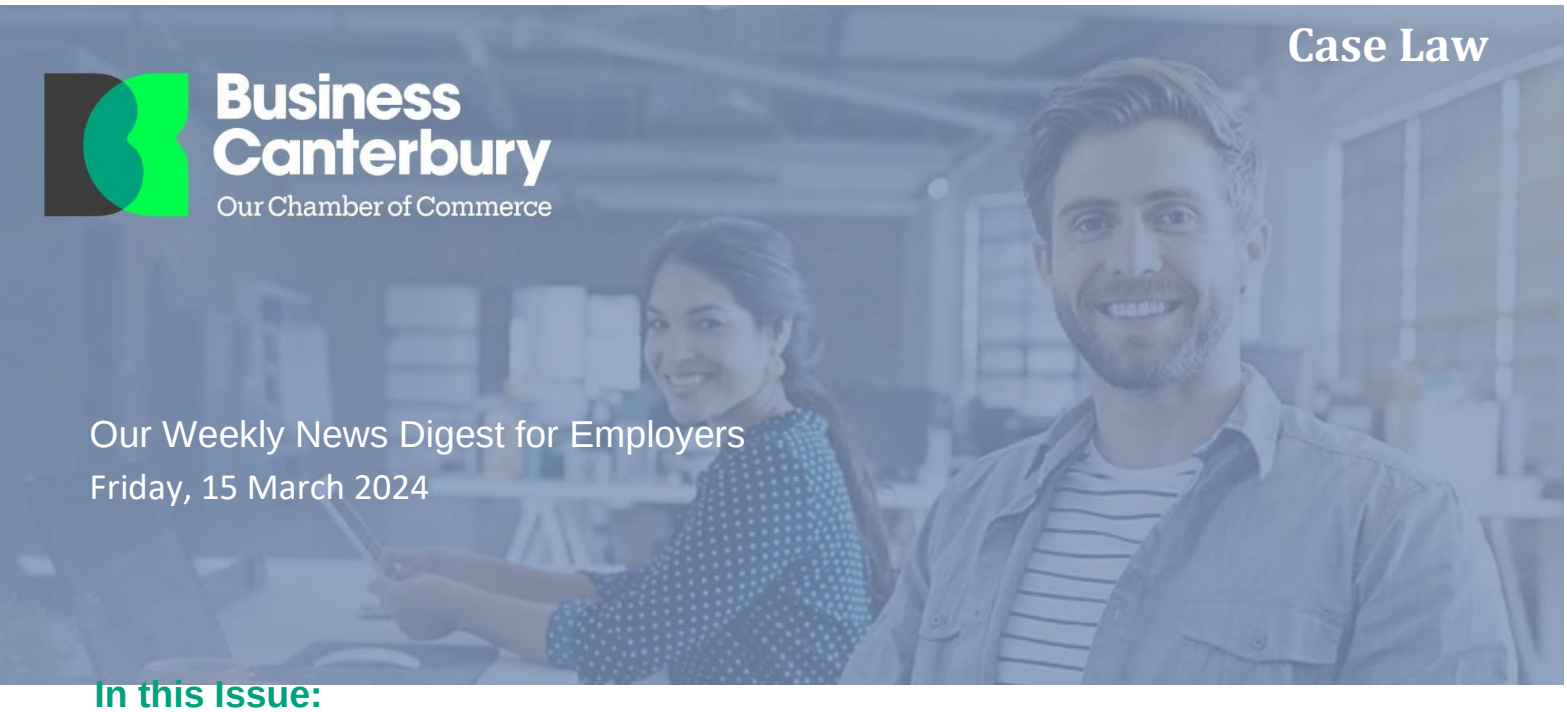

Business Canterbury
Our Chamber of Commerce

Our Weekly News Digest for Employers
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Case Law

Employment Relations Authority: Six cases

Due process required to terminate employment of person intending to work

On 12 June 2022, Hoki Dental Limited (Hoki Dental) offered Ms Lescure a permanent dental assistant position. Before she started, the outgoing staff member opted to stay at Hoki Dental, so Hoki Dental told Ms Lescure the role was no longer available. Ms Lescure raised a personal grievance stating that she had accepted the offer and Hoki Dental unjustifiably dismissed her as its employee. She sought compensation and reimbursement of lost remuneration.

