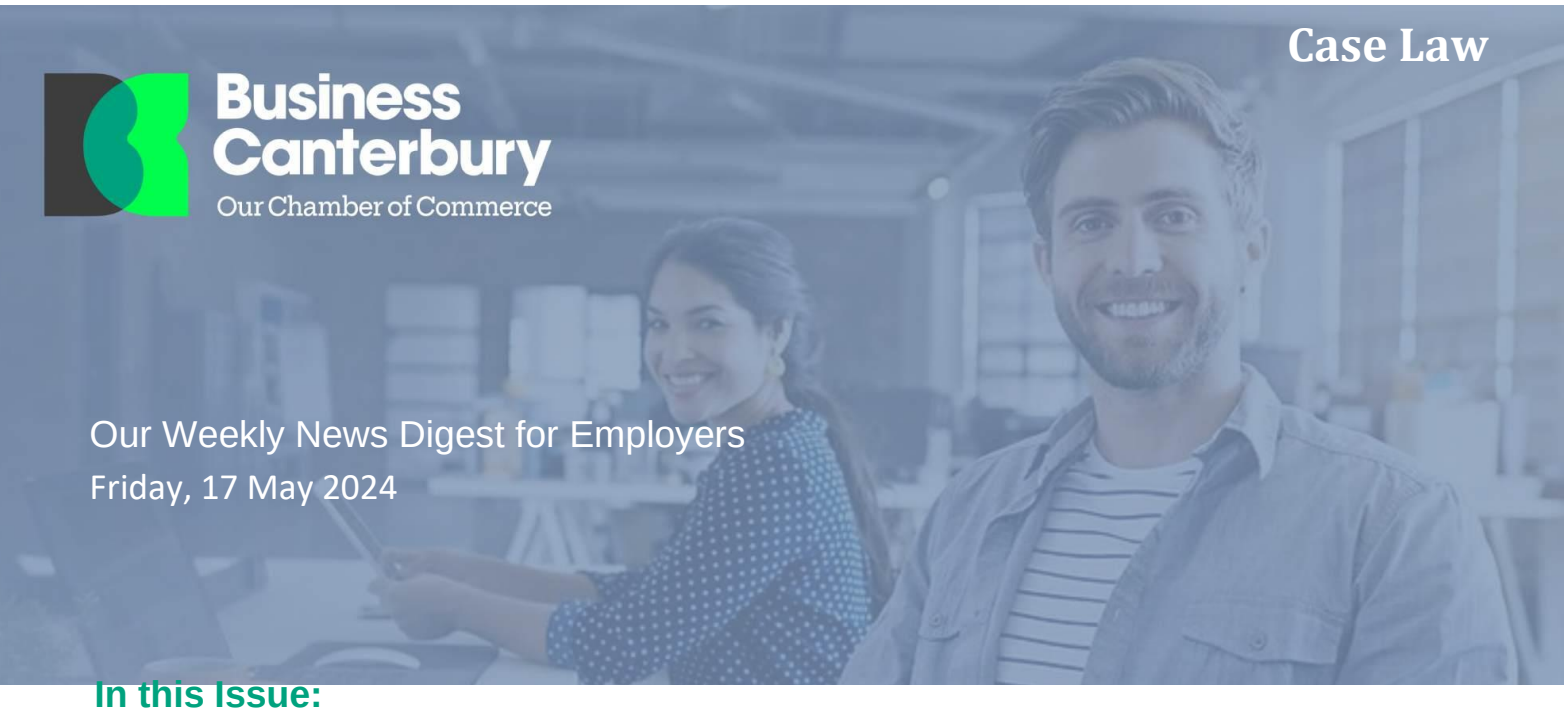

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Our Chamber of Commerce

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Case Law

Employment Court: One Case

Employment Court upholds Authority's clause interpretation in favour of union

KiwiRail Ltd (KiwiRail) and the Rail and Maritime Transport Union Inc (the Union) contracted into a multi-employer collective agreement (the CEA), running from 1 July 2021 to 30 June 2023. The Union had disputed the manner in which KiwiRail handled leave for certain employees (the Employees) and the Employment Relations Authority (the Authority) declared that the Union was right. KiwiRail appealed this decision and sought for the Employment Court (the Court) to overturn the Authority's decision.

