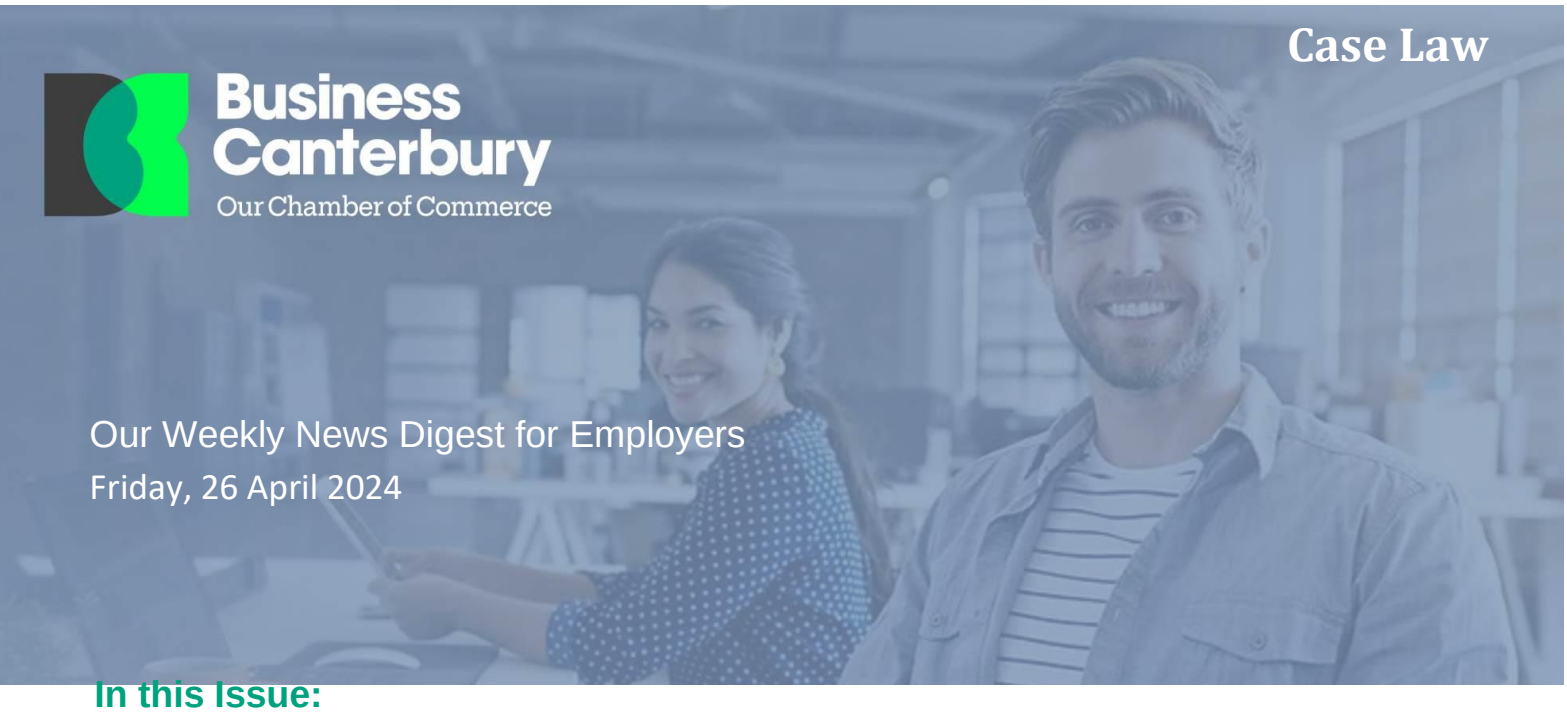

Business Canterbury
Our Chamber of Commerce

Our Weekly News Digest for Employers
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Case Law

Employment Court: One Case

Employee's role changed without consultation

Mr Keighran was employed at Kensington Tavern from November 2018. He was promoted to restaurant manager in March 2019. On 5 September 2020, he was advised that he would manage the bar instead of the restaurant. Mr Keighran left the workplace and did not return. He pursued a claim in the Employment Relations Authority (the Authority) for constructive dismissal, unjustified disadvantage, breach of good faith and the imposition of a penalty for failure to provide a written employment agreement. The Authority found that Mr Keighran had been unjustifiably disadvantaged and ordered $5,000 compensation in his favour. The remainder of the claims were dismissed. Mr Keighran asked the Employment Court (the Court) to review the decision on a de novo (from the beginning) basis.

