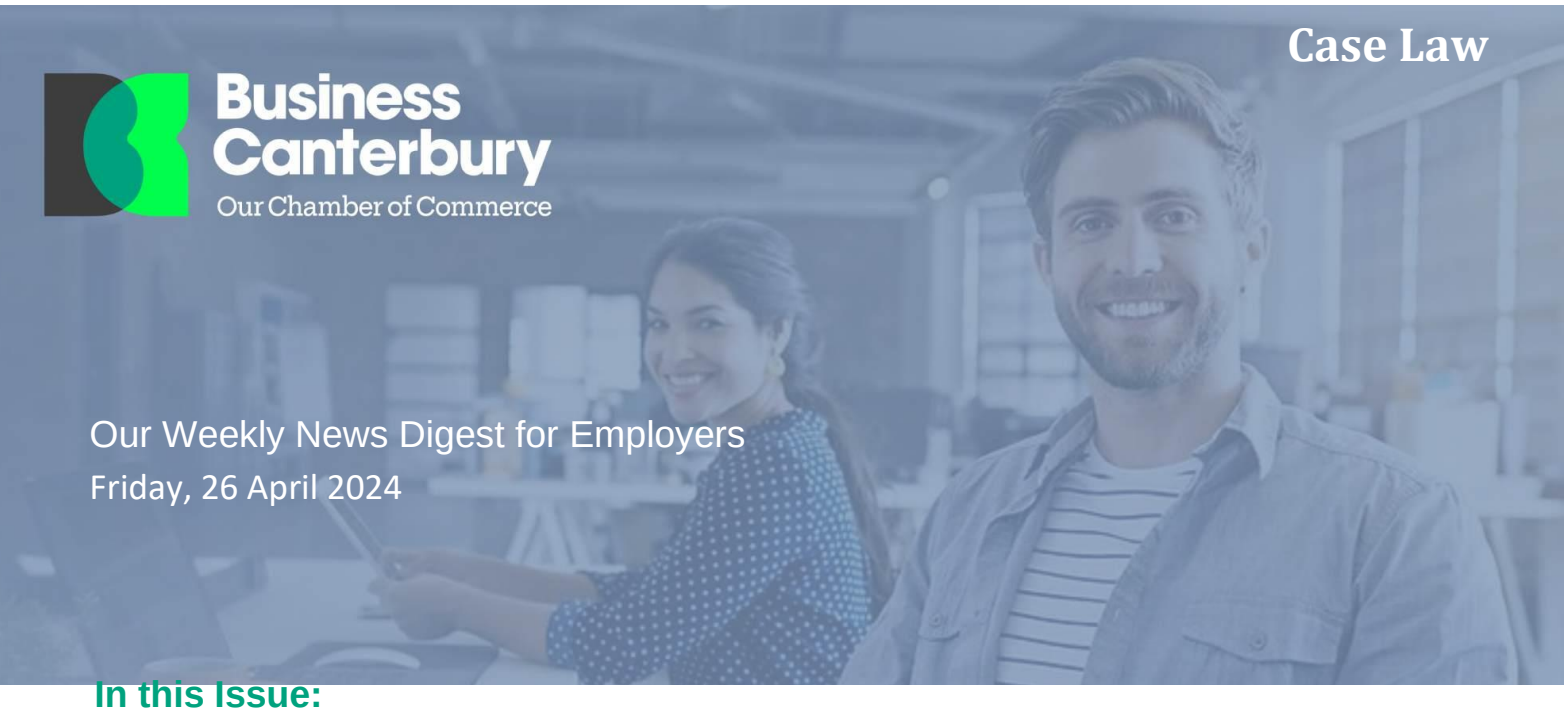

Business Canterbury
Our Chamber of Commerce

Our Weekly News Digest for Employers
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Case Law

Employment Relations Authority: Five cases

Company penalised for breaching employment law requirements

Laxmi Narayan Restaurant Limited (Laxmi) and Mr Singh operated a restaurant named Karfa Moroccan Cuisine. From October 2019 to January 2021, Mr Meena worked as the restaurant manager. Mr Meena alleged that Mr Singh instructed him to record fewer hours than he worked, based on a promise to help with applying for residency. He claimed that Mr Singh told him what Laxmi was willing to pay each week and to record hours to fit that. In June 2021, Mr Meena complained to the Labour Inspector, who led an investigation.