On 12 June, Hoki Dental emailed Ms Lescure a draft employment agreement to consider. It also noted an initial temporary change in working hours. She emailed some questions that Hoki Dental answered, including that the start date in the document was now outdated. Hoki Dental clarified a tentative start date of 11 July 2022. She replied saying "*everything looks perfect*" and "*could we say the 4th July for the start date? Would like to start fresh and not at the end of the week*."

On 22 June, after the previous staff member took back their role, Hoki Dental told Ms Lescure that the position "*we offered you would no longer exist*" and the most it could then offer was a casual role. Ms Lescure objected to this. Hoki Dental apologised and offered a small monetary gift. Ms Lescure did not accept the gift or contract.

Hoki Dental argued that Ms Lescure had to sign the agreement to accept it. The Employment Relations Authority (the Authority) said this was not based in law and a person could use another way to take on an "intended agreement". Employment agreements formed without signing were in fact quite common in practice. An offer can still expressly require signing, but Hoki Dental's offer did not specify any particular method of acceptance. Therefore, the first line of Ms Lescure's reply was enough to unequivocally accept the offer. Hoki Dental argued their exchange was a discussion of terms rather than acceptance. The Authority found parties could discuss the starting date while still forming an employment relationship.

The definition of employee in law included a "*person intending to work*" after accepting an offer. When Ms Lescure sent an acceptance email, she became an employee of Hoki Dental. Hoki Dental also argued that the contract was frustrated when the role stopped being available. The Authority found the event did not make Ms Lescure's employment agreement impossible to perform.

Even if Hoki Dental had justified reasons, it had to follow a process. It should have raised its concerns, consulted with her in an investigation meeting and provided her with an opportunity to respond, and consider Ms Lescure's feedback. Its offer of an alternative position could have been a fair and reasonable act, but not without consulting on whether Ms Lescure's role was surplus in the first place. If it still decided to terminate her employment, it should have been on notice. Instead, when it unilaterally revoked the position, it established it would not meet its obligations under the employment agreement. Its dismissal without due process was unjustified.

The Authority awarded Ms Lescure one month's lost remuneration until she next found employment, at a value of $5,000. It also awarded $15,000 of compensation for the resulting financial insecurity; her emotional suffering, including her lost trust in employers and her own judgement; and losing an alternative job offer which she had turned down. Costs were reserved.

Lescure v Hoki Dental Limited [[2023] NZERA 569; 02/10/23; P Cheyne]

Employees must agree to without-prejudice conversations with full understanding

Ms Philpott pursued a personal grievance against Allied Press Limited (APL) and its closely related company, Mainland Distribution Limited (MDL). She alleged she was constructively dismissed. APL and MDL asserted that Ms Philpott was solely engaged by MDL and resigned of her own volition. It denied that APL disestablished her position before she accepted an alternative role with MDL. The Employment Relations Authority (the Authority) determined whether the contents of a without-prejudice meeting could be used in this personal grievance.

Since 1977, Ms Philpott periodically worked for APL and its predecessor newspaper companies. She worked for APL until October 2022 when she met her regional manager, Mr McCaughan, to discuss whether she was interested in moving to an alternative role with MDL. This was to be on the same terms and conditions as her APL role. Ms Philpott was happy to work for MDL and from 31 October 2022, she commenced employment with them.

