Business Canterbury
Our Chamber of Commerce

Case Law

Our Weekly News Digest for Employers
Friday, 26 January 2024

In this Issue:

Case Law

Employment Court: Three Cases

Employment Court sets aside the Authority's judgment Employment

Mr Breen was employed by Prime Resources Company Ltd (Prime Resources) in April 2021. In August 2021, COVID-19 caused New Zealand to go into lockdown. Mr Breen immediately advised Mr Chung, Prime Resources' managing director, that he would work from home.

Mr Breen was paid on the first day of each month. On 1 September 2021, Mr Chung emailed Mr Breen to say that he was not intending to pay Mr Breen his full pay for August because he did not consider that he had been working full-time during that period. He sought Mr Breen's confirmation that he agreed with that course. Mr Breen objected to a reduction in his pay.

The parties subsequently attended mediation. Following mediation, Mr Breen received a payment of outstanding wages from Prime Resources. The payment meant that Mr Breen was paid in full for both August and September, albeit late. Mr Breen remained dissatisfied and pursued a personal grievance, claiming that he had been unjustifiably disadvantaged by the late payments.

The Employment Relations Authority (the Authority) determined that the company had unjustifiably disadvantaged Mr Breen by the late payment for August. The Authority awarded Mr Breen $2,000 by way of compensation for hurt and humiliation.

The Authority's determination gave rise to two challenges. Mr Breen challenged the quantum of the award in his favour on a non-de novo basis. Prime Resources filed a de novo cross challenge, which focused on the finding that Mr Breen was underpaid for August and the finding that the late payment gave rise to an unjustified disadvantage.

Prime Resources raised a challenge that there was no jurisdictional basis for Mr Breen's personal grievance because it derived solely from a dispute about the interpretation and application of an employment agreement. It submitted that the only procedural route available to Mr Breen was confined to the dispute processes contained within the Employment Relations Act 2000 (the Act).

Prime Resources contended that if the jurisdictional argument succeeded, Mr Breen's challenge must fail, and the Authority's determination must be set aside. Alternatively, if the Authority is found to have erred in its finding of unjustified disadvantage relating to the late August payment issue, then the compensatory award must be set aside.

Mr Breen's employment agreement contained a clause relating to deductions from pay, including the circumstances in which this could occur. It submitted that the parties were genuinely in dispute about the application and interpretation of that clause. They were required under the Act to seek to resolve this matter via the statutory dispute resolution processes, rather than by way of personal grievance.

Mr Chung advised Mr Breen that he would not be paid for August in reliance of the clause. This was based on his expressed belief that Mr Breen had only been working limited hours during lockdown and that the company was accordingly entitled to deduct the hours assessed as not having been worked. There was no suggestion that Mr Chung was deliberately being disingenuous.

The Court of Appeal's judgment in *Auckland College of Education v Hagg* stated that if a claim derives solely from the interpretation and/or operation of the employment agreement or derives solely from a dispute about the interpretation and/or operation of the agreement, it must be pursued by way of the disputes procedure. It cannot be pursued by way of personal grievance.

In *Cruickshank v Alliance Group Ltd* it was noted that the action complained of was contrary to the provisions of the employment agreement and was, therefore, an unjustified action. However, that company's actions were based on a genuine interpretation. While the company's interpretation was found to be wrong, the action was held to derive solely from a disputed interpretation of an employment agreement. Therefore, the dispute procedure applied, and no personal grievance based on disadvantage could be pursued.

The Authority held in this case that the reduction in pay and late payment were allegedly contrary to the provisions of the employment agreement and were unjustified. However, Prime Resource's actions were based on a genuine interpretation of the employment agreement. Its interpretation may well have been wrong, but the claim was an action deriving solely from a disputed interpretation of an employment agreement. Therefore, the dispute procedure applied, and no grievance based on disadvantage arose.

The Court concluded that there was a jurisdictional bar to Mr Breen's personal grievance claim, and Prime Resource's challenge succeeded on that basis.

The Authority did not have jurisdiction to investigate Mr Breen's claim as a personal grievance, nor did the Court have jurisdiction to do so. Prime Resource's jurisdictional challenge succeeded. The Authority's determination was set aside, and the Court judgment stood. Parties were encouraged to resolve any cost issues between themselves.

