Business Canterbury
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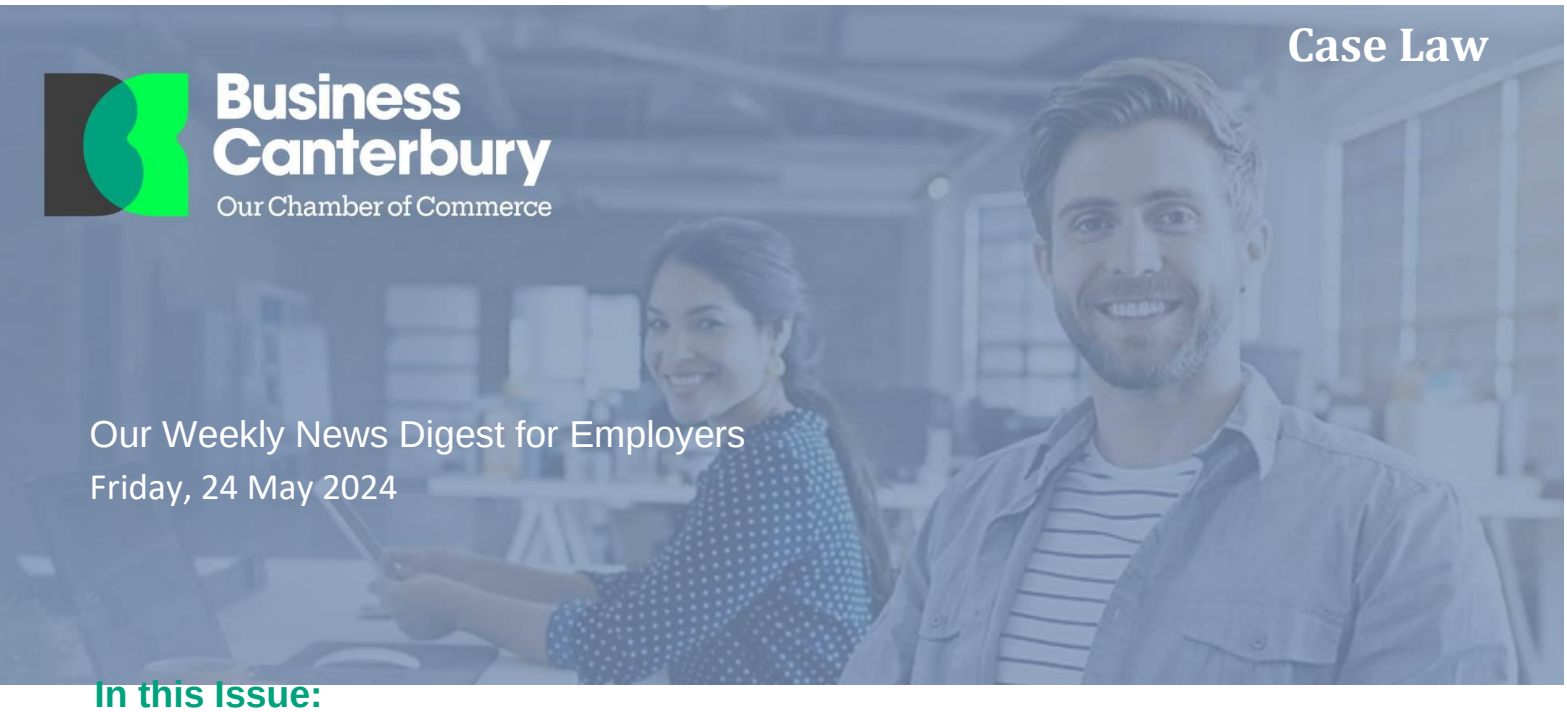

Our Weekly News Digest for Employers
Friday, 24 May 2024

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Case Law

Employment Relations Authority: Six Cases

Employer pressures employee to resign

Ben Cable Electrical Limited (BCE) employed Mr Kemble as an electrician from August 2021. Mr Kemble resigned on 29 July 2022 believing BCE had tried to coerce him into leaving. He raised claims at the Employment Relations Authority (the Authority) of unjustified dismissal and unjustified disadvantage for bullying and intimidation. He also sought penalties for alleged breaches of good faith.