Ms Philpott was provided with a new employment agreement but did not sign it. She initiated a conversation to discuss her struggles in the role. On 17 November 2022, Mr McCaughan, Ms Philpott, and her partner, Mr Hilton-Bright, attended a meeting. Mr McCaughan announced he was proceeding on a '*without-prejudice*' basis. Ms Philpott claimed that due to an impairment, she did not hear him say this. Mr Hilton-Bright confirmed that he heard it, but he "*had no idea of its legal significance*" and thought it meant "*without bias*".

While the two did not object "*to the meeting being held without prejudice*", all parties had different levels of understanding of without-prejudice conversations and their boundaries, since Ms Philpott did not have legal representation. Ms Philpott had no idea what the term entailed until after the meeting. The Authority said that even if Mr Hilton-Bright sufficiently understood the term, there was no evidence he explained it during the meeting to Ms Philpott.

After the meeting, the parties still communicated but did not resolve their differences. By 10 February 2023, Ms Philpott resigned, claiming she had been constructively dismissed and giving reasons in support of that.

There was no evidence that the discussion was mutually intended to be legally privileged from the outset. Mr McCaughan's intentions were not clear at the relevant time. He said he chose a without-prejudice conversation just in case anything arose that required a frank discussion, and if the company wanted to express opinions that they wished not to be repeated in litigation. It was unclear whether he was acting consciously or unconsciously as an agent of MDL.

The Authority was not convinced that Ms Philpott agreed to the meeting proceeding on a without-prejudice basis or was aware of Mr McCaughan's view of why the meeting should proceed on that basis. Thus, the meeting and any evidence pertaining to it did not have without-prejudice status and was deemed admissible in court. The parties would return to an investigation meeting to continue Ms Philpott's grievance. Costs were reserved.

Philpott v Allied Press Limited & Mainland Distribution Limited [[2023] NZERA 576; 04/10/23; D Beck]

A disingenuous redundancy created unjustified dismissal

Ms Kaur was employed by Kaiteriteri Properties Ltd (KPL) until her position was made redundant. Ms Kaur claimed she had been unjustifiably dismissed, following a hasty and non-genuine redundancy process. She also claimed to have been disadvantaged during her employment. Alongside these, the Employment Relations Authority (the Authority) considered whether Ms Kaur had been on call during her employment, and so entitled to compensation.

An employer needed to show that the decision to make an employee redundant was genuine and based on business requirements. If an employer can prove this, the Authority cannot later step in to replace the employer's business judgement for its own. Employers must also act in good faith. This means affected employees must be provided with information that is relevant to their employment, and given an opportunity to provide feedback on that information, before the decision is made.

The redundancy was complicated by the fact that Ms Kaur's employment was governed by three possible written agreements and one verbal agreement. It was unclear which was the correct one. Each contained slightly different terms and were entered into at different times. The role KPL sought to make redundant was the "*Accommodation and Hospitality Manager*" position. According to the second and third written agreements, Ms Kaur held that role.

Ms Kaur was not provided transparent material on how KPL decided to cut back on staffing costs. The Authority found this a significant flaw in the redundancy process. It especially considered that she did not receive an opportunity to consider why KPL justified making her position redundant, while other staff only had their hours reduced. More importantly, it also found that Ms Kaur had not been performing the role that she had been made redundant from. The Authority decided KPL and Ms Kaur's verbal agreement contained the actual terms of her employment, not the Accommodation and Hospitality Manager position, which was likely invented to support Ms Kaur's visa application. It ultimately found the decision to disestablish her role lacked genuineness, meaning Ms Kaur's dismissal was unjustified.

The Authority considered whether Ms Kaur was entitled to be paid for the time she was on call. Sleepover cases involve a person who makes themselves available to work but does not perform any work unless called upon to do so. Three factors would be assessed to determine her entitlement: Were there significant constraints on the employee's freedoms? Did the work involve significant and extensive responsibilities? Was being on call beneficial to the employer, because by being so the employee was meeting other obligations under their employment agreement? Ms Kaur could not produce sufficient evidence to show she had been on call for significant hours during her employment. The Authority decided she was not entitled to payment for that time.

