Employer Bulletin

Our Weekly News Digest for Employers

Friday, 17 November 2023

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Case Law

Employment Court: One Case

Employment Court finds claim to have been raised within 90-day period

This judgment by the Employment Court (the Court) concerned a challenge to a determination of the Employment Relations Authority (the Authority) which concluded that Mr Taniwha, a former employee of Te Rūnanga o Toa Rangatira Inc (Te Rūnanga) did not raise a dismissal personal grievance within 90 days.

Mr Taniwha's employment was terminated on notice on 13 December 2021 due to his refusal to be vaccinated. This was despite his role requiring a mandatory vaccination under the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order). Mr Taniwha said his dismissal was unjustified and supported his position with several reasons. The 90-day period for filing a personal grievance expired on 13 March 2022. Te Rūnanga claimed Mr Taniwha did not raise his grievance within the statutory 90-day timeframe provided for under the Employment Relations Act 2000 (the Act).

On 14 March 2022, Mr Taniwha sent an email to te Rūnanga stating that he would be "*lodging a personal grievance for unfair dismissal*". On 21 March 2022, he lodged a statement of problem, which was eight days after the 90-day period had ended.

There were three occasions on which Mr Taniwha had said he raised his "*personal grievances.*" The first was during a telephone call on 10 November 2021. Having listened to a recording of that telephone discussion, the Authority concluded it was clear Te Rūnanga was still expecting a reply as to whether Mr Taniwha would be vaccinated. The Authority found that nothing in the conversation indicated a personal grievance had been raised.

The Authority then considered a letter sent by Mr Taniwha on 10 November 2021, noting his point that at some future date he may exercise a right to file a personal grievance. It concluded the letter did not raise such a claim.

An email on 14 March 2022 also referred to a future date when a personal grievance for unfair dismissal would be lodged. The email was clear that Mr Taniwha was not raising a grievance then and there.

While Te Rūnanga knew Mr Taniwha had issues with its approach on COVID-19 vaccinations, there was no mention of bullying until the statement of problem which was outside the prescribed 90-day period. Accordingly, the Authority concluded Mr Taniwha could not proceed with his personal grievances as they were not filed within the statutory timeframe.

In Mr Taniwha's statement of claim raising the challenge, he relied on the affidavit he had filed with the Authority. He alleged that he had not raised an unjustified dismissal claim in the affidavit as it would have been out of time and that he had instead raised an unjustified disadvantage claim that arose during his employment.

The Court found there was an inconsistency in the documentation filed by Mr Taniwha. The statement of problem referred to a dismissal grievance whereas the supporting affidavit referred only to a disadvantage grievance. The Authority proceeded on the basis that the issue pertained to a dismissal grievance and did not consider the issue highlighted in Mr Taniwha's affidavit that he was in fact attempting to raise a disadvantage grievance. The Court stated it would have been desirable for the Authority to clarify this inconsistency.

The Court then considered whether the statements made in the telephone conversation of 10 November 2021, and the letter of that date, were sufficient to put Te Rūnanga on notice that a disadvantage grievance was in effect being raised. The Court reaffirmed that for personal grievance to be raised the employer must know what it is responding and must be given sufficient information, with a view to resolving the grievance soon and informally. It is insufficient for an employee to merely state they have a personal grievance. Although Mr Taniwha had referred to the wrong regulation when discussing his request for an exemption to vaccination in the telephone conversation, there was sufficient information provided by him as to his strong views about not being vaccinated, and to confirm he wished to obtain such an exemption. This was a step which Te Rūnanga, would plainly have had to have considered and, if appropriate, initiated, and if not appropriate, discuss its views with Mr Taniwha.

Additionally, in the telephone conversation Mr Taniwha had raised objection to overriding the ongoing disciplinary process by the possibility of him being terminated. It was clear he wanted Te Rūnanga to address this issue despite the possibility that the notice of termination of employment would be given at the same time as he understood the suspension was to be considered. Also, when he was terminated, Mr Taniwha made it clear in his communications of 10 November 2021 that he did not accept that Te Rūnanga could terminate his employment on the ground asserted. He plainly wanted his employer to engage with him about his concerns.

Mr Taniwha alleged that the treatment of him was unfair and bullying and the Court found that this combined with Te Rūnanga's actions of proceeding rapidly and without considering the suspension issue, clearly inferred Mr Taniwha felt he was being improperly treated. The Court was satisfied that Mr Taniwha had outlined his concerns and plainly wanted them all to be addressed.