Breen v Prime Resources Company Limited [[2023] NZEmpC 199; 15/11/23; Ingles CJ]

Company successfully withdrew offer of employment

In December 2020, Mr Edwards accepted a position with Laybuy Holdings Ltd (Laybuy). On 8 January 2021, before Mr Edwards started work, Laybuy withdrew the offer of employment as it was dissatisfied with the results of a pre-employment check, which it said was a condition of its offer of employment. Mr Edwards raised a personal grievance in relation to the withdrawal of the offer. The Employment Relations Authority (the Authority) found that Mr Edwards

was never an employee of Laybuy and therefore was unable to raise a personal grievance. Mr Edwards challenged the determination in the Employment Court (the Court) on a de novo basis.

Mr Edwards said that he was "*a person intending to work*", and therefore an employee, because he had accepted an unconditional offer of employment by signing an employment agreement with Laybuy. He said in the alternative that even if the offer was conditional, he was still able to accept it to become a person intending to work. The Court considered whether Mr Edwards was an employee pursuant to the Employment Relations Act (the Act) and therefore able to raise a personal grievance.

Towards the end of 2020, Mr Edwards was looking for new employment opportunities. He had several meetings with Mr Soong, the chief technology officer for Laybuy, and other Laybuy personnel. After a recruitment process, he was orally offered employment by Mr Soong who also advised that there would be some pre-employment checks to go through. Mr Edwards was sent a letter confirming the conditional offer of employment, a copy of an individual employment agreement and a consent form for pre-employment checking, which included consent to a criminal check. On 18 December 2020, Mr Edwards indicated he had digitally signed the documents.

The letter confirming the conditional offer of employment advised that "*This offer is conditional upon satisfactory pre-employment checks specific to the role we're offering you*". In the letter, Laybuy advised that, should it not be satisfied with the results of the check(s), the offer may be withdrawn. The employment agreement did not contain any conditions regarding pre-employment and had been signed by Mr Soong prior to it being sent to Mr Edwards.

On 18 December 2020, Mr Edwards had a conversation with the HR lead and told her of various matters that would likely show up on his police criminal check. On 7 January 2021, the criminal check came back, and it confirmed the matters Mr Edwards had previously mentioned to the HR lead. The next day, she called Mr Edwards and advised him that the offer of employment was withdrawn because of the outcome of the criminal check. A letter confirming the withdrawal of the offer was sent to Mr Edwards.

Further correspondence followed and Mr Edwards advised he was awaiting instructions about starting work. Laybuy replied, saying that there was no employment relationship entered into between the parties and no requirement for him to attend the Laybuy office as the offer of employment had been withdrawn. Mr Edwards thanked Laybuy and advised he understood.

There was no further contact between Mr Edwards and Laybuy until 9 April 2021, when Mr Edwards sent a letter headed *Personal Grievance - Unpaid Salary*. He sought what he said were three outstanding salary payments due on 20 January 2021, 22 February 2021 and 22 March 2021. Laybuy declined to attend mediation and the matter proceeded to the Authority and then the Court.

The Employment Relations Act (the Act) contained an extended definition of employee to include "*a person intending to work*". A person intending to work "*means a person who has been offered, and accepted, work as an employee*". The Act does not define the words offered or accepted. Laybuy made Mr Edwards a conditional offer of employment, which he accepted. The letter from Laybuy advised that Laybuy would only employ Mr Edwards upon being satisfied with the results of the pre-employment checks. If it was not satisfied, then, if Mr Edwards had not started work, the offer would not proceed and would be withdrawn. Laybuy thereby made it clear that it did not intend to be bound to employ Mr Edwards merely by his notification of assent.

Mr Edwards argued that, because the employment agreement itself did not include a condition requiring pre-employment checks, and was signed by Mr Soong, Mr Edward's signing of the agreement created an employment relationship. The Court did not accept that argument. The documents provided, in particular the letter confirming the conditional offer of employment and the individual employment agreement, were a package. The Court did not attach any significance to the agreement having been signed by Mr Soong and found that the employment agreement simply set out the terms upon which Laybuy was prepared to employ Mr Edwards, should the condition in the letter be met. That condition was not met, and Laybuy did not proceed with the employment. That meant that Mr Edwards was never

an employee and was not entitled to pursue a personal grievance. Having been successful in its defence of the challenge, Laybuy were entitled to costs.

Edwards v Laybuy Holding Limited [[2023] NZEmpC 188; 3/11/23; Holden J]

Court increases compensation to employee after employer challenged the Authority's ruling

In November 2018, Ms Kaur was employed by Henderson Travels Limited (Henderson Travels) as an agency manager. On 11 December 2019, Henderson Travels gave notice to terminate Ms Kaur's employment for reason of redundancy. Ms Kaur disagreed. She alleged her dismissal occurred on 26 November 2019 during a meeting with the director of Henderson Travels, Mr Sikri, when she refused his demands for payment of money. In the Employment Relations Authority (the Authority) Ms Kaur established that she was unjustifiably dismissed.

