Employer Bulletin

# Our Weekly News Digest for Employers

*Friday, 27 October 2023*


## In this Issue:



## Case Law

### Employment Relations Authority: Five Cases

#### Application for interim reinstatement failed

Ms Yang was employed by the Northland District Health Board, now called Te Whatu Ora Te Tai Tokerau (Te Whatu Ora), from November 2006 until March 2023 when she was dismissed. Ms Yang alleged she was unjustifiably disadvantaged from a breach of good faith through the implementation of an unreasonable training/performance management process and by Te Whatu Ora unjustifiably suspending her. She also alleged she was unjustifiably dismissed. Ms Yang applied to the Employment Relations Authority (the Authority) for interim reinstatement. Te Whatu Ora denied Ms Yang's claims and opposed her application. The determination dealt only with Ms Yang's application for interim reinstatement.

Ms Yang worked in the Whangārei Hospital Medical Laboratory. In January 2020, the laboratory services were restructured, and Ms Yang commenced work as a Medical Laboratory Scientist (MLS) working within the microbiology department. In November 2021, the new head of the department of microbiology had an informal meeting with Ms Yang and proposed to offer Ms Yang additional training, which she declined. In April 2022, Ms Yang was informed via email that a training plan would be established, which was confirmed in June 2022. Ms Yang alleged that Te Whatu Ora did not consult with her regarding the implementation of the training plan or its structure. From June to December, Ms Yang underwent an extensive structured training plan to achieve competency sign-off from the heads of departments in their discipline. At the conclusion of the training plan, Ms Yang was signed off in only two of the eight sections she needed to complete.

Ms Yang was invited to an investigation meeting to discuss a range of issues, including her competency levels. Te Whatu Ora alleged that at the meeting Ms Yang agreed for her training records to be reviewed by a consultant clinical microbiologist. Ms Yang said she was instructed to stay away from work and was not consulted about being stood down. She alleged she was unjustifiably suspended.

The review of Ms Yang's training records stated that although the training was appropriate, Ms Yang failed to achieve competency in any of the fields that were required to work as an independent scientist in microbiology or in an unsupervised role. In February 2023, Te Whatu Ora communicated its preliminary decision to terminate Ms Yang's employment. The parties met before the decision to terminate Ms Yang's employment was confirmed. Ms Yang alleged the lack of communication, and continued failure to warn her that punitive action may occur at the conclusion of the training plan, was a breach of Te Whatu Ora's duty of good faith to her.

The first question for consideration was whether Ms Yang had an arguable case that she was unjustifiably dismissed and that she would be permanently reinstated. The Authority accepted that Ms Yang had an arguable case that Te Whatu Ora did not act as a fair and reasonable employer could have done with respect to the question of redeployment. This could render her dismissal unjustified. However, the case was not a particularly strong one because it was not entirely clear whether Ms Yang would have reached the required competency levels even with further training.

Consideration on the balance of convenience required an assessment regarding the impact on each party if interim reinstatement was granted. The Authority's preliminary view was that the claim of unjustified dismissal was not strong but was arguable, however, the claim for permanent reinstatement was weak. That weighed against interim reinstatement when assessing the balance of convenience. The Authority accepted the impact on Ms Yang the longer she was not working and also considered the potential disruption for Te Whatu Ora if interim reinstatement was granted. To have Ms Yang reinstated, it was made clear that the process would not only be expensive, but time-consuming and would put a strain on limited resources. The Authority found that the balance of convenience weighed in favour of Te Whatu Ora. In relation to the overall justice of the case, the Authority considered an order for interim reinstatement was not in the interests of justice.

The Authority was satisfied that there was a serious question to be tried regarding whether Ms Yang was unjustifiably dismissed by Te Whatu Ora. However, Ms Yang had established a very weak case for permanent reinstatement. The balance of convenience and overall justice did not support Ms Yang being permanently reinstated. Ms Yang's application for interim reinstatement was not successful. Costs were reserved pending the outcome of the substantive investigation of Ms Yangs's grievance application.