Mr Keighran was generally unhappy with his remuneration when an incident occurred on 26 July 2020 outside of the workplace, involving Ms A, a teenage co-worker. Ms A raised a complaint with Kensington Tavern. In an effort to ease tensions, Kensington Tavern proposed that Mr Keighran work from home until matters could be sorted. Mr Keighran agreed. While working from home, Mr Keighran continued to raise the issue of a pay rise and indicated that he intended to resign if his request was not agreed to.

In August 2020 Mr Keighran returned to work. However, things did not go well. A team meeting on 5 September 2020 raised concerns about a change Mr Keighran had made the previous night. Co-owner Mrs McLean-Woods observed that Mr Keighran appeared to be more comfortable working behind the bar, and that was what he was good at. Further, since he had been away, senior staff had lost respect for him and management lost confidence in his ability to manage the floor. She decided that he would now manage the bar rather than the restaurant. His position, she said, had been made redundant. Mr Keighran left, and while he indicated he would return later in the week, he did not.

The Court observed that Mr Keighran was told his position had been made redundant without any prior discussion and in front of other staff. The decision was made to move him out of the position he had been employed to do, against a backdrop of concerns he had not been advised of or given a chance to comment on. The Court found this to be an unjustified termination and that he was constructively dismissed.

Mr Keighran indicated he would return to work after the 5 September 2020 meeting. Kensington Tavern felt this mitigated his claim for a constructive dismissal. The Court disagreed and felt his words needed to be considered in context. Mr Keighran endeavoured to remain professional in difficult circumstances. Ultimately, it was the receipt of the revised roster with reduced hours that led Mr Keighran to believe he had no other choice than to resign.

Kensington Tavern felt that the Court needed to consider how Mr Keighran may have contributed to the situation, when considering his compensation payments. It raised the out of work incident in July 2020, Mr Keighran's general behaviour when he returned to work from 31 August to 5 September, and the fact that Mr Keighran recorded the meeting on 5 September 2020 without advising Mrs McLean-Woods that he was doing so. The Court felt it more likely than not that the issues involving Ms A had very little, if anything, to do with what transpired at the 5 September 2020 meeting. The Court was not satisfied that remedies should be reduced for Mr Keighran's contribution based on his return-to-work conduct. Finally, the Court did not consider the recording of the 5 September 2020 meeting to be materially relevant and did not consider it blameworthy conduct. Accordingly, the Court decided not to reduce the remedies.

Three claims for breaches of good faith were advanced by Mr Keighran. The Court dismissed his claim that Kensington Tavern did not investigate the complaint from Ms A in an impartial manner. It established a breach of good faith for Kensington Tavern's conduct of the meeting on 5 September 2020. It established another breach for Mr Keighran not having a written employment agreement. The Court imposed a penalty for this breach.

Mr Keighran's challenge was successful, and the Authority's determination was set aside. The Court ordered Kensington Tavern to pay to Mr Keighran a sum equivalent to three months' lost wages. It also ordered his compensation be increased to $14,000, subtracting out the $5,000 Kensington Tavern already paid for the Authority's determination. They were ordered to pay a penalty of $500 for failure to provide a written copy of Mr Keighran's employment agreement, payable to the Crown.

Keighran v Kensington Tavern Limited [[2024] NZEmpC 28; 23/02/24; Chief Judge Inglis

Employment Relations Authority: Four cases

Employee unjustifiably dismissed but did not have evidence for some pay claims

VKU and PHZ worked together from 2015 until 19 May 2017, in an arrangement where PHZ secured funders and VKU performed most of the job. They never specified in contract how to split the revenue. VKU objected to the split PHZ calculated, claiming PHZ had agreed to higher. Their relationship deteriorated and PHZ ultimately terminated VKU. VKU sought a declaration that he was an employee and raised personal grievances for unjust disadvantage and dismissal. He sought compensation for the grievances alongside wage and holiday pay arrears.

When VKU contacted PHZ about joining PHZ's business, they agreed it would be advantageous if VKU was an employee. They used a standard employment agreement template. The relationship between PHZ and VKU deteriorated in 2017 with both feeling the other was dropping obligations. PHZ repeatedly contacted VKU from 16 January 2017 through to the end of March, frustrated at VKU's level of administration and handling of funds. He felt VKU needed to decide if he wanted to part ways.

VKU did not respond until 17 April 2017, detailing concerns with the office systems. PHZ gave VKU notice of termination the following day. He actively chose not to provide reasons, wishing not to comment on the previous day's email, but noting he had reasons on hand if VKU was to press the matter. During the notice period, VKU sought details about his

pay calculations and deductions. PHZ continued to email asking for VKU to process the funding claims so he could pay him, with little response.