The Labour Inspector found that Laxmi breached Mr Meena's minimum employment standards, including obligations regarding record keeping, minimum wage, deductions, holidays and leave. The Labour Inspector sought remedies, including minimum wage arrears, and amounts alleged to be unlawful deductions, for the difference between Mr Meena's contractual rate and the applicable minimum wage.

The Employment Relations Authority (the Authority) found it likely that Mr Meena worked the additional hours he claimed and should receive the remedies sought. It rejected Mr Singh's allegation that Mr Meena "*schemed the whole scam up for his own financial gain and benefit*". Records of Mr Meena's hours were either not kept or inaccurate. Mr Meena's employment agreement recorded that he would work 35 to 40 hours a week, but the Labour Inspector found he worked between 45 and 60 hours a week. His job description included tasks such as opening and closing the restaurant, so he would regularly start at 10:15am, beyond his contracted hours, in order for the restaurant to open at 11am. His timesheets only recorded 11am starts. Data from the cash register showed entries under Mr Meena's profile when the timesheet recorded Mr Meena as not working.

Laxmi breached the Employment Relations Act 2000 by not ensuring an accurate record of all the hours Mr Meena worked. Laxmi did not pay Mr Meena for hours worked more than those recorded in his timesheets. Laxmi also breached the Minimum Wage Act 1983 for not paying Mr Meena minimum wage for those hours.

The Labour Inspector calculated an arrears of $19,320.53.

The Labour Inspector also sought payment of the difference between the contractual rate and minimum wage owed for hours unpaid. This failure to pay wages was categorised as an unlawful deduction, which the Labour Inspector could recover under the Wages Protection Act 1983. The unlawful deductions totalled $3,865.79.

Laxmi constantly underpaid Mr Meena's entitlements under the Holidays Act 2003. For this, the Authority ordered Laxmi to pay shortfalls of worked public holiday of $272.88, $623.94 in alternative holidays, $318.13 of unworked public holidays, $310.81 of sick leave, $522.81 of annual holidays and $1,625.50 of final holiday pay. The Authority added interest of $2,019.27 for Mr Meena being deprived of being able to use money he ought to have received several years ago.

Mr Singh was deemed a person involved in breaching employment standards. He was the sole shareholder and director of Laxmi, handled all employment matters, had knowledge of the essential facts giving rise to the breaches and authorised any payroll transactions. The Authority ordered him to pay any unpaid amounts where Laxmi was unable to pay. For the failure to comply with minimum entitlements and three breaches of the law, the Authority issued Laxmi a penalty of $17,000 and Mr Singh $5,500. Half was to be paid to Mr Meena and the other half to the Crown. Costs were reserved.

A Labour Inspector v Laxmi Narayan Restaurant Limited [[2023] NZERA 660; 8/10/23; L Vincent]

Employer agreed to use Tikanga principles

Ms Moke applied for interim orders that would require Raukura Hauora o Tainui Trust (RHOT) to keep her employed as the Chief Executive Officer (CEO) until the Employment Relations Authority (the Authority) determined her personal grievance. During the order, it would not be able to dismiss her. Ms Moke alleged RHOT acted unfairly in carrying out an inquiry, regarding two complaints of bullying and harassment made against her. She claimed the Board unjustifiably disadvantaged her by failing to act in good faith and in accordance with tikanga while looking into the complaints.

The names and positions of the two complainants were prohibited from being used in the proceedings and the determination. They were instead referred to as Mr A and Mr B.

RHOT was an incorporated iwi charitable trust. Ms Moke began working as the CEO on 2 December 2019. On 7 July 2022, Mr A made a formal complaint about Ms Moke's conduct and on 16 August 2022, Mr B made his complaint. On 18 August 2022, Ms Moke and the Board representatives met with an independent mediator. They discussed a proposal, made by a Board representative, for the complainants' concerns to be addressed through a tikanga-based hohou i te rongo process.

At her request, Ms Moke went on paid special leave from 31 August 2022. On 21 September 2022, she returned to work with special conditions on contacting Mr B at work. In the following months, Ms Moke and others attended interviews with the investigator. In February 2023, Mr B made further allegations about Ms Moke's interactions with him. He raised these concerns formally as an employment relationship problem. The Board suspended Ms Moke from her position pending receipt of the final investigation report.

