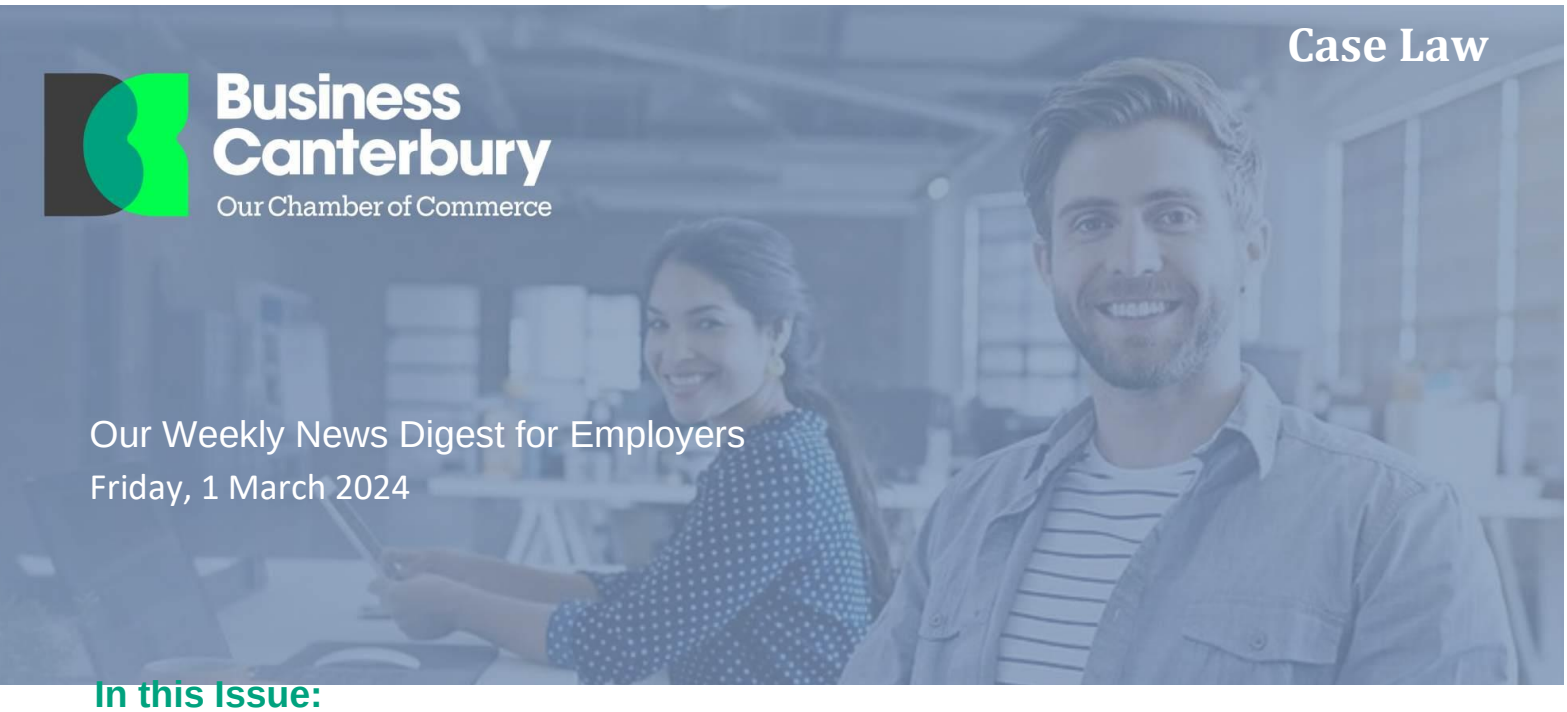

Business Canterbury
Our Chamber of Commerce

Our Weekly News Digest for Employers
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Case Law

Employment Court: Two Cases

Court overturns Authority limiting long service leave clause based on "business common sense"

Mr Le Gros worked for Fonterra Co-Operative Group Limited (Fonterra) for 20 years. In 2022, he moved to a role covered by a collective employment agreement (CEA). This agreement contained a clause granting leave benefits at particular milestones of service (the Clause), one being after 15 "*years continuous service*". Fonterra argued the terms and conditions of the CEA did not cover Mr Le Gros at his 15th-year anniversary in 2018, so he did not qualify for the long-service leave. The Employment Relations Authority (the Authority) decided in favour of Fonterra. Mr Le Gros' union, E Tū, went to the Employment Court (the Court) to challenge the Authority's decision.

