Employer Bulletin

Our Weekly News Digest for Employers

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Case Law

Employment Relations Authority: Five Cases

Record of Settlement held to be binding despite party's refusal to sign

As an employee of Ziwi Limited (Ziwi), Mr Harding received share options in Amazonia Midco 1 Holdings Limited (Amazonia) which owned 100% of Ziwi's shares. Mr Harding raised personal grievance claims with Ziwi, after Ziwi took steps that would impact Mr Harding's role. Mr Harding, through his counsel, entered into negotiations with Ziwi and Amazonia (both represented by the same counsel) which resulted in the latter two offering him a settlement agreement (the Agreement). He was invited to sign and return the Agreement if acceptable to him, in which case, it would then be signed by Ziwi and Amazonia, and then sent to Mediation Services for countersigning in accordance with the Employment Relations Act 2000 (the Act). Mr Harding signed and returned the Agreement. Ziwi signed the agreement also, however, Amazonia then refused to sign. Amazonia took the position that its unsigned offer to Mr Harding was merely an offer to treat that could be revoked, or alternatively, there was not a binding agreement for various reasons including a lack of certainty, lack of consideration, or conditions that were not fulfilled.

Mr Harding sought a declaration that the Agreement was binding on Amazonia, and orders that Amazonia perform the agreed terms from the Employment Relations Authority (the Authority). Ziwi reached an agreement with Mr Harding hence there was no dispute to be determined as between Mr Harding and Ziwi by the Authority.

The Authority first considered whether there was a binding and enforceable contract between Mr Harding and Amazonia. The formation of a contract requires an offer; acceptance of that offer; communication of acceptance; sufficiently certain terms; consideration; whether there are any conditions that must be met; lack of accord and satisfaction and need for variation to be in writing.

Mr Harding claimed that Amazonia had made an offer by sending a draft settlement agreement on 17 May 2023 and inviting him to sign if he "*approved*" of the terms. Amazonia claimed this was only an invitation to treat and this was indicated by them stating in the covering email that once Mr Harding's signature had been obtained, "*we will get it signed and executed*". An offer (as opposed to an invitation to treat) must consist of a definite promise to be bound by certain terms.

Amazonia put a completed contract (save for signing and dates) before Mr Harding, and this action coupled with stating Mr Harding should sign the Agreement "*if acceptable to him*", indicated that these terms were already acceptable to them. The Agreement was also in a recognisable form of a record of settlement capable of being signed by a mediator in accordance with the Act and did not require further drafting to be put into action. Hence, the Authority found this was an offer, not just an invitation to treat. Mr Harding accepted this offer by accepting the "*marked up*" tracked changes sent to him in full and without alteration and confirmed this by signing the Agreement and sending it to Ziwi and Amazonia before the end of the working day on 17 May.

Amazonia then argued that even if there was offer and acceptance, the Agreement wasn't binding because it lacked certainty of two terms. Amazonia stated it had two classes of shares on issue, and the Agreement did not specify which shares were to become the property of Mr Harding nor did the Agreement deal with the cancellation of Mr Harding's share options. The agreement specifically referenced the Share Option Agreement between Mr Harding and Amazonia which was described as being "*a direct result of his employment with Ziwi*" and stated it was a "*full and final settlement of all claims, grievances, and disputes between them arising from and/or relating to their employment relationship*". Therefore, the Authority concluded that the agreement effectively ended all claims between Mr Harding, Ziwi, and Amazonia, and this included the share options Amazonia referred to.

Amazonia claimed the agreement was not binding because it did not contain any consideration for it, only for Ziwi. The Authority found there was consideration for Amazonia as the Agreement provided for Mr Harding to return 400,000 shares held in his name to Amazonia, in exchange for 308,000 shares and for Mr Harding to waive additional rights he had to receive shares in Amazonia. These were benefits in favour of Amazonia not just Ziwi and hence amounted to consideration and thus the Agreement was not void for want of consideration.

Amazonia then claimed the Agreement was conditional on both parties signing the document and a mediator countersigning the document. Amazonia argued that the phrase "*we will get it signed and executed*" from the covering email meant that the Agreement was conditional on all parties signing the document. However, the Authority found that the plain words could not be interpreted to mean this, nor was there any mention of a condition. Additionally, the Agreement itself did not state it would only be binding once all three parties had signed therefore the Authority determined it would not be appropriate to infer a clause such as the one proposed by Amazonia into the Agreement.

