Employer Bulletin

Our Weekly News Digest for Employers

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Case Law

Employment Court: One Case

Employment Court upholds determination of unjustified dismissal

The Employment Relations Authority, in its determination, found that the Department of Corrections (Corrections) had unjustifiably disadvantaged and unjustifiably dismissed AJY from their position as a Corrections Officer. The Authority awarded AJY lost remuneration and compensation for humiliation, loss of dignity and injury to feelings under the Employment Relations Act 2000 (the Act). It did not reinstate AJY to their former position with Corrections. AJY challenged this decision in the Employment Court, primarily seeking reinstatement. Corrections also challenged the decision, denying that AJY was unjustifiably disadvantaged and unjustifiably dismissed.

The background of the case goes back to 2017 when, after some relational challenges between AJY and another staff member, AJY raised a complaint about bullying on 20 September 2017. Due to staff changes and other factors, the complaint was never investigated and eventually disappeared between the cracks. AJY continued to raise concerns about the Prosecutions Department where they worked until November 2017, when Corrections moved them to the Gatehouse without their agreement. The move was sudden and without any consultation.

AJY's health deteriorated while working in the Gatehouse. Due to ongoing concerns they had about how matters were progressing in the Prosecutions Department, AJY accessed information they were not supposed to and passed this on to a visiting Justice. Following an investigation, AJY was suspended on full pay in May 2018 until December 2019 when the investigation was concluded and AJY was ultimately dismissed for breaches relating to privacy and Corrections losing trust and confidence in the employment relationship. AJY had argued that mental health issues contributed to their behaviour, and this was supported to a degree by medical advice. Corrections felt that the actions were deliberate and intentional and could not be attributed to mental health symptoms.

In consideration of the complaint AJY made about alleged bullying on 20 September 2017, the Court found that in failing to follow its own policy in relation to AJY's complaint, Corrections' actions were unjustified and disadvantaged AJY.

Regarding the decision to move AJY from the Prosecutions Team to the Gatehouse, Corrections felt it was entitled to make the change for AJY's wellbeing. The Court agreed a change of role was something Corrections was entitled to do, however there was a requirement for consultation to take place. The Court observed that Corrections' process was a breach of the Employment Relations Act 2000 (the Act), which requires the parties to an employment relationship to be active and constructive in maintaining a productive employment relationship in which the parties are responsive and communicative. The way that Corrections acted and reached its decision prior to communicating that decision to AJY, in the face of their stated preferences, was not conducive to an employment relationship in which the parties are communicative. The failure to consult with AJY was also not fair and proper treatment as required by their collective agreement. Accordingly, the Court found that AJY was disadvantaged by the unjustified actions of Corrections in relation to the movement of them from Prosecutions to the Gatehouse.

Regarding the decision to terminate AJY's employment, the Court found that Corrections, having not fairly considered the psychiatric evidence provided by AJY, was not in a position to make any final decisions about whether there were any mitigating factors arising from that evidence that would affect their dismissal. Their decision that AJY's mental health and medication did not mitigate their behaviour at all was not a conclusion that a fair employer could have reached. The Court also felt there were other possible sources of mitigation that were not considered, including their length of service, their clean record of service, the fact they admitted wrongdoing, Corrections' failure to respond promptly to their legitimate concerns, and their belief that they were acting in the nature of a whistleblower.

A number of deficiencies were found in the investigation process and in the decision to terminate AJY's employment. The Court observed that, ultimately, when considered in totality, the breaches were not minor, and AJY was treated unfairly. The decision to dismiss was not one that a fair and reasonable employer could have made in the circumstances. Therefore, the Court found that AJY's dismissal was both procedurally and substantively unjustified. The Court found that AJY's request for reinstatement was not practicable or reasonable and so was not ordered.

The Court ordered reimbursement of nine months' lost wages, compensation of $40,000 for humiliation, loss of dignity, and injury to the feelings and any long service leave or retirement benefits that would have arisen as a result of nine months' additional service. Costs were reserved.

