Our Weekly News Digest for Employers
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In this Issue:

CASE LAW 1

Employment Court:

Court found actual loss of wages to be 6 months' worth 1

Employment Court affirms unjustifiable dismissal for no consultation during restructure 2

Employment Court upholds decision of the Employment Relations Authority 3

Employment Relations Authority:

Parent company found not to be a controlling third party 4

Unsuccessful claim by employee claiming constructive dismissal 5

Employee did not have a reasonable opportunity to respond 6

LEGISLATION 8

Bills open for Submissions: No current bills 8

Case Law

Employment Court: Three Cases

Court found actual loss of wages to be 6 months' worth

Mr Pyne was employed by Invacare New Zealand Limited (Invacare) before his position was made redundant. He applied to the Employment Relations Authority (the Authority) and claimed he had been both unjustifiably dismissed and disadvantaged. He successfully proved his redundancy was not based on genuine business reasons, rather his role had been disestablished due to performance issues. The Authority awarded him $27,500 compensation for lost wages, and $10,000 compensation for humiliation, loss of dignity and injury to feelings. The $10,000 award was reduced by 15 per cent because the Authority found Mr Pyne had made inappropriate comments in response to an employee he had been managing. That incident was considered a contribution to the situation that gave rise to the personal grievance. Even though Mr Pyne's claims were successful, he challenged the Authority's determinations regarding compensation by appealing to the Employment Court (the Court).

The Employment Relations Act 2000 (the Act) provides that if a personal grievance claim is made out and therefore results in lost wages for the employee following their dismissal, the Authority must order the employer to pay the amount owed, or up to three months' lost wages, whichever sum is lesser. The Authority has discretion to award an amount greater than three months if the circumstances justify it.

After Mr Pyne was dismissed, it took him nearly 20 months to find another job. However, the Authority restricted the award to three months' lost wages, finding Mr Pyne had failed to establish that a greater sum ought to be paid. The Court reconsidered the Authority's decision. It looked at Mr Pyne's efforts in finding a new job immediately after his dismissal. He had applied for many vacancies and attended around 70 interviews. Believing he had no other choice, he moved to Australia for better job prospects. It could not be shown that Mr Pyne's failure to find employment was due to a lack of genuine effort on his part. Therefore, it decided Mr Pyne was entitled to six months' lost wages, which was a fairer reflection of the loss he actually

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incurred. It noted that compensation for lost wages could not be more than what was actually lost by the employee following their dismissal.

The Court went on to assess the Authority's decision relating to compensation for hurt and humiliation. The Court disagreed with how the Authority had arrived at the $10,000 figure. The Court noted that the usual method for determining the correct remedy was the "*banding approach*", which was well established in case law. Following *GF v Comptroller of the New Zealand Customs Service*, depending on the seriousness of an applicant's suffering, the relevant authority may determine the amount to be compensated to fall within one of three categories (band 1: $0-$12,000; band 2: $12,000-$50,000; band 3: over $50,000).

The Court referred to a case similar to Mr Pyne's as the basis for deciding it fell within the lower portion of band 2. It set aside the Authority's decision and found Mr Pyne was instead entitled to $18,000. The Court also decided to do away with the 15 per cent reduction by finding Mr Pyne had in fact apologised to the employee and so settled the matter, a fact that was not brought to the Authority's attention at the time.

Under the Act, a person may apply to penalise another party for breaching its obligation of good faith. The Court noted that a penalty was intended to punish poor behaviour, whereas compensation was intended to remedy the loss suffered by one party due to the conduct of another. This distinction meant there was a much higher threshold for an applicant to satisfy. For a breach of good faith to warrant a penalty, the Act required the breach to be "*deliberate, serious and sustained*", or "*intended to undermine an employment relationship*". The Court found it had broad discretion to determine whether that occurred by assessing the circumstances of every case. The Court decided to impose a penalty of $6,000 for Invacare breaching its obligation of good faith to Mr Pyne.

Finally, the Court noted that if compensation was awarded following a successful personal grievance claim for breach of an employment agreement, there could be a "s*pecial facet of the breach that calls for punishment*" to justify imposing an additional penalty. No such special facet of the breach was established in this case.

