Business Canterbury
Our Chamber of Commerce

Our Weekly News Digest for Employers
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Case Law

Employment Relations Authority: Six cases

Employee claimed medical retirement was inappropriate

OSP was employed by Inland Revenue (IRD) for approximately 31 years until IRD ended his employment on medical grounds in 2022. OSP sought a determination that his dismissal was unjust, that he was made redundant, and that redundancy compensation was payable together with compensation for humiliation and loss of dignity. IRD said that the decision to end OSP's employment was what a fair and reasonable employer could have done in all the circumstances, and that OSP was paid a medical retirement payment of 89 days' salary and one month's pay in lieu of notice.

The Employment Relations Authority (the Authority) did not make an order prohibiting publication of medical information but prohibited the publication of the Applicant who is referred to as OSP.

In 1992, OSP was appointed to a permanent role in IRD's child support unit. In 1995, OSP suffered an event which required more than a month off work, psychological assistance, and medication to deal with depression for a period of time. From 1996 onwards, OSP continued working for IRD and was not required to undertake any further duties which involved interactions with members of the public. In 2017, IRD implemented a significant restructure following a business transformation process. OSP's role was disestablished and they were offered a customer service officer (CSO) role. OSP said that they accepted the role on the basis that they were told there would also be work which was not customer facing.

It took some years for the area in which OSP worked to be fully transferred to the new database system, START. For that period OSP's disability was able to be accommodated and they continued to undertake work that did not require customer interaction. IRD said from late October 2021 there was no longer any ability to accommodate OSP with work that did not involve customer interaction as the area in which OSP worked was fully transferred across after the Labour weekend. Medical retirement was proposed by IRD however OSP said medical retirement was inappropriate because their position was redundant. After

discussions and exploration of alternatives, IRD ended the employment relationship due to medical retirement.

No evidence was given to support that OSP was appointed to a role which did not require them to perform customer facing aspects. Rather, for a period before child support work was fully transitioned to the START, they were still able to perform work that was not customer facing. There was no real dispute that OSP was unable to fulfil the requirements of the CSO position when fully transitioned to START.

IRD provided evidence about why it was not possible to reduce CSO's role to avoid customer contact after the full transition to START and that it could not reasonably accommodate OSP's disability. Nearly every task required customer engagement. IRD also considered redeployment options. The Authority concluded that IRD was unable to continue to reasonably accommodate OSP's disability.

The Authority considered if OSP's employment with IRD came to an end for medical retirement or redundancy. The Authority found OSP's acceptance of the CSO role was unconditional and customer contact was a key component of the role. The position of CSO remained unchanged but OSP could not perform the requirements of the role once child support had been fully transitioned across to START. The Authority concluded it was not a redundancy situation because the CSO position still remained and was not surplus to requirements. The collective agreement provided for ending employment on medical grounds and OSP was unable to perform the CSO role because of a medical condition.

The Authority found that a fair and reasonable employer could have ended the employment relationship on the basis of medical retirement. The process was fair. Costs were reserved.

OSP v The Chief Executive of Inland Revenue [[2023] NZERA 575; 20/06/23; H Doyle]

Suspended employee unjustifiably dismissed and disadvantaged

In 2012, Mr Amin became a member of the Board of Directors of Hutt and City Taxis Limited (HCTL). He was employed by HCTL as an acting manager before being employed as a permanent manager. He was suspended and then terminated for serious misconduct, where he deliberately misled the company about the terms of his individual employment agreement. He raised a personal grievance for an unjustified disadvantage and dismissal at the Employment Relations Authority (the Authority).

While Mr Amin was an acting manager, the Commerce Commission commenced an investigation. The allegation related to HCTL and four directors, including Mr Amin, engaging in prohibited anti-competitive behaviour between taxi companies. The Commerce Commission proceedings were resolved, costing HCTL more than $200,000 and warnings were issued by HCTL to the relevant directors.

As a result of the Commerce Commission issues, the Board resigned, and a new Board was elected. One of the new people on the Board was Mr Sami. Mr Amin was employed as a permanent manager as his fixed term contract kept getting extended and so he requested that the agreement be secured for four months. The new board launched an investigation into Mr Amin. Mr Amin submitted that there was no reasonable basis for the initiation of an investigation into his conduct, including the allegations related to conduct during an earlier period of employment which the previous board already investigated. The Authority did not accept that HCTL were barred from investigating Mr Amin's role in the Commerce Commission matters simply because there had been a break in the employment relationship.