Lastly, Ms Kaur argued KPL disadvantaged her by providing her with inadequate living conditions under an accommodation agreement. The Authority again found that she did not provide sufficient evidence to prove she was disadvantaged. Ms Kaur said KPL threatened to not support her visa application if she declined their accommodation package. She was unable to support this with evidence. The Authority found it was Ms Kaur who sought support from KPL for her visa application, and KPL agreed to this. The Authority also referred to messages sent by Ms Kaur to her family in India which showed that she wanted to stay in New Zealand. Therefore, Ms Kaur could not show she had been disadvantaged in her employment by the accommodation agreement. Ms Kaur raised other disadvantages, but they fell outside the 90-day time limit for personal grievances.

Ms Kaur received $6,000 in compensation for hurt, loss of dignity, and injury to feelings. Based mainly on the fact that Ms Kaur was unjustifiably dismissed, the Authority awarded her three months' lost earnings. Costs were reserved.

Kaur v Kaiteriteri Properties Ltd [[2023] NZERA 571; 02/10/23; A Baker]

Au pair found to be employee

On 3 August 2020, Ms Guyomard began a three-month fixed term arrangement working as an au pair for Ms Mortensen (the Mortensens). She signed an employment agreement that set out that she was "*self-employed*" and was not an employee of the Mortensens. The agreement provided that she would be paid $250 each week and be provided with full board, living in an attached studio at the Mortensen's home. After three weeks the arrangement was not working well. On 18 August, the Mortensens said that due to the COVID-19 lockdown, they were moving in with Ms Mortensen's parents and did not require Ms Guyomard's services any longer and gave her three weeks' notice.

On 23 August, Ms Guyomard met with Ms Mortensen to get a better understanding of why her services were no longer required. Ms Mortensen claimed that Ms Guyomard had said she no longer wished to be an au pair and wanted to leave. The following day, Ms Guyomard left the Mortensens' premises.

Ms Guyomard raised a personal grievance for unjustified dismissal. She claimed that she was an employee and advanced claims for compensation, lost wages, holiday pay and refund of the application filing fee with the Employment Relations Authority (the Authority). The Mortensens claimed Ms Guyomard was an independent contractor rather than an employee and resigned from her role by mutual agreement. They denied that Ms Guyomard was unjustifiably dismissed.

The first matter for the Authority to consider was the nature of the relationship between Ms Guyomard and the Mortensens. With the employment agreement not being clear on this, the Authority reviewed how the relationship operated in practice. It considered the factors of control, integration, and the degree to which Ms Guyomard was working on her own account.

The evidence demonstrated that Ms Guyomard was subject to a degree of control by the Mortensens and integrated into the role of caregiving for the Mortensens' children. Ms Guyomard was given a manual of instructions to follow. Ms Mortensen set feeding times for the children and also directed Ms Guyomard on the day-to-day care of the children. Although Ms Guyomard was free to do as she pleased on her three-day weekends, the Mortensens required her to remain at the house during her hours of work and to do night feeds.

The Authority found no evidence that Ms Guyomard was in business on her own account. Ms Guyomard was ruled to be an employee rather than an independent contractor. This meant that when the Mortensens gave Ms Guyomard notice on 18 August 2020, they effectively made her role redundant. The dismissal of Ms Guyomard fell far short of the requirements of procedural fairness and natural justice. Her claim for unjustified dismissal was established.

The Mortensens were ordered to pay Ms Guyomard reimbursement of lost wages of $1,500 plus interest, holiday pay of $100, and compensation for humiliation, loss of dignity and injury to feelings of $4,000. They also had to pay the filing fee of $71.56 to Ms Guyomard. Ms Guyomard was unrepresented so there was no claim for costs.