PHZ argued that VKU worked as a contractor. Even if VKU was an employee, he argued he ended employment and became a contractor when he began to tire of the work and came into the office increasingly less. The Employment Relations Authority (the Authority) found that the parties' intent throughout the relationship, VKU's lack of independent business or assets, PHZ's level of control, and application of PAYE, all pointed to VKU being an employee throughout the entirety of the arrangement.

The Authority found it likely PHZ dismissed VKU based on the view that VKU failed to follow lawful and reasonable instructions. Both parties felt the other was defying the arrangement. However, PHZ did not deal with his concerns as a fair and reasonable employer could have done. He gave no warnings, did not advise VKU that his employment was in jeopardy, call him to a meeting to specify the issues or give him a chance to respond. PHZ did not have position to properly conclude that VKU was guilty of misconduct, instead reacting with a peremptory dismissal. The Authority found this to be an unjustified dismissal.

The Authority did not award lost wages that would have been caused by the dismissal. PHZ deferred but ultimately delivered VKU's final pay. This was in line with the agreement they made on the manner of pay. They did not have set pay periods PHZ needed to abide by.

VKU argued that PHZ owed him higher earnings. Since the parties did not specifically agree on the revenue split, the Authority could not fix terms and conditions of employment, so did not impose a contractual obligation to pay at a new rate. VKU also argued for reimbursement for the difference between a corrected rate and what he earned with his subsequent employer. Because the Authority did not alter his percentage revenue, VKU's earnings with PHZ were actually less than with the subsequent employer, so there was nothing to award.

VKU described being humiliated by the dismissal from someone of a longstanding, strong relationship. He felt betrayed, deeply hurt, and suffered some anxiety. The Authority awarded $12,000 for compensation for hurt and humiliation.

PHZ last paid VKU in the second week of April 2017. He claimed he stopped payments since VKU had not sent out his invoices to bring the payments in. The Authority found that in this pay arrangement, payment to VKU was not directly related to work undertaken. Moreover, rather than any connection to VKU's work, the only issue was the invoicing. PHZ paid a final pay of only VKU's divvy-up sum, missing wages for his last weeks of employment.

The Authority found PHZ owed five weeks of wages of $5,000. It also found PHZ did not pay holiday pay for two full years and awarded this at $8,000. It awarded interest on these sums for being quite overdue. It did not order costs but awarded its filing fee of $71.56 to be paid by PHZ.

VKU v PHZ [[2023] NZERA 625; 24/10/23; N Craig]

Dismissed co-founder wins at the Employment Relations Authority

Mr Wright and Mr O'Keefe were co-founders of Te Whare Hukahuka Limited (Te Whare). Te Whare formally employed Mr Wright. The scope of his role was never entirely defined, but at some point, Te Whare unilaterally allocated him responsibility for sales. It then called him a "*poor performer*" when his sales dropped in a COVID-19 environment. On 25 November 2020, Mr Wright was issued a written warning "*out of the blue*" without any formal process for unsatisfactory performance. Even though the warning gave three months for improvement, on 23 December 2020 Mr Wright was dismissed for poor performance. He raised a personal grievance for unjustified dismissal at the Employment Relations Authority (the Authority).

On the substantive justification for Te Whare's action, it was known that Mr Wright was spending less time in sales. Te Whare failed to provide credible evidence to support its alleged performance concerns. The limited evidence that was produced to the Authority strongly indicated that Mr Wright was not responsible, or at least solely responsible, for any sales issues that applied. There was no evidence that Mr Wright was given specific or realistic targets to meet, or even that it was his role or responsibility to meet those targets.

Procedurally, Mr Wright's employment agreement required Te Whare to follow a fair disciplinary process, advise Mr Wright of his right to representation and put allegations forward for Mr Wright to comment. None of that occurred for either the warning or his dismissal. Te Whare failed to meet any of the minimum procedural fairness tests in the Employment Relations Act (the Act), which fundamentally undermined its ability to justify Mr Wright's dismissal. The Authority also noted that a fair and reasonable employer could not have provided a warning which set out a three-month timeframe for improvement but then dismiss the employee less than one month later, without any process or procedure in place to address its concerns.

Te Whare failed to meet its good faith obligations, contractual obligations, or any of the minimum procedural fairness tests in the Act. Accordingly, Mr Wright was entitled to remedies. After the dismissal, Mr Wright appropriately mitigated his loss by contracting his services to Te Whare. But, despite submitting invoices for the work he did, he still was not paid for that work. Recovery of those arrears were outside the Authority's jurisdiction. Mr Wright claimed lost remuneration of $22,733.72 for the three-month period following his unjustified dismissal. Mr Wright also missed out on KiwiSaver contributions. The Authority ordered Te Whare to pay Mr Wright $682.01 into his KiwiSaver scheme. It also awarded eight per cent of his gross earnings as holiday pay, totalling $1,818.70.