*Yang v Te Whatu Ora – Health New Zealand Te Tai Tokerau (Northland)* [[2023]; 27/07/23; A Gane]

### Outcome of breach of contract claim

In a previous determination from the Employment Relations Authority (the Authority), Ms McDonald was found to have breached the terms of her employment agreement when she tendered invoices to KML (her employer) under the name of a company of which she was the sole director and shareholder. The invoices included a claim for GST input credits, which could not be claimed under the employment agreement between Ms McDonald and KML. Because the claim was made under the name of a different entity, KML did not know about the breach at the time it was made.

In response, KML voluntarily approached and discussed the issue with the Inland Revenue Department (IRD) and took steps to unwind and rectify the tax implications of the invoices. KML sought compensation for the costs incurred in dealing with Ms McDonald's breaches of the employment agreement.

Following past case law, the general principles that apply for damages claims include the following. First, damages are intended to compensate an injured party that has suffered loss. Second, injured parties are not entitled to a windfall; respondents should only be held liable for what can convincingly be said to be the results of their conduct, and the onus is on the injured party to prove the extent of their loss on the balance of probabilities. The objective of paying damages would be to put KML in the position it would have been in had Ms McDonald not breached her employment agreement.

KML sought an award for damages of $11,077.50, representing accounting fees incurred during their investigation into Ms McDonald's conduct. Ms McDonald argued that the steps taken by KML to rectify the consequences of her conduct were unreasonable. She believed only 3.5 hours was necessary to properly investigate the matter.

The Authority decided that it was reasonable for KML to take Ms McDonald's breaches seriously once they were discovered. It was not unreasonable to hire outside experts to help conduct multiple investigations and make the necessary rectifications. The Authority noted that it was uncertain whether KML could have hired outside experts at a lesser rate and held that Ms McDonald could not be expected to pay for costs that may have been secured at a lesser rate. To account for that, it decided to award KML $8,000 as compensation for costs incurred rectifying the consequences of Ms McDonald's conduct.

KML also sought an award for legal fees worth $2,250. Because it was likely that the time spent with lawyers would not have focused solely on the issues relating to Ms McDonald, the Authority decided to award $500 compensation. KML then went on to claim $17,645.41, which was the amount paid to the IRD by KML to rectify Ms McDonald's breaches. Ms McDonald argued that because KML delayed in addressing the issue, she should not be liable for all the costs incurred, considering the delay. The Authority held that Ms McDonald had not sufficiently proven that KML's delay increased the costs payable to the IRD and decided that she was liable for the entire $17,645.41 claimed. Costs were reserved.

*Kevin McKerrow Limited v McDonald* [[2023] NZERA 375; 17/07/23; M Urlich]

### Claim for unjustified disadvantage found to be lodged within statutory timeframe

Mr Jeffery was initially engaged by Appliances Galore & More Limited, trading as Refresh Appliances (Refresh), by way of a letter of offer dated 27 October 2021. This letter described the role as "*Trainee Service Technician, Sales, Promotion, Customer Acquisition"*. The prime intent of the role was expressed as to "*support Mr Jeffery's Electrical Certification and Training"*. However, the description of the role also envisaged Mr Jeffery would be trained in Refresh's product, sales and systems, customer acquisition and promotion work. Mr Jeffery disclosed he had just been accepted into an electrical engineering pre-trade course at a local tertiary trade training provider (Ara) that he envisaged commencing in mid-October 2021. He began work for Refresh around 10 January 2022 and signed an employment agreement on 17 February 2022, which included a position description and the job title: "*Sales, Service, Promotion, Sales Support".*

During the first six weeks, Mr Jeffery was expected to "*gain competency in each facet of the position requirements*" (that were not set out in the job description). The second six weeks was described as a "*consolidation period*" in which Mr Jeffery was to "*demonstrate and maintain the level of competency required"*. Thereafter, Mr Jeffery was expected to be fully trained. To achieve these stated objectives, the agreement noted regular appraisal meetings would occur and that full training would be given.