The Authority explained the countersigning by a mediator is only needed if wanting to engage the statutory protections and obligations under section 149 of the Act, namely, to create a full and final settlement that is not able to be challenged. Without the Mediator's countersignature, agreement and a binding contract can and did still exist. The Authority found that the agreement was not conditional upon the signatures of all parties, nor was it conditional on the signatures of all parties and a Mediator. The Agreement signed by Mr Harding on 17 May 2023 was binding and enforceable on all parties and so should be performed in accordance with its terms. Costs were reserved.

Richard Harding v Ziwi Limited and Amazonia Midco 1 Holdings Limited [[2023] NZERA 409; 01/08/23; C English]

Care worker found to be employee

Mr Campion suffered from Parkinson's disease. From October 2019, Ms Sharp had boarded in his house, providing him personal care and household support services. His need for those services increased as the disease progressed. Their arrangements for providing the care and support, and payment to Ms Sharp for providing it, were initially made directly between Ms Sharp and Mr Campion. As Mr Campion's condition deteriorated, Ms Franklin, a long-term friend of Mr Campion, took over management of his finances with an enduring power of attorney.

On 26 January 2021, Mr Campion called a meeting at his home to discuss his ongoing care needs. While accounts differ of the meeting outcomes, Ms Sharp left the meeting with the impression she was to be an employee. Alternatively, Ms Franklin felt the matter was not settled. She had asked Mr Campion's accountant to prepare an employment agreement, however this was never sent to her. Mr Campion's accountant, and Ms Franklin, ultimately felt a contractor arrangement may be best. A contract agreement was sent to Ms Sharp however she did not sign it as she felt this was not what was agreed. Payments continued to Ms Sharp without any signed agreements in place.

In May 2022, Ms Sharp needed to take two weeks off work because the workload was affecting her health. When she was ready to return, she requested to have two days off per week so she could have proper breaks. Ms Franklin advised her, via text, that her services were no longer required, and she should vacate the premises. The reasons given include Ms Sharp's health and that Ms Franklin could not agree with the request for two days off per week. Ms Sharp sought a determination from the Employment Relations Authority (the Authority) as to the nature of her working relationship. The Authority set aside the issue of the fairness of how the working relationship ended. In recognition of Mr Campion's health, Ms Franklin was permitted to act as litigation guardian for Mr Campion.

The Authority observed that Ms Sharp was not in business on her own account in the period prior to 26 January 2021. She did not invoice for her services. and used Mr Campion's own house and resources to provide care to him. The expectations for her availability meant she could not grow any business of her own or increase her remuneration by working elsewhere. No change in the nature of the relationship was agreed. The character of those arrangements did not change as a result of the 26 January 2021 meeting. She continued to act on her own initiative in meeting Mr Campion's day-to-day needs, consistent with care work of that type. However, decisions about payments, leave and relief staffing were properly referred to Ms Franklin for decision in her capacity as attorney acting on Mr Campion's behalf in relation to all matters of his personal care, welfare, and property.

The Authority concluded that contrary to submissions made on Mr Campion's behalf, Ms Franklin had the necessary authority to enter and conduct contractual relations on his behalf. The enduring power of attorney did not prevent Ms Franklin from entering into an employment relationship or contractual arrangement on Mr Campion's behalf. The appointment of someone to support Mr Campion with his health needs was in scope for the enduring power of attorney and Ms Franklin was unambiguously acting as the agent of Mr Campion in the interactions she had with Ms Sharp. She clearly understood she had authority under her powers of attorney to do the best she could to make arrangements for his personal care and welfare, including using money from his bank accounts to make payments to Ms Sharp, agency staff and any other bills. The Authority found that, assessed in its full context and under the relevant criteria of section 6 of the Employment Relations Act 2000, the true nature of the relationship between Ms Sharp and Mr Campion, including through Ms Franklin as his representative, remained one of employment for the period 26 January 2021 to 16 May 2022. Costs were reserved.