Pyne v Invacare New Zealand Limited [[2023] NZEmpC 179; 25/10/23; Inglis CJ]

Employment Court affirms unjustifiable dismissal for no consultation during restructure

BCL raised a non-de novo challenge at the Employment Court (the Court) for the Employment Relations Authority's (the Authority) decision that BCL wrongfully dismissed its employees, Ms Matsas, Ms Duin, Ms Hansen, Ms Robben and Ms Babb (the Midwives). The Midwives worked for BCL, a primary birthing services provider with locations around New Zealand, one of which was Te Papaioea (the Centre) where the Midwives worked.

In April 2019, the Centre discovered it was operating at a loss and approached its funder, MidCentral District Health Board (MDHB), for an increase in funding. They agreed that MDHB would grant a lease of its facility to BCL. This meant that the Centre's employees would be made redundant as the Centre would cease to exist and if interested, they could apply to work for MDHB but MDHB would pick and choose which employees they took on.

BCL did not inform any of the employees, including the Midwives, of the restructure or communicate with the Midwifery Employee Representation and Advisory Service (the Union), the union of which they were members. The Midwives discovered it through the media on around 9 March 2020. The majority of BCL's employees at the Centre then received a pack from MDHB containing "*an offer of employment*" with a termination letter either because staff had accepted employment with MDHB or, if they did not do so, their employment was terminated as the Centre would no longer be in operation. The Authority noted that the lack of consultation of the restructure led to the Midwives being unjustifiably dismissed.

The Court reaffirmed the duty of good faith under the Employment Relations Act 2000 (the Act) "*requires an employer who is proposing to make a decision that will or is likely to have an adverse effect on the continuation of employment of one or more of their employees*" to have access to the proposal and have an opportunity to comment. BCL submitted that the transfer was not a "*proposal*" as "*either before the split second it said it would transfer the Centre, or before the memorandum of understanding was agreed*" therefore it did not need to consult. The Court and Authority agreed

that the whole point of consultation was to hear what the affected employees wished to say before a conclusion was reached.

An exemption to the duty to propose the restructure to the relevant employees under the Act was if there was "*good reason"* to maintain confidentiality of commercial information. BCL claimed that it did not need to propose the transfer to the Midwives as it was a commercial transaction and needed to be confidential until finalised as it could prejudice its commercial position. The Court agreed with the Authority in that it was not a "*good reason*" as the proposal would only prejudice the position of MDHB, who was not the employer here. A fair and reasonable employer could have dealt with the situation in other ways such as involving the Union on an embargoed basis or negotiating with MDHB that they will go ahead with the transfer on the basis that their staff be consulted on a confidential basis and their views considered before the contract could become unconditional. On that basis, the Authority did not err in its decision in finding that the Midwives were unjustifiably dismissed.

BCL raised that there was a waiver to providing notice when terminating the Midwives' employment as they did not work out a notice period. The Court noted that they were not required to work out a notice period as they did not resign, their employment was terminated, and no work was available with BCL.

BCL also raised mutual termination claiming that the Midwives and BCL both agreed when they would transfer to MDHB. The Court declined this assertion as while the Midwives could apply to work for the MDHB, it was not guaranteed. They were presented with a decision that had already been made, being that their employment with BCL would end, which were not the circumstances of a mutual termination.

In the event of a redundancy, the Midwives had to be given four weeks' notice or pay in lieu of notice. No notice was given so the Authority ordered a sum of four weeks' wages being the unpaid notice period. BCL claimed that since the Midwives were terminated but then began employment immediately with MDHB, they mitigated their losses and should not be compensated an award as they suffered no damage. The Court concluded that there was no issue of mitigation in light of a contractual entitlement, so BCL was ordered to pay four weeks' notice for all the Midwives.

The challenged was dismissed.