Fonterra relied on other clauses defining the eligibility, like that it ran "*from the start date for continuous service stated in the current employment agreement*", and that "*membership of each [period of long service leave benefits] is restricted to current employees"*. If Mr Le Gros had moved to the CEA moments before his 15-year anniversary, Fonterra felt he would be covered by its terms and conditions at the relevant time, entitling him to the leave. The Authority found that Fonterra applied the Clause in a consistent manner over many years. There was "*business sense*" for Fonterra to not create a system where employees banked up leave. It would cause inconsistencies and unfairness "*contrary to good business common sense*" including that it enabled employees to "*game the system*".

The Authority's concepts of business efficacy, commercial absurdity and business common sense came from the Employment Contracts Act, which preceded the current Employment Relations Act 2000 (the Act). The Court noted additional obligations that employment agreements had, like good faith in statutory law, and fidelity and fair dealing from common law. These became relevant after the case law on business sense that the Authority used. Nowadays, business implications were relevant to context but should be weighed properly against the agreement being fundamentally about human relationships, and in themselves contextualised.

The Court assessed the plain interpretation of the Clause. Any employee of Fonterra who had 15 years of continuous service and was covered by the CEA was entitled to two weeks of special leave. The wording did not exclude any employees, manners of entitlement or which service would be recognised. Other clauses in the CEA recognised continuous service broadly, even where the employee had technically been under a different employer at the time.

The Clause's purpose was relevant to interpreting it. It willingly provided a benefit beyond the law's requirements. This was for overall service and not focused on the contractual arrangements the service came from. This purpose was not undermined by interpreting the Clause to include Mr Le Gros' situation. Statute law also affected the Clause's scope. The Act defined CEAs as applicable to employees who "*become members of [the relevant] union*", with the intent that people could move into a CEA mid-employment and still enjoy its entitlements. When an employee joined the CEA, they attained the ability to enforce all terms.

Fonterra had relied on law that established clauses required clear expression of intention to provide a double entitlement. The Court found this law to be a different situation than the one in Fonterra's Clause, so it did not apply. Fonterra's witnesses also brought up that the Clause had been used for a long time without being interpreted the way E Tū suggested. The Court took evidence that Mr Le Gros' situation was rare and that a lack of history on the matter did not provide any support for either side. It simply meant no one thought to cover this situation, rather than assuming cases like that of Mr Le Gros would be specifically disentitled. If "*gaming the system*" was so important to mitigate, the Clause would have reflected that.

The Court felt Fonterra's interpretation unilaterally picked and chose arbitrary entitlement dates to apply. Fonterra could have revised this but chose instead to rely on "*business common sense*" to receive a good interpretation. The Court did not feel this to be an appropriate use of the law. Ultimately, Fonterra and E Tū revised the Clause in updated CEAs. However, in Mr Le Gros' case regarding the wording that applied at the time, the Court declared that he was eligible for the long-service leave and overturned the Authority's conclusion. It did not make any orders on costs.

Le Gros v Fonterra Co-Operative Group Limited [[2023] NZEmpC 193; 08/11/23; Inglis J]

Authority orders back pay of pay rise to be applied to union member

Mr Farmer was employed by Tasman Cargo Airlines Pty Ltd (Tasman Cargo) as a pilot from 2014 until October 2022, when he retired. On 16 June 2019, an email was sent by Mr Young, Tasman Cargo's CEO, to all of the company's staff. Included in the email was a statement about a pay rise. The email stated all full-time and part-time employees would have a three percent salary increase backdated to April 1.

On 17 June 2019, the New Zealand Air Line Pilots' Association IUOW Inc (the Union) gave notice to Tasman Cargo initiating collective bargaining. By that stage, Mr Farmer had joined the union and expected to be covered by any collective agreement that was concluded.