Guyomard v Mortensen [[2023] NZERA 591; 11/10/23; A Gane]

Termination under invalid trial period provision leads to unjustified dismissal

Ms Tepania commenced work with Haven Falls Funeral Home Limited (Haven Falls) in Auckland in July 2022, and worked as a funeral director until receiving notice of her dismissal on 3 October 2022. Haven Falls said the parties' employment agreement contained a 90-day trial period provision and that it lawfully dismissed her using the clause. Ms Tepania said her dismissal was unjustified and sought reimbursement of lost wages, compensation for her humiliation, loss of dignity and injury to feelings, and an order for costs.

On 11 July 2022, Ms Tepania attended an interview at Haven Falls for the position of funeral director/embalmer, with Ms Pukepuke and her husband, co-owners of Haven Falls. Haven Falls invited her to attend the funeral home again the following day. Haven Falls said the purpose of this was so she could meet the team and have a look around

the premises. Ms Tepania said her employment with Haven Falls commenced that day. During the attendance she performed cleaning duties around the funeral home.

On 12 July 2022, Ms Tepania and Ms Pukepuke agreed via text message that Ms Tepania would attend Haven Falls on 18 July 2022, *"prior to her starting on 25 July 2022"*. Ms Tepania would observe other staff members in this week. Ms Pukepuke's daughter, Ms Te Tai, the human resource and administration manager for Haven Falls, had been sick and returned to work on 20 July 2022. When she returned, she was surprised to learn that Ms Tepania had already completed two full days at Haven Falls, on 18 and 19 July 2022. Ms Tepania requested to keep attending for the full week, ahead of her official start.

Ms Pukepuke gave Ms Tepania the option of the employment agreement's start date being amended to Monday 18 July 2022. Ms Te Tai presented this to Ms Tepania on 20 July 2022. Ms Tepania agreed with the suggestion. Haven Falls paid wages for the hours Ms Tepania worked on Monday 18 July 2022 through to Thursday 21 July 2022. Due to receiving the payment, Ms Tepania was not a "*volunteer*". Ms Tepania and Haven Falls did not possess a common understanding of the employment agreement until they both signed it on 20 July 2022.

Ms Tepania said she did not agree to the trial period until she and Ms Te Tai signed the employment agreement on the morning of 20 July 2022. The Employment Relations Authority (the Authority) found that Haven Falls employed her on an unwritten employment agreement for the two days' work, prior to signing the written one. The Authority found that the 90-day trial provision contained in the written employment agreement was invalid.

On 3 October 2022, Ms Pukepuke held an informal meeting with Ms Tepania to discuss complaints arising from the Rotorua site and address the issue of Ms Tepania working on a public holiday, amongst other things. At this meeting the employment relationship ended. Haven Falls did not provide either of its complaints to Ms Tepania in writing before the meeting. Haven Falls had other options than termination of employment, such as placing Ms Tepania on a performance improvement plan, commencing a disciplinary process for failing to follow lawful and reasonable instructions, or both. A fair and reasonable employer could be expected to comply with the termination provisions of the employment agreement. The agreement included a requirement to follow a fair process when ending the employment.

Haven Falls could not justify its decision to dismiss Ms Tepania from her employment. The Authority determined that Haven Falls pay Ms Tepania compensation in the sum of $18,000 for hurt, humiliation and injury to feelings. It was also to pay reimbursement of lost wages of $4,830, and holiday pay of $386.40, being eight per cent of the six weeks' lost remuneration. It encouraged the parties to resolve the issue of costs between themselves.

Tepania v Haven Falls Funeral Home Limited [[2023] NZERA 587; 11/10/23; J Lynch]

Employer breached several employment standards but did not constructively dismiss employee

Ms Tindall worked for Winterset Proprietary Limited (Winterset) from March 2018 until November 2020. She handled guest needs and cabin upkeep in the company's holiday accommodation park (the Park). She also rented accommodation from the directors (the Winters) and eventually moved onsite. Ms Tindall claimed wage arrears for unpaid time performing cover for the Winters going offsite, and incorrectly applied holiday entitlement. She also claimed that she resigned due to the cash payments, incomplete documentation and poor accommodation practices, which in combination caused constructive dismissal.

