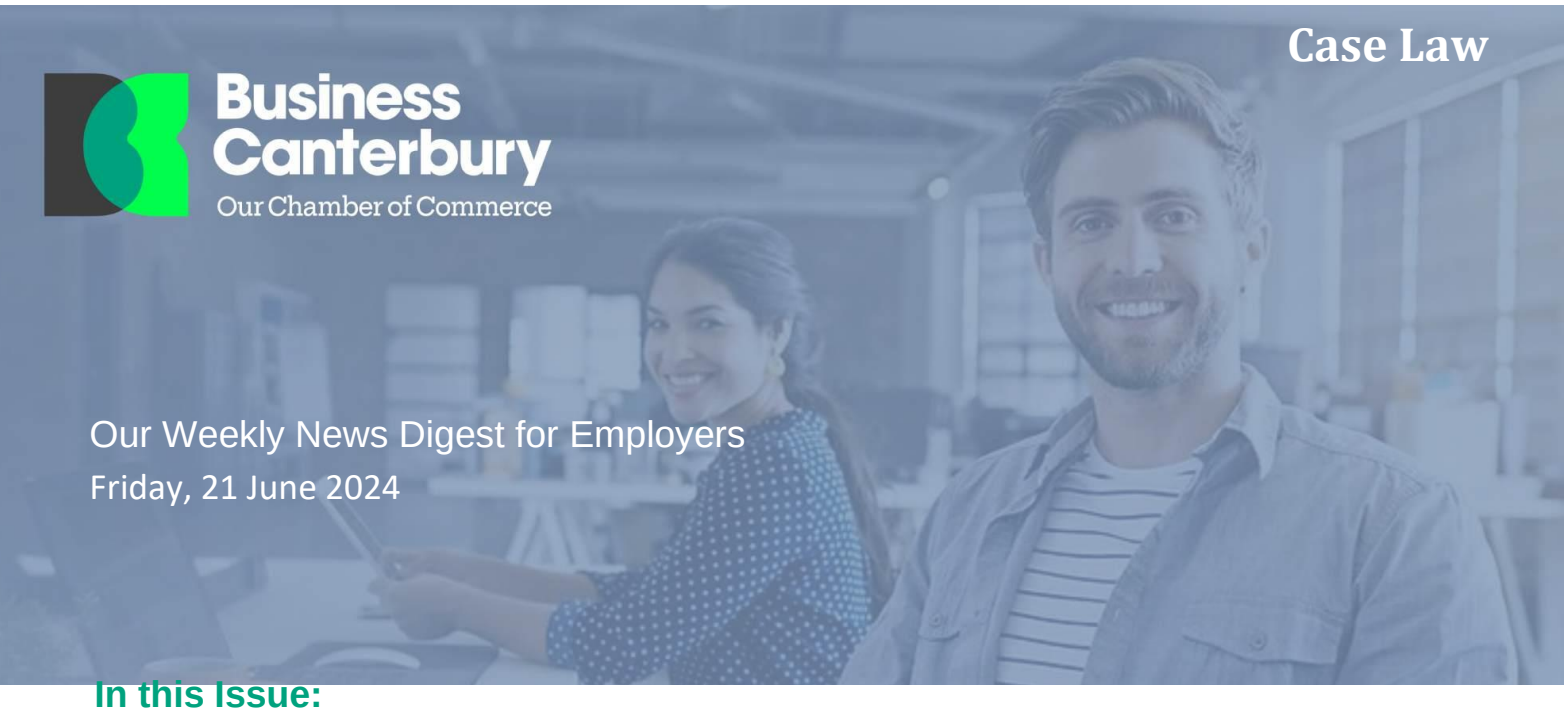

Business Canterbury
Our Chamber of Commerce

Our Weekly News Digest for Employers
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Case Law

Employment Relations Authority: Five Cases

Huge compensation awarded for significant health and safety breaches

Magnum was a heavy machinery equipment hire company based in Auckland. Mr Field and Mr Walker were both directors of Magnum. It was uncertain whether Magnum started employing Mr Parker, either 2008 or 2009. Apart from his salary, they agreed that Mr Parker would be paid a yearly bonus based on annual profit before tax. During his employment, the parties agreed that instead of paying a yearly bonus, the money would instead be used to purchase any items that Mr Parker selected. In 2014, it was a boat and a motor.

