionnaire and all relevant medical reports are received.*"

Ms Ross called as follow-up. She asked Ms Smith whether the email meant she had the job, and Ms Smith allegedly replied "*yes"*, she all but had the job, subject to some further checks. Ms Smith maintained she did not make an offer to Ms Ross. While not remembering her exact words, she likely gave a standard response she relied on, consistent with the email.

Ms Ross disclosed her epilepsy in the health screen questionnaire. This pertained to the driving standard, so St John asked her for more information to consider against its policies and standards. The hiring manager found that with her epilepsy, Ms Ross was not able to pass the medical standard for driving, and St John could not offer Ms Ross employment. On 12 August 2019, he informed her of this.

Whether Ms Ross was a person intending to work depended on if St John had given an offer and she accepted it. Ms Ross argued St John made an offer in her 2017 conversation but could not provide a name or role of her interlocutor, or conversational details. The Authority did not have sufficient information to determine if this was an offer. Moreover, St John had a different relationship with students completing clinical placements, to its employees. The requirements of entering a tertiary institute differed from employment, and acceptance by one could not automatically lead to the other. St John therefore was unlikely to have made an offer here.

As for statements made in the recruitment process, the Authority noted a difference between thinking favourably about a candidate and making an offer. It found it unlikely St John would have made a verbal offer when its written communications made sure not to do so, especially emphasising medical clearance was not given yet. The Authority found on the balance of probabilities that St John would not deviate from its standard process for a single candidate. The discussion of start dates and location fell short of delivering the terms of a verbal offer. For example, they did not discuss salary and no actual start date or location.

A job candidate being informed they were through to the next stage, involving further checks, differed from a conditional offer of employment. Based on this standard recruitment process, St John did not offer employment, and Ms Ross was not a person intending to work. Not being in an employment relationship, the Authority did not hear Ms Ross's other claims and personal grievances. Costs were reserved.

Ross v The Priory In New Zealand Of The Most Venerable Order Of The Hospital Of St John Of Jerusalem [[2023] NZERA 517; 11/09/23; S Kennedy-Martin]

Justified termination of employment

YJL commenced work with Talent Propeller Limited (Talent) on 4 February 2019 and worked there until 19 February 2020. In early February 2020, YJL sought to use clause 13.3.2 of their employment agreement which stated, "*The Employee is entitled to ten days' sick leave for each 12-month period of employment after the end of the six-month period*". Talent subsequently commenced an investigation believing the employment agreement had been altered by YJL. A recommendation to suspend YJL was emailed to him with two hours to respond however before a final decision was made to suspend YJL his access to the computer systems of Talent was removed. The subsequent investigation concluded that YJL had falsified his employment agreement, and his employment was then terminated with immediate effect.

YJL took the matter to the Employment Relations Authority (the Authority) claiming their dismissal was unjustified and sought remedies including reimbursement of lost wages, benefits and compensation for humiliation and hurt feelings. YJL also sought declaratory orders against Talent, Ms Davies (Talent's Manager and Owner) and Ms Maskell (a former Talent employee) for breach of their employment agreement and breach of non-publication orders made in relation to YJL's identity. YJL further sought an award of penalties for any found breach. Talent denied YJL's dismissal was unjustified. It said it undertook a fair investigation into an allegation of serious misconduct after which YJL was

dismissed. It said the decision to dismiss was a decision a fair and reasonable employer could make in all the circumstances. Talent brought a counterclaim against YJL for breach of contract and penalties. It said YJL falsified and altered the parties' written employment agreement and then sought to rely on it, and that during and after the disciplinary investigation YJL sought to reply on a false document and falsified their curriculum vitae.

The first matter the Authority considered was the matter of the suspension. While noting the concerns Talent held, the Authority felt the time period given to YJL to provide feedback was inadequate. Further, the decision to revoke access to the computer systems gave the appearance the decision to suspend was predetermined. The Authority concluded the suspension was unlawful and caused disadvantage to YJL in their employment.

The Authority's investigation focussed on a pre-employment email trail between YJL and Talent between 12-14 January 2019 which led to YJL signing an employment agreement and returning it to Talent. The Authority concluded that YJL amended the employment agreement before signing and returning it to Talent on 14 January 2019. The amendments were not brought to the attention of Talent and Talent had not checked the returned signed agreement. YJL sought to use an email of 1:13pm on 11 January 2019 which they claimed set out in detail the amendments they required. Talent denied such an email was received and an internal IT review could not locate it. YJL could only produce a forwarded copy of the 1:13pm email and could not provide the original. The Authority concluded it was more likely than not that YJL falsified the 1:13pm email.

YJL challenged the character of the investigation and suggested the outcome was predetermined. The Authority did not agree, the totality of evidence supported the conclusions reached by Talent were those a fair and reasonable employer could have made in all the known circumstances at the time. In broad terms, YJL's explanation was considered, questions were asked to better understand the sequence of events and flow of documentation between the parties, that information was shared with YJL and having identified to YJL questions about the explanation further information was invited, which was considered, and a conclusion reached.

The Authority dismissed claims by YJL for a bonus payment and for a referral payment. The claims for lost wages and holiday pay were also not accepted. The Authority found Ms Maskell, Ms Davies and Talent did not breach their non-publication orders nor did they aid or abet any breach.

The Authority found YJL was entitled to compensation under the Employment Relations Act (the Act) for the unjustified disadvantage caused by the suspension. $4,000 was considered an appropriate amount however this was reduced by 50 per cent because of the contributory actions of YJL. Talent was ordered to pay YJL $2,000.