In March 2022, Mr Jeffery raised concerns with Mr Carpenter, Refresh's sole Director, about the lack of service work he had been given. He noted he had only completed around one hour's service work in seven weeks. He also set out that Ara had declined to allow him to continue with his "*level 3 electrical engineering theory course*" for "*lack of engagement*". Mr Jeffery was then given work in the company's workshop. However, there was no structured learning with qualified personnel.

Matters deteriorated until, in August 2022, Mr Jeffery, in an email exchange with Mr Carpenter, indicated he was no longer available for work due to his return to studies. No further contact occurred until Mr Jeffery became aware that his student allowance application had been declined on the ground he had not completed over 50 per cent of his previous study course.

On 14 August 2022, Mr Jeffery raised a personal grievance with Mr Carpenter. The remedy initially identified that Mr Jeffery was seeking reimbursement of his lost student allowance. The correspondence concluded with reference to him having previously raised issues of the lack of training by appropriately qualified people during his employment at

Refresh. Broadly, the issues concerned were a suggestion that the job was misrepresented to him, or he was misled. Once he began, he said he was given insufficient time and technical support to pursue his expressed goal of advancing his trade qualification and that led to him resigning. By contrast, Refresh maintains that before engaging in technical training, Mr Jeffery had to satisfactorily demonstrate a knowledge of Refresh's sales and promotional procedures and that he was later provided with support in technical areas. Refresh contended that Mr Jeffery "voluntarily" resigned to pursue his trade qualification at a tertiary provider and therefore Mr Jeffery was not disadvantaged in his employment. Refresh further contended that Mr Jeffery had not identified a viable cause of action and that the claims advanced are frivolous and should be struck out as lacking legal merit.

The parties were not able to resolve the matter through mediation and Mr Jeffery then filed an application with the Employment Relations Authority (the Authority) alleging unjustified disadvantage.

The first task for the Authority was to determine if the grievance had been raised within the statutory timeframe. In considering the evidence, it was apparent that Mr Jeffery used the employment problem resolution process in his employment agreement, and he properly identified his issue as access to training by a qualified person. Mr Jeffery first raised the issue in writing with Mr Carpenter on 15 March 2022. The Authority found the grievance had been raised within the statutory timeframe.

In considering the motion to dismiss the claim, the Authority, after reviewing substantive issues and having had the ability to question both parties and examine documentation, concluded Mr Jeffery's case was not trivial and could not be dismissed. The parties were directed to further mediation. As Mr Jeffrey was not represented and was the successful party, there was no issue as to costs.

*Jeffery v Appliances Galore & More Limited T/A Refresh Appliances* [[2023] NZERA 366; 11/07/23; D Beck]

### Personal grievance raised successfully considering the totality of communications by employee

Matthew Biddle was employed by iDesign Architecture NZ Limited (iDesign) from 11 October 2021. In July 2022, following the publication of a newspaper article naming Mr Biddle, it came to iDesign's attention that Mr Biddle had been involved in proceedings before the Employment Relations Authority (Authority) relating to a previous employment relationship that was not listed on his curriculum vitae (CV) when applying for his role at iDesign. iDesign commenced an investigation process, and ultimately Mr Biddle was summarily dismissed from his employment on 2 August 2022. Mr Biddle claimed that he was unjustifiably dismissed.

On 28 July 2022, Mr Biddle sent an email to iDesign expressing concerns about the conduct of a meeting he had attended earlier that day. He asserted the conduct was unfair and raised issues relating to representation and breach of good faith. The next day, iDesign communicated its preliminary decision that the allegations were substantiated and amounted to serious misconduct, and that Mr Biddle should be dismissed without notice. On 1 August 2022, Mr Biddle responded to iDesign's preliminary findings, further raising procedural concerns regarding the investigation and disciplinary process in some reasonable level of detail. On 2 August 2022, Ms Carleton, general manager, communicated iDesign's final decision that Mr Biddle was summarily dismissed to him.