Henderson Travels sought a rehearing at the Employment Court (the Court). The matters to be addressed focussed on whether redundancy was the reason for the dismissal. If it was, then whether the process was adequate. If not, whether Ms Kaur was unjustifiably dismissed.

The Court was faced with a number of conflicting arguments about the circumstances of this case. In order to progress, the Court needed to make a decision about the credibility of statements. The Court preferred the evidence of Ms Kaur as it was consistent and plausible and was also supported by transcripts of recorded conversations. The Court rejected the notion that the transcripts had, in some way, been altered.

The Court noted that, prior to the meeting on 26 November 2019, Ms Kaur had received phone requests for money on 7 and 14 November 2019. On 26 November 2019, when Mr Sikri attended the office, what he intended to do was extract the payment. When that failed, he promptly took steps to end the employment agreement. The failure or refusal to pay led to an instruction to return all company property and to leave the premises. That was conduct that had one unequivocal meaning, which was that she was dismissed.

Henderson Travels asserted that the redundancy process they ran was based on financial difficulties the company was experiencing. The Court disagreed and found the company's evidence to be inconsistent and confusing and there was no justification for the redundancy. The financial information Henderson Travels relied upon was not provided to Ms Kaur at the time of the redundancy process, nor was it provided to the Court. The Court ruled that the challenge from Henderson Travels was not successful.

The Court considered the matter of whether Ms Kaur had received loans from Henderson Travels. It was alleged by Henderson Travels that loans were advanced to offset the cost of varying a work visa and to allow Ms Kaur to repay part of an airfare cost that she was alleged to have taken. The Court found that there was no evidence to support the existence of the first loan and that the circumstances of the second loan were implausible.

Because Henderson Travels' challenge was to the whole determination, which included the compensatory awards the Authority made, Counsel for Ms Kaur sought an uplift of compensation under the Employment Relations Act 2000 (the Act) from $21,000 to $40,000. The Court noted the physical and emotional effects on Ms Kaur and ordered an uplift to $30,000.

Counsel also submitted that under the Act, the process of fixing remedies should result in restoring the aggrieved party to the financial position he or she would have been in if the dismissal had not occurred. Ms Kaur was out of work for 19 months and could not easily obtain a job because of the necessity to obtain variations to her visa. The Court considered it was appropriate to award compensation for lost remuneration and to exercise the discretion to extend it beyond the three-month limit in the Act. Taking into account the observations in case law, the complications arising from COVID-19 and the impact that was likely to have had in searching for employment, the Court allowed 12 months' remuneration of $38,220.

The Court also ordered that Henderson Travels pay Ms Kaur $9,702 for unpaid wages and holiday pay. The Court further confirmed Henderson Travels had to repay Ms Kaur for the premium payment and that the penalties ordered by the Authority were appropriate. The Court found Ms Kaur was entitled to an award of costs.

Henderson Travels Limited v Kaur [[2023] NZEmpC 181; 26/10/23; Smith J]

Employment Relations Authority: Three Cases

Employee dismissed on a group chat raised personal grievance

TUJ was employed by Pro Pine Silviculture Limited (Pro Pine) between May and June 2022. TUJ never received a written employment agreement. TUJ was dismissed by way of a message sent by Mr Pirere, the director and sole shareholder of Pro Pine, in a group chat with five other people saying that he did not think the job was for them. TUJ raised a personal grievance for unjustified dismissal and disadvantage at the Employment Relations Authority (the Authority).

Pro Pine was given notice of the Authority's investigation meeting but did not attend. Instead, Mr Pirere replied, "*we no longer are in business... F*** off and leave us alone... We have no money to give as we are claiming bankruptcy... Tell [TUJ] because of idiots like him we no longer want to be in business*." The investigation meeting and determination proceeded in their absence. Pro Pine also did not lodge a statement in reply.

TUJ said they worked Monday to Friday starting at 7am and ending at 5pm and sometimes weekends. Whilst the terms and conditions of TUJ's engagement were not entirely clear, primarily because no written employment agreement was ever produced, the Authority was satisfied that TUJ was engaged to work under a contract of service.