Mr Sami perused Mr Amin's employment agreement only to have found that it was not prepared or approved by HCTL's solicitor as the directors were led to believe and as stated on the agreement. The agreement stated that he would be employed for a "*minimum of four months*" instead of a "*maximum of four months*". HCTL launched an investigation as it felt misled by Mr Amin.

Mr Amin was suspended pending an investigation but was never consulted on it which denied him natural justice. Suspensions without consultation could be lawful if there was an imminent need for the suspension but here it was not urgent. Further, Mr Amin was never provided a notice detailing the reasons for the suspension as required by HCTL in the employment agreement. The actual reasons for the suspension were not specified in the suspension letter nor did it mention "*serious misconduct*".

Other matters were considered by HCTL when deciding to suspend. The failure to notify Mr Amin of those reasons was not merely a minor procedural defect. The action taken by HCTL, and the way in which it acted, were not actions open to a fair and reasonable employer at the time the action occurred. Mr Amin was unjustifiably disadvantaged by HCTL's actions in suspending him from his employment.

During the disciplinary process, Mr Amin was removed as a director. At the meeting no notes were taken which indicated a serious procedural failing. Conclusionary statements were recorded after the meeting which did not have any critical assessments but were repetitive and taken as face value. There was no evidence that the process was genuine, and that Mr Amin's responses were considered. Here, he was disadvantaged by HCTL's actions.

There was also no sufficient evidence that Mr Amin's actions were "*deliberately misleading*". The Authority found that the agreement had initially been sourced from HCTL's solicitor and had been used on previous occasions as a template. At most, there was a misunderstanding between Mr Amin and HCTL but nothing to suggest grounds for dismissal.

Mr Amin was dismissed from his employment by way of a letter that did not explicitly confirm the termination but instead recorded that the relationship of trust and confidence had ended. The Authority concluded that the dismissal was procedurally and substantially unjustified and that the suspension and findings of the investigation unjustifiably disadvantaged him.

Mr Amin made reasonable and genuine attempts to gain alternative employment in order to try and mitigate his losses after the dismissal. For this, lost wages of three months equating to $20,696 was ordered to be paid by HCTL. The process induced stress and anxiety for which he needed prescription medication. It was clear that he suffered injury to feelings and humiliation, so HCTL was ordered to pay $28,500. Mr Amin sought pre-litigation costs but this was declined as HCTL's actions rose out of genuine concern. Costs were reserved.

Amin v Hutt and City Taxis Limited [[2023] NZERA 493; 31/08/23; R Anderson]

Authority confirms paid parental leave is to be paid in one continuous period per person

On 8 February 2023, Inland Revenue Department (IRD) approved Ms Odlin's application for paid parental leave from 20 February 2023 to 20 August 2023, for 26 weeks of paid parental leave. She wanted to transfer part of the payments to her husband and her application for this was approved by IRD. The arrangement was that he would receive 11 weeks of paid parental leave.

Ms Odlin's paid parental leave began on 28 February and she elected to receive two weeks' parental leave payments upfront. Then, it was transferred to her husband for 11 weeks. Following the end of her husband's paid parental leave, Ms Odlin expected that the remaining 13 weeks would be transferred back to her. However, she did not receive any payments after.

On 16 June 2023, Ms Odlin was advised by IRD that she was not entitled to any payments because she was only entitled to transfer her payments once. On 27 June 2023, Ms Odlin lodged a statement of problem with the Employment Relations Authority (the Authority) seeking a formal review of the decision.

When Ms Odlin applied for paid parental leave, she had no reason to believe that by transferring some of her entitlements to her husband that she would forfeit the remainder of her entitlements. The information available online on the Employment New Zealand website in relation to eligibility to transfer some of her payments implied that she could transfer some of her payments and "*did not provide any 'red flags' to investigate further*". The Ministry of Business, Innovation and Employment (MBIE) replied that she did not contact them or IRD before making her application. However, based on the publicly available information, she did not consider there would be a reason to seek further advice.