The Agreement covered extra leave entitlements and standardised some rules for calculating leave. Some of KiwiRail's employees with nonstandard hours worked 12-hour shifts. When the Employees took leave, KiwiRail deducted from their balance at a rate of approximately 1.5 days for each day on holiday. The Union had argued this breached the Employees' minimum entitlements, by not giving them the time off that KiwiRail recorded they were entitled to or that KiwiRail had contracted into.

The Court assessed the law, clauses and the parties' interpretations from the top. The Holidays Act 2003 (the Act) grants leave entitlement to employees using a metric of weeks. Clause 26.6.1 of the CEA (the Clause) read, *"Annual leave for a full pay fortnight is counted as 10 days' annual leave. Annual leave is otherwise deducted on the basis of one day for every 8 hours' absence, rounded to the nearest half day."*

KiwiRail took the weekly metric of the Act and the CEA and turned them into *"notional"* days. It considered 20 days to equate to four weeks, although the CEA granted some staff an extra week, including the Employees. It applied the *"notional"* eight-hour day in the Clause regardless of how long the employee's actual shift was. To adjust for a 12-hour worker who took leave shorter than a fortnight, KiwiRail deducted 1.5 days in the balance for every actual day's leave.

KiwiRail argued the Act required it to determine the Employees' genuine working week and that it could calculate this by hours. KiwiRail set each annual leave entitlement for 200 hours. This balance equated to 25 days for eight-hour shift workers and 16.66 days for 12-hour shift workers. One of the Employees worked three to four 12-hour shifts per week. Averaged to a quantity of 3.5, their four weeks of legal leave entitlement converted to 14 days or *"work periods"* of leave. Another of the Employees, Mr Beazley, semiregularly worked 12 hours and 15 minutes, resulting in 14.16 work periods. KiwiRail argued it exceeded the Employees' minimum entitlements by over two work periods and abided exactly by the phrasing in the Clause.

KiwiRail provided employees' holiday entitlements and current accrual on its payslip. KiwiRail considered this a correct record of employees' holiday entitlements and relied on the record in its calculations.

The Union countered that the CEA generally referred to annual holidays in a metric of days. The Clause stemmed from early agreements assuming eight-hour days and should not have been applied to nonstandard patterns. Moreover, the clause itself was an agreement by the parties on a genuine working week, as the Act allows. There they agreed to calculate it in days.

KiwiRail upheld a metric of days in practice with its use of part year accruals of holidays, allocating entitled annual leave in days, and using days for its payslips and debiting method. Deducting 1.5 days for any given day of leave was a leap of logic that contradicted the rest of this metric. The practices made any averaging or hourly conversions irrelevant. The days written on the payslip were not "notional", but instead precisely what KiwiRail measured with and relied on to calculate the entire entitlement. Indeed, if an employee ran the balance on the payslip down to zero, they would run out of entitlement. The Union also noted KiwiRail's different rules for leave if it was less than a fortnight, compared to a full fortnight. This meant the leave taken as separate days produced a different debit than taking a continuous block. The debit would not vary if the days were plainly deducted one-to-one.

The result depended on whether the CEA expressed leave in weeks that could be converted to hours, or days. The Court agreed with the Union; the Clause explicitly ruled two weeks of annual holidays must be treated as ten days. This implied a basis for variable work patterns to be translated into more manageable days. The Court also favoured the Union's argument on KiwiRail's practice. It concluded that KiwiRail's calculations using hours did not match the CEA.