TUJ was initially told that they would be earning piece rates but then was told they would be paid $25.00 per hour until they got the hang of the job. TUJ claimed that Pro Pine unilaterally reduced TUJ's hourly rate without consultation and agreement. Pro Pine offered no justification and so the Authority confirmed that this caused TUJ an unjustifiable disadvantage. TUJ was also dismissed unjustifiably without any proper process, so that claim also succeeded.

After the dismissal, TUJ took genuine steps to mitigate their loss but could only find a role after a few months. The Authority confirmed that lost wages relating to a total of eight weeks should be awarded. This was calculated on an hourly rate of $25.00 based on an average of 45 hours per week and $9,000 was ordered to be paid by Pro Pine.

The dismissal caused embarrassment and humiliation. His mother gave evidence that TUJ was negatively impacted. She also gave evidence that Mr Pirere went to TUJ's house to threaten them after receiving notice of the personal grievance. As a result, $22,500 was awarded for compensation for humiliation, loss of dignity, and injury to feelings.

The Authority found that Pro Pine breached the Employment Relations Act 2000, Holidays Act 2003, and the Wages Protection Act 1983 in multiple sections. There was a breach of good faith for unilaterally changing the rate of pay, not providing a written employment agreement, not providing wage and time records when requested, not paying TUJ when wages became payable and not paying holiday pay. The breaches of the Wages Protection Act and the Holidays Act were serious and deliberate, but the breaches of the Employment Relations Act were less severe. A global penalty of $7,000 was ordered of which $4,000 was to be paid to the Authority and $3,000 to TUJ. Costs were reserved.

TUJ v Pro Pine Silviculture Limited [[2023] NZERA 482; 28/08/23; R Anderson]

Constructive dismissal claim successful following transfer of shares

Mr Yang worked as a chef for Thorndon Café Ltd (Thorndon). When shares in Thorndon were transferred to a new owner, Mr Yang's employment did not continue despite assurances that it would. Mr Yang applied to the Employment Relations Authority (the Authority) arguing that he had been constructively dismissed. He also claimed that he had been incorrectly paid while employed, and that his final pay did not include the correct amount of annual holiday pay. Thorndon opposed Mr Yang's claims.

The Authority restated the legal test used to determine whether an employee's dismissal was unjustified. In this case, the question was whether Thorndon's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The Authority focused on whether Thorndon sufficiently investigated the matter before deciding to dismiss, whether it raised concerns with Mr Yang before deciding to dismiss, whether Mr Yang was provided a reasonable opportunity to respond, whether Thorndon genuinely considered Mr Yang's explanations or comments as well as any other factors the Authority thought appropriate.

Ms Zhang told Mr Yang that she wanted him to continue working for Thorndon. She then told him that he needed to resign so he could enter into a new employment agreement with Ms Zhang, who had become the majority shareholder. The pair then had discussions about what would be owed to Mr Yang upon his resignation. Ms Zhang also told Mr Yang that she wanted him to continue working for Thorndon. Following a meeting held between Ms Zhang and Mr Yang, Ms Zhang argued that she was at that time led to believe that Mr Yang had resigned without intending to return to work for Thorndon. The Authority assessed what was said at the meeting and found that even though Mr Yang said he was making good money working as an Uber driver, he never said that he wanted to stop working for Thorndon. Further, Mr Yang said Ms Zhang had later told him that he was not needed at Thorndon.

The Authority considered what resources were available to Thorndon. Both Ms Zhang and Ms Yang said they received advice from an accountant, which meant they had likely acted under a limited understanding of employment law. The Authority found Ms Yang was mistaken in thinking Mr Yang had to resign in anticipation of her selling her shares to Ms Zhang. Beyond telling him to resign, no further process was followed. No reason was provided to justify telling him that he needed to resign. It decided Mr Yang had been unjustifiably dismissed.

The Authority awarded Mr Yang compensation totalling $26,547 for both lost wages and humiliation, loss of dignity and injury to feelings. Mr Yang also claimed that he was not paid correctly. During the COVID-19 lockdowns, Mr Yang's regular work hours became changeable and less consistent. Mr Yang argued he never agreed to a reduction in pay. The Authority disagreed. It looked at WeChat messages sent between the parties whereby it was established that Mr Yang and Ms Zhang had agreed to a temporary variation to the employment agreement, meaning Mr Yang had been paid correctly.