Ms Odlin did not view this as a situation where she was seeking to transfer "*back*" entitlements to herself because the transfer to her husband was limited to 11 weeks. She had no reason to think she would not be paid the residual entitlements. When she contacted IRD about the payments coming to a halt, they referred to the Parental Leave and Employment Protection Act 1987 (the Act). The Act stated that a person would not be entitled to parental leave payments in respect of a child if they previously received parental leave payments in respect of that child. Since Ms

Odlin received two weeks of parental leave payments at the start for her child, she was unable to get entitlements transferred back to her.

The Authority referred to the Act, which in its plain interpretation noted that a parental leave payment is payable for one continuous period per person. It did not matter that Ms Odlin only received two weeks of paid parental leave up front prior to the transfer of 11 weeks to her husband. The Act applied regardless of the duration of either payment. It therefore found that Ms Odlin was not entitled to further parental leave payments.

Ms Odlin urged the Authority to use its discretion under the Act to reverse IRD's decision in declining the remaining 13 weeks of paid parental leave, as it was not reasonable to expect her to have read the legislation or hire a lawyer to provide advice on this matter prior to making her application. The restriction of payments to one continuous payment was not set out on the application forms nor was it readily made available or accessible on the relevant websites. The Authority reversed IRD's decision as it was inequitable to deprive Ms Odlin of her remaining entitlement. It accepted that she would not have transferred her entitlements had she known the consequences. MBIE was ordered to pay $71.55 for the filing fee to Ms Odlin.

Odlin v Ministry of Business, Innovation and Employment [[2023] NZERA 523; 13/09/23; D Tan]

Interim reinstatement of employee deemed inequitable

An interim order for non-publication of the parties' names was made by the Employment Relations Authority (the Authority) in a notice of direction dated 25 August 2023. There was no opposition to the order as the trainee teacher was in a vulnerable position, and the disclosure of the name of the employer school would likely identify the employee.

SFC was employed by YKQ on a two-year fixed term agreement from 28 January 2022 to 27 January 2024 as an employee-based trainee teacher of Te Reo at a Christchurch secondary school. She participated in the Ako Mātātupu Teach First NZ Education programme (Ako Mātātupu) which provided candidates with the opportunity to teach whilst completing a postgraduate diploma in secondary teaching. SFC's work was covered by the offer of employment and the Secondary Teachers' Collective Agreement (the collective agreement).

The Board of Trustees was notified of employment concerns by the principal, who had met with SFC on 30 March 2023. The Board arranged a hui and a subcommittee of three was established to investigate the employment issues.

SFC was dismissed from her employment on 28 July 2023 for electing not to teach a class on 24 March 2023, telling students she was going home due to mental health reasons and not giving notice of her intention to leave to enable relief or cover. There were findings that SFC attended a public event Manu Kōrero whilst suspended, which had an unsettling effect on students and staff. She also held fundraising money in a manner not in accordance with the fundraising policy. Further findings were made that she communicated with students whilst suspended, via inappropriate messages that undermined the school and management, whilst other messages were capable of being harmful to students. The reasons for dismissal were contained both in a letter dated 2 June 2023 and in a letter of dismissal dated 28 July 2023.

On 18 August 2023, SFC lodged a statement of problem asking the Authority to resolve unjustified disadvantage and unjustified dismissal grievances. SFC sought interim reinstatement on an urgent basis, permanent reinstatement, and other remedies. The dismissal was for serious misconduct. The principal advised SFC of the 24 March 2023 concerns about leaving the classroom and the teacher complaints. The principal's communication after the hui on 30 March 2023 was that the complaints were not resolved by way of a non-disciplinary outcome. SFC did not return to the school after 24 March 2023 before she was dismissed. The Board subcommittee then communicated with SFC about the reasons for the initiation of the formal disciplinary processes and the concerns. On 25 May 2023, a meeting took place to meet with SFC and her representatives to provide responses.

The Authority found it arguable whether what YKQ did with the request of how to run the process on 25 May 2023, and how it handled it, was what a fair and reasonable employer could have done. The summarised interview notes provided as part of the process were also arguably inadequate and not in accordance with internal policies. SFC submitted that it was unfair that they received delayed advice, alongside relationship concerns and a failure to attempt restorative processes.

SFC wanted to be reinstated to help her become a qualified teacher. The Authority acknowledged SFC was in a more vulnerable position than a qualified teacher because to become qualified under the programme, she had to be employed. YKQ recognised this by at one stage supporting a transition to a new school. Taking all matters into account, YKQ would suffer the greater prejudice if required to reinstate SFC so the balance of convenience favoured YKQ. The application for interim reinstatement was not granted. The parties did not attend mediation but were directed to do so.