AJY v The Chief Executive of the Department of Corrections [[2023] NZEMPC 168; 03/10/2023; Judge K Beck]

Employment Relations Authority: Four Cases

Employee found to be unjustifiably dismissed in flawed redundancy process

In December 2018, LNF applied for, and was successful in taking up, a role as a Business Services Advisor (BSA) with The Department of Corrections (Corrections). The advertised role was dated 2007 and did not accurately set out what the role would entail. Corrections had in mind that this role would be broken down into two distinct tasks: 80% of the time would be spent on operational procurement, while 20%

would be focussed on programme procurement. LNF was not made aware of the difference between the advertised role and her actual role.

LNF commenced her role in January 2019. She found her first couple of weeks working for Corrections confusing. She had multiple people allocating work to her, and no context. It soon became apparent to LNF that there was a split in her role between operational procurement and programme procurement work, but LNF was not clear about how this was to be managed.

LNF was working with one of the Business Finance Advisors (BFA) as part of her operational procurement work. The working relationship deteriorated and came to a head in April 2019 with an altercation between the two individuals. The BFA felt LNF was overstepping her responsibilities and causing confusion. LNF continued to assert that she needed greater clarity in her role. Corrections decided to remove LNF from the operational procurements work. Mediation had been offered but refused by LNF.

Throughout the year Corrections attempted to clarify LNF's work role. Revised position descriptions and task lists were offered, but they were rejected by LNF as she felt these did not align with her actual work tasks or job description. Mediation was proposed but did not take place because of a disagreement about the framing of the issues. Throughout the COVID-19 period of 2020-21, no resolution to LNF's role or tasks was discussed or progressed.

In April 2021, Corrections undertook a restructure process seeking to disestablish the two regional BSA roles and replace these with two generic administrator roles. After an extended process, the restructure was confirmed in November 2021 and LNF's role was disestablished. She continued to do work for Corrections until her employment was terminated in February 2022. The matter was considered by the Employment Relations Authority (the Authority). LNF claimed that she was unjustifiably disadvantaged and unjustifiably dismissed from her employment with Corrections, and that Corrections breached its obligation of good faith. She sought lost wages and compensation.

Based on the evidence before the Authority, it found that the redundancy was not genuine and was used to attempt to justify LNF's dismissal. Corrections knew before it employed LNF that the BSA job description did not accurately represent the role and tasks that it was recruiting for, and it did not fully explore the option of updating the job role. The Authority found that there was no role for a BSA in the region that was in line with the job description prior to LNF's employment.

The Authority found that Corrections did not fully consider redeployment (or other options), which indicated an absence of genuineness in the decision to dismiss. Problems with lack of role clarity arose very early in LNF's employment. The situation was exacerbated by the removal of 80% of LNF's role in April 2019. The genuineness of the decision to terminate LNF's employment in February 2022 on the basis of redundancy was therefore tainted from the beginning of her employment. Proper alternatives to redundancy were not fully considered. The redundancy was not for genuine business reasons and in this case was of the person, and not of the role. The Authority found the redundancy process to be procedurally flawed. It contained elements that suggested the outcome was predetermined. The Authority considered the process to lack transparency and robustness and could not be considered fair or reasonable.

LNF also sought a finding, without penalty, that Corrections had breached good faith. The Authority found that Corrections was not active and constructive in establishing a productive employment relationship and therefore found that there was a breach of good faith.

The Authority found that LNF's claim that she was unjustifiably dismissed from her employment with Corrections was successful and remedies were appropriate. Corrections was to reimburse LNF for lost wages for a period of six months following her dismissal under the Employment Relations Act 2000 (the Act) in the amount of $36,500. They were also ordered to pay LNF compensation for humiliation, loss of dignity and injury to feelings under the Act in the amount of $23,000. The claim of unjustified disadvantage was ruled to be absorbed by the unjustified dismissal claim. Costs were reserved.

LNF v The Department of Corrections [[2023] NZERA 399; 27/07/2023; N Szeto]

Committee of Management did not consider a proposal or alternatives before redundancy

Nuhiti Q was a block of land on the East Coast of the North Island, which the Ferris whānau lived at for generations and spent their careers farming. Nuhiti Q's Committee of Management (the Committee) made Mr Ferris Sr and Mr Ferris Jr (the Ferrises) redundant on 22 October 2021. They raised a personal grievance for breaches of good faith and unjustified dismissal, claiming that Nuhiti Q did not decide based on a genuine reason and did not fairly consider Mr Ferris Sr's proposals on alternatives. They sought remedies of lost wages and distress compensation. They also claimed wage arrears for the hours they worked that exceeded their gross pay.

