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Our Chamber of Commerce

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Case Law

Employment Court: Two Cases

Court orders employer to comply with consultation clause

Television New Zealand Limited (TVNZ) proposed a redundancy to its employees in March 2024, which was challenged by a union, E tū Incorporated (E tū). The Employment Relations Authority (the Authority) found TVNZ breached a clause in its collective employment agreement (the CEA), by delivering the proposal without developing it with its employees. The parties could not solve the matter in mediation. E tū applied for a compliance order, but the Authority did not have the capacity to immediately examine the claim. TVNZ then challenged the Authority's decision in the Employment Court (the Court) under urgency.

The clause in question in the CEA on Workforce Participation (the Clause) stated that TVNZ will "*support the active participation of staff in the development of the organisation and changes in workplace practices.*" This required "*assisting staff to be involved in the developmental stages of decision-making processes and… business planning.*" It stated TVNZ "*acknowledged employees will be involved throughout.*"

The aim of participation was "*to discuss all relevant information openly and honestly and to reach agreement and to make recommendations to management. TVNZ will enter these discussions with an open mind and will fully consider options and proposals put forward by staff. TVNZ will take any recommendations fully into account.*" Additionally, a different clause in the CEA stated that in a "*surplus staffing situation … TVNZ will advise the employees concerned and their Union … in the event that no agreement is reached*" that it would only then consider making positions redundant.

TVNZ undertook two initiatives with staff in 2023 to respond to a reduction in audience: the Te Paerangi Transformation Programme on moving to a digital platform in July 2023 and an Ideas Week in August 2023. TVNZ was not looking to restructure in either occasion.

In November 2023, TVNZ's finance team advised the executive team of the need to cut $10 million in costs. TVNZ did not tell this to the Union or staff. This was a watershed moment for the executive team who entered a "*crunching*" rather than ideas-generating direction. Between mid-December and early January 2024, senior staff met to discuss initial ideas for labour cost reduction. The executive team decided on a proposal to cancel some shows, which would make certain staff redundant.

TVNZ kept quiet about this proposal and other role reductions until 8 March 2024. When it did make its announcement, it did not disclose the options it had considered since November or seek discussion on them. TVNZ handed out preprepared information packs which stated that to offset ongoing declining revenue, it needed to reduce its labour cost. TVNZ had decided what needed to be done and proposed how this would be achieved.

E tū disputed TVNZ's process, arguing that it breached the Clause because it proposed cancellations and redundancies without any consultation with its employees. TVNZ maintained it had complied with the Clause but did not seek advice for this or pause its process in any way. Later, executive witnesses would admit they had no familiarity with the Clause. On a 12 April 2024 meeting, TVNZ's Executive Editor told staff "*we don't make these decisions in the open.*" He believed responsibility for developing proposals should rest with TVNZ executives.

The Court examined the obligations the Clause imparted. It found the Clause imposed deeper obligations upon the standard restructure process. Staff needed to be actively involved at the developmental stage. The Clause did not give TVNZ any discretion or managerial veto on whether to use the process, even if TVNZ felt conditions were not suitable. The Clause provided that certain criteria had to be met for TVNZ to unilaterally invoke redundancy. Possible biased favourability in the Clause did not overcome these plain meaning interpretations.

The Court confirmed TVNZ had to run a deeper form of participation with its employees rather than formulating an advanced proposal on its own. TVNZ argued that Te Paerangi and Ideas Week formed this participation, but these did not specifically concern redundancy. TVNZ kept important information to itself instead of informing its employees. It could have had a roundtable on the financial issues without revealing the sensitive information of hard numbers. When it only gave employees standard information on their own show, it stymied participation in the wider situation.

Finally, the Court considered whether it would accept E tū's application for a compliance order. It found that rather than debating its effectiveness of remedying prejudice, the purpose of an order would be to provide the employees with their contractual entitlement. TVNZ argued an order would bring uncertainty for employees that were redeployed or left. The Court found that if current employees were in a limbo after having had their role disestablished, they could apply their time and energy to engage with the Clause's process. Compliance with the Clause would address uncertainty rather than exacerbate it. Lastly, the Court rejected any issue of financial practicality because the labour costs involved were small compared to the savings of the confirmed show cancellations.

E tū argued TVNZ was unlikely to engage in the process without the compliance order. Since TVNZ had maintained so firmly that it would not revisit its actions, the Court agreed with E tū. Moreover, the Court thought there was real value to staff contributing their depth of experience, specialist knowledge and expertise, which was likely the intention of the Clause.