SFC v YKQ [[2023] NZERA 529; 15/09/23; H Doyle]

Complete lack of process leads to successful unjustified dismissal claim

From January 2020 to July 2022, Ms Cooper worked as a café assistant at the Sprout Café (the Café), operated by Sweet Greens Limited (Sweet Greens) in Whangārei. Ms Cooper claimed that she was unfairly treated when working at the café, had her hours reduced and finally was unfairly dismissed. Ms MacFarlane, the owner of Sprout Café was not usually at the café. Her husband (the Manager) also had other work but spent periods of time running the Café as a manager.

Ms Cooper had a good relationship with Ms MacFarlane and the Manager however after a while she found the Manager was berating and belittling her, sometimes in front of others. She saw his behaviour as nagging and micromanaging, with extensive task lists left on a white board but additional frequent surveillance of her activities both in person and by phone calls if he was not on site. Other staff mentioned to Ms Cooper that they made mistakes sometimes but were not subjected to the same harsh treatment as they saw Ms Cooper receiving.

On 21 April 2022, Sweet Greens held meetings with Ms Cooper which ended in Ms Cooper receiving a final warning. Sweet Greens described "*behavioural issues*" and provided two allegations of theft. Sweet Greens claimed it gave verbal warnings for these incidents but did not give written warnings because Ms Cooper chose the verbal ones. Ms Cooper denied being given proper warnings. The scenario described by Sweet Greens of offering a choice of warning type was unusual and the Employment Relations Authority (the Authority) could not conclude that warnings were given.

Ms Cooper raised sincere concerns in a reasonable way with Ms MacFarlane about the way she was being treated and was entitled to a proper response. Ms MacFarlane replied that she would sort it out and later reported back that her husband was going to stop such behaviour. The Manager stayed away from the Café for a few weeks but upon return the behaviour continued. Ms MacFarlane never checked in with Ms Cooper to see how things were. Accordingly, the Authority concluded that Sweet Greens failed to take adequate steps to deal with Ms Cooper's legitimate concerns and when the behaviour continued, failed to provide a safe and healthy working environment.

The Authority found that there had been no unjustified action regarding Ms Cooper's hours of work. Although she had clearly occasionally worked longer hours than those stated in the employment agreement, there was no formal variation agreement. The base number of hours worked remained more or less the same, and changes occurred by agreement between Ms MacFarlane and Ms Cooper. The Authority found that a sufficiently clear arrangement to give her a contractual right to longer hours was not established and hence no grievance for unjustified action was established.

On 21 July 2022, Ms Cooper arrived to open up the Café and found notes all around the Café about what to do. The Manager then called her to ask whether she had cooked the chicken and vegetables in the order he prescribed. A few minutes later he called back to say "*shut the shop and go home. You're fired*". Ms Cooper messaged the Manager stating how unfair the situation was and requested a termination letter be given as WINZ required it. Ms Cooper heard nothing for several days. On 26 July 2022, Ms MacFarlane messaged to say the termination letter would be sent and her final pay would be done on the normal pay run. The payment was made but no letter was received.

About two and a half weeks after her dismissal, Sweet Greens sent a dismissal letter to Ms Cooper. The letter purported over several pages to set out dates and times for various events and disciplinary action allegedly taken against Ms Cooper. Ms Cooper accepted that some discussions occurred but denied that she was given warnings or that there was any basis for such action by Sweet Greens.

The Authority found Ms Cooper had been unjustifiably dismissed. This detailed dismissal letter came so long after the termination and appeared as a belated attempt to justify the dismissal and in the absence of contemporaneous documents and witnesses for Sweet Greens, with Ms Cooper's evidence being credible, the Authority was not satisfied that the letter accurately described the events as they occurred during Ms Cooper's employment.

In addition, the process was significantly inadequate as Ms Cooper was dismissed over the phone without any notice of a disciplinary process being activated, she was only given a minimal chance to be heard before the Manager hung up and the length disciplinary letter was an attempt to retrospectively justify a decision taken without fair process. Hence it was found that Sweet Greens did not act as a fair and reasonable employer could have done and unjustifiably dismissed Ms Cooper.