The concerns related to events that had taken place from 3 to 10 November 2021 and were within the necessary 90-day timeframe. The Court was satisfied that the test for raising a grievance under the Act was met. The challenge was allowed. The Court directed the parties to mediation to resolve the limited personal grievance claims it had found were validly raised.

Hone Heke Taniwha v Te Rūnanga O Toa Rangatira Inc [[2023] NZEmpC 140; 28/08/23; Corkill J]

Employment Relations Authority: Four Cases

Process to change employee to contractor deemed procedurally flawed

Mr Nguyen worked as a painter and labour hand for Complete Homes Painting Limited (Complete Homes) from 28 April 2020 until the employment ended and he became a contractor for Complete Homes on or

about 9 August 2021. Mr Nguyen said his employment was terminated without proper consultation or justification. Complete Homes said that Mr Nguyen agreed to change to a contractor and due to concerns about his performance, it was a necessary change. Complete Homes claimed there was no dismissal because Mr Nguyen agreed to become a contractor and any actions it took were justified and the process it followed was that of a fair and reasonable employer.

Mr Steven Nguyen and Ms Cao were directors of Complete Homes. Mr Nguyen and both directors were flatmates living together. In October 2020, Mr Nguyen was promoted to manager when the previous manager resigned. Mr Nguyen was a below average painter and often received complaints from clients due to the poor paint work. There was also a complaint about his work ethic and interactions with other employees of Complete Homes. The complaints were not shared with Mr Nguyen during his employment.

As a result of the mounting number of issues, the directors agreed that Mr Nguyen should stop working as a painter and work instead with Mr Harris, operations manager, as a scaffolding labour hand and at the same time start learning an accounts/sales manager role for Complete Homes. On 18 July 2021, they met to discuss this proposal where Mr Nguyen agreed to becoming a scaffolding labour hand and accounts/sales manager under the guidance of Mr Harris. Things did not go well. Mr Nguyen did not like the scaffolding work and alleged Mr Harris was verbally abusive towards him. Mr Harris denied it and called Mr Nguyen unmotivated. The relationship between Mr Harris and Mr Nguyen deteriorated.

By August Mr Nguyen had not been able to secure any clients for Complete Homes. On 6 August 2021, Ms Cao, Mr Steven Nguyen and Mr Nguyen met to discuss transitioning Mr Nguyen to a marketing and sales role as a contractor. Mr Nguyen agreed to terminate his employment contract immediately and move onto a contracting role from the following week.

Mr Nguyen argued that while it would have looked like he agreed, he was put in a very difficult position and was required to make a decision at the meeting. He said he was scared of Mr Steven Nguyen who had been screaming at him and was unsure what his options were or what he should do. The fact Mr Nguyen was also their flatmate, meaning his accommodation was connected with the directors of Complete Homes made it difficult for him when the employment relationship became strained.

By 9 August 2021, Complete Homes stopped giving Mr Nguyen any work or communicating with him. On 31 August 2021, he received his final pay. In late August, Mr Nguyen expressed he was going to raise a personal grievance at the Employment Relations Authority (the Authority). Before he could do so, New Zealand went into lockdown and Complete Homes failed to answer Mr Nguyen's enquiries about whether he would be getting paid or getting the wage subsidy. Subsequently, a personal grievance for unjustified dismissal and disadvantage was raised at the Authority.

The Authority found that Complete Homes fell short in its dealings in two ways. Firstly, it did not raise any concerns with performance or conduct to Mr Nguyen. Even if it did, the issues were unlikely to be sufficiently serious enough to support a proposal to end an employment. Secondly, Complete Homes did not act in good faith by not communicating the proposal in full to Mr Nguyen and providing information relevant to why they did not want him as a painter, and they wanted to end his employment. The decision to change to a contractor was made at the meeting without a reasonable period to allow for consultation which did not allow him any time to seek advice. The decision to change him to a contractor was also predetermined. Despite Mr Nguyens partial agreement, the process to reach the decision was procedurally flawed resulting in an unjustified dismissal and disadvantage.

$20,000 was awarded for suffering financial stress from having to move out of the house and feeling hurt and humiliated. $2,288 was ordered for lost wages starting from the time he was dismissed to securing new employment. 25 per cent reduction of remedies was ordered as Mr Nguyen failed to reach the level of competence required as a painter while Complete Homes set realistic expectations and supported him extensively in his role. Costs were reserved.