Mr Ferris Sr worked as a farmer at Nuhiti Q for 31-and-a-half years and Mr Ferris Jr worked as a station shepherd for 10 years. Meanwhile, a Māori Incorporation managed Nuhiti Q via the Committee. The Incorporation underwent a few rounds in the Māori Land Court based on concerns with bank debt. Nuhiti Q's bank then withdrew its services on 29 April 2019.

When Mr Andrew, interim kaitiaki, presented his analysis of the tight financial situation and operational issues, he recommended the farm vary its species of stock. At the AGM on 5 December 2020, Nuhiti Q directed that the Committee's immediate requirement was to reduce the debt. In February 2021, Nuhiti Q completely ran out of funds. The Committee decided to fully exit farming.

Nuhiti Q made a consultation document in April 2021 with a proposal to disestablish its farm positions and gave a timeline for doing so. The process was emotionally difficult for all parties, including that the employees (including the Ferrises) laid their wage arrears and holiday pay claim shortly after. Mr Ferris Sr presented proposals for alternative operations to the Committee, on 3 and 27 July. The Committee had reservations on their viability. Mr Ferris Sr felt that the Committee was not listening to him. Meanwhile, the Committee felt Mr Ferris Sr was beginning to make major decisions without their input, like re-hiring an employee.

In September 2021 the Committee presented its restructure proposal to the Ferrises, including free accommodation and covering expenses for any new operations. The Ferrises firmly rejected this. They submitted one more proposal on 6 October, which allowed for the farming operation to fall away, but still have them as employees. However, the next day the Committee delivered their final decision to terminate the Ferrises employment.

The Authority found that initially, the redundancy came from genuine commercial reasons. Nuhiti Q consulted with the Ferrises thoroughly and considered proposals carefully – up until the final proposal, by which point the Committee had lost trust in him. Due to this, it abruptly closed consultation, evidenced by how fast it sent out the termination letter.

Nuhiti Q also did not genuinely consider all alternatives to the operation or the Ferrises employment. It did not consider Mr Andrew's recommendation, which formed the basis of all of Mr Ferris Sr's proposals. Nor did it consider that Mr Ferris Sr's final proposal engaged with the crux of the Committee's financial concern. Moreover, after the farm shut down, the Committee still had responsibilities based on the land covenants. Duties included pest control; maintenance of the structures, pathing and scrub; rubbish removal; and security. The Committee engaged the Ferrises as contractors for this when it should have considered employment. These made the redundancy unjustified.

The Authority considered remedies for the Ferrises. Mr Ferris Sr kept a diary of his hours, recording an arrears of 1,101 hours worth $26,466, and 480.5 hours for Mr Ferris Jr, worth $9,610 at minimum wage. Mr Ferris Jr's salary was below minimum wage at $32,240, so the Authority gave leave for him to make another application for its arrears and any public holidays alongside. Due to contracting immediately

after redundancy, the Ferrises did not lose any renumeration from the dismissal. However, they gave evidence of its hurt and humiliation. The stress was detrimental to Mr Ferris Sr's sleep and appetite, which he sought medical treatment for. As he was past retirement age, he felt he was unlikely to find further work. Mr Ferris Jr was worried and embarrassed about the loss of job security for him and his young family, who had expected to rely on the operation and had few other opportunities in the area. The two experienced a loss of opportunity to continue living and working on the Nuhiti Q land, and this cut into Mr Ferris Jr's identity. The Authority awarded them $20,000 each as compensation. Costs were reserved.