The Court found that KiwiRail exclusively relied on the roster to determine a genuine working week which could not reliably represent the reality. While rosters were one factor the Act looks at, KiwiRail failed to consider other factors listed, like actual work patterns. Each employee's case was highly specific and had to be assessed practically. For example, Mr Beazley also occasionally worked an extra full shift, which had to be included in the assessment of the week. KiwiRail's method was also over-deducting from the Employees and only stayed in the black due to their large accumulation of years of leave and their extra week of leave. A method that produced this was flawed.

The Court noticed that if each leave period was 8 hours, then the Employees' plain hours equalled more leave than KiwiRail was giving. For example, when one of the Employees worked 48 hours, this equated 6 leave periods of 8 hours, but KiwiRail only gave 5. Finally, KiwiRail's own maths actually equalled 210 hours for 5 weeks of 12-hour shifts.

The Court concluded that KiwiRail's method did not clearly comply with the CEA or satisfy the Act's criteria. Due to this it did not make a new declaration in favour of KiwiRail and the Authority's decision stood. It noted the Clause needed to be renegotiated to match the law and the rest of the CEA, and to not be used to overcompensate employees. Costs were reserved.

Kiwirail v Rail and Maritime Transport Union Incorporated [[2024] NZEmpC 56; 27/03/24; Judge Smith]

Employment Relations Authority: Four Cases

Large employer incorrectly runs medical incapacity process

Ms Honamombe was employed by Tegel Foods Limited (Tegel) as a process worker. In September 2019, she suffered a shoulder injury. She returned to work a few months later, but due to ongoing issues, ceased working again in May 2021. In February 2022, she was placed on a return-to-work plan. Despite the plan, she still had difficulties working, and in May 2022, her employment was terminated on the basis of medical incapacity. Ms Honamombe applied to the Employment Relations Authority (the Authority) claiming that her dismissal was unjustified.

Case law provides that *"An employer is not bound to hold open a job for an employee who is sick or prevented from carrying out their duties for an indefinite period."* Instead, *"there can come a point at which an employer … can fairly cry halt"*. It described medical incapacity as similar to redundancy in that dismissal was not at all the employee's fault. Employers must provide employees a reasonable opportunity to recover from their issue. Whether the decision was reasonable depends on various factors, including the terms of the employment agreement, any relevant policy, the nature of the employee's position and the length of time they were employed.

Employers must undertake a fair and reasonable inquiry by engaging with the employee to determine their likelihood of being able to return to work. That involves seeking and considering relevant medical information. Employers must also explain to the employee the reasons for the inquiry, its possible outcome, and provide them with an opportunity for input and comment. Employers must fairly consider what an employee has to say before deciding to terminate.

Employers are entitled to consider their business needs and any applicable timeframes in deciding an appropriate response to the situation. Employers are not obliged to keep a job open indefinitely, regardless of how long an employee has been employed or how large the organisation is. All employees are obliged to be responsive and communicative. Due to medical difficulties, if those employees have a reduced ability to undertake certain tasks, they are expected to engage with attempts to facilitate a return-to-work plan.

Although Tegel engaged with Ms Honamombe by seeking and considering her medical information, its own policy required it to regularly review Ms Honamombe's return-to-work plan to ensure it was effective. Although her manager had a couple of brief conversations with her, she was largely left "on her own". No one at Tegel proactively ensured the tasks it gave to Ms Honamombe were suitable for her gradual mobilisation and eventual recovery. The Authority found that Ms Honamombe's managers were not briefed properly about her situation and so were not in a good position to implement her return-to-work plan. The Authority found Tegel failed to adhere to its own rehabilitation policy, which was not what a fair and reasonable employer could have done.

Tegel made no inquiry into why the return-to-work plan initially failed. Therefore, Ms Honamombe was not given a reasonable opportunity to recover. Ms Honamombe's original role required a degree of fitness, but the Authority found she could have undertaken alternative duties which were far less physically demanding. Tegel needed to prove why a long-serving single employee could not be accommodated by stepping into those roles temporarily. The Authority also considered that as a large business employing over 200 staff, Tegel needed a reason why it could not accommodate her absence for a further reasonable period.