On 8 July 2019, Tasman Cargo's Head of Flight Operations, Mr Sturrock, advised Mr Farmer by email that, along with other pilots who were union members, he would not receive the pay increase referred to in the CEO's email. The reason for the decision was because the company considered any future changes to remuneration would become part of the bargaining process.

Mr Farmer was not paid the three percent increase in 2019 or at any time since then, whilst non-union employees were paid the increase with effect from 1 April 2019. A collective agreement between the union and Tasman Cargo was signed on 22 April 2020, but it was backdated to come into effect from 1 April 2020.

Before the collective agreement was ratified, Mr Farmer wrote to Tasman Cargo about the pay rise he anticipated receiving because of the CEO's email. He asked the company to reconsider its position but got no response. Mr Farmer believed he was owed arrears of pay. He claimed that the absence of the pay rise flowed into the value of bonuses he was entitled to receive for each of the years 2020, 2021 and 2022.

Tasman Cargo's counsel, Ms Dunn, preferred not to see the email as varying the employment agreement or as creating a binding commitment. She submitted its unilateral nature was relevant and sought to qualify the effect of the announcement of the pay rise because the increase was not actioned before it was overtaken by the union's bargaining notice. Further, there was no acceptance of the email by Mr Farmer. That approach treated the email as if it was a proposal that required acceptance before becoming binding.

The Employment Relations Authority (the Authority) did not accept Ms Dunn's submissions. A pay rise was clearly intended. Mr Farmer remained employed when the email was sent, which meant there was a contractual requirement to pay. Once the pay rise was announced, the email could not be withdrawn or the pay rise rescinded unless Mr Farmer agreed, which he did not do.

The Authority considered whether the collective agreement precluded the pay rise that applied from April 2019. Ms Dunn relied on a complete agreement clause of the collective agreement to assist Tasman Cargo's position and to exclude Mr Farmer's claim.

Tasman Cargo's position was that union members were not entitled to the three percent pay rise because they had negotiated their increase in bargaining and the complete agreement clause in the agreement was a bar to any claim.

Tasman Cargo's submissions were unsuccessful for two reasons. The bargaining did not remove the pay increase awarded to Mr Farmer from 1 April 2019. The second reason was the agreement included a savings provision. No pilot was to incur a reduction in salary or rank because of the agreement except where expressly provided. The provision meant that the increase approved by the company in June 2019 was part of the salary Mr Farmer enjoyed when the collective agreement was signed. It could not be withdrawn or denied in reliance on the collective agreement. The Authority held Mr Farmer was entitled to arrears from 1 April 2019. Tasman Cargo requested an opportunity for the parties to liaise over the proper sum to pay, which the Authority accepted was appropriate.

The Union sought to establish that a breach of the Employment Relations Act 2000 (the Act) occurred when Tasman Cargo declined to pay the increase to its members. The Act provides that the union and employer "*must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining*". The only remedy sought was a declaration. The Union argued Tasman Cargo undermined the collective bargaining by denying the increase to union members. The point was that the union would have to bargain for a previously approved pay increase.

Ms Dunn argued the Act was not breached, because Tasman Cargo's position about the pay increase was clearly stated before bargaining. The company was transparent, and the union knew it would negotiate over remuneration during bargaining.

The Authority agreed that Tasman Cargo was very transparent in its position. However, that decision must have placed the union on the back foot in bargaining over pay. The bargaining position was potentially compromised because of the position from which the union started. In that sense, Tasman Cargo's actions were likely to undermine bargaining.

A declaration was made that in denying the pay increase to the union's members following the initiation of collective bargaining, Tasman Cargo breached the Act. Costs were reserved.

NZALPA v Tasman Cargo Airlines Pty Limited [[2023] NZEmpC 234; 29/12/23; Smith J]

Employment Relations Authority: Three cases

Breaches of employment agreement result in substantial penalties

The Employment Relations Authority (the Authority) was asked to consider three separate but related applications pertaining to Coverstaff Recruitment Group Limited (Shamrock).