Nguyen v Complete Homes Painting Limited [[2023] NZERA 381; 18/07/23; S Kennedy-Martin]

Deductions required consulting and employee experienced disadvantage from treatment

Hardy St Pharmacy Limited (Hardy St Pharmacy) employed senior pharmacist, Mr Mohamed, from 27 April 2021. He resigned on 21 February 2022 with notice. Hardy St Pharmacy deducted all of his final pay and holiday pay for recruitment costs and professional fees, based on clauses in the employment agreement. It charged Mr Mohamed the remaining shortfall. Mr Mohamed raised a personal grievance of unjustified disadvantages. The disadvantages were the deductions, inadequately discussing the COVID-19 wage subsidy and sick leave entitlements, and not explaining an allegation of unauthorised breaks. Mr Mohamed sought compensation, recovery of his final pay and a public holiday, penalties and for payment of his costs.

Mr Mohamed's employment agreement contained a clause allowing deductions for owed money, with consultation on specific deductions. In termination Hardy St Pharmacy would also pro-rata recoup any annual professional fees, alongside recruitment costs from the following 36 months.

Mr Handforth, one of the directors at Hardy St Pharmacy, did not communicate directly to Mr Mohamed which caused him stress in his senior position. He felt humiliated to find out through others when pharmacy hours or services changed. Mr Handforth also omitted Mr Mohamed from group emails during his notice period.

When Mr Mohamed entered COVID-19 isolation, Hardy St Pharmacy did not apply for the government subsidy. Mr Mohamed argued his entitlement, but after limited discussion Mr Handforth cut the emails off, writing "*this matter is settled.*" Hardy St Pharmacy abruptly paid the figure much later. Around this time, sick leave entitlement increased to 10 days. On 18 March 2022, Mr Mohamed asked for clarity on his leave balance, but Mr Handforth did not follow up as he said he would.

At this point, Mr Handforth also said he had been told Mr Mohamed regularly took extra breaks, and asked whether these were written in the timesheet. Mr Mohamed asked who complained but Mr Handforth said it was in confidence. He said he would provide details by email but did not.

Mr Mohamed's final payslips contained no money and did not mention deductions. He asked Mr Handforth why he had not been paid and received a letter itemising recruitment fees and two pharmacy association memberships. The letter also contained the outstanding balance of $655.38. Mr Handforth expected this repaid at short notice upon threat of debt collection. Later at proceedings, Mr Handforth established that the breaks of concern were unauthorised prayer breaks.

The Authority found Hardy St Pharmacy disadvantaged Mr Mohamed by not constructively communicating about the COVID-19 leave subsidy. This caused Mr Mohamed stress and was causative of the delayed payment. The Authority found leaving Mr Mohamed out of communications was a disadvantage.

The accusation of Mr Mohamed being dishonest about his breaks upset him, especially when it seemed to be religious discrimination. Hardy St Pharmacy did not clarify its allegation or follow any process. It also lacked a genuine reason because Mr Mohamed held his two work prayers during his usual breaks. This made the allegation unjustified and not a fair and reasonable employer's actions. Mr Mohamed was disadvantaged by the affront caused to his integrity.

The Authority considered whether Hardy St Pharmacy made lawful deductions. By law and the employment agreement, Hardy St Pharmacy should have consulted with Mr Mohamed on the nature and value of the deductions. The letter it sent was a response, so Hardy St Pharmacy did not consult, making the deductions unlawful. Moreover, premiums are illegal, and Mr Mohamed could not consent to owing one, so the recruitment fee deduction was another employment law breach. The Authority found that for Mr Mohamed to suddenly lose his pay, when he needed to support his family, was a disadvantage. In general, Hardy St Pharmacy breached good faith in the final days of Mr Mohamed's employment. These breaches were severe enough and violated fundamental rights to require deterring, plus even if it was unintentional, Hardy St Pharmacy did not correct itself. It caused significant adversity to Mr Mohamed, being in a vulnerable position and taken advantage of. The Authority imposed a single penalty of $4,000, half of which was to be paid to Mr Mohamed.

The Authority awarded compensation for all the above disadvantages at $7,000 with interest. The Authority also ordered compensation of Good Friday wages that Hardy St Pharmacy incorrectly removed from Mr Mohamed's payable period. Finally, it ordered a contribution to Mr Mohamed's costs for having to bring his successful case, at $2,250.