Birthing Centre Limited v Matsas, Duin, Hansen, Robben & Babb [[2023] NZEmpC 162; 27/09/23; Corkill J]

Employment Court upholds decision of the Employment Relations Authority

Ms Unsworth and Ms Towers lodged personal grievances against their employer Helloworld Travel Services (NZ) Limited (Helloworld). The Employment Relations Authority (the Authority) considered whether Helloworld caused them unjustifiable disadvantage, by imposing a closedown that reduced their pay from 27 March 2020 until their employment ended. They sought arrears of wages and compensatory damages. They further claimed their dismissals for redundancy were unjustified both procedurally and substantively for which they sought remedies of lost earnings, compensation and a penalty for breach of good faith. The Authority, in its finding, upheld all the claims with the exception of the breach of good faith claim.

Helloworld sought a ruling from the Employment Court (the Court) challenging only some aspects of that determination. It claimed the Authority was wrong in fact and law in finding that the dismissals of the Employees were unjustified and also, even if they were justified, in finding that Ms Unsworth was entitled to three months' lost earnings. If the challenge was successful, it asked that the Court order that the amounts that had been overpaid to Ms Unsworth and Ms Towers be repaid.

Helloworld's objections to the finding of the Authority largely centred on the Authority's views that the procedure for the redundancy was rushed and contained elements of predetermination. There was also objection raised about the Authority's view that the information provided to Ms Unsworth and Ms Towers at the restructure proposal meeting on 6 July 2020 was insufficient. Helloworld also criticised Ms Unsworth and Ms Towers for not fully engaging with the redundancy process.

In addressing the matter of the information provided at the meeting on 6 July 2020, the Court found that information was lacking, specifically the rationale behind selection of the particular roles chosen for disestablishment. There was no information provided about why both roles were to be disestablished nor was any information provided about which of the remaining contestable positions would take on the duties or responsibilities of these roles. This meant that the information was insufficient to enable Ms Unsworth and Ms Towers to enter into any meaningful consultation. The Authority's conclusion in that regard was not an error of fact or law.

With regard to whether the restructure outcome was predetermined, the Court considered the evidence of Ms Unsworth and Ms Towers that they were told during the 6 July 2020 meeting that their positions were being disestablished. The Court also reviewed the evidence of Helloworld that the meeting was only a proposal. The Court found that both Ms Unsworth and Ms Towers were told on 6 July 2020 that their positions were to be disestablished. Accordingly, the matter was predetermined. The Court found no error in fact or law.

The Court found the timeline for the restructure to be reasonable. It felt the Authority erred in this point. The issue was not so much the timing of the process but rather the nature of the consultation.

The Court found that Helloworld was not open-minded. It had already determined that Ms Unsworth and Ms Towers' positions were to be disestablished. Accordingly, they did not have a reasonable opportunity to meaningfully engage and provide feedback. They regarded the invitation to do so as not being genuine. They cannot be criticised for that view. Nor, as suggested by Helloworld, can they be criticised for failing, in an excess of caution, to ask questions and provide feedback in any event. That course of action had not been at all effective in the previous few months. They were presented with a fait accompli. The fact that they did not challenge it at the time is not a criticism that can be sheeted home to them.

The Court observed that the issue of predetermination went to the genuineness of the consultation process and the question, which was at the heart of the matter, as to whether Ms Unsworth and Ms Towers were in a position to meaningfully engage in the restructure process. Having determined (arguably for good business reasons) that their positions were to be disestablished, they were deprived of the opportunity to present alternatives or attempt to change Helloworld's mind. This was despite the restructure document disingenuously advising them that they had the opportunity to do so.

The Court concluded that the Authority did not make an error of fact and law in declaring that Helloworld's decision to make Ms Unsworth and Ms Towers redundant was not one that a fair and reasonable employer could have made in all the circumstances. The Authority's determination was upheld in full.