In 2016, Mr Parker realised his bonus was capped when Magnum's annual profits were above $1 million, so he requested a pay rise. Both parties agreed that a pay rise would be given if the bonus scheme was removed.

Around 2012, Mr Walker exited the business. From then on, Mr Field started subjecting Mr Parker to bullying and psychological abuse including excessive and unprovoked personal criticism, verbal abuse, threats to his job security, public humiliation, denigrating him as incompetent, and engaging in manipulative behaviour.

There was ample evidence from staff that the work culture at Magnum was "*toxic*", and Mr Field set the tone of the place. Mr Field was often described as being "*unapproachable*", "*rude and verbally aggressive*", and had tantrums. A former employee resigned because they felt bullied by Mr Field.

Mr Parker began experiencing panic attacks from all the abuse and eventually resigned. He raised a personal grievance at the Employment Relations Authority (the Authority) later than 90 days after the end of the employment. However, Magnum implicitly consented to the personal grievance being raised by responding to it and not disputing the fact that it was raised out of time.

The Authority found that Mr Field's actions were repeated, unreasonable, directed at Mr Parker and led to physical and psychological harm. This constituted bullying, and Magnum was clearly aware of it as it was perpetrated by its director and owner. While bullying on its own did not give rise to a personal grievance, it could form the basis on which an employer may fail to provide a safe workplace as it failed to protect an employee against the harm of bullying. This was the basis for the personal grievance.

Employers were bound to provide a safe workplace in terms of protecting employees against foreseeable risks of harm. Magnum had no process or mechanism to support workers or to deal with concerns or complaints. It had no bullying or harassment policy or procedures available for Mr Parker to follow. It was reasonably foreseeable that without any systems in place, he would experience being bullied without recourse. Magnum had failed to provide him with a safe workplace.

Mr Parker was also unlawfully suspended from work on 8 October 2021. Magnum denied that he was suspended. However, during the time he was away, it had another employee carry out his work and diverted his phone. The situation amounted to a suspension at law. Magnum did not follow any process before suspending him which amounted to an unjustifiable disadvantage.

The circumstances confirmed that Mr Parker was constructively dismissed and therefore entitled to remedies. For struggling mentally and physically with the constant abuse and pressure to continue to work at an extreme level, Magnum breached an implied contractual obligation to take all reasonable care to maintain a safe workplace. The Authority ordered payments of $50,000 for suffering significant harm, $5,000 for compensation for an unjust suspension and $5,000 for constructive dismissal. Mr Parker was able to recover the costs of his therapy sessions as special damages costing $5,071.50.

Mr Parker alleged that during his employment, Mr Field promised him 5% of the value of Magnum when he decided to leave as director, but since there was no clear attempt to formalise this until six years later, compensation for the unsubstantiated promise was declined.

After his resignation, Mr Parker obtained alternative employment almost immediately but with a lower annual income of $29,564.16. He claimed a loss of $30,000 for his first period of employment and then $2,463.68 for his second period. Both sums were awarded.

The Authority recommended that Magnum implement a clear Bullying and Harassment Policy and Code of Conduct which Mr Field agreed to be bound by. It also recommended it implement a clear avenue for complainants to report bullying and harassment and a process for investigating such allegations. Mr Parker claimed for his bonuses to be paid in money which was a requirement under the Wages Protection Act 1983 (the Act). Magnum argued for the Authority to exercise its equity and good conscience jurisdiction to prevent Mr Parker from receiving a "*windfall*" payment as he had already received his bonus entitlements by way of purchases that he selected. The Authority applied the Act instead and ordered for the bonuses to be paid in money. The meaning of "*gross profit*" was disputed. The Authority asked the parties to come to an agreement on how the bonus was to be calculated and ordered interest.

The Authority did not issue a penalty for failing to pay cash bonus as Mr Parker raised it too late. But a penalty of $4,000 was ordered for failing to keep time and wage records, $1,000 payable to Mr Parker and the rest to the Crown. Costs were reserved.