The Authority ultimately decided Ms Honamombe had been unjustifiably dismissed and awarded her $30,000 as compensation for the humiliation, loss of dignity, and injury to feelings. Costs were reserved.

Honamombe v Tegel Foods Limited [[2023] NZERA 721; 04/12/23; Blick S]

Successful interim injunction of breach of restraint of trade clause

Ms Dowler was employed as a senior stylist by Ms McCormick-Wilson who was the owner of Tanglez Hair Studio, a hairdressing business. Ms Dowler began working for Tanglez in mid-2021. On 19 September 2023, she held a meeting with Ms McCormick-Wilson where she submitted her resignation. At that meeting, Ms McCormick-Wilson expressed encouragement about Ms Dowler's plans to start her own hairdressing business. However, Ms McCormick-Wilson would later apply to the Employment Relations Authority (the Authority) for an interim injunction to stop Ms Dowler from operating her business. She claimed Ms Dowler was in breach of the restraint of trade clause contained in their employment agreement.

The Authority restated the law relating to whether it could impose an interim injunction to prevent Ms Dowler from operating her new business. It had to decide whether there was a serious question to be tried about whether Ms Dowler had in fact breached the restraint of trade clause contained in her employment agreement with Ms McCormick-Wilson. It then had to decide whether an order should be made to restrain Ms Dowler from operating a competing business. It assessed where the balance of convenience lay on the alleged breach of the restraint of trade clause. After, it assessed where the overall justice of the case lay on the amount of time the interim injunction would be in effect. To determine if there was a serious question to be tried, the Authority had to decide whether the restraint of trade clause was valid and enforceable, and whether Ms Dowler was in breach of it by operating her own hairdressing business.

Considering the restraint of trade clause could possibly be unenforceable, the Authority found the onus was on Ms McCormick-Wilson to prove she had legitimate proprietary interests she wished to protect, and that the restraint was no wider than reasonably necessary to protect her proprietary interests. Ms Dowler also argued Ms McCormick-Wilson waived her right to enforce the restraint of trade clause by verbal agreement, at their meeting held on 19 September 2023. Ms McCormick-Wilson successfully argued that she had never made a clear statement that waived her right to enforce the clause. Further, Ms Dowler already made significant preparations to start her new business before the meeting, so could not have relied on a waiver given then.

The Authority found customer relationships were a proprietary interest that could be protected by enforcing a restraint of trade clause. Ms Dowler tried to argue that customer relationships in the hairdressing industry attach to the hairdresser, not the business. The Authority disagreed, finding customers went to Ms McCormick-Wilson's business to have their hair styled, not Ms Dowler specifically, or any other individual stylist. The Authority had to assess whether the restraint of trade clause as written was no wider than necessary to protect the business's customer relationships. Even though it found the 12-month restriction to be too long, it said it had the power to modify the time restriction later, and so for the purpose of an interim assessment, the clause was considered reasonable. Overall, there was a serious question to be tried regarding whether the restraint of trade clause was valid and enforceable, subject to the likelihood that the 12-month restriction would be reduced to 3 – 4 months at the substantive trial.

The Authority went on to assess the balance of convenience, involving weighing the effects such an interim order would have on both parties, and decided in Ms Dowler's favour. It found damages would likely become a less adequate remedy and more difficult to quantify if the injunction was not granted, considering if Ms McCormick-Wilson was allowed to continue to operate, it would be difficult to determine what effects that had on Ms Dowler's business as time went on. Also, Ms Dowler had a strong case. Lastly, the Authority assessed where the overall justice of the case lay and decided it favoured the granting of an interim injunction. Costs were reserved.

McCormick-Wilson v Dowler [[2023] NZERA 753; 18/12/23; P van Keulen]

Was the employment agreement's abandonment clause applied correctly?