Mr Yang claimed his annual holidays were paid out incorrectly upon his resignation. The Authority agreed. It compared Mr Yang's wage and time records with his payslips and found a discrepancy. It decided Mr Yang was owed $1,721.32 in unpaid annual holiday pay. The Authority also ordered compensation for a public holiday that Mr Yang worked but was not paid for, and a period of sick leave he was entitled to but was not paid correctly at the time.

The Authority may decide to impose penalties on companies which breach the Holidays Act 2003. First, the Authority had to identify the number and nature of breaches committed. In this case, it decided to combine four identified breaches into one. Second, it must assess the severity of the breach. It was established that Thorndon incorrectly paid Mr Yang, but considering Thorndon acted negligently rather than intentionally, the penalty was limited to 30% of $20,000, which was the maximum amount a company may be made to pay for each breach of the Act. Third, as a matter of fairness, it must determine whether the amount should be reduced further. It looked to the amount imposed in similar cases and decided $1,500 was an appropriate penalty. Costs were reserved.

Yang v Thorndon Café Ltd [[2023] NZERA 483; 28/08/23; S Kinley]

Successful unjustified disadvantage claims due to unilateral change to employment agreement

Mr Liu was employed to work as a welder for Allstar Roofing Limited (Allstar) from 12 November 2019. His employment was arranged in China through a recruitment agent. Mr Liu came to New Zealand in November 2019 to take up the employment. He started to work for Allstar on 12 November 2019 as a roofer. His employment with Allstar ceased on 14 January 2021.

On 12 March 2019, when Mr Liu was recruited, he signed an individual employment agreement for the position of a welder (the first IEA). The first IEA stipulated Mr Liu would be paid $25.00 an hour for a minimum of 40 hours per week. On 8 August 2019, Mr Liu was required by Allstar to sign another individual employment agreement (the second IEA). He was specifically told by the agent that the terms and conditions were the same, however, the contractual pay rate was $23.00 an hour for 35 hours per week. Both employment agreements were for the position of welder. Mr Liu was not provided with a copy of either employment agreement.

At the Employment Relations Authority (the Authority), Mr Liu claimed personal grievances for unjustifiable disadvantage by Allstar not employing him as a welder and/or paying him correctly, unjustified dismissal and breach of the Holidays Act 2003 (the Act). He sought lost remuneration, wage arrears, and reimbursement of legal costs. Mr Liu also sought penalties against Allstar, Mingyang Ma and Mengyao Yu, directors of Allstar, for various breaches of the Act.

A significant component of Mr Liu's wage arrears claim related to the majority period of his employment when he was being paid the hourly rate of $23.00. Mr Liu worked as a roofer, and not in the role of welder for which he had been recruited. The Authority found that because Mr Liu was specifically told that the Second IEA had the same terms and conditions as the First IEA, he was entitled to enforce the terms and condition of the First IEA, which stated payment was at an hourly rate of $25.00 for 40 hours per week.

In the course of his employment, Mr Liu was not paid for six public holidays. Mr Liu also worked 11.5 hours on Auckland Anniversary Day (27 January 2020), but he was paid 8 hours at $23.00 an hour, being $184.00. He should have been paid 1.5 x his hourly rate of $25 for the hours worked, being $431.25, and provided an alternative day off or paid in lieu of this public holiday.

The Authority found that Mr Liu was disadvantaged by Allstar's unjustifiable action, in treating him as a roofer and making him undertake work in this role rather than as a welder, which was the role he was employed in. Mr Liu was also disadvantaged by Allstar failing to pay him his contractual pay as specified in the First IEA and by Allstar failing to correctly pay his public holiday entitlements.

Mr Liu claimed he was constructively dismissed as the real reason for his resignation was that he had been unjustifiably disadvantaged for a long time by having been underpaid his agreed contractual rate and that his employment had been unilaterally altered by the position being changed from a welder to a roofer. On 21 December 2020, Mr Liu resigned via WeChat. He advised that his last day of employment would be 14 January 2021. The resignation message did not raise any reasons or issues that had prompted the ending of the employment.

Allstar's evidence was that the company believed that Mr Liu had already arranged another job. Allstar accepted Mr Liu's resignation and did not require the Mr Liu to work out the four-week contractual notice period. When Mr Liu was questioned about his future employment at the investigation meeting, he said he had obtained a role as a welder for another roofing company with a significant increase in hourly rate. Therefore, the Authority found Mr Liu was not constructively dismissed as there was no causative link between the employer's breaches and Mr Liu's resignation. Mr Liu resigned from his employment at Allstar to take up a better employment opportunity. Mr Liu's personal grievance for unjustified dismissal was unsuccessful.

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 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