On 15 July 2022, one of BCE's clients banned Mr Kemble from their property, which meant there was no work for him that day and the following Monday. Co-owner Mr Young commented that the matter could be sorted *"the easy way or the hard way"*, with the implication being that if Mr Kemble resigned it would resolve things, and BCE would hire him as a contractor. Mr Young said at the Authority that Mr Kemble had already received 15 complaints.

Over the next few days, BCE received four more written complaints about Mr Kemble. On Sunday 17 July 2022, Mrs Young, the other co-owner, texted Mr Kemble asking him to stay at home for two days on full pay while BCE considered the next course of action. Mr Kemble felt this was a suspension, which BCE denied. On 18 July 2022, Mr Young texted and called Mr Kemble's father. While BCE denied this contact was to pressure Mr Kemble to resign, this was the impression that Mr Kemble's father was left with.

On 19 July 2022, BCE met with Mr Kemble to discuss the complaints. This meeting was covertly recorded by Mr Kemble. On 21 July 2022, BCE invited Mr Kemble to return to work on 25 July 2022, as they had office duties for him. Mr Kemble's counsel responded that Mr Kemble was now sick and would be unfit for work until 29 July 2022. BCE learned that while off sick, Mr Kemble arranged to work for other clients as part of his own business. It raised the matter with Mr Kemble but did not take any disciplinary action. After this, Mr Kemble resigned.

The Authority considered it most likely that it was Mr Young who first raised the possibility of an agreed exit, because that would have best met his own needs. It agreed that Mr Young's call to Mr Kemble's father was an attempt to press for a resignation. BCE acted with a deliberate or dominant purpose of coercing Mr Kemble to resign. It was that pressure that, more likely than not, resulted in him resigning. Therefore, BCE constructively dismissed Mr Kemble. The Authority also found that the allegation of 15 complaints against Mr Kemble was overinflated and, as such, breached good faith.

The Authority found that Mrs Young's text was an instruction to stay away rather than a request. The recorded conversation also indicated that Mr Young viewed the time off work as a suspension. While Mr Kemble had not been consulted about this, this was a minor procedural flaw in the circumstances. Mr Kemble's other claims that BCE bullied and harassed him, and failed to investigate the complaints appropriately, were not proven. None of these unjustified disadvantage claims succeeded.

The Authority found that Mr Kemble's conduct significantly contributed to the events, so reduced his compensation by twenty percent. BCE was ordered to pay Mr Kemble final amounts of $2,864.44 in lost remuneration, $20,000 in compensation for distress and $229.16 in annual holiday pay entitlements. The parties were encouraged to come to an agreement about costs.

Kemble v Ben Cable Electrical Limited [[2024] NZERA 15; 12/01/24; R Larmer]

Employer walks back WFH permission and rejects medical certificates

Ozac Architects Limited (Ozac) employed Ms Kuo as an architectural technician on 8 January 2018. During the COVID-19 pandemic, she applied for Ozac's work from home permissions, which it rejected. It logged her days offsite as sick leave, to be justified with medical certificates. Ms Kuo resigned and raised a personal grievance that Ozac disadvantaged her by doing this. She also alleged constructive dismissal and breach of good faith, warranting a penalty.

Ms Kuo became sick with the flu during late January and early February 2020, but felt well enough to request to work from home. At this point, Ozac did not have a work from home policy. While they were open to Ms Kuo's request, she did not have the equipment and systems set up to aid her to do so.

On 31 January 2020, Ozac introduced a working from home policy where employees would request to be considered and it would apply the policy's criteria. Ozac said the purpose of the policy was to provide options for those with COVID-19, but gave applicants an option to provide *"other"* reasons to be considered. Ms Kuo applied for this but was rejected on the basis that no supporting medical evidence was provided, that her application implied that she was sick in the past rather than the present, and that she had the flu rather than COVID-19. Ms Kuo challenged the rejection on the grounds that the application allowed working from home for those with *"similar symptoms"* to COVID-19. For her period of absence, Ms Kuo asked it to be processed as unpaid leave. Ozac rejected the request and decided that this time was sick leave.