Sharp v Campion [[2023] NZERA 413; 03/08/23; R Arthur]

Personal grievance raised out of 90-day time frame did not have exceptional circumstances

Mr Putaanga was employed by Move Freight Limited (Move Freight) as a Class 5 Driver until his employment was terminated on 12 May 2022. On 28 September 2019, Mr Putaanga suffered a workplace accident and was unable to work until February 2020. Mr Putaanga believed Move Freight had failed to protect him

adequately and was responsible for the accident and the injuries he suffered. Further, in connection with the termination of his employment, Mr Putaanga believed Move Freight had not properly allowed him to undertake the return-to-work programme. Mr Putaanga raised a personal grievance in the Employment Relations Authority (the Authority) for unjustified dismissal and unjustified disadvantage. The Employment Relations Act 2000 (the Act) sets out that any employee wishing to raise a personal grievance must do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

Move Freight argued that Mr Putaanga had not raised the necessary personal grievances within the required 90-day time frame and therefore the Authority did not have jurisdiction to investigate and determine Mr Putaanga's claims. In response, Mr Putaanga said that he did raise his personal grievances in time. Alternatively, if he did not, then the Authority should allow the grievances to be raised outside of the 90-day period because there were exceptional circumstances relating to the timing of him raising the grievances.

In February 2020, Mr Putaanga was cleared to recommence work on a restricted basis. In June 2020, Mr Putaanga was moved to a return-to-work plan which allowed him to drive on his own. What followed until March 2021 were various attempts by Mr Putaanga and Move Freight to have Mr Putaanga work in some way to fulfil the return-to-work plan. However, it was clear that Mr Putaanga was struggling to work consistently even at reduced hours. During this time Mr Putaanga did not raise any concerns or complaints about the workplace accident in a way that could be considered to have been raising a personal grievance.

In April 2021, Mr Putaanga began writing out his personal grievance. He said it took him about six weeks to complete as he found it difficult to concentrate. On 18 May 2021, Mr Putaanga sent a letter to Move Freight that set out various complaints he had about the workplace accident and Move Freight's handling of his return to work. The letter set out the complaints as various personal grievances based on unjustified action causing disadvantage to Mr Putaanga's employment.

On 29 May 2021, Move Freight responded to Mr Putaanga's letter advising him that he had not raised his personal grievance within the 90-day period, and it would not consent to him raising it out of that time.

In December 2021, Mr Putaanga went on annual leave. In February 2022, Move Freight extended Mr Putaanga's leave on the basis that he would engage with them over his capability to return to work. The process to ascertain Mr Putaanga's fitness for work culminated in a meeting on 12 May 2022. In this meeting, Move Freight confirmed to Mr Putaanga that it was terminating his employment effective immediately.

Mr Putaanga disputed the decision, stating that if Move Freight followed the return-to-work programme he would be able to work. He said quite clearly that he disagreed with the termination of his employment, and he wanted to attend mediation to discuss it. Move Freight responded saying it had followed a fair process and was confident that termination was the right decision. The parties subsequently attended mediation.

Based on the workplace accident occurring on 28 September 2019, Mr Putaanga's personal grievances needed to be raised by 28 December 2019. Mr Putaanga did not do this. The personal grievances relating to the workplace accident were only raised in the letter of 18 May 2021. The Authority was satisfied that Mr Putaanga did not raise a personal grievance for unjustified disadvantage in connection with the workplace accident within the requisite 90-day period. Mr Putaanga's explanation for the failure to raise his personal grievance for unjustified action causing disadvantage due to the workplace accident, was that it took Mr Putaanga a long time to write the grievance down as he struggled to concentrate. The Authority was not satisfied that this amounted to exceptional circumstances as it only explained the time it took Mr Putaanga to write up his grievance once he commenced writing it in March 2021.

The Authority found it was clear that after Move Freight confirmed the termination of Mr Putaanga's employment, he complained about the decision. Mr Putaanga then told Move Freight what the nature of his complaint was. Through this, Mr Putaanga was effectively saying he could return to work if given the opportunity and this was in the context of having previously raised concerns about the implementation of the return-to-work programme. Move Freight knew Mr Putaanga wanted to resolve this complaint, so it needed to respond, which it partly did in the meeting. Mr Putaanga told Move Freight that he wanted to resolve his complaint through mediation, which Move Freight agreed to attend. Based on this, the Authority was satisfied that Mr Putaanga did raise a personal grievance for unjustifiable dismissal within the 90-day period. Costs were reserved.