The Court ordered for TVNZ to comply with the Clause within 20 working days. It noted that the compliance order would not restrain the redundancies that were already scheduled to occur. At the request of the parties, costs were reserved.

Television New Zealand Limited v E tū Incorporated [[2024] NZEmpC 93; 31/05/24; Inglis CJ]

Court increases remedies ordered to employee after challenging decision

Mr Singh worked for E tū Incorporated (E tū) and was involved with the Migrant Workers' Association (MWA) and the Migrant Rights Network – organisations which focused on minority worker exploitation. Mr Singh helped HVF, a business owner, settle her worker exploitation matter in Hamilton during a workday. HVF was unhappy with the outcome. She told E tū that Mr Singh had demanded sexual favours from her in return for settling her worker exploitation case. Mr Singh tried to tell E tū that the messages HVF provided were fabricated and that it was part of

their worker exploitation campaign. E tū suspended and then dismissed Mr Singh following an incomplete process and investigation. The Employment Relations Authority (the Authority) found that Mr Singh was unjustifiably dismissed and suspended.

The Authority ordered Mr Singh be paid $22,000 in compensation for hurt and humiliation and twelve months' worth of lost wages, with a 15 percent reduction for his contribution. E tū challenged the Authority's decision in the Employment Court (the Court). Mr Singh argued that his compensation and remuneration be increased, and his contribution removed for not being at fault.

When the complaints were made, E tū did not provide Mr Singh with adequate time to engage on the issue. It rushed the process, caused unnecessary stress and anxiety, and damaged his reputation. Mr Singh started getting tagged in media articles, even by members of his community, and was the subject of intense speculation. He said that E tū could have done more to minimise the damage to him, such as putting out a media statement and that its failure to do so exacerbated his distress.

While media coverage did not expressly name Mr Singh, it was obvious the coverage was about him. The nature and extent of E tū's comments in the media exacerbated matters. The Court stated that if E tū had taken steps to clarify its position in respect to its engagement with the media, it may have lessened the impact on Mr Singh. It was reasonable for him to feel that he had been hung out to dry by his employer.

The dismissal had a drastic impact on Mr Singh in that he was unable to find alternative work in his field, was obligated to tell his family and friends about the dismissal, was unable to sleep, shut himself off from his partner and family, felt unable to adequately provide for his three children, suffered financial hardship (and was in receipt of a benefit) and was distracted and upset for many months. His evidence was corroborated by the evidence of his partner.

The Court found that while there was no doubt that Mr Singh was humiliated and suffered emotional harm, it needed to set that aside from the emotional turmoil he was feeling following the separation from his wife and becoming a full-time father. It decided there was a causal link between E tū's breaches, and the emotional harm Mr Singh was made to suffer, but only enough to increase his compensation from $22,000 to $25,000.

On the issue of reimbursement for lost wages, it took Mr Singh two years to find alternative work. E tū argued that he failed to mitigate his losses and that an award of reimbursement for lost wages should be limited to three months. Mr Singh said that his efforts to find alternative work were hampered by his loss of self-confidence, a focus on seeking reinstatement, and the desire to remain working in a field he was passionate about. The market for union organisers was constrained at the time. The Authority deemed reinstatement to be impractical. He made some inquiries into the aviation industry, an area he had previously worked in, but that sector was also suffering. Eventually, he was only able to secure a baggage handling job.

E tū was not entirely responsible for the negative media attention Mr Singh received and did not need to carry the loss while he waited for the "*perfect role.*" An award of twelve months' lost wages was just.

The Court found that Mr Singh could not be blamed as E tū could not "*pinpoint the proven wrongdoing.*" There was no proof that he travelled to Hamilton for the sole purpose of seeking favours from HVF. He also had arguable grounds against the harassment complaints which E tū did not bother to explore. The Court overruled the reductions previously made to his remedies.

Mr Singh incurred $11,500 in pursuing his grievance. The Court ordered E tū to pay this sum. Costs were reserved.

E tū Incorporated v Mr Singh [[2024] NZEmpC 84; 21/05/24; CJ Inglis]

Employment Relations Authority: Three Cases

Authority considers whether grievances were raised in time

Ms Chen was employed by Armstrong Prestige Limited (AP) to sell cars. Her employment was from 3 December 2018 until she resigned on 14 September 2019. During her employment, she received both a salary and commission. Her final day of employment was 11 October 2019. Ms Chen lodged claims in the Employment Relations Authority (the Authority) against AP on 22 December 2022. She claimed she had been unjustifiably constructively dismissed and disadvantaged in her employment. She also lodged claims for issues related to wages and breaches of good faith.