A preliminary issue in the case was whether Mr Biddle had raised the personal grievance within the 90-day period as required by section 114 of the Employment Relations Act 2000 (the Act). iDesign submitted that Mr Biddle did not raise a personal grievance within the 90-day period, which expired on 31 October 2022. Mr Biddle submitted he did raise the grievance within the required 90-day period and relied upon a text message sent on 2 August 2022, correspondence sent on 4 August 2022, and his submitting a request for mediation on 5 August 2022 to support his claim.

To determine this matter, the Authority considered whether any communication in isolation raised a personal grievance and if not whether a personal grievance was raised having regard to the *"totality of the communications".* The Authority found that although Mr Biddle's email of 2 August 2022 contained some content reflecting disagreement, the substance of the matter being raised was unclear. The email did not raise a personal grievance and instead only indicated that a personal grievance may be raised in the future.

After his email on 4 August 2022, however, it was clear that Mr Biddle had raised issue with an assertion made by iDesign regarding the design plans, and more broadly regarding the fairness of the dismissal. Mr Biddle did not elaborate on his asserted unfairness in the email but did advise iDesign that he was going to lodge an application for "*unfair*" dismissal and that he would be taking the matter further. The Authority did not accept that the reference to future lodgement of application meant that Mr Biddle was not raising a personal grievance. In fact, the suggestion that an application would be lodged in the future, viewed objectively having regard to the context, indicated that a grievance had been raised, or at least that Mr Biddle thought it had, and that further action would be taken to progress it.

The Authority concluded that by sending the email of 4 August 2022, Mr Biddle had taken reasonable steps to make iDesign aware that he had a personal grievance that he wanted it to address. It was sufficient that Mr Biddle had raised his disagreement with at least one factual finding relevant to the dismissal. Mr Biddle had also raised the issue with the procedural steps taken by iDesign during its investigation prior to the dismissal. Further, Mr Biddle's indication that an application would be made for unfair dismissal was found to have put iDesign on notice that Mr Biddle considered he had been unjustifiably dismissed and wanted iDesign to address his concerns that the dismissal was unfair.

Additionally, iDesign's response to Mr Biddle's email on 4 August 2022 was in effect iDesign defending the steps they had taken in dismissing Mr Biddle. Mr Biddle's request for mediation also put iDesign on notice that Mr Biddle considered his dismissal unfair, had issues with both iDesign's substantive findings and procedure and wanted these issues addressed. After considering the totality of the communication, the Authority found Mr Biddle raised a personal grievance for unjustified dismissal within the statutory 90-day period. Costs were reserved pending consideration of Mr Biddle's claim of unjustified dismissal.

*Mathew Biddle v Idesign Architecture NZ Limited* [[2023] NZERA 361; 07/07/23; R Anderson]

### An employer's failure to discuss changes disadvantaged employee

Ms Zhang was employed by Health New Zealand - Te Whatu Ora (Te Whatu Ora) as a senior financial analyst. She worked in the analytics and insights division providing accounting and analyst services to an operational team. Te Whatu Ora wanted Ms Zhang to change where she worked to the corporate and compliance services team in centralised tasks. Ms Zhang said the work she did for a division is fundamentally different to the work performed in centralised tasks.

Ms Zhang opposed the change and sought orders from the Employment Relations Authority (the Authority) to prevent it permanently. She also sought a finding that actions by Te Whatu Ora unjustifiably disadvantaged her in her employment and that Te Whatu Ora breached the duty of good faith.