Mr Spotswood commenced employment with Concrete Structures (NZ) Limited (Concrete Structures) on 4 August 2021. His individual employment agreement (IEA) included an abandonment clause which set out, *"In the event the Employee has been absent from work for three consecutive working days without any notification to the Employer, this Agreement shall automatically terminate on the expiry of the third day without the need for notice of termination of employment."* Concrete Structures sought to use this provision when they terminated Mr Spotswood's employment early on the morning of 24 November 2021 when Mr Spotswood did not attend work on from 20 November 2021 to 24 November 2021.

Mr Spotswood lodged a claim with the Employment Relations Authority (the Authority) claiming that he was unjustifiably dismissed and sought compensation for humiliation, loss of dignity, and injury to feelings, and for lost wages. Concrete Structures contended that Mr Spotswood abandoned his employment in that he failed to attend work, without notification. The parties agreed that Mr Spotswood did not notify Concrete Structures of his absence for the days in question. Mr Spotswood indicated his absences from Monday to Wednesday related to a non-work injury sustained earlier in November 2021, and he lacked sufficient credit on his phone to reach out to Concrete Structures.

Whether Concrete Structures could rely on the abandonment provision turned on whether Saturday 20 November 2021 could be considered a working day for Mr Spotswood. In a *"toolbox meeting"* held on Thursday 18 November 2021, staff were advised there was work available in the weekend but on a voluntary basis. Mr Spotswood felt that he had not been notified that he was required to work on Saturday 20 November 2021. His understanding was that Saturday work was for finishing off the concrete and that other staff performed that work. Mr Spotswood attended the *"toolbox meeting"* and signed the minutes. Concrete Structures argued that Mr Spotswood's signature was an affirmation that he would work on the following Saturday. The Authority did not agree with that view. There was no evidence that clearly set out that Mr Spotswood was required to work on the Saturday.

The Authority found that Mr Spotswood had not abandoned his employment. The reason for this was that Saturday 20 November 2021 was not a working day for the purposes of the abandonment clause in his IEA. It also found that Mr Spotswood was not clearly instructed to work on the Saturday. As such, Concrete Structures notified Mr Spotswood of the termination of his employment before being absent for three working days. The Authority found that Mr Spotswood's dismissal was procedurally and substantively unjustified.

It was not necessary for the Authority to consider how much Concrete Structures attempted to contact Mr Spotswood about his absence. It still reviewed the circumstances to establish to what degree Mr Spotswood contributed to the outcome. Concrete Structures had sent a text requesting contact to Mr Spotswood on 23 November 2021 and had made one phone call on the same day. The Authority felt Concrete Structures could have done more and observed that their attempts to reach Mr Spotswood were unreasonable and insufficient.

Equally, the Authority was critical of Mr Spotswood and his insufficient efforts to communicate his absence with his employer. Mr Spotswood appeared to explain his absence from work as being on account of injury. The Authority observed that he did not take any reasonable steps to notify his employer of the asserted basis for his absence. Accordingly, the Authority made a reduction to the compensation payable to Mr Spotswood of twenty-five per cent in recognition of his culpable and blameworthy behaviour.

Finally, Concrete Structures had sought a penalty against Mr Spotswood for delaying the Authority's investigation. The nature of this was that Mr Spotswood knew he had COVID-19, but did not disclose this until immediately before the Authority's investigation, when Concrete Structures' staff had made travel arrangements to attend the meeting already. The Authority declined this request noting the threshold for a penalty was to be almost criminal. It did note that Mr Spotswood paying the costs incurred by Concrete Structures may be considered when it becomes relevant.

Concrete Structures was ordered to make payment to Mr Spotswood of $2,929.50 as compensation for lost wages and $10,500 as compensation for humiliation, loss of dignity and injury to feelings. Costs were reserved.