Mr Wright was dismissed two days before Christmas which meant he could not seek legal advice due to the Christmas shutdown. He suffered reputational damage, hurt, and humiliation as a co-founder. The actions damaged his personal brand and credibility in the marketplace. Mr Wright pointed out that the Māori business world was small and very connected. He heard rumours that he must "*have done something dodgy*" so it was therefore important to Mr Wright that he achieved a public restoration of his reputation. Accordingly, Te Whare was ordered to pay Mr Wright $30,000 as compensation for humiliation, loss of dignity, and injury to feelings he had suffered. It was also ordered to reimburse Mr Wright $692.56 for his disbursements. Costs were reserved.

Wright v Te Whare Hukahuka [[2023] NZERA 683; 17/11/23; R Larmer]

Non-consultation during restructuring leads to unjustified dismissal

Ms Kim was employed by Brak Burns Limited (BBL) as a sous chef from 21 July 2021 until she was made redundant on 11 April 2022. On 5 July 2022, she raised personal grievances with BBL for unjustifiable disadvantage, failure to pay wages when due and owing, and unjustifiable dismissal. Ms Kim sought remedies of compensatory damages and reimbursement of lost wages with holiday pay calculation, arrears of unpaid wages and annual leave and public holiday pay.

Ms Kim claimed she was not paid her full wages on 5 December 2021, 27 February, 13 March and 27 March 2022. She said she raised this with BBL on multiple occasions and was told the wages were delayed. However, BBL did not pay the arrears or engage with her about how it might be paid. Failure to pay wages in full when due and owing is a serious breach of an employer's duty. The Employment Relations Authority (the Authority) held that this failure caused Ms Kim to suffer a disadvantage in her employment. She established a personal grievance for unjustifiable disadvantage.

On 1 April 2022, BBL managers came to Ms Kim's workplace. They told her BBL could no longer pay her, and she could leave work then or finish her shift. She left work then. On 6 April 2022, she emailed one of the managers, Mr Needham, asking for a letter confirming the advice she had received on 1 April. On 7 April 2022, she received a letter advising her BBL was closing, outlining the reasons why and asking her to attend a meeting on 11 April to discuss her role being made redundant. The letter did not advise her she could bring a support person or representative to the meeting.

On 13 April 2022, Ms Kim attended the meeting. She was told her role was redundant because BBL was closing down, and she could accept a new role with Burgered Restaurant New Zealand Limited or be made redundant. Ms Kim elected for redundancy. She said she did not accept the offer of employment because she could not trust the business after all the issues with her pay. At the meeting it was agreed her last day would be 11 April 2022 and she would be paid one month's usual wages in lieu of notice. Ms Kim asked for a signed copy of the 7 April letter, a written reference and a calculation of her final pay including outstanding wage arrears.

On 13 April 2022, Ms Kim was emailed a reference letter. On 26 April 2022, Mr Needham sent her a signed copy of the 7 April letter. The final pay and arrears calculation remained outstanding. On 29 June and 2 July 2022, Ms Kim followed up this request but she did not receive a response.

Ms Kim's dismissal was so swift and the process so deficient that BBL did not have good answers on the genuineness of her dismissal. Ms Kim was not provided with information about how other staff might be impacted or why a seemingly related business was in a position to offer her employment. She was given no information about how her arrears claim would be met if she accepted the new employment. For this reason, the Authority did not have sufficient evidence that Ms Kim's redundancy was genuine.

BBL did not meet the notice and consultation obligations owed to Ms Kim. Ms Kim went into the meeting unprepared and without any reasonable opportunity to bring a support person or representative. BBL was unable to establish it had fairly considered any issue raised by Ms Kim because it could not establish it fairly put any such issue to her for comment. Ms Kim's dismissal for redundancy was unjustified.

Ms Kim started looking for another job immediately and found new employment on 19 April 2022 but could not commence her new employment until her work visa was transferred from BBL. The consequence of this is she was she was out of work for 12 weeks. The Authority awarded her $12,375, being 12 weeks' pay. Holiday pay of $990 was ordered to be paid as well.