Ferris v The Proprietors of Nuhiti Q [[2023] NZERA 395; 26 July 2023; S Kennedy-Martin]

Unsuccessful personal grievance claims

Mr van der Plas worked for KiwiRail Ltd (KiwiRail) from 27 August 2018 until 6 June 2022. He claimed he was the subject of ongoing, unreasonable treatment by co-workers and claimed the treatment was not adequately resolved by KiwiRail in a supportive, good-faith manner, which led to his resignation in circumstances that he claimed amounted to a constructive dismissal or a situation where he was disadvantaged in his employment. Mr van der Plas sought compensation for distress and humiliation, lost wages and costs. KiwiRail contested the claims and said they took adequate steps to ensure a safe working environment for Mr van der Plas. KiwiRail asserted Mr van der Plas voluntarily resigned having arranged ongoing employment with another organisation.

On 10 September 2021, Mr van der Plas raised an issue by email to KiwiRail regarding an operations team leader who he said had used profane and abusive language towards him. Mr van der Plas also highlighted a general issue of negative "constant unprofessional behaviour" from operations' team leaders. The accused was stood down and issued a letter of expectation to him about his communication style. The Employment Relations Authority (the Authority) observed that the matter was dealt with expeditiously and objectively, fairly.

Other issues arose in mid-October 2021. Mr van der Plas on two occasions emailed KiwiRail about another team leader's use of sarcastic email communication. Again, the issue was promptly dealt with.

On 22 October 2021, Mr van der Plas was the subject of angry and aggressive behaviour by a KiwiRail customer's employee. Whilst initially saying he handled the incident well, and was able to calm the antagonist, Mr van der Plas emailed Mr Love, customer logistics supervisor, and Ms Woodgate, customer delivery general manager, on 21 December 2021, indicating he had been more shaken than anticipated by the customer incident and he also complained about a co-worker yelling at him on the same day. On 22 December 2021, Ms Woodgate met with Mr van der Plas and Mr Love. During this meeting they resolved to meet again early in the New Year to discuss the customer incident in more detail. Mr van der Plas also described his general work environment as "toxic".

Ms Woodgate invited Mr van der Plas to "take the time to document why he felt it was a toxic environment" and to provide examples of the things he thought contributed to this for discussion in the New Year. On 11 January 2022, Ms Woodgate and Mr Love met with Mr van der Plas. The customer incident was dealt with by Ms Woodgate committing to formally raise the issue with the customer's management. The Authority found that Ms Woodgate dealt with the issue in a comprehensive and exemplary manner.

On 25 January 2022, Mr van der Plas provided bullet points listing the reasons the environment felt toxic to him. The overall concern Mr van der Plas identified was his belief that management had not effectively addressed unwarranted attitudinal issues he had been the subject of from co-workers.

On 4 February 2022, a further meeting was held to follow up on the issue of the alleged toxic working environment. Mr van der Plas did not raise any other significant issues of concern until he decided to resign in mid-May 2022.

Mr van de Plas accepted employment on 17 May 2022 with an airline. He consequently resigned by email on 23 May to Mr Love and "KiwiRail HR" and widely to all co-workers. Mr Love could recall nothing bitter being raised.

On 27 May 2022, while he was working out his notice, Mr van der Plas was the subject of what he considered an abusive and threatening phone call from a team leader. On 30 May 2022, he emailed a complaint to KiwiRail. The email indicated he had resigned from KiwiRail due to the behaviour.

KiwiRail promptly responded, assuring Mr van der Plas that it was committed to addressing it with the identified team leader's managers. Mr van der Plas' concern was dealt with immediately and the worker concerned was the subject of appropriate disciplinary action.

The personal grievance letter suggested Mr van der Plas had resigned due to a failure of KiwiRail to "provide a safe working environment". Mr van der Plas asserted that KiwiRail had failed to investigate and resolve his concerns in a fair and impartial manner which allowed "toxicity within the workplace to persist".

It was evident that Mr van der Plas resolved to leave KiwiRail due to his dissatisfaction with the working environment and a wish to return to an industry he felt more comfortable working in. Mr van der Plas was not constructively dismissed. The Authority did not find that Mr van der Plas made out the initial threshold of establishing any breach of duty occurred.

In the alternative, Mr van der Plas suggested the same circumstances amounted to an unjustified disadvantage. KiwiRail addressed the claim by stating no disadvantage claim was raised within 90 days of a specific event occurring. As the Authority found that KiwiRail did deal with all Mr van der Plas' significant concerns as they arose and did so in a timely and appropriate fashion, there was no basis for the disadvantage claim regardless of its timeliness. Mr van der Plas was unsuccessful in his personal grievances and was not entitled to consideration of any specific remedies. Costs were reserved.