Helloworld Travel Services (NZ) Limited v Unsworth & Towers [[2023] NZEMPC 180; 25/10/23; Beck J]

Employment Relations Authority: Three Cases

Parent company found not to be a controlling third party

A group of nine employees (the Applicants) worked for PlaceMakers, trading as Fletcher Distribution Limited (Fletcher Distribution). In late 2021, FDL implemented its New Zealand COVID-19 Procedure (the Policy) which required all employees to be fully vaccinated against the COVID-19 virus by early 2022. In this case, the Applicants were terminated because they failed to be vaccinated by the 2022 deadline. The Applicants went on to claim that their dismissals were unjustified. Complicating the issue was that the policy Fletcher Distribution relied on to terminate the Applicants was not its decision, as it was just a subsidiary of its parent company, Fletcher Building Limited (Fletcher Building). As part of their claim, the Applicants sought to have Fletcher Building join the proceedings as a controlling third party. Fletcher Building challenged their claim by arguing that it did not fall within the definition of a controlling third party under the Employment Relations (Triangular Employment) Amendment Act (the Act).

Under the Act, employees who work for a controlling third party may raise personal grievance claims against that third party directly as opposed to their employer. The purpose of the amendment was to ensure that those who work under a "*labour-hire*" or "*recruitment agency*" arrangement were empowered to pursue claims against the party that treated them unfairly, as opposed to their employer which merely organised the arrangement. Under the Act, a controlling third party was a person who had a contract or other arrangement with an employer under which an employee of the

employer performed work for the benefit of the person, and who exercised, or was entitled to exercise, control or direction over the employee that was similar or substantially similar to the control or direction that an employer exercised, or is entitled to exercise, in relation to the employee.

The Employment Relations Authority (the Authority) found that Fletcher Distribution was a different legal entity to Fletcher Building, which operated its own separate business. Fletcher Distribution and Fletcher Building had separate senior management teams, different performance and financial objectives and operated in different areas of business. Fletcher Distribution was considered a subsidiary of Fletcher Building, broadly speaking, a retail and distribution arm of Fletcher Distribution's "*Distribution Division*". The Distribution Division had ten senior executives. Although the senior executives were responsible for overseeing the strategic direction of all the businesses that were a part of the Distribution Division, they had limited involvement in Fletcher Distribution's day-to-day operations. Fletcher Building had a much broader focus encapsulating the entire building and construction supply chain, whereas Fletcher Distribution focused on the supply of building materials and hardware at a retail level to both trading entities and the public. Fletcher Distribution took sole responsibility for the decision to terminate the Applicants.

The Authority went on to assess whether Fletcher Building fell within the definition of a controlling third party under the Act. It found there was no contract or other arrangement which provided that the Applicants performed work for the benefit of Fletcher Building. Such an arrangement could not be implied based merely on the fact that Fletcher Distribution was a subsidiary of Fletcher Building. The Applicants were employed by Fletcher Distribution under an individual employment agreement and their work was for the company's sole benefit. Further, there was no evidence that Fletcher Building exercised control, or were entitled to exercise control, over any of the Applicants in a manner similar to the way Fletcher Distribution were entitled to exercise control as an employer. Even though it was Fletcher Building which created and implemented the policy, there was no evidence that it was then legally entitled to exercise control over Fletcher Distribution's employees. The Authority concluded that Fletcher Building did not fall within the definition of a controlling third party for the purposes of the Act. It ultimately decided that the Applicants had failed to show they had an arguable case. As the successful party, Fletcher Distribution was entitled to a contribution towards its legal costs.

Jackson and Ors v Fletcher Distribution Ltd [[2023] NZERA 507; 07/09/23; R Larmer]

Unsuccessful claim by employee claiming constructive dismissal

Mr Hanekom was employed by HCL (New Zealand) Limited (HCL) from 20 July 2020 to 20 August 2021 in the IT security team. On 30 June 2021, Mr Hanekom gave HCL notice of his resignation due to receiving a low performance bonus and experiencing delays with being reimbursed for his expenses claims. He raised claims for unjustified dismissal, unjustified disadvantage, breach of good faith by HCL and estoppel at the Employment Relations Authority (the Authority).

For a successful constructive dismissal claim, there needed to be a breach of duty on the part of the employer which caused the resignation, and if there was such a breach, it needed to be sufficiently serious to make it reasonably foreseeable by the employer that the employee would resign.

HCL's Global Bonus Policy (the Policy) stated that a performance bonus could be expected to be paid after an employee had completed 12 months' employment. This meant that Mr Hanekom could reasonably expect one after July 2021. However, he was communicating with HCL from April 2021 pushing to get his performance bonus and at this point, he had been working less than 12 months.