The investigator's final report on Mr A's complaint substantiated "*multiple findings of unreasonable actions*" by Ms Moke towards him. The report on Mr B's complaint concluded Ms Moke' behaviour was "*unreasonably negative*". On 5 May 2023, Ms Moke raised a personal grievance regarding how the investigation was being conducted and the delays in providing reports.

Where an organisation has expressed a commitment to tikanga principles or values, it becomes obliged to consider and apply tikanga values and processes throughout the employment relationship, to all employees whether Māori or not. The Authority found more should have been done to consider and apply accepted tikanga principles. The principles could have applied to how the complaints were dealt with from the outset, the reports in July 2023 and the disciplinary process that followed. Ms Moke also had an arguable case she could be entitled to the remedies she sought, including distress compensation, if RHOT was found to have acted unjustifiably in its investigation and disciplinary processes.

There was a high threshold to intervene in an employer's investigation of workplace issues or disciplinary process. Ms Moke argued money was no remedy for the potential loss of mana and reputation to her and her whanau. While Ms Moke bore responsibility herself for some of the delay, she had the stronger argument that the length of time taken for the investigation was unfair, to the complainants as well as her. The Board was open to addressing matters in a tikanga manner at the outset. The investigation proceeded under terms of reference that Ms Moke had the opportunity to comment on and had agreed to.

However, a further concern was that pausing an investigation or disciplinary process risked cutting across the employer's obligations to other employees and dealing with their concerns. The Authority found that the overall justice did not favour making the interim order Ms Moke sought. It denied Ms Moke's application for interim orders. The parties would proceed to a case management conference for Ms Moke's case. Costs were reserved until the case's outcome.

Moke v Raukura Hauroa O Tainui Trust [[2023] NZERA 603; 16/10/23; R Arthur]

Part-time employee compensated for minimum entitlements and $30,000 for harm

Castlewood Home (Castlewood) was a rest home facility owned and operated by Mr Diehl. Mrs Wright worked in Castlewood as a home assistant carer from 5 February 2020 until she resigned on 15 October 2021. She raised personal grievances for unjustified dismissal and unjustified disadvantage and sought compensation, wage arrears and interest.

On 19 July 2021, Mrs Wright raised a complaint about the kitchen manager to the facility manager, Mr Cooney. She alleged that the kitchen manager used a large kitchen knife in a threatening manner and keyed her car. Mr Cooney interviewed Mrs Wright, the kitchen manager and a witness who heard the interaction from the next room. He did not disclose the accounts from the witness and kitchen manager to Mrs Wright.

Mr Cooney preliminarily decided Mrs Wright was dishonest about what happened. He claimed she hoped that the kitchen manager would be dismissed and tried to damage Castlewood's reputation. He alleged this amounted to serious misconduct, being grounds for instant dismissal. Mrs Wright denied the accusation. It was the first time Castlewood informed her there was potential for dismissal.

The Employment Relations Authority (the Authority) said that a fair and reasonable employer would not have concluded that Mrs Wright initiated the incident and then complained about it in the expectation that Mr Diehl, as her employer, would dismiss the kitchen manager with no supporting evidence. Mrs Wright co-operated with team members and met all other obligations. Mr Diehl did not disclose the other employees' accounts to Mrs Wright. He predetermined the outcome and did not consider the available information. He did not advise Mrs Wright that he was considering an allegation of serious misconduct against her. Accordingly, Mr Diehl unjustly disadvantaged Mrs Wright.

The Authority found that Mrs Wright was constructively dismissed. Many factors made it foreseeable that she would resign. Mr Diehl was unaware of his remuneration obligations under the Support Workers (Pay Equity) Settlements Act 2017 (the Support Workers Act) and so underpaid her. Both parties agreed on her lower remuneration, but this agreement could not displace the law. The Support Workers Act also provided for back payment, which Mr Diehl was also not aware of.

Mr Diehl also treated alternative holidays as interchangeable with annual holidays at his election, when Ms Wright never requested them paid out. The payments were not consistent with the employment agreement and breached the Holidays Act 2003. When Mrs Wright raised the issue, Mr Diehl failed to resolve it. He reinstated some alternative holiday entitlements but deducted equivalent entitlement from her annual holiday balance.

Mrs Wright was accused of serious misconduct without proper grounds. She was criticised for swapping out a shift Castlewood rostered her onto during her approved annual leave, being told she "*unilaterally altered rosters*", acted "*in breach of [her] employment agreement*" and "[*chose] to ignore the procedures to advantage yourself*". Castlewood did not have such a policy prohibiting staff from agreeing to swap shifts.