Putaanga v Move Freight Limited [[2023] 03/08/23; P Keulen]

Successful claim by Labour Inspector against Employer for breaches of Employment Standards

The Labour Inspector alleged that SLD Agriculture Limited (in liquidation) failed to pay Mrs Grobbelaar, an employee, the minimum wage for all of the hours she worked and failed to pay her and Mr Grobbelaar, another employee, their correct holiday pay entitlements. The Labour Inspector lodged claims in the Employment Relations Authority (the Authority) seeking payment of these minimum entitlements. The Labour Inspector also sought orders against Mr Donaldson, the director and sole shareholder of SLD Agriculture, on the basis that he was a person involved in the breaches of employment standards, pursuant to the Employment Relations Act 2000.

A preliminary issue was whether SLD Agriculture was the employer of Mr and Mrs Grobbelaar as it opposed the claims asserting it was the employer. The Authority determined SLD Agriculture was the employer. SLD Agriculture went into liquidation during the investigation. This meant the Labour Inspector could not proceed against SLD Agriculture, but it could proceed with the preliminary issue for the purposes of establishing its claims against Mr Donaldson.

SLD Agriculture was incorporated on 11 May 2018 and placed into liquidation on 30 September 2022. Mr Donaldson was the sole director and shareholder of SLD Agriculture. Mr and Mrs Grobbelaar had an informal interview with Mr Donaldson in relation to managing the farm. On 1 February 2019, Mrs Grobbelaar started working on the farm without an employment agreement. On 17 May 2019, Mr Grobbelaar started working on the farm after his visa was granted.

Mrs Grobbelaar worked five days per week totalling 55 hours. Mr Grobbelaar worked seven days per week, with this likely totalling more than 50 hours as set out in his employment agreement. This was the basis used for calculation of minimum wage entitlements by the Authority. Mrs Grobbelaar's salary was $30,000.00 and she was paid a total of $58,287.21 (gross) during her employment. Mr Grobbelaar's salary was $63,600.00 and he was paid a total of $60,202.28 (gross) during his employment. Based on these figures, the Authority found Mr Grobbelaar was paid at least the minimum hourly wage for the hours he worked for SLD. However, Mrs Grobbelaar was not paid the minimum hourly wage with a shortfall of $24,955.29. Therefore, the Authority found SLD Agriculture breached the Minimum Wage Act 1983 by not paying Mrs Grobbelaar at least the applicable minimum wage for the hours she worked whilst employed.

Mr and Mrs Grobbelaar were paid their annual holiday pay entitlement on a weekly basis at the rate of 8 per cent of their weekly wage. The Holidays Act 2003 (the Act) allows for annual holiday pay to be paid on this basis if the employee is on a fixed term employment arrangement or is a casual employee. Neither of these situations applied to Mr and Mrs Grobbelaar. It followed that SLD Agriculture paid their annual holiday pay incorrectly. After taking into account leave already taken by Mr and Mrs Grobbelaar, the amount of annual holiday pay they were entitled to was $1,103.76 for Mr Grobbelaar and $1,944.18 for Mrs Grobbelaar. The Authority concluded SLD had breached the Act by failing to pay Mr and Mrs Grobbelaar

the amount of their annual holiday pay that had accrued but not been taken at the end of their employment.

For Mr Donaldson to be a person involved in SLD Agriculture's breaches, he had to have knowledge of the essential facts that established the breaches. Mr Grobbelaar reported to Mr Donaldson, as the sole shareholder and director of SLD Agriculture, about work relating to the management of the farm and took instructions from him about this work. Expenses for work done on the farm were charged to Mr Donaldson's account. Mr Donaldson signed the employment agreements for Mr and Mrs Grobbelaar personally. He also completed the immigration forms for Mr Grobbelaar and applied for the COVID-19 Consolidated Wage Subsidy on behalf of both Mr and Mrs Grobbelaar through SLD Agriculture.

Based on these facts, the Authority inferred Mr Donaldson managed the overall operations of the farm including the finances covering outgoings and expenditure as well as income, through SLD Agriculture. Mr Donaldson was essentially a CEO with overview of operations and finances and so must have had knowledge of the essential facts relating to the breaches of employment standards by SLD Agriculture. Thus, Mr Donaldson was found to be a person involved in breaches of employment standards by SLD Agriculture. Mr Donaldson was liable for the amounts outstanding to Mr and Mrs Grobbelaar from the breaches of employment standards if SLD Agriculture was unable to pay the amounts owed and for penalties for three breaches of employment standards. The penalties were to be quantified at a later date.