The Authority held a preliminary investigation hearing to determine if the claims of unjustified dismissal and disadvantage could be included in the main investigation hearing.

It found that Ms Chen's representative wrote to AP on 5 December 2020 to request various pieces of information including wage and time records, details around rest and meal breaks taken, and any information AP held about Ms Chen's performance and conduct. AP responded to her request as best it could. Ms Chen's representative sent another letter on 8 January 2021 requesting further information and raising a personal grievance for constructive dismissal. AP provided additional information, however, and felt the issues being raised were more in the nature of a dispute over wages rather than a grievance.

While AP felt the 8 January 2021 letter lacked information regarding the basis for the constructive dismissal claim, the Authority did not agree. The letter stated that Ms Chen "*was incorrectly and consistently paid commission on sales, and was not provided with accurate information related to sales in a manner which fundamentally breached the terms of her employment agreement.*" This statement provided AP with enough information to warrant a response. Although Ms Chen's representative indicated further information would follow about the grievance, nothing further was submitted until the claim reached in the Authority some years later, which included an amended statement of problem submitted on 31 July 2023.

Even though the Authority found Ms Chen had raised a personal grievance within the 90-day timeframe for unjustified constructive dismissal, that was only for the issue relating to her not receiving information about her commission payments throughout her employment. It found Ms Chen had not raised any other grievances within time, which included those contained in the amended statement of problem submitted on 31 July 2023.

The Authority then considered whether exceptional circumstances existed which prevented the claim being lodged in time. These included whether Ms Chen was so traumatised that she could not raise the claim within 90 days, or whether her representative had unreasonably failed to raise the claim within the required timeframe. The Authority did not find supporting evidence for exceptional circumstances to be considered. Even if exceptional circumstances did exist, consideration would need to be given to the overall justice of allowing the claim to proceed after the time that had elapsed. Costs were reserved pending the outcome of the next investigation meeting.

Chen v Armstrong Prestige Limited [[2024] NZERA 91; 16/02/24; A Baker]

Constructive dismissal and discrimination claims

In this case, the Employment Relations Authority (the Authority) made a non-publication order to keep the names of the parties anonymous. They were referred to as HFM, the Director, and IMH.

HFM was employed by IMH as an apprentice mechanic from November 2021 until they resigned in January 2023. HFM claimed they were the subject of ongoing and unreasonable treatment that amounted to discrimination, and that IMH breached its good faith obligations. HFM said this led to their resignation in circumstances amounting to a constructive dismissal.

IMH asserted HFM resigned prematurely whilst holidaying overseas. IMH said prior to the communicated resignation, they offered to have a meeting to discuss HFM's return to work date after a significant absence following a workplace accident as well as other concerns.

HFM discussed their diagnosis of Attention Deficit/Hyperactivity Disorder (ADHD) with IMH's Director during their preemployment interview. As their employment progressed through 2022, the Director said there was an emerging concern about HFM taking time off during working hours to seek counselling assistance with their ADHD, as well as with the timing of them taking annual leave.

On 3 November 2022, HFM injured their right hand significantly while unloading a crate at work. ACC advised that HFM would remain unfit to work until 20 December 2022. This was supported by a medical certificate. IMH had, prior to the accident, approved HFM's annual leave to travel to the UK from 21 December 2022 with a return-to-work date of 16 January 2023. A compounding factor was that the Director had also approved further leave for HFM to attend a family holiday in Australia between 20 January 2023 and 30 January 2023. Effectively this entailed HFM being potentially absent for three months with a combination of sick leave and annual leave from 3 November 2022 to 30 January 2023.

IMH was frustrated by the situation, so it instructed its advocate to write to HFM setting out its various concerns. The advocate's letter stated it needed to know for certain whether HFM would be 100 percent fit to return to work from their injury or if they had to arrange cover, a concern of potential further time off for medical appointments associated with HFM's ADHD and some clarity around the diagnosis. The purpose, timing, content and impact of the letter became central to the employment relationship problem.

HFM said they received the letter by email while in Hong Kong en route to the UK, and recalled being confused and upset by the content given they were on approved annual leave. The letter also advised HFM to direct communications regarding it to the advocate. HFM described being distressed and believed it was a formal disciplinary letter that prevented them from contacting their employer directly, questioned past absenteeism, and was a threat to cancel HFM's leave for their Australian trip.