The first application was from Mr Byrne who claimed he was unjustifiably dismissed from Shamrock. Shamrock believed the termination was justified as Mr Byrne had set up a company, named Titan Cooperative Limited (Titan), in

direct competition to Shamrock, breaching his employment agreement. In the second application, Shamrock sought a penalty and damages from Mr Byrne. The third application related to Mr Lemisio, who received a relocation payment to work for Shamrock. This was a conditional payment that was to be repaid if Mr Lemisio left Shamrock within one year of his employment commencing. Mr Lemisio left within the year without giving the required notice. He said he was happy to repay the balance of the relocation payment. However, at the time of the Authority's investigation, this had not been repaid in full and Shamrock sought penalties for the delay in payment and for other damaged or unreturned company property. Both Mr Byrne and Mr Lemisio failed to participate in the Authority's investigation process.

On 14 March 2021, Mr Byrne gave notice of his intent to resign from Shamrock, without explanation. The company had some suspicions as Mr Byrne had, in February 2021, verbally told Shamrock he felt his future lay with the company. The verbal assurance had been given just after Mr Byrne's close acquaintance, Mr Lemisio, had left Shamrock.

The company undertook online research. This revealed that both Mr Byrne and Mr Lemisio (who had left Shamrock in February 2021) were directors of Titan and that Titan, which was incorporated in February 2021, was recruiting in the same areas as Shamrock. At a heated meeting the following day, Mr Byrne was advised his employment was terminated with immediate effect and he was to return company property and leave the premises. Following the dismissal, correspondence was exchanged between Shamrock and Mr Byrne regarding Mr Byrne allegedly not complying with the restraint of trade clause in his employment agreement. This subsequently led to Mr Byrne raising his personal grievance.

The Authority noted that Shamrock had legitimate grounds to promptly raise its concerns with Mr Byrne. However, it gave him no notice that the meeting was potentially disciplinary in nature and no opportunity to get advice or representation to assist his participation. A fair and reasonable employer could not have ended his employment that day without giving him a better opportunity to respond to Shamrock's concerns and then genuinely considering whatever responses he might have given before any decision was made on whether to dismiss him. In consideration of remedies, the Authority did not make any orders. There was no evidence provided by Mr Byrne to justify any lost wages claim and no information provided by Mr Byrne to enable the Authority to consider any claim for compensation relating to loss of dignity and humiliation. The Authority also declined the claims Mr Byrne made regarding payment for his notice period and a $200 deduction from his final pay as he had not presented himself at the Authority's investigation meeting to answer questions about the claims.

On the balance of probability, the Authority found that Mr Byrne had breached his employment agreement when he set up Titan without discussing the matter with Shamrock. Further breaches were identified relating to Mr Byrne not disclosing that Mr Lemisio was involved in Titan. Mr Byrne was also found to have inappropriately used Shamrock property for his work with Titan and actively attempted to lure Shamrock clients to work with Titan. The Authority felt the restraint of trade provision in the employment agreement of nine months was unreasonable. A term of three to six months was considered more appropriate and in keeping with sector norms. The Authority ordered that Mr Byrne pay penalties of $25,000 in total for the seven breaches of his employment agreement. This penalty was to be paid to Shamrock.

Regarding the relocation grant, the Authority ordered that Mr Lemisio repay Shamrock for the outstanding portion, being $6,008.57, along with penalty interest until the debt was repaid. He was also ordered to pay Shamrock $547 to replace a broken work phone with data deleted and $200 for an unreturned work uniform. The Authority found these breaches of Mr Lemisio's employment agreement were deliberate and he was ordered to pay a penalty of $2,000 to Shamrock. Costs were reserved.

Byrne and Lemisio v Coverstaff Recruitment Group Limited [[2023] NZERA 549; 25/09/23; R Arthur]

Dismissal of employee who acted in self-defence held to be substantially justified

In February 2021, Mr Hika was employed as a psychiatric assistant (PA) for Te Whatu Ora – Waitematā District (TWOW) until he was dismissed on 21 March 2022 for serious misconduct. The issue was whether his dismissal was substantively and procedurally justified. Mr Hika sought remuneration for lost wages and compensation for hurt and humiliation.