As Ms Kuo was away for more than three days, Ozac required a medical certificate. It allowed her to continue taking sick leave if she was still unwell. Ms Kuo continued to contest that her leave be processed as unpaid leave. They argued back and forth and could not settle in the end. During this time, Ozac withdrew Ms Kuo's previously approved leave for 21 February to 9 March and told her to work from home, return to work on 10 February, and take annual leave on 13 and 14 February as she had *"recently taken too much leave"*.

On 10 February, Ms Kuo returned to work. She raised her first personal grievance for inappropriately and unjustifiably determining her absence to be sick leave and the requirement to provide a medical certificate. On 19 February, Ms Kuo went on stress leave for 14 days as advised by her doctor. Ozac complained the medical certificate did not show that any clinical tests were carried out, and the doctor simply relied on patient comment and did not distinguish the investigation into her employment situation. Ozac invited Ms Kuo to a disciplinary meeting on 4 March for poor performance in providing so little detail. The subject matter was not mentioned but dismissal was advised as a potential consequence of the outcome. Ozac also demanded that Ms Kuo get a medical examination from a medical practitioner of its choice.

Ms Kuo raised a second personal grievance that the disciplinary process was only initiated in retaliation for the original grievance. Ms Kuo raised unjustified dismissal and numerous unjustified disadvantage claims, including having to provide proof of illness for her absences, but also having the security of her employment threatened. She resigned effective 15 April 2020 and Ozac decided not to pursue the disciplinary action.

The Authority decided that Ozac had fallen short in its employment obligations. While Ms Kuo had advised she was ill to some extent, she was still willing to work from home. The work from home policy had *"apparent inconsistency"* and Ozac took the approach that was most beneficial to it. The final absence attributed to the sickness was only a single day, so falling short of the three-day threshold, Ozac was not entitled to obtain proof of sickness at Ms Kuo's own cost.

Pursuing its invalid requirement for a medical certificate and instituting disciplinary action placed Ms Kuo's employment at risk. However, she was not constructively dismissed, as she admitted that she resigned to secure a new job. Ms Kuo never had intentions to return to work. For the way Ozac approached the situation, Ms Kuo was awarded $10,000 for hurt and humiliation. Her personal grievance for unjustifiable disadvantage succeeded and all other claims failed. Costs were reserved.

Kuo v Ozac Architects Limited [[2024] NZERA 25; 18/01/24; M Loftus]

Employer denies assault he was convicted for

Mr Wright worked as a cook/duty manager at the Otira Stagecoach Hotel Limited (Otira). Mr Wright did not return to work after an assault on 14 November 2018. Mr Wright claimed Otira failed to provide him with a safe work environment and by not returning to work, he resigned in response to the assault. He alleged that upon his resignation in response to this breach of duty, Otira committed constructive dismissal.

The altercation occurred between Mr Wright and business director, Mr Rowntree. Mr Wright was injured in the altercation. He called the police and was taken to hospital. Mr Wright said he was assaulted and injured by Mr Rowntree. Mr Rowntree denied assaulting Mr Wright, instead claiming Mr Wright injured himself when he stumbled and fell twice.

As a result of the events on the night, criminal charges were laid against Mr Rowntree. Mr Rowntree was found guilty by a jury in the District Court for assault with intent to injure on 30 January 2020. While Mr Rowntree appealed the conviction and the District Court reheard his case, it found him guilty of assault (dropping the element of intent to injure) on 1 June 2022.

After the incident, Mr Wright did not return to work at Otira. He said he was constructively dismissed as a result of Mr Rowntree's assault, and that Otira acted unjustifiably which caused a disadvantage to his employment. Otira claimed there was no basis for Mr Wright's complaints because Mr Rowntree said, notwithstanding his conviction, the assault did not occur.