Parker v Magnum Hire Limited [[2024] NZERA 85; 14/02/24; S Blick]

Employee unjustifiably disadvantaged by not receiving a written employment agreement

On 7 January 2021, Ms Worth began working for the Garden Art Studio (the Studio) which was owned and operated by Ms Nicholson. According to Ms Nicholson, the effects of COVID-19 had significantly impacted her ability to keep the Studio open. She decided to close for the month of July 2022 and told Ms Worth that work would recommence once the Studio reopened. However, Ms Worth was never offered further work after the Studio closed. She applied to the Employment Relations Authority (the Authority) and claimed she had been unjustifiably dismissed, as well as unjustifiably disadvantaged for having never received a written employment agreement. In response to her claims,

Ms Nicholson argued she had been a casual employee. That meant Ms Nicholson was not obliged to offer her further work, meaning she could not have been unjustifiably dismissed.

The Authority had to decide whether Ms Worth had been a casual or permanent employee by considering the situation's facts against certain factors in case law. Those factors included the number of hours worked each week, whether work was allocated in advance by roster, whether there was a regular pattern of work, whether there was a mutual expectation of continuity of employment, whether the employer requires notice before an employee is absent or on leave, and whether the employee works to consistent starting and finishing times. Considering the regularity of Ms Worth's shifts every week, and the fact that she was expected to notify Ms Nicholson if she became unable to work, the Authority decided she was a permanent employee.

It then had to decide whether she had been dismissed. A dismissal occurred if the employer sent away the employee. Even though Ms Nicholson had explained to Ms Worth that the Studio was going to close, there was no evidence that the parties had mutually agreed to terminate the employment relationship. By shutting the Studio, and by not clarifying whether Ms Worth was still employed via any following conduct, Ms Nicholson had sent her away, meaning she had been dismissed.

To determine whether Ms Nicholson's decision was justified, the Authority had to decide whether her actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Ms Nicholson's decision to dismiss was substantively justified because the business could no longer afford to pay Ms Worth's wages. However, it was not procedurally justified, as the expectation in these circumstances would have been for Ms Nicholson to undertake a restructure process. Ms Nicholson's failure to undertake any process at all rendered the dismissal unjustified.

The Authority went on to consider whether Ms Worth had been unjustifiably disadvantaged by not having been provided with a written employment agreement. Ms Nicholson argued that the disadvantage Ms Worth suffered by not having an employment agreement was purely theoretical. In practice, Ms Worth at all times retained the protections provided for under employment law. The Employment Relations Act requires parties to an employment arrangement to have a written employment agreement. To not have one was a disadvantage to the employee. The Authority explained that Ms Worth suffered significant disadvantage by not having certainty and clarity over the essential terms of her employment.

Ms Worth believed she was a permanent employee entitled to a minimum of 30 hours per week. Ms Nicholson believed Ms Worth was a casual employee with only a minimum of 20 hours per week. The Authority noted that a written employment agreement would have clarified any confusion around Ms Worth's terms of employment. It decided she had been unjustifiably disadvantaged.

Under the Employment Relations Act, failure to provide employees with a written employment agreement could result in a penalty of up to $10,000. Ms Worth did not make an application for such a penalty, so the Authority made no finding about this. The Authority decided to award Ms Worth $6349 in lost wages and $18,500 as compensation for hurt and humiliation. Costs were reserved.

Worth v Nicholson [[2024] NZERA 87; 16/02/24; J Lynch]

Authority upholds claim for unjustified dismissal

Mr Clarkson was employed by the Glenlyon Trust (the Trust) as a farm manager for Glenlyon Station, a farm owned by the Trust. His employment commenced in 1985 and continued until 10 March 2020. Along with his brothers, Mr H Clarkson and Mr I Clarkson, he was also a trustee of the Trust (the Trustees). Against a backdrop of a deteriorating relationship with the Trustees on 17 November 2019, Mr Clarkson was advised that his employment was terminated for misconduct with 12 weeks' notice. His last day of employment was 10 March 2020.