The last matter was Mrs Wright's request for unpaid leave "*to enrol in a course of study related to aged care*", from 15 October 2021 to 12 December 2021. Her employment agreement stipulated that "*applications for unpaid leave will be given reasonable consideration by the employer*". Mr Diehl said Castlewood's staffing requirements did not allow for that amount of leave and that if she decided to do this course, she needed to resign. Mrs Wright resigned the next day. Mr Diehl did not give "reasonable consideration" to Mrs Wright's application and breached the employment agreement.

The Authority said the substantial risk of Mrs Wright's resignation was reasonably foreseeable. Each breach on its own was quite serious. Taken together, it was foreseeable an employee would not be prepared to continue working in those circumstances. Mr Diehl was personally liable as Mrs Wright's employer. He was the named party and signatory to the agreement. Conversely, the company's name was incorrectly stated in the agreement.

For the successful personal grievances, the Authority ordered $3,905 and $100 in arrears for underpayment of wages. When Mrs Wright's employment ended, she retained an entitlement to 15 alternative holidays, which were not paid in her final pay. For this the Authority ordered arrears of $3,240. Mr Diehl also did not pay her final holiday pay to a total of $3,446.92. Mr Diehl caused significant harm from both grievances, so the Authority ordered compensation of $30,000. It also ordered Mr Diehl to pay costs of $71.56.

Wright v Diehl [[2023] NZERA 613; 19/10/23; P Cheyne]

Unjustified dismissal during company liquidation

Mr Reynolds worked as a long-haul truck driver for Willow Transport Limited (Willow). Willow had been facing serious financial difficulties and was put into liquidation. He claimed Willow unilaterally varied his employment agreement by reducing his wages. He further claimed he had been unjustifiably dismissed when Willow ended his employment.

The morning of 31 December 2022, Mr Reynolds found a relative of Willow's director waiting for him at work. He told Mr Reynolds the truck he drove had been repossessed by another company. The person paid him $1,500 to *"tide him over"* and offered him work, which he accepted. He would drive trucks for that person for a week before taking leave to have hand surgery. Mr Reynolds applied to the Employment Relations Authority (the Authority) claiming his annual holidays were not paid out with his final pay.

Under the Employment Relations Act (the Act), an employer's decision to dismiss must be justified. The question is whether that decision was what a fair and reasonable employer could have done in all the circumstances, at the time the dismissal occurred. The Authority found Mr Reynolds turned up for work one day and suddenly found himself unemployed. Mr Reynolds had little understanding of what liquidation involved and the effects it would have on his employment. He described himself as a "trusting person" and took the offer of work at its word. He knew Willow had been facing serious financial issues as there had been ongoing issues with his pay over the preceding few months. Willow could not show that it had undertaken a restructuring process of any kind. The Authority decided he had been unjustifiably dismissed.

Mr Reynolds also claimed Willow had reduced his wages without his agreement. The claim was complicated by the fact that Willow had not kept his wage and time records, meaning he could not show exactly how much he was out of pocket. Willow also did not hold a written copy of his employment agreement. Mr Reynolds said he was meant to be paid at least $1,600 per week. However, the Authority found Mr Reynolds had in fact agreed to a pay reduction to $1,500 per week. Even though some weeks he was paid a lesser amount, the difference was usually made up in later payments. The Authority decided not to make any findings on the matter. Mr Reynolds also did not provide sufficient evidence to show that he was entitled to lost earnings.

Mr Reynolds initially claimed Willow owed him $6,912 in annual holidays of approximately one year and four weeks. The Authority recalculated based on his entitlement to annual holidays for working one year, and accrual on his remaining employment. This added up to $9,267 instead. The Authority made Willow pay interest on that amount. Willow breached its obligations under the Holidays Act to pay annual holiday pay in Mr Reynolds' dismissal, but the Authority found it was not appropriate to order a penalty in the circumstances of this case.

Mr Reynolds claimed compensation for humiliation, loss of dignity and injury to feelings. He described "feeling stink" about the whole situation. His sudden and unexpected dismissal meant he had to consider cancelling his hand surgery. His wife described an adverse change in his behaviour, sleepless nights and a low mood. The Authority decided to award $10,000.