The Employment Relations Authority (the Authority) investigated Mr Wright's claims by receiving written evidence and documents including relevant transcripts and decisions of the District Court in relation to the assault charges against Mr Rowntree. It also assessed the written submissions of the parties and questioned witnesses.

Whether Mr Rowntree assaulted Mr Wright was the crucial question. The parties' versions of events differed from each other. When faced with conflicting evidence, the Authority decided which side it preferred based on its credibility. It was more persuaded by Mr Wright's version of what occurred: that Mr Rowntree did assault Mr Wright. The assault was in turn an action of Otira and a serious breach of duty. Mr Wright resigned in response to the breach of duty, which was foreseeable. This meant Mr Wright was constructively dismissed, and the dismissal was unjustified both procedurally and substantively. The Authority ordered Otira to pay Mr Wright $34,000 of compensation, $8,424 for lost remuneration and $252 for the KiwiSaver contributions. Costs were reserved.

Wright v Otira Stagecoach Hotel Limited [[2024] NZERA 29; 19/01/24; P van Keulen]

Employee creating workplace drama loses personal grievance

JTK worked as a waitress at a bar and restaurant operated by Murphy's Law 54 Limited (Murphy's). During the employment, she often complained of incidents with Mr Z, a chef at Murphy's, pushing and cursing at her. She felt that Murphy's was not taking her situation seriously and resigned. During her notice period she secured new employment. She applied to the Employment Relations Authority for Murphy's to pay her lost wages and compensation for her distress.

While at Murphy's, a few incidents occurred between Mr Z and JTK where she alleged he pushed her aside. After these incidents, JTK would inform general manager Mr Elliot of what happened. Mr Elliot would speak to Mr Z about his behaviour and offer for JTK to take the rest of her shift off. He encouraged her to speak to director Ms Hogan about the issues. Mr Elliot also ran a mediation with JTK and Mr Z, and they all settled on putting their personal issues aside. Despite this, JTK still raised complaints of Mr Z being physical with her.

Ms Hogan found in the CCTV footage that Mr Z never pushed or physically touched JTK in all the incidents she alleged. Ms Hogan's conclusion was consistent with other witnesses. She believed that JTK was *"the one creating all the drama with [Mr Z]"*.

JTK felt that Murphy's was not taking her safety into consideration and met with Ms Hogan on 24 August. During the meeting, JTK felt Ms Hogan discouraged her from making a police report against Mr Z. She said a potential consequence of going to the Police was that they would lay a non-molestation order against Mr Z, which would prevent him working at the same place as JTK. Without a chef, the restaurant *"would have to close the door"*. The parties discussed what could be done to reduce contact between JTK and Mr Z at work.

JTK submitted she was treated unfairly because she was told or *"it was heavily implied"* that she would no longer be able to work for Murphy's if she went to the police about Mr Z. However, JTK said at the Authority she had real doubts about the value of making a report to the police due to her past experience of making a complaint. Realistically this turned out to be more influential on what actions she felt were necessary or useful rather than what Ms Hogan said.

The Authority found that Mr Elliot acted promptly on each report and was active and constructive in addressing problems in the employment relationship. Ms Hogan determined Mr Z was innocent using evidence. Managers and supervisors changed JTK's area of work, offered to escort her to her car at the end of her shifts if she felt uneasy, checked in often and asked if she wanted to have the rest of her shift off after certain incidents. They showed they were *"genuinely worried"* and had her *"best interests at heart"*.

Murphy's had met its obligation to sufficiently investigate and act on harassment or abuse in the workplace. It acted reasonably, investigated properly and took all fair and reasonable steps. There was not a basis to determine her resignation was really caused by Murphy's breaching duties owed to her. Therefore, it did not constructively dismiss her. The Authority dismissed JTK's personal grievance. Costs were reserved.