Mr Clarkson made a claim to the Employment Relations Authority (the Authority) alleging an unjustified disadvantage coming from a final written warning. He also claimed unjustified dismissal and claims for unpaid holiday pay. The Trust refuted the claims and noted that Mr Clarkson, as the farm manager, had responsibilities for managing his own holiday pay.

Mr Clarkson provided a letter sent to him by the Trust on 18 July 2019 indicating a number of allegations relating to health and safety compliance issues. On 8 August 2019, Mr Clarkson received a further letter from the Trust which stated that it considered the employment relationship was in difficulty and proposed to address the issue through mediation.

Mr Clarkson was invited to an investigation meeting on 18 September 2019, but due to his representative being unavailable, this did not take place as planned. His representative wrote to the Trust setting out that they proposed to discuss the matters further at the planned mediation. Before it occurred however, the Trust wrote to Mr Clarkson setting out its findings of serious misconduct. Mediation was not successful, and on 6 November 2019, the Trust wrote to Mr Clarkson and issued him a final warning.

On 7 November 2019, he was requested to attend a meeting on 12 November 2019. The purpose of the meeting was to discuss governance issues, the 2019 annual accounts, the use of quad bikes without dogs, and financial performance. Mr Clarkson requested that the meeting be on 15 November 2019 when his representative would be available. However, his request was declined, and the meeting went ahead without him. The Trust met with Mr Clarkson again on 10 December 2019. At this meeting, Mr Clarkson was advised that the meeting of 12 November 2019 was a business-as-usual meeting, that he was not entitled to representation and his refusal to attend the meeting was considered a failure to follow a lawful and reasonable instruction. On 17 December 2019, the Trust terminated Mr Clarkson's employment as he was on his final warning and had failed to attend the meeting of 12 November 2019.

The Authority found that the final written warning Mr Clarkson received on 2 October 2019 was unjustified. The evidence indicated that the warning was issued after Mr Clarkson complained about the farm visit. Regardless of the substance of the health and safety concerns, the evidence showed a high degree of predetermination, coloured by an ever-worsening relationship between the brothers. There was never any proper investigation of the allegations and the relationship between the two brothers and Mr Clarkson had deteriorated to the point that those issues had spilt over into the employment relationship. Mr Clarkson's dismissal was not something a fair and reasonable employer could have done in all the circumstances.

The Trust argued that Mr Clarkson's termination was based on his failure to attend an alleged business-as-usual meeting on 12 December 2019. It considered that because there was a final written warning in place, his decision not to attend was sufficient to justify the dismissal. Mr Clarkson had advised that he would not attend the meeting because his legal representative was unavailable that day. His lawyer had also advised the Trust that he could not attend and gave reasons why. He also offered to meet at a later date. Mr Clarkson had previously been given the opportunity to have a representative present. To categorise the meeting as "*business as usual*", against a background of the disciplinary path the Trust was taking and the ever-worsening relationship between Mr Clarkson and his brothers, was disingenuous. Mr Clarkson's dismissal was unjustified.

The Authority observed that Mr Clarkson should have disclosed to the Trust the extent of the holiday pay owing, but this did not diminish his entitlement. The Trustees were ordered to pay Mr Clarkson the sum of $8,168.11 as reimbursement for lost wages following his dismissal. The Authority awarded $20,000 as compensation for hurt and humiliation, outstanding holiday pay in the sum of $74,375 and payment for time worked on public holidays, together with 321 days of alternative holidays totalling $120,375. Costs were reserved.

Clarkson v Clarkson and Ors. [[2024] NZERA 90; 16/02/24; G O'Sullivan]

Abruptly dismissed employee wins personal grievance

Mr Xu claimed to have been both unjustifiably dismissed and disadvantaged due to the actions of his employer, Pioneer Education and Immigration Services Group Limited (Pioneer). Pioneer mainly provided education consultancy services to international students.