Mr Reynolds also sought to have Willow's director, Ms Duff, made personally liable for breaches of employment standards. The Authority allowed Mr Reynolds to return to it later to address this issue.

Reynolds v Willow Transport Limited (In Liquidation) [[2023] NZERA 644; 01/11/23; Baker A]

Availability provision is found to be illegal

Messrs Williams, Shearer and Finn (the Employees) worked in the New Zealand Defence Force (NZDF) as regional technical managers (RTMs) within its Communications Information Services (CIS) branch. On 31 December 2020, NZDF disestablished their roles. They claimed that RTMs were required to be available outside standard business hours to support NZDF's information communications technology (ICT) without compensation. They believed their employment agreements were not compliant with the Employment Relations Act 2000 (the Act).

NZDF denied that the '*hours of work'* clause was an availability provision. It said employees could decline to perform work outside standard business hours since their employment agreements did not provide for reasonable compensation. It accepted the clause was not compliant with the Act but said the employees were not required to be available.

The agreements set out that RTMs were required to work 40 hours a week, Monday to Friday, between 7am to 7pm. It further set out that RTMs were part of the escalation process for IT faults and could require this after standard business hours. A rotational duty roster listed the names of on-call personnel who reported to the RTMs, and at its bottom, named the Employees as escalation points for their respective regions. RTMs were the first escalation point for all urgent faults.

The Employment Relations Authority (the Authority) considered the background of the RTM role and noted an internal letter of 26 September 2015. This set out that the Employees were permitted to take work vehicles back home, under the expectation they would be available 24/7, and that this had been custom and practice for some time.

In April 2017, section 67D of the Act came into effect, providing for employees to be compensated when making themselves available for work outside their usual hours. While NZDF made an allowance of $50 per day for affected staff, it excluded the RTM roles from its consideration and assessment of personnel entitled to reasonable compensation at that time. Mr Finn challenged this decision in that RTMs had to make themselves available for work outside their usual hours. NZDF never responded to this, but management still expected that the RTMs would continue to work whenever required. The issue continued behind the scenes until NZDF held a meeting with the RTMs in May 2019 and instructed them to cease all on-call support. It did not give rationale for this or put the instruction in writing. Nothing actually changed operationally for the RTMs; they still received calls on an on-call basis and NZDF still expected them to respond.

On 21 November 2019, NZDF offered a 5 per cent variation to the Employees, applying from 1 April 2017 to 31 May 2019. The payment addressed that the RTMs were providing non-rostered on-call coverage to their respective geographical areas. The employees did not consider this to be '*reasonable compensation'* and that the $50 per day allowance would be a more appropriate outcome. They rejected the offer.

The Authority accepted the Employees' argument. While NZDF claimed the Employees could refuse to answer off-hour calls that had no reasonable compensation, in reality NZDF's operational requirements prevented them from refusing. Both NZDF and the Employees said that any refusal to take those calls would be adversely viewed and likely become a performance issue, both for the Employees as individuals and NZDF's operations. Accordingly, the Authority found that NZDF required the Employees to be available to perform work outside standard business hours, in addition to their guaranteed hours.

The Authority then considered whether the agreements included an availability provision. The Employees argued that the use of the word "*required*" meant they had to be available when called upon. NZDF contended the term enabled greater flexibility for both parties. NZDF's own Human Resources department knew about the on-call nature of the RTM role and had some health and safety concerns, but could not put in place an availability payment without sign-off from senior management.

The Authority found that the hours of work clause was not compliant with the Act. It required the employees to be available to perform work in addition to their minimum guaranteed 40 hours, but did not provide for reasonable compensation, and had no genuine entitlement to refuse to perform work that was in addition to guaranteed hours. Costs were reserved.

Williams v Chief of Defence Force [[2023] NZERA 631; 25/10/23; D Tan]

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: Nine Bills

There are currently nine bills open for public submissions to select committee:

Fast-Track Approvals Bill (19 April 2024)

Budget Policy Statement 2024 (24 April 2024)

Companies (Address Information) Amendment Bill (2 May 2024)

Corrections (Victim Protection) Amendment Bill (6 May 2024)

Report of the Controller and Auditor-General, Making infrastructure investment decisions quickly (8 May 2024)

Regulatory Systems (Primary Industries) Amendment Bill (9 May 2024)

Fisheries (International Fishing and Other Matters) Amendment Bill (15 May 2024)

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)

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