On 1 July 2021, Mr Hika was on duty and was working in the day room. Slightly further down the corridor was a nursing station, which, at the time, was occupied by RN Cocker, Kim and Magallanes. Mr Hika stated that he observed TK, a user of TWOW services, approach and he opened the door for him. Once inside, he started to punch Mr Hika and swore at him, using aggressive language.

Mr Hika stated that TK had him up against the wall and was punching furiously. Mr Hika put up an elbow block but that did not stop TK. Fearing for his personal safety, Mr Hika felt that he had no other option but to punch back. He threw three to four punches at TK in self-defence. The first punch had no effect, so he punched him two more times, which enabled him to grab TK by the collar, put him off balance, and bring him to ground where Mr Hika restrained him.

RN Cocker stated that she heard a bang, looked up and saw Mr Hika swinging and punching TK to his head three to four times. Seeing this, RN Cocker thought she needed to stop Mr Hika immediately and ran out of the nursing station followed by RNs Kim and Magallanes, both of whom also stated they saw Mr Hika punch TK. TK needed to be taken to the High Care area for medical attention. TK sustained a cut above his eye and two black eyes. Mr Hika did not sustain any injuries that required treatment.

Mr Hika was instructed to finish work for the day. Before leaving, he completed a "*Risk Pro*" form in which he stated that TK had lunged at him, attacked him, and had punched him with closed fists. Mr Hika further said that he was shocked by this and that he had tried to block TK but was able to grab his arm and take him to ground where he was held.

On 6 July, TWOW's operations manager telephoned Mr Hika to advise that a complaint against him for assaulting a patient was being investigated. He was further advised that pending the investigation he would be placed on paid suspension.

The Police also investigated the incident. The Police emailed TWOW to advise that TK had punched Mr Hika multiple times and that Mr Hika had acted in self-defence by punching him back. Mr Hika was not charged.

TWOW's disciplinary process comprised a disciplinary meeting on 27 July 2021, which was delayed because of the COVID-19 lockdown in Auckland at the time. TWOW took into account a written response from Mr Hika on 27 November 2021 and 26 January 2022. A preliminary decision to dismiss Mr Hika was made on 14 February 2022. On 21 March 2022, TWOW confirmed its decision by letter to terminate Mr Hika's employment for serious misconduct.

The Employment Relations Authority (the Authority) considered Mr Hika's response and whether it breached TWOW's discipline and dismissal policy, and whether his behaviour was irresponsible or unacceptable. The Authority asked Mr Hika whether he could have used the width of the corridor to perform a "*break away*" manoeuvre so as to create distance between himself and TK. Mr Hika's said that TK had given him no room. The Authority found that evidence not credible. Even if Mr Hika had his back against the wall, he still had a whole corridor to break away from TK and to deploy the calming and restraint techniques, which he had learnt from his induction training. Mr Hika confirmed he had received this training. Further, Mr Hika was not alone in the day room. There were three experienced registered nurses a short distance away from him, all of whom were familiar with TK and had received calming and restraint training.

Mr Hika relied on the Police investigation that found that he acted in self-defence. However, the investigation did not take into consideration what TWOW must consider as an employer who owes a duty of care to its patients and staff. The Authority stated it was correct of Mr Hika to use his elbow to block TK's punches, but he went too far in punching TK multiple times and to then swear at him repeatedly. Mr Hika failed to follow the processes training, and protocols he had been taught by TWOW to de-escalate the situation.

The evidence established that while not the initial aggressor, in the end Mr Hika resorted to having a fist fight with TK and verbally abused him. The Authority found TWOW's decision to dismiss Mr Hika to be substantively justified. The application was unsuccessful. Costs were reserved.

Hika v Te Whatu Ora - Waitematā District [[2023] NZERA545; 21/09/23; P Fuiava]

Employer found to be fair and reasonable throughout employee's employment

Ms McLeod was employed as a breakfast cook with Sun Court Hotel Limited (Sun Court). In May 2022, there was an incident at work where Ms McLeod used offensive language about a staff member. Following a disciplinary process, Ms McLeod did not return to work. On 12 October 2022, Sun Court terminated her employment for abandonment. Ms McLeod said that the incident was a situation of Sun Court's making. She claimed that she was unjustifiably constructively dismissed, and actions taken by Sun Court in the lead-up to her dismissal disadvantaged her and that her termination for abandonment was unjustified.