Mr Xu was initially engaged as a student counsellor and was issued an essential skills work visa. He said he was subsequently compelled to engage in Licensed Immigration Adviser (LIA) work, and this formed the basis of one of his grievances. He agreed to have his role amended and LIA duties added. Mr Xu said that on 7 January 2020, he was simply told that he was going to be dismissed. That was followed by an email headed "*Personal issue about*

supervising capability and time engagement". On 9 January, Mr Xu responded with an email questioning the decision. Mr Xu expressed that he wished to remain at Pioneer and asked that Mr Zhu, his supervisor, reconsider his decision. Mr Zhu did not change his mind and the parties met on 10 January. Mr Xu was dismissed, and his last day of employment was 28 January 2020.

Mr Xu's main claim was that he was unjustifiably dismissed. An employer looking at dismissal was required to conduct a sufficient enquiry prior to dismissal. A sufficient investigation required, as a minimum, that the employer put its concerns to the employee, allow them an opportunity to respond and then consider their responses with an open mind. Mr Xu said none of that happened and it was all abrupt. There was no process or consideration of Mr Xu's situation. Pioneer claimed it lacked the resources to undertake such a process. The Authority found that was no excuse, and that Mr Xu's dismissal was unjustified.

Mr Xu alleged that Pioneer unilaterally altered Mr Xu's role from student counsellor to LIA. He claimed that he was disadvantaged by having his immigration status put at risk by reason of a unilateral change in duties contrary to his visa, which initially described him as a student counsellor.

Pioneer argued that the LIA duties were not imposed as Mr Xu had agreed to the change. This was supported by him having said that he enjoyed the "*hybrid*" nature of the role as it offered experience in both education and immigration consultancy. Pioneer submitted that Mr Xu's dismissal could have been avoided had he accepted its offer in January 2020 to give up immigration advisory work and revert to education consultancy work. The evidence favoured Pioneer as Mr Xu's job description, approved by Immigration New Zealand, allowed him to do immigration work generally. LIA duties fell within this. The Authority found Mr Xu's visa was not affected and so he was not disadvantaged.

His third claim was that during his employment, he was required to follow non-compliant LIA procedures. He had little evidence to support this. Also, as a supervised LIA, the bulk of any risk would fall on the supervisor.

Mr Xu also complained that he was subjected to Mr Zhu's religious practices in the workplace without any consultation. Mr Zhu's religious views and practices were explained to Mr Xu when he was employed. He accepted that by the time he considered Mr Zhu's religious views and practices an issue, he was already leaving. The Authority decided that this claim must fail.

It also concluded that Mr Xu was not unjustifiably disadvantaged, but had been unjustifiably dismissed. Pioneer was ordered to pay Mr Xu three months' wages and a further $15,000 as compensation for hurt and humiliation. While Mr Xu had been successful, he was self-represented, which meant recoverable costs were limited to the Authority's filing fee.

Xu v Pioneer Education and Immigration Services Limited [[2024] NZERA 102; 23/02/24; M Loftus]

Employee improperly dismissed after predetermined accusations

NLC worked for the Tainui Home Trust Board (Tainui) as a clinical nurse manager. They claimed Tainui unjustifiably dismissed them and unjustifiably disadvantaged them when they were suspended. They argued Tainui owed them a variety of payments relating to overtime, on-call work and annual holiday pay.

NLC was hesitant to accept the role of a clinical nurse manager due to its high workload. They only did so after the chief executive officer (CEO) agreed to employ more clinical coordinators. But during the COVID-19 lockdown, the CEO stepped down in October 2020 and his successor, Mr Hudson, started on March 2021.

An external audit of Tainui's operations conducted on 3 and 4 March 2021 reported *"a high level of concern"* to do with NLC. Tainui found that NLC had harassed and bullied staff members. To address this, the acting CEO, Mr Burn, arranged for a disciplinary meeting disguised as a meeting to check in on NLC's recovery from surgery and return to work.

At the 2 April 2021 meeting, Mr Burn and Mr Hudson questioned NLC about the audit report. Tainui did not notify him ahead of time about any of the topics they would be discussing or give an opportunity to have a support person or representative present.

NLC returned to work on light duties on 23 April 2021, but Mr Hudson told NLC that they *"couldn't be on the floor"*. Mr Hudson sent NLC home for a few days and Tainui never ended the suspension. Tainui's employment agreement provided for suspension in cases of *"serious misconduct, workplace bullying or harassment"* and that it could come *"after consultation"*.