Covering both the failure to deal adequately with the treatment to Ms Cooper during her employment and the dismissal, the Authority found $25,000 was a fair assessment of compensation for humiliation, loss of dignity and injury to feelings. Additionally, Sweet Greens was ordered to pay Ms Cooper $8,066.60 for lost wages and $71.56 for the Authority's filing fee. It was also ordered to pay a penalty of $1000 with $500 of the money received to be paid into a Crown account and $500 forwarded to Ms Cooper.

Cooper v Sweet Greens Limited Trading as Sprout Café [[2023] NZERA 537; 18/09/23; N Craig]

Authority upholds claim for commission back pay

Auckland Trotting Club Incorporated (the Club) owned and operated Alexandra Park, a harness racing venue. Inside Alexandra Park, the Club operated a TAB for the New Zealand Racing Board, which in 2020 became known as TAB New Zealand (the TAB). The TAB paid the Club a commission-based agency fee for running the TAB at Alexandra Park (the agency fee). Mr Payne commenced employment with the Club in 2005 as TAB Manager and was paid a base salary and commission which included a percentage of the agency fee the TAB paid the Club. Mr Payne claimed he was owed commission arrears, because his commission payments had not been calculated in accordance with the commission formula in his 2013 employment agreement, and he had not been paid commission on the increased agency fee the TAB had paid the Club from February 2015 onwards.

The Club disputed the claim on several grounds. It argued the commission formula in Mr Payne's 2013 employment agreement was incorrect, that Mr Payne waived any rights to revise commission payments set out in a revised 2013 employment agreement, and Mr Payne verbally agreed not to receive an increase in 2015. Mr Payne contended he tried for some time to resolve these matters whereas the Club believed the issues only arose when Mr Payne changed to a new role in 2021. Mr Payne asked the Employment Relations Authority (the Authority) for a determination and the Club sought leave of the Authority to have the commission formula in the 2013 Employment agreement amended.

The reason for the revised 2013 employment agreement (the 2013 agreement) was disputed. Mr Payne claimed this was to set out the commission calculation more clearly, whereas the Club contended the revision was to deal with the matter of the 2005 agreement not being signed. The Authority preferred the evidence of Mr Payne and noted that the commission payment calculation in the 2013 agreement differed significantly from that in the 2005 agreement. Although the calculation changed, Mr Payne continued to receive commission payments based on the 2005 agreement. The Authority did not agree with the Club's claim to rectify the 2013 agreement as rectification of the 2013 agreement commission formula was not legally possible, because it would not reflect the parties' true mutual intention, which the Authority considered was recorded in the 2013 Agreement. The Authority observed that Mr Payne did not intend for the 2013 agreement to simply record the same commission formula that was used in the 2005 agreement, as he would have had no reason to have signed it if that was the case. Nor did Mr Payne say or do anything that would have reasonably led the Club to believe that he had intended the 2013 agreement to record the 2005 agreement commission formula.

Even if it was a mistake, which was not accepted, the Authority was satisfied Mr Payne did not know there had been a mistake. He had not, by his words or actions, lead the Club to reasonably believe he intended his commission formula would be anything other than what was recorded in the 2013 agreement. The Authority found that Mr Payne did not waive his contractual rights to be paid commission in accordance with the commission formula in the 2013 agreement, and it was unreasonable for the Club to consider he had.

Regarding the alleged verbal agreement about the increased agency fee in 2015, the Authority found it was most unlikely that Mr Payne would waive his rights to a commission increase. The onus was on the Club to establish the evidential basis for a waiver, and it had failed to do so. The evidence fell well short of reaching the threshold of a clear and unambiguous representation by Mr Payne, to forego his contractual rights to enforce the commission formula in the 2013 agreement. As a matter of fairness and good faith, such an important change that deprived Mr Payne of contractual entitlements amounting to significant sums needed at the very least to be clearly recorded.

The Authority found Mr Payne was entitled to be paid commission from 14 April 2016 to 21 August 2021 in accordance with the commission formula in the 2013 agreement. The parties agreed that any commission arrears that may have been owed prior to 14 April 2016 were time barred under section 142 of the Employment Relations Act 2000.

Payne v Auckland Trotting Club Incorporated [[2023] NZERA 539; 19/09/23; R Larmer]

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 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