Mohamed v Hardy St Pharmacy Limited [[2023] NZERA 367; 12/07/23; A Baker]

Unjustified dismissal and wage arrears claims of the employees upheld by the Authority

Father and son, Mr Byrne and Mr Joel Byrne, were employed by Kanaloa Hawaii Sports Entertainment Limited (Kanaloa) for the Kanaloa Hawaii Rugby team, which Kanola intended to participate in an American rugby competition known as Major League Rugby (MLR).

In the beginning of 2020, Mr Byrne was approached by (then) director and rugby manager of Kanaloa, Mr Kilgour, and was invited to apply for a vacant head coaching role for a new rugby team that Kanaloa wished to enter into the 2021 MLR competition. On 18 May 2020, Mr Byrne was offered the position of head coach. Mr Byrne began work almost immediately. Kanaloa employed his son, Mr Joel Byrne as 'director of strength and conditioning' for the team. Mr Joel Byrne started work as soon as he accepted the role even though the start date of his employment was 1 July 2020. The applicants were eventually provided with written employment agreements dated 30 July 2020 which they both signed. For the work Mr Byrne had done already for Kanaloa, it agreed to pay him a sign-on payment valued at USD21,666.67.

On 5 September 2020, Ms Atiga (CEO for Kanaloa), emailed several people connected with the club, explaining that Kanaloa had decided to exit its plans to join the MLR. On 1 October 2020, Mr Byrne and Mr Joel Byrne were advised in an email from Ms Atiga that Kanaloa had insufficient funds to make its payroll payments.

On 5 October 2020, Mr Byrne was copied into an email from Ms Atiga which was sent to Mr Kilgour, two other directors and Mr Atiga. The email stated that Mr Kilgour had been summarily dismissed for serious misconduct for carrying on business on behalf of Kanaloa without the consent of its CEO or its board of directors.

Without notice, on 2 November, Mr Alcock, sports agent for Mr Bryne and Mr Joel Byrne, received letters from Ms Atiga stating that their employment with Kanaloa had been terminated for serious misconduct. The letters alleged that they had colluded with Mr Kilgour to form a new entity under new leadership without the knowledge or approval of the CEO or the board. On 12 November 2020, Mr Alcock requested a copy from Ms Atiga of her email of 1 October 2020 to Mr Bryne and Mr Joel Bryne in which she claimed that they had been suspended. That information was never provided.

Kanaloa could not offset their wages unilaterally when it had both a contractual and a statutory obligation to pay them. During the investigation meeting, Ms Atiga stated that her company had been valued at $32 million by a large accounting firm but Kanaloa did not have $5M in its bank account. The company was relying on a refund of USD200,000 from the MLR being the balance of a deposit paid to it by Kanaloa's initial investor, Mr Wagner. The Authority could not see how Kanaloa could reasonably have expected to have raised the necessary MLR licence fee of $10M if it did not have sizeable funds of its own to contribute. The applicants wage arrears claim was established on the facts.

Ms Atiga stated in her written witness statement to the Authority that both applicants clearly were dismissed for serious misconduct by engaging and contributing to an attempted and illegitimate takeover of her company. This is denied by both Mr Byrne and Mr Joel Byrne. This was also because that no information was provided to them substantiating this. The first time the applicants heard of the particular concern was in their letters of dismissal.

During the investigation meeting, Ms Atiga did apologise to the applicants stating that she now understood how Mr Byrne may have got the impression from her email on 1 October 2020 that Mr Kilgour and Mr Wagner would be taking Kanaloa forward without her. The Authority found that there was no justification behind the applicants' dismissal from employment. The Authority found that Mr Byrne and Mr Joel Byrne's claims of unjustified dismissal was established.

The Authority ordered Kanaloa to pay $69,709 to Mr Byrne in wage arrears as it found its directors had failed to act in good faith and in best interests of company. It awarded $40,753 to Mr Joel Byrne in wage arrears. Both applicants were also awarded interest on the wage arrears application from 2 November 2020 to date of payment using the civil debt interest calculator. $18,000 was awarded to each applicant in compensation for hurt and humiliation. Costs were reserved.

Bryne v Kanaloa Hawaii Sports Entertainment Limited [[2023] NZERA 387; 19/07/23; P Fuiava]

Improper investigation leads to successful unjustified dismissal and disadvantage claims

Mr Singh was employed by E tū from July 2017 until he was dismissed in 2022. He was also actively involved with assisting minority workers who were subject to exploitation. He carried out this work through organizations such as the Migrant Workers' Association (MWA) and the Migrant Rights Network. Mr Singh was friends with an employer, referred to as HVF.