Ms McLeod started work for Sun Court in July 2021. On 16 May 2022, an incident occurred that resulted in her leaving. The evening before, Ms McLeod was advised by the head chef that at the next day's breakfast service there would be a table of 10 all having the Big Suncourt breakfast. Ms McLeod was advised the breakfast had to go out by 6.30am. She arrived to work at 5.45am and started to prepare meals based on the instructions from the head chef the night before. At around 6.10am, the front-of-house staff told Ms McLeod that the guests would be ordering individually off the bed and breakfast menu, instead of the Big Suncourt breakfasts she had prepared.

The change in orders was stressful for Ms McLeod and she felt that the front-of-house staff were not supportive. She directed a comment to the waitress about the food and beverage manager, which he overheard, calling him an offensive name, and threatening to walk out. After the group had departed, a further 12 orders came through before 10am. The kitchen assistant had started work around 8:00am and the head chef also came into the kitchen earlier than normal in response to a request from Ms McLeod and Sun Court management.

Sun Court invited Ms McLeod to meet to discuss the incident reported by the front-of-house staff and an alleged failure to follow reasonable instructions regarding serving customers in a timely manner. The following day, Ms McLeod responded and raised a personal grievance for unjustified disadvantage due to the instruction to prepare the Big Suncourt breakfasts and the resulting experience. Ms McLeod's representative later clarified the personal grievance also related to Sun Court failing to act in good faith by not providing chef and kitchen service support as promised.

Ms McLeod provided Sun Court with a medical certificate and the parties attended mediation. It was unsuccessful and in July, Sun Court advised Ms McLeod there would be no further action in respect of the second allegation that she had failed to follow a reasonable instruction. In September 2022, following a disciplinary meeting, Sun Court issued Ms McLeod with a first written warning for misconduct. Sun Court acknowledged the issues around the instructions she received, however it said Ms McLeod had demonstrated that she was capable of preparing 10 breakfasts by herself and irrespective of the stress of the situation, there was no justification for the language used.

Sun Court asked Ms McLeod to confirm her ongoing employment status noting there was no medical certificate covering her absence from 6 June and a statement at the disciplinary meeting implying that she was not returning to work. Ms McLeod was unresponsive, and her employment was terminated on grounds of abandonment.

The Employment Relations Authority (the Authority) investigated Ms McLeod's claims. The Authority found that Sun Court did everything that a fair and reasonable employer could do to ensure that Ms McLeod was trained and supported in her employment. The Authority accepted Sun Court believed Ms McLeod was competent to handle the breakfast service and Sun Court could not be blamed for the situation. The change to the orders on the morning of the incident was stressful but her reaction to the situation could not be attributed to Sun Court's lack of support. Ms McLeod was not unjustifiably disadvantaged in her employment. In relation to the constructive dismissal claim, the end of Ms McLeod's employment was not caused by breaches of duty by Sun Court, so she was not constructively dismissed from her employment.

The Authority then considered whether Ms McLeod was unjustifiably dismissed because her employment was terminated for abandonment. At the time, Ms McLeod had been absent from work since 17 May 2022. Medical certificates covering her absences had expired on 6 June 2022, and there had been no communication from her since 7 September 2022. Sun Court was substantively justified in dismissing Ms McLeod for abandonment and followed a fair and reasonable process. The Authority also found no support for the claim that Sun Court breached its duty of good faith towards Ms McLeod. Costs were reserved.

McLeod v Sun Court Holtel Limited [[2023] NZERA; 540; 19/09/23; N Szeto]

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: Three Bills

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

Misuse Of Drugs (Pseudoephedrine) Amendment Bill (26 February 2024)

Pae Ora (Healthy Futures) (Improving Mental Health Outcomes) Amendment Bill (28 March 2024)

Inquiry into the 2023 General Election (15 April 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