Ms Tindall was contracted to hours '*as and when required*'. Winterset kept inadequate employment records. Payments were cash or '*through the books*' and inconsistent with time records. Winterset tallied its wages against accommodation costs it automatically deducted and kept a running tally of what Ms Tindall owed.

While living at her private accommodation, Ms Tindall would still respond to any guest requests at the Park. Mrs Winter would go off site but continue to check in with Ms Tindall about bookings, sales, guest needs and particularly guest payment. Ms Tindall claimed these hours as unpaid, but Winterset did not believe she worked or was on call during these times. The Authority considered whether her situation was a '*sleepover*' case, in which '*on call*' employees are entitled to minimum wage during their available hours, on top of hours worked. To qualify, the situation would have to place significant constraints on the employee's freedoms. The employees would have

significant and extensive responsibilities, like for disabilities, or student pastoral care and welfare. The role also had to be beneficial to the employer, by meeting the employer's other obligations, like care and welfare to live-in young students or high-needs clients. The Authority focused on the special-needs scope of sleepover cases and found this situation did not qualify for minimum wage during available hours.

The Authority found that Ms Tindall most likely did more work than logged on her timesheets during the summers of 2018 until 2020. However, she did not have evidence to support this, so the Authority could not find a wage arrears for these times. It found more generally Winterset did not pay minimum wage for her recorded work. The Authority could not calculate the arrears without sufficient records from Winterset. It ordered Winterset to calculate arrears for the entire period of employment, in the fortnightly blocks that it would have paid at the time. It did not require interest, which is done for long-standing and repeatedly non-compliant employers.

Winterset deducted accommodation from Ms Tindall without consent, which breached the Wages Protection Act 1983. The Authority ordered all the deductions to be repaid. It also found that Winterset did not pay extra half time on some public holidays and ordered these arrears paid. Winterset did not have evidence it gave Ms Tindall her annual leave entitlement or contracted into pay-as-you-go annual leave. The Authority determined Winterset therefore owed annual leave for the employment period and ordered it to calculate this, too.

The Authority considered Ms Tindall's argument of constructive dismissal. Winterset breached several employment standards. It failed to retain a written employment agreement, pay full wages, or keep correct records, and breached deductions and holiday pay obligations. Ms Tindall said instead of raising these issues, she felt stuck in accommodation attached to her employment, with the increasing stress of working more and seeing her children less. She felt intimidated by Mrs Winter and said she ultimately left without sharing her work-related reasons out of fear. However, the message history between the two indicated Ms Tindall was upbeat and Ms Winter encouraging and caring, and they shared close matters in the manner of close neighbours. Ms Tindall told Ms Winter that she resigned to address a serious diagnosis in her family. She felt they had "*quite a good conversation*" upon her resignation. The Authority did not feel this relationship resembled the "*toxic and abusive*" one that Ms Tindall claimed. It concluded Ms Tindall's true reason for resignation was her family and not the employment breaches, so Winterset did not make any constructive dismissal.

Overall, the Authority ordered Winterset to calculate and pay wage arrears and annual leave entitlement, $257.13 of public holiday pay and $6,274.42 of deductions. Costs were reserved.

Tindall v Winterset Proprietary Limited [[2023] NZERA 608; 18/10/23; A Baker]

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: Seven Bills

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

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

Gangs Legislation Amendment Bill (5 April 2024)

Courts (Remote Participation) Amendment Bill (5 April 2024)

Firearms Prohibition Orders Legislation Amendment Bill (5 April 2024)

Inquiry into the 2023 General Election (15 April 2024)

Parole (Mandatory Completion of Rehabilitative Programmes) Amendment Bill (16 April 2024)

Fast-Track Approvals Bill (19 April 2024)

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

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

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