Another meeting was arranged on 29 April 2021. At the meeting, NLC confronted Mr Hudson by asking whether he was right for the position. Mr Hudson admitted, *"No I don't think you are the right person … right now the staff don't respect you"*. Mr Hudson did not provide any evidence when NLC requested it. He did not provide any notice of the meeting and did not allow NLC to have a support person for the meeting. He continued to emphasise that their relationship had deteriorated and that NLC's best option was to leave.

Tainui held more meetings with steadily more formal process but still not specifying any particular incidents. On 11 May 2021, Mr Burn and Mr Hudson predetermined the direction of the conversation and continued to say they *"didn't think this is going to work"*. On 25 June 2021, Tainui was working through a formal disciplinary process for serious misconduct and obtained witness statements for incidents about a year prior. Tainui ultimately confirmed dismissal for bullying equating serious misconduct on 30 July 2021. It stated the dismissal was also based on taking too long for NLC to get to the level required for a clinical nurse manager.

The Employment Relations Authority (the Authority) found that Tainui did not follow any conditions in its suspension clause. It also did not conduct any meaningful process or look at assessing NLC's capacity. Tainui's private reasons for suspending included NLC's capacity and concerns from the audit. The Authority did not consider that Tainui had any substantive justification for the suspension and Tainui did not cite them as the reasons. Tainui's suspension was unjustified in both process and substance which disadvantaged NLC.

The Authority found Tainui made conclusive findings against NLC based on inadequate information. It did not give notice or seek evidence for the claims. The audit report was simply adopted as criticisms of NLC without Tainui conducting its own inquiries, assessing NLC's performance for itself or giving NLC an opportunity to comment on it. The Authority felt the report was not *"damning"* of NLC as it did not conclusively assess NLC's ability to perform the role. The report's critique concerned other staff other than NLC, but Tainui seemingly ignored the organisational failure and blamed it. Tainui also had a thorough staff performance and management policy which it did not use to handle the issue constructively.

Tainui accepted staff complaints without sufficient investigation or evidence. The complaints were historic, vague and were only produced in response to queries from NLC's representative. Mr Hudson's comments in the meeting on 29 April 2021 were unfair and unreasonable. By predetermining the matter, Tainui deprived NLC of their opportunity to respond to the allegations. All of these meant Tainui also lacked substantive or procedural justification for the dismissal.

The Authority awarded NLC three months' lost wages at $30,270.50 for being dismissed. It rejected the balancing of an assessment of compensation for hurt and humiliation against the audit and staff concerns. It felt that these were not relevant when Tainui did not follow fair process on these concerns. NLC was hurt and stressed by the incident and for a period kept to themselves. The Authority awarded $22,500 in compensation for hurt and humiliation stemming from the dismissal and another $5,000 for the disadvantage.

NLC said their overtime was credited as time in lieu and when cashed in, Tainui did not compensate at its agreed overtime rate. The Authority agreed and calculated $4,781.25 for arrears. It also found that Tainui did not pay NLC oncall allowances and overtime payments that he would have received while he was suspended. It calculated these arrears totalled $7,399.

Tainui required a clinical person be on call after hours, who had to be within reach of the facility within 20 minutes. As a result, NLC said that they were on call 24/7 during public holidays and had to remain within phone coverage and driving distance. The Authority found NLC was entitled to six public holidays in lieu and awarded $2,160 for its

payment. Finally, the Authority ordered Tainui to pay KiwiSaver on the above unpaid earnings at $464.62. Costs were reserved.

NLC v Tainui Home Trust Board [[2024] NZERA 79; 12/02/24; R Anderson]

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: Five Bills

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

Resource Management (Freshwater and Other Matters) Amendment Bill (30 June 2024)

Residential Tenancies Amendment Bill (3 July 2024)

Oranga Tamariki (Repeal of Section 7AA) Amendment Bill (3 July 2024)

Regulatory Systems (Primary Industries) Amendment Bill (8 July 2024)

International Treaty Examination Of The Agreement On The Indo-Pacific Economic Framework For Prosperity (18 July 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