Van der Plas v Kiwirail Limited [[2023] NZERA 404; 28/07/2023]

Validity of Record of Settlement

VJZ was previously employed by KJT, a law firm. VJZ started work at the firm in September 2019 and by December 2019 she had received feedback about concerns the firm had. In January 2020, KJT initiated discussions and correspondence with VJZ to explore the possibility of mediation. VJZ engaged her own lawyer and a without prejudice meeting was held on 5 February 2020. This culminated in the parties entering into a Record of Settlement (Settlement), which was signed by an MBIE Mediator on 12 February 2020. VJZ's last day of employment with KJT was the same day.

VJZ lodged a Statement of Problem (SOP) in the Employment Relations Authority, which challenged the validity of the Settlement. The substantive problem VJZ asked the Authority to resolve was the claim that the Settlement was unreasonable and an illegal contract. VJZ's claim of unconscionability was made based on a statement she alleged KJT made during the without prejudice meeting.

KJT also objected to without prejudice communications referred to in the SOP and without prejudice documents attached to the SOP being before the Authority. KJT created Document K, "Outline of issues for Mediation" (3 February 2020) and sent it to VJZ. The document referred to concerns it had and concluded by saying that KJT wanted to use mediation to openly discuss these concerns. On 4 February

2020, VJZ's lawyer contacted KJT confirming she had been instructed by VJZ and suggesting that rather than attending the scheduled mediation on 5 February 2020, the parties should have a "without prejudice" meeting at her office.

On 10 February 2020, KJT's external lawyers emailed VJZ's lawyer with a proposed resolution to employment issues which was further to a proposal made during the without prejudice meeting. On 11 February 2020, VJZ's lawyer responded to KJT in a letter on her firm's letterhead (Document N). Document N confirmed that VJZ's lawyer had instructions to respond on VJZ's behalf. VJZ's lawyer referred to part of KJT's correspondence as a "threat" and said that the threat was not subject to privilege. On 12 February 2020, KJT's external lawyers sent VJZ's lawyer a further email headed "Without Prejudice" (Document O), setting out revised terms for a proposed resolution to employment issues.

KJT's submission was that without prejudice discussions are "a long standing, important, and frequent feature of attempting to resolve employment relationship issues". VJZ's position was that Documents M, N, and O were admissible as they were required documents for the Authority to conduct its investigation into the enforceability of the Settlement.

The Authority has jurisdiction to hear matters relating to potential illegality or unconscionability of a Record of Settlement. The Authority has broad powers in relation to evidence. It also has the power to consider privileged evidence if the circumstances so require.

The Authority found VJZ's claim that there was no serious employment problem as at the date of the without prejudice meeting on 5 February 2020, to be unrealistic. The fact that the meeting changed from a mediation to a without prejudice meeting does not make a material difference to whether there was a serious problem in the employment relationship. VJZ was knowledgeable about employment matters. She was also represented by a very experienced employment lawyer. Documents M, parts of N and O clearly set out a proposed resolution to employment issues. These communications were part of the without prejudice discussions that had been commenced earlier in connection with an attempt to resolve the dispute.

The Authority ordered that there was insufficient evidence to displace the without prejudice privilege, when balanced against the strong public policy interest in the privilege being maintained. VJZ was instructed by the Authority to remove Document M (email from KJT to VJZ dated 10 February 2020) from the list of documents. VJZ was to remove Document O and some paragraphs from Document N. An interim non-publication order was made by the Authority for the non-publication of names and identifying details of the parties. Costs were reserved.

VJZ v KJT [[2023] NZERA 403; 28/07/2023; N Szeto]

Legislation

Note: Bills go through several stages before becoming an Act of Parliament: Introduction; First Reading; Referral to Select Committee; Select Committee Report; Consideration of Report; Committee Stage; Second Reading; Third Reading; and Royal Assent.

Bills open for submissions: No Bills

There are currently no Bills open for public submissions to select committee:

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