The Authority found after setting aside the unfortunate timing of the letter, that the tone and content of it was objectively unreasonable and confronting. It traversed too many issues.

HFM resigned with 2 weeks' notice by email on 11 January 2023 in a stressed and anxious state. To support their claim, they focused on what they perceived as the negative content and tone of the December letter, as well as the difficulty of getting medical information to IMH in the time allotted. After the letter set the deadline for HFM to provide information, it indicated that IMH "*can only make decisions based on the information it receives*". The Authority found that could reasonably be construed to be a potentially negative decision impacting HFM's ongoing employment.

The Authority found there was no reason to suggest absenteeism for sick leave taken prior to the accident as being specifically unacceptable. An analysis did not show absenteeism was extraordinary, unexplained or objectively excessive.

In relation to whether IMH engaged in discriminatory actions, the Authority found there was no justifiable reason to raise HFM's ADHD as being at issue but did not conclude that the action was an act of conscious discrimination. Overall, the Authority found that the action of highlighting the ADHD in the December letter was not discrimination, but it was not the act of a reasonable employer and IMH could have easily appreciated that this would cause HFM unnecessary anxiety and distress, or at the very least ruin their holiday. As such, it was an action that unjustifiably disadvantaged HFM.

The Authority then considered whether HFM was constructively dismissed. In reviewing all the contextual circumstances leading up to the resignation, the Authority concluded HFM was the subject of ongoing breaches of a nature sufficiently serious and causative of their resignation. The timing, content and tone of the December letter was confusing and conflicting in its messages, unreasonable, and likely to cause distress. The Authority found the level of potential distress was objectively foreseeable and the additional impact of HFM's ADHD and associated anxiety should have been appreciated.

The Authority found IMH's actions were unjustified and in breach of good faith obligations and as a result HFM suffered a disadvantage in their employment. HFM resigned in circumstances where it was foreseeable that they would, which amounted to unjustified dismissal. IMH was ordered to pay HFM $18,000 compensation for hurt and humiliation and $5,610 for lost wages. Costs were reserved.

HFM v IMH [[2024] NZERA 100; 23/02/24: D Beck]

Employee raises a personal grievance against a controlling third party

From 3 August 2022, Mr Brookes was employed by Equip Worldwide Limited trading as Equip Recruitment (Equip Recruitment) on a casual basis. Mr Brookes said his employment was terminated on 7 September 2023 after he sent an email outlining his concerns about issues occurring at his workplace, Firth Industries.

On 11 September 2023, Mr Brookes raised personal grievances against Firth Industries rather than his employer, Equip Recruitment. It responded by saying Mr Brookes' employment relationship was with Equip Recruitment, and Firth was not his employer. Even if he wished to raise a personal grievance against Firth Industries, it needed to be in joint with Equip Recruitment. On 21 October 2023, Mr Brookes raised personal grievances at the Employment Relations Authority (the Authority) against Firth Industries.

Firth Industries argued that by not raising a personal grievance against Equip Recruitment, he had not met the requirements of the Employment Relations Act (the Act) for joining a controlling third party to a personal grievance, and so there was no jurisdiction for the Authority to hear his claim under the Act.

The Authority found that Mr Brookes' employment relationship was with Equip Recruitment. They were parties to the employment agreement and Mr Brookes confirmed this at the Authority's case management conference.

There was no personal grievance between Mr Brookes and his employer to which Firth Industries could be joined as a controlling third party. Accordingly, the Authority did not have jurisdiction to consider Mr Brookes' claims against Firth Industries as a controlling third party.

The parties were encouraged to resolve any issue of costs between themselves. Costs were reserved.

Brookes v Fletcher Concrete and Infrastructure Limited T/A Firth Industries [[2024] NZERA 133; 06/03/24; 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: Eight Bills

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

Resource Management (Freshwater and Other Matters) Amendment Bill (30 June 2024)

Residential Tenancies Amendment Bill (3 July 2024)

Oranga Tamariki (Repeal of Section 7AA) Amendment Bill (3 July 2024)

Regulatory Systems (Primary Industries) Amendment Bill (8 July 2024)

International treaty examination of the agreement on the Indo-Pacific Economic Framework For Prosperity (18 July 2024)

International treaty examination of the Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Clean Economy (18 July 2024)

International treaty examination of the Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Fair Economy (18 July 2024)

International treaty examination of the Indo-Pacific Economic Framework for Prosperity Agreement Relating to Supply Chain Resilience (18 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

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