JTK v Murphy's Law 54 Limited [[2024] NZERA 30; 19/01/24; R Arthur]

Union correctly gave notice to initiate bargaining on behalf of zero employees

The Athletes' Cooperative Incorporated (TAC) sought to commence bargaining with High Performance Sport New Zealand Limited (HPSNZ) for a collective agreement covering elite athletes. None of TAC's athletes were employed by HPSNZ, within the coverage it proposed. HPSNZ declined to engage in the collective bargaining on the basis that it did not employ athletes, including those that were members of TAC. TAC contended that HPSNZ was obligated to engage in bargaining. It sought compliance orders requiring HPSNZ to engage in good faith.

TAC gave notice seeking to initiate bargaining with HPSNZ on 20 July 2022. HPSNZ employed employees with roles outside the intended coverage clause TAC sent. HPSNZ submitted that the collective bargaining regime in the Employment Relations Act 2000 (the Act) applied only to employees. Consequently, the establishment of an actual employment relationship is a precondition to bargaining. TAC argued that HPSNZ tried to introduce a new requirement to the rules on initiation of bargaining.

The Authority felt that other arrangements could fall within the definition, and as a result, so did collective bargaining for terms and conditions of employment and accompanying obligations. The bargaining process under the Act could not apply to existing contractual arrangements between the athletes and national sporting organisations, or between the athletes and HPSNZ. The Act's objectives did not indicate that the terms *"employer"* or *"employee"* should exclude circumstances where there were no current employees within the proposed coverage.

A union is required to have as an object the promotion of its members' collective employment interests. That membership is not restricted aside from its own rules. It could include persons seeking employment, retired members, or other persons. There are no requirements that any of the members be in current employment. The same applied to the union's collective employment interests. The coverage proposed in TAC's initiation notice reflected its membership. A relevant employee will be bound by a collective agreement, and the union and the employer are the ones who are its parties. For a collective agreement to come into force, relevant employees ratify the agreement. That phase required a union to have a member within the coverage of the agreement. However, the Act does not require that to be the case as at the time of initiating bargaining.

In good faith, parties must conclude bargaining with a collective agreement unless there was a genuine reason not to, based on reasonable grounds. HPSNZ had no intention of employing TAC's members. The parties were fundamentally opposed as to whether there would be an employment relationship to apply a collective agreement to.

There are several prerequisites or limitations to the commencement of collective bargaining. First, the proposed employer party must be an employer of any employee, rather than just ones in the intended coverage clause. Second, only employers and registered unions can initiate bargaining. Third, any bargaining may be subject to limitations anyway, for example, excluding the negotiation of terms and conditions of independent contractors. An approach that permitted the initiation of bargaining here was also consistent with the objects and purpose of the Act.

The Authority found that TAC gave HPSNZ a valid notice initiating bargaining, in accordance with the requirements of the Act. Bargaining was validly initiated on the day the notice was given, 20 July 2022. HPSNZ were obligated to comply with the Act. The Authority did not yet consider any issue of compliance, since the parties indicated they would deal with the outcome of this determination. As a dispute relating to collective bargaining, costs were not an issue.

The Athletes' Cooperative Incorporated v High Performance Sport New Zealand Limited [[2024] NZERA 43; 26/01/24; R Anderson]

Employer does not investigate allegation or listen to employee's explanation

Ms Moyle was working for New Zealand Thoroughbred Racing Incorporated (NZTR) when it accused her of misappropriating company funds and property. It dismissed her for serious misconduct on 12 January 2022. She lodged a personal grievance at the Employment Relations Authority (the Authority) for unfair dismissal.

NZTR took on Ms Moyle under a fixed-term contract that ran from 2 August 2021 to 29 July 2022. On 22 October 2021, her coworker, Ms Payne, said she believed Ms Moyle bought private items *"on her work credit card by mistake"*. On 26 November 2021, Ms Payne formally complained that Ms Moyle used *"NZTR's resources for personal gain"* as well as bullying. She attached an Excel spreadsheet asserting about $12,000 worth of items.