The Authority found YJL had breached the employment agreement on two occasions and penalties were warranted. The actions were considered deliberate, calculating and sustained. Having regard for the nature of the breaches, and YJL's ability to make payment, the Authority ruled YJL must pay Talent $5,000. Costs were reserved.

Talent Propeller Limited v YJL [[2023] NZERA 534; 18/09/23; M Urlich]

Breach of good faith leads to unjustified constructive dismissal

Mr Zhang worked for FM 90.6 Chinese Radio (FM 90.6), owned by JRL Culture Media Limited (JRL), as a radio host from early 2019 till 4 May 2022. At the Employment Relations Authority (the Authority), Mr Zhang claimed he was unjustifiably disadvantaged during his employment. He said he was subject to ongoing workplace bullying and discrimination and that he was unjustifiably dismissed by JRL. He sought compensation for his personal grievances, lost remuneration arising from his unjustified dismissal, wage arrears and reimbursement of legal costs. Mr Zhang also sought penalties against JRL for various breaches of good faith.

Mr Zhang claimed he was unjustifiably disadvantaged during his employment as Ms Feng, another employee, exhibited several instances of unjustifiable behaviour. He alleged Ms Feng made discriminatory comments towards him on the basis of his sexual orientation and repeatedly belittled, scolded, and reprimanded him, creating a negative work environment and undermining his confidence and job satisfaction. Mr Zhang claimed this was a breach of good faith

and that there was an ongoing failure to provide a safe and respectful working environment for Mr Zhang which was also a breach of the good faith obligation.

The Authority accepted that Mr Zhang may have experienced disparaging comments or actions. However, he was unable to recall specific details of these incidents of alleged discrimination and bullying. Other witnesses could not recall any incidents of such behaviour. There was also no evidence that Mr Zhang had raised the issues of alleged bullying or discrimination with Ms Feng, or with the station manager and Ms Feng's daughter, Ms Du. As Mr Zhang did not raise the issues with JRL management, JRL was not given an opportunity to investigate any alleged issues or take steps to address the alleged behaviour.

Ms Feng strongly denied that she or Ms Du ever discriminated against Mr Zhang or bullied him. Therefore, the Authority found that Mr Zhang was not disadvantaged and thus his personal grievance for unjustified disadvantage was unsuccessful.

On 4 May 2022, Mr Zhang was concerned about the circumstances surrounding a friend and colleague leaving the radio station. Through his inquiries he learnt from Ms Xian, a volunteer at JRL, that Ms Feng blamed Mr Zhang for the colleague's resignation. Mr Zhang went looking for Ms Feng to confront her about her comments. He could not find Ms Feng so phoned Ms Du. He asked her why her mother made such an allegation and comment about him. Ms Feng overheard the conversation.

Mr Zhang said Ms Feng began to yell at him saying "*Do you want to quit?*" She repeated this question twice while shouting at him. Mr Zhang said at this stage he was shaking and said to Ms Du over the phone, "*Your mum's asking me whether I want to work here anymore. I want to tell you I may not*." At this point Ms Feng came into the room and attempted to grab Mr Zhang's phone off him. Ms Feng stated she was not shouting, however stated the conversation could be described as being robust.

It was unclear what happened next, but in a recording of the incident played at the investigation meeting both Ms Feng and Mr Zhang could be heard shouting, and some form of physical altercation took place, with Mr Zhang complaining Ms Feng was pinching him and a chair could be heard crashing to the ground.

Both Mr Zhang and Ms Feng were in highly agitated states, and Mr Zhang was clearly traumatised by the events. After hearing the recording and reading the transcript of the meeting the Authority preferred Mr Zhang's version of events.

Shortly after the incident Ms Du came to the station and the three of them had a meeting. Mr Zhang said he was still in shock at the time. Ms Feng and Ms Du's view was that the parties had had a robust discussion regarding the former colleague's departure but had been able to resolve their differences. Mr Zhang said he left the premises feeling very sick and troubled and resigned from the job later that day.

In the circumstances, the Authority found that Ms Feng's actions did not amount to an actual dismissal of Mr Zhang as there was no sending away by her. Mr Zhang resigned as a result of JRL's breach of its duty of good faith to him. It was likely that Mr Zhang left the workplace distressed after Ms Feng shouted and physically handled him at the meeting on 4 May 2022. The Authority stated it was entirely foreseeable that he would not put up with this course of conduct nor could he feel safe returning to the workplace and hence would resign. The Authority concluded that whilst Mr Zhang resigned, this was a dismissal by JRL. Given that the dismissal resulted from a breach of good faith and JRL did not follow any sort of process leading up to the dismissal, JRL's actions could not be justified. Hence, Mr Zhang was unjustifiably dismissed by JRL.

Mr Zhang was unemployed for a period of time, despite reasonable attempts to find employment. Mr Zhang was awarded 3 months' salary as reimbursement of lost wages, being $8,400 and holiday pay of $672. He was also awarded $20,000 in compensation for hurt and humiliation feelings which was then reduced to $18,000 for his contribution to the situation, namely during the heated exchange with Ms Feng.

Also, as Mr Zhang was not paid at his correct contractual rate of $28 per hour during his employment, the parties were ordered to consult to calculate the amount recoverable by Mr Zhang for the hours he worked 9 September 2021 to 12 April 2022. Costs were reserved.

Changyong Zhang v JRL Culture Media Limited [[2023] NZERA 531; 15/09/23; A Gane]

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 one Bill open for public submissions to select committee:

European Union Free Trade Agreement Legislation Amendment Bill (16 Feb 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/

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