Labour Inspector v SLD Agriculture Limited (In Liquidation) and Scott Donaldson [[2023] NZERA 419; 04/08/23; P Keulen]

Employee unjustifiably summarily dismissed for sending an ambiguous email to customer

Mr Taggart worked with Carter Holt Harvey LVL Limited (LVL) as an account manager and was dismissed because of an email he sent to a customer explaining why LVL was not offering a lower price on its product. Mr Taggart was issued a final written warning in March 2021 for sending an email to a customer that contained confidential information belonging to LVL while he was subject to an embargo. LVL claimed both incidents were similar and dismissed him for serious misconduct on that basis.

Mr Taggart applied for a personal grievance at the Employment Relations Authority (the Authority) for unjustified disadvantage, alleging the final warning was wrongly issued and unjustified dismissal. The Authority found that the unjustified disadvantage claim was not brought within 90 days. Mr Taggart raised the grievance when he realised that it disadvantaged him, whereas the warning was issued in March 2021 which was when he ought to have known about it.

On the matter of the dismissal, the Authority found that Mr Taggart was unjustifiably dismissed. The event that warranted the dismissal happened in May 2021 when Mr Taggart sent an email to a customer who had requested the "*sharpest price*" on an LVL product. Mr Taggart tried to check in with another manager before sending the email but could not get hold of them. He copied in another manager at LVL when he sent the email. Later, Mr Fletcher saw the email and suspended Mr Taggart on full pay pending investigation.

In the email, Mr Taggart told the customer that "*based on our current market position*", competing on price was not something that the business was in any position to do, as there was high demand for timber but limited supply in the market. LVL claimed the email was negligent and had the potential to be read as LVL being anti-competitive and misusing its market power by suggesting that LVL was unwilling to compete on price because it had market dominance and did not have to compete. Mr Taggart could not understand why the email was an issue as he was communicating LVL's business decision and was just being honest with the customer. LVL accepted that Mr Taggart's intentions were good but still contended the email lacked care and attention because if the email had come to the attention of the Commerce Commission,

there could have been serious consequences for the company. LVL summarily dismissed Mr Taggart following a process from his employment for serious misconduct.

The Authority found that the investigation meeting letter failed to mention the final written warning, while the dismissal letter linked both incidents as similar. The Authority found that the second incident was ambiguous while the first was not which made the incidents different and ultimately the March incident would not, in isolation, have been sufficient to precede a dismissal without notice for the May incident.

LVL admitted the ambiguity of the critical phrase from the dismissal letter where it said the email was "*potentially incorrect*" and had the "*ability to affect or potentially affect*" LVL. Here LVL interpreted the email in a way that was the least favourable to Mr Taggart. A fair and reasonable employer would not have adopted the anti-competitive interpretation when other interpretations were available to it.

LVL also did not investigate fully by not following up with the customer or attempt to correct the record in any way as it felt that following up with the customer would have opened LVL to more conjecture. There was no evidence that LVL was adversely impacted by the email. Any potential consequences for LVL's business were contained and could have been managed in-house in a low-key way.

LVL also did not consider alternatives to dismissal. While they did not need to, it demonstrates good faith and supports that a decision to dismiss was fair and reasonable.

LVL claiming that trust and confidence in Mr Taggart was "*unfortunately broken*" was not accepted. The March incident was a clear breach of a lawful instruction. It was not a clear breach of the disciplinary policy because it was not "*clearly*" anti-competitive, and no adverse consequences eventuated for LVL.

LVL refused to provide Mr Taggart with a work reference which potentially delayed new employment by one year. Evidence showed that he worked elsewhere for a week and received the benefit. The Employment Court has held that social security payments do not displace the employer's liability to pay compensation for wages. Mr Taggart's actual lost remuneration because of the grievance equated to two and a half months income minus the one week of income totalling $16,399.78.

Considering the humiliation, distress, and loss of dignity experienced by Mr Taggart, $15,000 was awarded. This was reduced by 10 per cent for his contribution to the situation as his conduct was not constructive in trying to resolve the employment relationship, as he was very hostile in the investigation and accused LVL of discrimination without any real basis. Costs were reserved.

Mr Taggart v Carter Holt Harvey LVL Limited [[2023] NZERA 416; N Szeto; 04/08/23]

For further information about the issues raised in this week's cases, please refer to the following resources:

Discipline

Contract for Services

Personal grievances

Full and Final Settlements

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