On 2 October 2018, HVF was scheduled to have a meeting with MWA as they were investigating a claim by HVF's employee of alleged exploitation relating to the underpayment of wages. HVF told Mr Singh that she was going to attend the meeting with MWA and that MWA agreed that Mr Singh would be the mediator. Mr Singh had not been told about the meeting and his potential involvement, so he spoke to MWA about it. MWA told Mr Singh about the potential exploitation by HVF and that HVF agreed to have the meeting if he was present. Mr Singh agreed to help.

At the meeting, MWA believed Mr Singh was the mediator while HVF believed Mr Singh was acting on her behalf. His actions and behaviours indicated that he was supporting HVF in the meeting. After the meeting, a document was signed stating that the settlement was confidential and full and final. However, later he told HVF that more evidence had come to light about the exploitation and that HFV should pay more than what was agreed in the meeting to settle. HVF was unhappy about this and argued with Mr Singh but ultimately agreed to pay the suggested amount.

On 10 July 2020, HVF emailed her complaint against Mr Singh to Ms Mackintosh, Assistant National Secretary of E tū, alleging defamation, breach of privacy, mental and physical harassment, promoting wrong information and hate speech against her business, provoking staff to act against her and causing the loss to her business. HVF included copies of messages and emails including WhatsApp messages about Mr Singh telling HVF he wanted a favour to settle matters for her and that she should book a hotel room, appearing as if Mr Singh was requesting sex. HVF also included a video that was about HVF's business that had been shared on social media, which HVF said was evidence that Mr Singh had vandalised her business premises.

After working through the evidence, Ms Mackintosh emailed Mr Singh advising him of the complaint and asked for comments on evidence that he appeared to have travelled to Hamilton during work hours using an E tū car to meet HVF for a coffee, use of his work phone and office for non-business uses and apparent messages mentioning a hotel room. Mr Singh admitted to being a mediator in the situation and using his work phone, stating that he had been receiving threatening messages from employers who were alleged to exploit employees as part of bullying and threats being made against everyone who is working against exploitation and that the messages referencing the hotel room were fabricated. However, Ms Mackintosh accepted the inappropriate messages as genuine, stated that his behaviour compromised E tū's image and that the lack of judgement amounted to serious misconduct which could warrant dismissal.

Mr Singh was then invited to a disciplinary meeting. Before the meeting, HVF warned Ms Mackintosh that she had media interviews pending and that the story was about to be public. In haste and fear for E tū's reputation, Ms Mackintosh emailed Mr Singh proposing suspension without proper reason.

At the meeting, Mr Singh and his representative explained how the messages were false. Ms Mackintosh could not decide whether they were real or not, so she disregarded them entirely. The preliminary decision outlined in an email was that his actions were unethical, jeopardised E tū's credibility and that he did not appreciate the damage caused. Another meeting was arranged with a different representative who knew HVF. He explained that there was a string of exploitation cases involving HVF and that she was a consummate liar and said that the fabricated WhatsApp messages could be verified if HVF provided her phone. Ms Mackintosh said she was no longer pursuing the sexual harassment complaint, but all other allegations were substantiated and constituted serious misconduct. Mr Singh was terminated for serious misconduct.

Mr Singh raised claims for unjustified dismissal and unjustified disadvantage at the Employment Relations Authority (the Authority). The Authority noted that suspending Mr Singh due to concerns of potential damage to reputation was not a valid reason and suspension in the circumstances was not necessary. Thus, the claim for unjustified disadvantage was successful.

The Authority also found Mr Singh was unjustifiably dismissed as E tū did not sufficiently investigate to be able to commence a disciplinary process and that it did not properly set out all the relevant concerns and information for Mr Singh to respond. E tū also disregarded some information because it could not decide whether it was correct or not. But the evidence could have easily been verified as true or false and were significant pieces of evidence. Additionally, the letter of termination mentioned that his *"communications with HVF were inappropriate."* While he was not dismissed for the sexual harassment, it may appear that he had been. E tū failed to show that the process it carried out with Mr Singh that led to his dismissal was justified.

The Authority determined that reinstatement was not practical in the circumstances. $22,000 was awarded to Mr Singh for hurt and humiliation. His loss was greater than three months as he was only able to find new employment from 25 July 2022. The Authority calculated actual loss was equal to six months ordinary remuneration being $37,965.36. A 15 per cent reduction was made to both remedies for his contribution. Costs were reserved.

Mr Singh v E Tū Incorporated [[2023] NZERA 384; 19/07/23; P Keulen]

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: No 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/

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