Ms Kim said this was a very stressful time for her. She felt miserable and the ongoing wage arrears caused her financial hardship. The Authority ordered an award of $18,000 for hurt and humiliation to be paid by BBL to Ms Kim. BBL was ordered to pay Ms Kim wage arrears totalling $11,765.75, for 218.53 hours between 5 December 2021 and 2 April 2022 which remained unpaid. In addition, it was to pay one month's pay in lieu. This included $2,303 in holiday pay entitlements and $220 in alternative leave entitlements to total $4,125. BBL was ordered to pay interest on a total of $18,413.75, calculated from 11 April 2022 until the date payment was made in full. The Authority ordered BBL to pay a penalty of $6,000, half to be paid to Ms Kim. BBL was lastly to pay Ms Kim $2,000 as a contribution towards costs and the filing fee of $71.56.

Kim v Brak Burns Limited [[2023] NZERA 656; 6/11/23; M Urlich]

Employee did not raise grievance in time

Ms Hall started work with Fire and Emergency New Zealand (FENZ) in July 2019 and is employed as a Firefighter. On 11 October 2021, the New Zealand Government amended the COVID-19 Public Health Response (Vaccinations) Order 2021 ("Vaccinations Order") to cover a wider range of workers. On 29 October 2021, after consultation with staff, FENZ advised affected staff that they needed to be vaccinated by 29 November 2021 otherwise they would be stood down. Ms Hall decided to remain unvaccinated, so from 30 November 2021 until 8 May 2022 she was stood down on full pay. From 9 May 2022 until 22 July 2022 Ms Hall was stood down without pay until she returned to work on 23 July 2022.

On 8 July 2022, Frontline Law Limited wrote to FENZ raising personal grievances on behalf of 68 individuals. Some of these were current employees, while others had left FENZ and others were referred to as volunteers.

Ms Hall's claims before the Employment Relations Authority (the Authority) took the form of alleged unjustified disadvantages relating to her suspension and to alleged breaches of her employment agreement relating to the suspension. FENZ claimed that Ms Hall did not raise her disadvantage grievances within the 90-day time limit required by the Employment Relations Act 2000 (the Act). FENZ also said Ms Hall's penalty claims were not commenced within 12 months of the breach becoming known, or when the cause of action should reasonably have become known to her, as required in the Act. The Authority was to determine which of Ms Hall's claims could be considered under its jurisdiction.

The Authority considered Frontline Law's correspondence and Frontline Law was required to identify what specific personal grievance claims each individual was making, what facts each individual relied on, and how each individual wanted their problem resolved. The correspondence did not set out this level of detail. When FENZ received the correspondence, they rejected the personal grievance claims and noted Frontline Law sent this letter out of the

statutory time limit. The Authority ruled the letter of 8 July 2022 did not raise personal grievances on behalf of Ms Hall. The first time FENZ knew of the specifics of Ms Hall's grievances was when they received a copy of the Statement of Problem, lodged with the Authority on 15 March 2023.

The Authority turned to the statement of problem and considered whether it should have regard to the series of communications, and whether it may find that the totality of all communications, in effect, adequately raised a personal grievance claim. This involved a factual inquiry to determine what FENZ would reasonably have known, as a result of the totality of the communications between the parties.

Even taking consideration of the correspondence between Ms Hall and FENZ, and the letter of 8 July 2022, the Authority concluded that no disadvantage claims had been raised with FENZ. Taken together, the totality of the communications Ms Hall, the New Zealand Professional Firefighters Union Inc (NZPFU) and her union representative had with FENZ still did not fairly, reasonably, or appropriately put FENZ on notice of the particular personal grievance claims. FENZ could not have known what it was required to address or how Ms Hall wanted her various personal grievance claims resolved. The Authority ruled that none of Ms Hall's unjustified disadvantage personal grievance claims were raised within the statutory 90-day time limit required by the Act.

The Authority did not have jurisdiction to investigate any of Ms Hall's unjustified disadvantage grievances. It also only had jurisdiction to investigate one of her penalty claims. This was a claim for a penalty because FENZ breached its good faith obligations to her, when it put her on an unpaid suspension from 9 May 2022. Costs were reserved.

Hall v Fire and Emergency New Zealand [[2023] NZERA 648; 03/11/23; 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: Eight Bills

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

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

Corrections (Victim Protection) Amendment Bill (6 May 2024)

Report of the Controller and Auditor-General, Making infrastructure investment decisions quickly (8 May 2024)

Regulatory Systems (Primary Industries) Amendment Bill (9 May 2024)

Fisheries (International Fishing and Other Matters) Amendment Bill (15 May 2024)

Te Pire Whakatupua mō Te Kāhui Tupua/Taranaki Maunga Collective Redress Bill (22 May 2024)

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

Restoring Citizenship Removed By Citizenship (Western Samoa) Act 1982 Bill (31 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/

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