His expectation of a performance bonus lacked reasonableness and showed that he ignored the wording of his offer letter, employment agreement and the Policy. His expectation of a bonus was not raised at the job interview or after he secured the role.

However, despite this, Mr Suman, a senior HR representative in HCL, made the mistake of assuming that Mr Hanekom's letter of offer or employment agreement did entitle him to a performance-related bonus. By doing so, he was processed a payment of $4,667 described as a "*project allowance*" in August 2021. Mr Hanekom complained it was paid late and far too low.

Mr Hanekom's expectation of a performance bonus was based on nothing more than him being hopeful of getting one. Despite the errors made by HCL's HR staff, an exception was made in Mr Hanekom's case. Although Mr Hanekom made an issue of the timing of his performance bonus payment, the Authority found that HCL had sped up the process for him as a fair and reasonable employer could have done in the circumstances so that claim failed.

The project allowance represented 4.2 per cent of Mr Hanekom's base salary which he claimed was the lowest annual bonus he had ever seen. Mr Ramaguru, the deputy general manager of HR, calculated Mr Hanekom's bonus by adopting a starting point of $10,000 then paid 70 per cent of the starting point because of Mr Hanekom's performance rating which was four out of five. The figure of 70 per cent was the same used in respect of other employees who received the same performance rating. The figure was then adjusted on a pro-rata basis. The Authority noted that Mr Ramaguru's methodology was sound and fair and demonstrated that he had treated Mr Hanekom consistently with other employees with the same performance rating so that claim failed as well.

It was submitted that HCL's failure to pay Mr Hanekom's work-related expenses was the final straw for him which contributed to his constructive dismissal. He had three reimbursement claims totalling $1,307.61 which were delayed by 257, 138 and 99 days. HCL's global claims team had 40 people who were responsible for clarifying and paying expense claims of 220,000 HCL employees. It was reasonable that they took time to verify claims rather than accept it at face value. Mr Hanekom used the wrong category to lodge his claim, did not provide sufficient information and then failed to respond to follow-up queries from a member of the global claims team who was trying to help. In the past there were 14 other expense claims which were fairly and reasonably processed and reimbursed by the company.

The first Mr Phillips, his manager, heard of Mr Hanekom's outstanding expense claims was when he received his letter of resignation. The combined value of the expense claims in question was insignificant so it was an insufficient reason for Mr Hanekom to feel that he had no option but to resign. He did not establish that HCL breached its duty to him so it could not be said that his resignation was reasonably foreseeable. Accordingly, the claims were dismissed.

Mr Hanekom claimed that HCL should be estopped from departing from representations made to him that it would pay a performance bonus. The Authority found that Mr Hanekom was not entitled to one yet due to HCL he received an ex-gratia payment under a "*project allowance*" of $4,667 and his claimed expenses. He received his bonus albeit not the quantum he expected. Even so, no inequitable action had occurred to necessitate the equitable relief sought.

A penalty for breach of good faith was sought but Mr Hanekom did not satisfy the high threshold and so no penalty was warranted. Costs were reserved.

Hanekom v HCL (New Zealand) Limited [[2023] NZERA 472; 23/08/23; P Fuiava]

Employee did not have a reasonable opportunity to respond

Mr Pawar was dismissed from his role as a lifeboat service technician at Den Ray Marine Services Limited (Den Ray) following an investigation into allegations of aggressive behaviour and of a lack of care in the servicing a set of life jackets. Mr Pawar said that his dismissal was both procedurally and substantively unfair and was therefore unjustified. Den Ray denied Mr Pawar was unjustifiably dismissed. It said the decision was taken on the grounds of a broken employment relationship and was not taken lightly.