Spotswood v Concrete Structures (NZ) Limited [[2024] NZERA 9; 11/01/24; R Anderson]

Procedural shortcomings in terminating employee who got injured at work

Mr Burt was employed as a fencer by the respondent, Tawaroa Farming Limited (Tawaroa). In early April 2022, Mr Burt had an accident at work, where he slipped in wet conditions and hurt his shoulder. He was unable to work. He was told he needed surgery. When he told the farm manager Mr Atkins of his surgery, Mr Atkins said that the farm needed a fencer, and he would have to let Mr Burt go. Mr Burt raised a personal grievance for unjustified dismissal and sought remedies of compensation for hurt and humiliation. He also sought penalties for breaches of good faith relating to the way he was dismissed and his employment agreement, breaches of the Wages Protection Act 1983 in relation to the deductions from his wages, and breaches of the employer's obligations to provide wage, time, holiday and leave records.

Tawaroa said that its dismissal of Mr Burt was justified as he was not able to work, had been on sick leave for some three months, and did not provide any indication as to how long he would need off for his unscheduled surgery and rehabilitation. It said it could not hold the job open any longer.

After his injury, Mr Burt's doctor suggested that he should go on light duties, for 4 hours per day. Both parties agreed that there were, in practice, no light duties available. Mr Burt therefore had to effectively stop work, as he was not physically able to perform his duties. Mr Burt obtained medical certificates which he provided to Tawaroa via Mr Atkins. In the interim, he was placed on ACC. Mr Burt and Mr Atkins met at Mr Atkins' house on 4 July 2022. Here, Mr Atkins said that he would need to let Mr Burt go.

At the beginning of July, Tawaroa was very concerned about how long it could continue to hold Mr Burt's job open. When Mr Burt advised that he needed surgery and rehabilitation, Mr Atkins terminated his employment. This is as the trustees had authorised him to do for anything short of an imminent return to full duties. On 24 August 2022, Mr Burt received an email with his final payslip. It listed deductions made from his final pay, which was made up entirely of holiday pay. At the hearing, Tawaroa accepted that the deduction of monies for the electricity and rent was a mistake and was contrary to what had been agreed between the parties.

The Authority found that Tawaroa did not sufficiently investigate the concerns it had about the possible duration of Mr Burt's injury, how long it might realistically take him to recover, or its view that it needed a person to complete fencing work and no other tasks could have been performed by Mr Burt while he recuperated. He was never asked to provide a detailed diagnosis or prognosis for the trustees to assess whether his job could have been kept open or if he could realistically perform other tasks. The trustees never spoke with Mr Burt, or even told him his job was at risk. There was no opportunity for Mr Burt to respond to the trustees' concerns before they made the decision to dismiss. The Authority found that Mr Burt should have been informed of these matters, and that Tawaroa's decision not to communicate these matters to him were part of what rendered Mr Burt's dismissal unjustified.

Mr Burt argued penalties should be awarded for Tawaroa's failure to provide either wage and time records and holiday and leave records, which were requested by his representative. Following the investigation meeting, Tawaroa provided several payslips showing Mr Burt's fortnightly pay. The Authority found Tawaroa took no efforts to properly inform itself of its legal obligations or how to meet them. The Authority concluded that Tawaroa breached its statutory obligations by making deductions from Mr Burt's final pay in breach of both the Wages Protection Act 2003 and the Holidays Act 2003, and it breached its statutory obligations to provide wage and time records and holiday and leave records on request.

The Authority ordered Tawaroa Farming Limited to pay Mr Burt $20,000 as compensation for humiliation, loss of dignity, and injury to feelings. It also ordered $2,000 in penalties, with a further $2,000 to be paid to the Crown account. Costs were reserved.

Burt v Tawaroa Farming Limited [[2024] NZERA 36; 24/01/24; C English]

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: Six Bills

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

Te Pire Whakatupua mō Te Kāhui Tupua/Taranaki Maunga Collective Redress Bill (22 May 2024)

Te Korowai o Wainuiārua Claims Settlement Bill (26 May 2024)

Restoring Citizenship Removed by Citizenship (Western Samoa) Act 1982 Bill (31 May 2024)

Contracts of Insurance Bill (3 June 2024)

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

Privacy Amendment Bill (14 June 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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