Te Whatu Ora said the change was within the contemplation of the parties' individual employment agreement and job description and it had acted fairly and reasonably towards Ms Zhang. Ms Zhang's primary submission was the change amounted to a unilateral variation to her employment agreement. Te Whatu Ora suspended the change pending the Authority's determination of the employment relationship problem.

The Authority confirmed that an employment agreement cannot be unilaterally varied. The question was whether the proposed change was within the terms of the parties' employment agreement. The Authority considered the employment terms and referred to the words in the position description "*that functions, duties, and responsibilities may be changed from time to time by the employer, after discussion with you, in order to meet its operational requirements".*

Te Whatu Ora emphasised the change was motivated by an issue of fit and it had no concerns about Ms Zhang's work performance. The change was first raised with Ms Zhang on 23 May 2022 in a telephone call with Mr Hix, her manager. Ms Zhang said he told her the business partners were not happy because month-end reporting packs had not been delivered. He asked why. But before she could explain, he said she was to change to a role in the corporate and compliance team. Mr Hix's recollection of the conversation was different. He said they discussed the reasons for the

late return of the month-end reporting packs and the change being necessary because in his opinion the relationship with the division business partners and Ms Zhang was not working well and she would benefit from the support he could provide her if she was working more closely with him. He said the call ended with him suggesting a meeting to discuss the change in more detail.

The Authority said the conversation between Mr Hix and Ms Zhang did not discharge Te Whatu Ora's obligation to discuss the change. Given the contractual requirement to discuss a change to meet operational needs, Te Whatu Ora was obliged to engage Ms Zhang in a more careful conversation that identified the issue, proposed a resolution in the context of the needs of the organisation and sought Ms Zhang's comment. Such a discussion could have avoided Ms Zhang understanding the change was proposed due to a hidden performance concern, or at least meant Te Whatu Ora could have satisfied its contractual obligation in the face of Ms Zhang's opposition to the change.

The Authority discussed whether an order be made preventing Te Whatu Ora from making the intended change and said the effect of such an order would be to freeze Ms Zhang's functions, duties and responsibilities. The order would be inconsistent with both the terms of the parties' employment agreement and the ongoing nature of the employment relationship. The order sought was declined.

The Authority determined Te Whatu Ora could make changes to Ms Zhang's functions, duties and responsibilities within the scope of the employment agreement and the job description if the changes were first discussed with Ms Zhang and met its operational requirements.

The Authority considered whether the actions of Te Whatu Ora unjustifiably disadvantaged Ms Zhang in her employment. Te Whatu Ora was obliged to discuss a change in functions, duties, and responsibilities with Ms Zhang but did not do so. The flaw was at the heart of the employment relationship problem. There was no doubt Ms Zhang had concerns about the change and she was entitled under the express terms of her employment agreement, read through the lens of good faith, to discuss those concerns with Te Whatu Ora. It was clear to the Authority that Ms Zhang was profoundly upset by the situation and the circumstances of her personal grievance had a negative impact on her. The Authority ordered Te Whatu Ora to pay Ms Zhang $10,000 in compensation.

The Authority declined Ms Zhang's claim for a penalty for breach of the duty of good faith. It was also noted that her actions in secretly recording a meeting she had agreed to attend for the purpose of advancing an issue between the parties was not consistent with good faith obligations. Costs were reserved.

*Zhang v Health New Zealand-Te Whatu Ora* [[2023] NZERA 363; 10/07/23; M Urlich]

## 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: Seven Bills

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

Employment Relations (Protection for Kiwisaver Members) Amendment Bill (30 October 2023)

Whakatōhea Claims Settlement Bill (31 October 2023)

Inquiry into seabed mining in New Zealand (1 November 2023)

Inquiry Into Climate Adaptation (1 November 2023)

Hauraki Gulf / Tīkapa Moana Marine Protection Bill (1 November 2023)

Fair Digital News Bargaining Bill (1 November 2023)

Emergency Management Bill (3 November 2023)

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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