On 19 October 2021, Mr Pawar was at the Den Ray Service Station working on servicing a set of life jackets. Mr O'Dea, who had allocated the task, observed Mr Pawar starting to disassemble the jackets and inflate them for a one-hour pressure holding test. Once the jackets were inflated, Mr Pawar left the workshop and after he had left, Mr O'Dea noticed that two of the jackets had lost significant pressure. He discussed the matter with Mr Peake, one of the

witnesses, and in Mr Pawar's absence, both agreed that the jackets needed further attention and could need to be condemned and replaced. The men agreed to allow Mr Pawar to finish his servicing of the jackets and that they would keep an eye on the two that had failed. They did not pass the information on to Mr Pawar.

Mr Pawar returned to the task a few days later and re-assembled the jackets, folding them to be sent back to the customer. He also issued a certificate for the jackets. Mr O'Dea asked Mr Pawar whether it would be okay to retest the two jackets in question. They were then inflated, and it became obvious that neither was going to hold air. Mr O'Dea did not tell Mr Pawar that he already knew the jackets would fail the test. Mr O'Dea then advised Mr Crooks, the general manager, what had happened.

Mr Crooks also received a complaint in writing from another employee, Mr Dsouza, alleging Mr Pawar was verbally aggressive towards him. He investigated the issues raised and concluded in respect of the life jacket servicing, Mr Pawar's testing was not up to standard and without intervention, defective jackets would have been sent to the customer. In respect of the altercation with Mr Dsouza, he found there was a level of aggression which was unacceptable. Mr Crooks then decided that the issue in respect of the life jackets was serious misconduct and put aside Mr Dsouza's complaint in respect of the altercation as being less material. Mr Crooks found that he could no longer trust Mr Pawar or his work. He found that the damage to the employment relationship was irreparable and dismissed Mr Pawar on four weeks' notice. Mr Pawar was not permitted to attend work during the notice period.

The Employment Relations Authority (the Authority) said it was evident there were some flaws in Den Ray's process. In looking at substantive justification in respect of any findings regarding the life jackets, the Authority said it needed to be noted that Den Ray re-checked the life jackets after Mr Pawar had left the building. At that point they knew the life jackets had failed the test. Rather than questioning Mr Pawar as to why he had passed them, Den Ray said nothing but waited for Mr Pawar to return to see what he did with them. There was a certain level of entrapment in respect of that process. That was especially so when Den Ray relied on the threat to its reputation and indeed the danger potentially caused to a customer who had a defective life jacket. In reality, that was not going to occur as Den Ray already knew of the problems with the life jackets and should have been more open and transparent in its discussion with Mr Pawar. It should not have waited to see how Mr Pawar dealt with the life jackets on his return, it should have immediately raised the issue with him and sought an explanation at that time. Waiting as they did, for Mr Pawar to eventually start packing the defective life jackets for delivery, was unfair.

Den Ray's evidence and the details in the dismissal letter relied on grounds not properly put to Mr Pawar, namely its findings that Mr Pawar misrepresented comments of a co-worker, that there had been a theme of dishonesty and lack of accountability, and that there had been an increasing disengagement by Mr Pawar which led to a lack of care about his workmanship. Mr Pawar did not have a reasonable opportunity to respond to the concerns before he was dismissed. Mr Pawar's dismissal was unjustified.

Den Ray was ordered to pay Mr Pawar $9,000, less PAYE for lost wages and $15,000 as compensation for the humiliation, injury to feelings and loss of dignity. Costs were reserved.

Pawar v Den Ray Marine Services Limited [[2023] NZERA 479; 25/08/23; G O'Sullivan]

Legislation

Note: Bills go through several stages before becoming an Act of Parliament: Introduction; First Reading; Referral to Select Committee; Select Committee Report; Consideration of Report; Committee Stage; Second Reading; Third Reading; and Royal Assent.

Bills open for submissions: Zero Bills

There are currently no Bills open for public submissions to select committee:

Overviews of bills and advice on how to make a select committee submission are available at:
https://www.parliament.nz/en/pb/sc/make-a-submission/

The Employer Bulletin is a weekly update on employment relations news and recently published legal decisions. It is EMA's policy to summarise cases that contain legal issues relevant to employers. The purpose of the Employer Bulletin is to provide and to promote best practice in employment relations. If you would like to provide feedback about the Employer Bulletin, contact advice@ema.co.nz