NZTR sent this data and the allegations to Ms Moyle. It invited her to a meeting offering the opportunity for her to respond. It encouraged her to bring a representative or support person. It wrote that the allegations were serious and could involve disciplinary action, including dismissal.

Ms Moyle said overall her card use was legitimate and signed off by her manager. If she used the wrong card for a private transaction, she would alert her manager and repay it. She accepted she was tardy to repay but argued she was not given a deadline. She asserted she had never seen the company handbook, and regardless, NZTR's longtime custom and practice on company property contradicted the policy. The marquee historically could be used *"on the odd occasion"* in return for a donation to the staff Christmas fund. Similarly, if a vehicle was primarily travelling for

NZTR purposes it could also be used in an ancillary manner. Accordingly, she took her personal belongings from Wellington up to her Wanaka home on 6 September 2021.

Ms Moyle left the meeting feeling the decision-makers were *"combative and dismissive of her explanations"*. After investigating, on 21 December 2021, NZTR wrote another letter with its remaining allegations. This included her drive to Wanaka, plus other personal use of the marquee, a transit vehicle and staff member, who she had paid through NZTR. NZTR held a meeting on 22 December to *"carefully consider any response"*. It repeated the allegations were serious and could involve summary dismissal.

NZTR wrote on 7 January 2022 that it substantiated the misuses of company property, plus breaches of Ms Moyle's employment agreement and the staff handbook. It held another meeting on her preliminary dismissal, then on 12 January 2022 confirmed the outcome with a 14-page letter deeply detailing its reasoning.

The Authority found several issues in this process. It felt NZTR had contradictions and inconsistencies in its documents. It said NZTR jumped to conclusions as soon as the question of misusing its resources arose. NZTR predetermined its dismissal based on *"the mere spectre of dishonest conduct"*.

NZTR ran an incomplete investigation. It never interviewed Ms Payne as the complainant and the decision-maker never directly heard from her. NZTR ideally should have interviewed her from the outset, and at latest done so once Ms Moyle disagreed with her allegations. Ms Payne moved from perceiving a mistake to a claim of malice, but this inconsistency was not investigated. *"Inadvertence, oversight, or negligence"* did not equate serious misconduct.

When Ms Moyle disputed the claimed facts, NZTR should have tested them and the credibility of their source. It only tested Ms Moyle, not Ms Payne nor another witness. In contrast, it did not investigate Ms Moyle's explanation of the custom and practice, despite another manager backing it up. NZTR did not hold formal interviews and proper records, and it did not table some information to Ms Moyle. Moreover, the Authority felt that in the meetings, NZTR shut down Ms Moyle's explanations. All this meant NZTR did not run a fair process and unjustifiably dismissed Ms Moyle.

Ms Moyle sought lost wages continuing beyond the fixed term, based on that NZTR ultimately transferred all its employees to the next company. The Authority felt this did not prove the next company would have specifically taken on Ms Moyle, so it paid lost wages until the end of the fixed term, totalling $55,369. Ms Moyle became stressed, requiring medical treatment for depression and anxiety, and suffering mental health issues as far as suicidal thoughts. She also experienced embarrassment and reputational humiliation, difficulty when job applications asked, *"have you previously been dismissed?"*, and sleep issues. The Authority awarded $25,000 as compensation. Costs were reserved.

Moyle v New Zealand Thoroughbred Racing Incorporated [[2024] NZERA 45; 29/01/24; M Loftus]

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: Eight Bills

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

Te Korowai o Wainuiārua Claims Settlement Bill (26 May 2024)

Restoring Citizenship Removed by Citizenship (Western Samoa) Act 1982 Bill (31 May 2024)

Case Law *continued*

Contracts of Insurance Bill (3 June 2024)

Te Pire mō Ō-Rākau, Te Pae o Maumahara/Ō-Rākau Remembrance Bill (14 June 2024)

Privacy Amendment Bill (14 June 2024)

Inquiry Into Climate Adaptation (16 June 2024)

Residential Tenancies Amendment Bill (3 July 2024)

Oranga Tamariki (Repeal Of Section 7AA) Amendment Bill (3 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