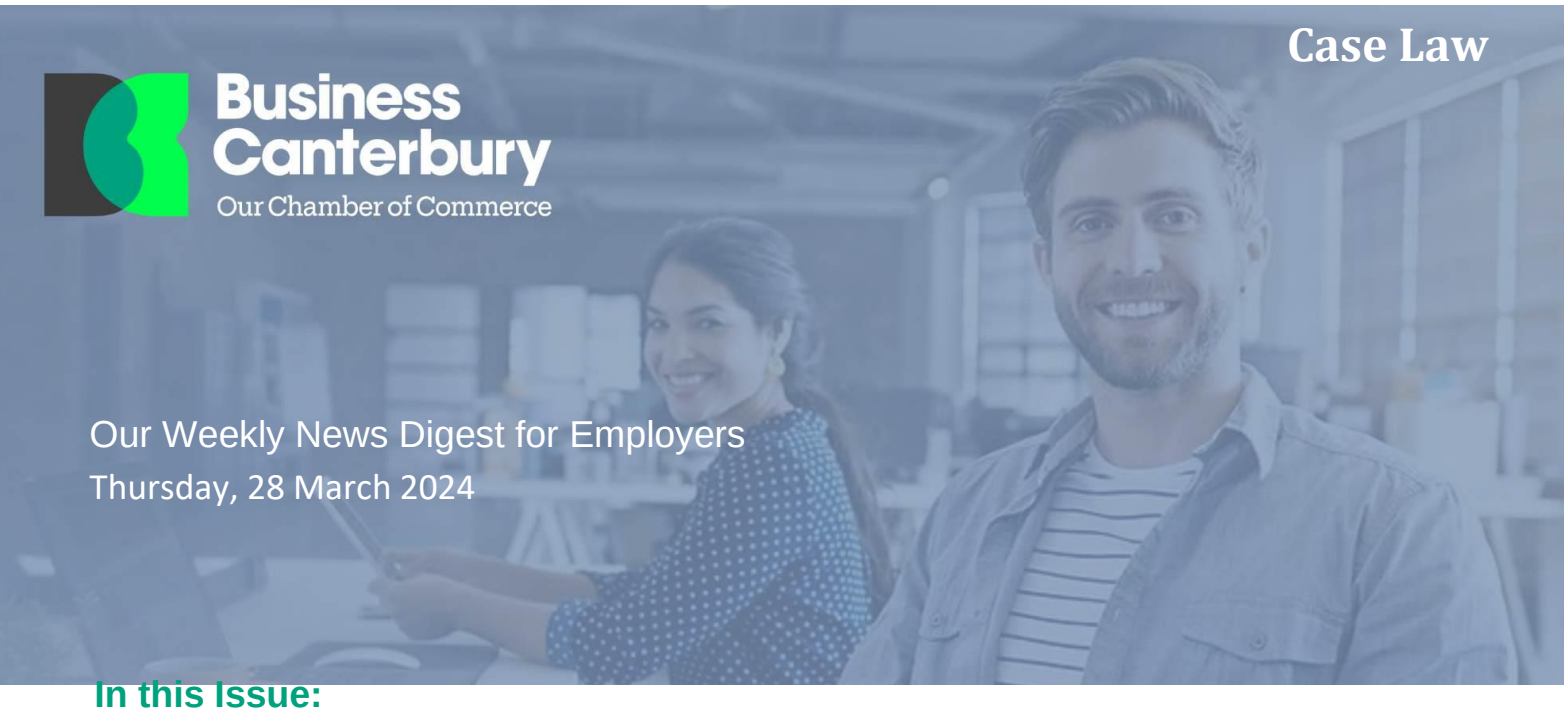
Business Canterbury
Our Chamber of Commerce



Our Weekly News Digest for Employers
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Case Law

Employment Court: One case

Employment Court decides sufficient information was provided for transferring employees

Total Property Services (Canterbury) Ltd (Total) and Crest Commercial Cleaning Ltd (Crest) were both cleaning companies. In August 2019, Total lost their contract to clean a school to Crest. As Total's employees were considered "*vulnerable*" under part 6A of the Employment Relations Act 2000 (the Act), they had a right to transfer to Crest.

Total believed it provided sufficient information to ensure that the employees were transferred on the same terms and conditions of employment and that it complied with the Act and the Holidays Act 2000. Crest argued that the Act required Total to provide "*full*" information, including actual employment records. Failure to do so warranted a compliance order and the imposition of penalties.

The Employment Relations Authority (the Authority) held that Total provided sufficient information, but its tardiness warranted a modest penalty of $1,000 to the Crown. Crest challenged the whole determination, claiming that a compliance order was the appropriate remedy. It also alleged $20,000 for each identified breach. Total sought to overturn the penalty and to set aside certain paragraphs of the determination that criticised its managing director, Mr Emery, which breached natural justice.

The paragraphs criticising Mr Emery suggested that he had "*a jaundiced view of Crest's business methods and may have had a degree of bitterness at losing the cleaning contract*". The comments were never raised to him in the investigation meeting. The Authority was only able to make adverse comments if they were warranted and if the criticised person was "*fairly on notice of that risk and given an opportunity to respond"*.

The Court found that Total breached both the Employment Relations Act and Holidays Act. The Act defined '*individualised employee information'* to mean information kept for "employment-related purposes". The definition was not exhaustive, indicated by use of the word "including", with examples following it. It also referred to "any personnel records relating to the employee" that were "*relevant*

to establishing the terms and conditions of employment that will continue." Wage, time, holiday and leave records had to be supplied.

Total gave Crest written elections to transfer by eleven employees, their individual employment agreements, a spreadsheet showing set hours of work, rates of pay and leave balances, the employee handbook, some holiday and leave data, summaries of the previous 12-month earnings and calculations, payslips, and timesheets for two pay periods, sick leave information, copies of disciplinary letters, tax code declarations and KiwiSaver information.

It emerged that Crest believed Total's calculations regarding certain entitlements were incorrect; Total's response was to request Crest's calculations, which Crest was not willing to provide in the absence of information to verify those calculations.

The Court found that the information on the spreadsheet was inaccurate. It did not specify the number of hours worked each day and the pay for the hours as required by the Act. Total admitted that the employees worked slightly different hours from those referred to in the spreadsheet. It also did not show patterns of leave for one employee. The Act required the age of the employee to be recorded if they were under 20. Some of the transferring employees were under 20 but this information was not provided.

The Court decided that the Authority was wrong to say that the information provided was sufficient. What was provided fell short of Total's obligations under both Acts. But neither Crest, nor the transferred employees suffered any actual disadvantage or financial loss from what happened and so no penalty was ordered. Crest was able to establish the terms and conditions of the employment agreements. The challenges were successful, and the Authority's determination was set aside. Costs were reserved.

Total Property Services (Canterbury) Limited v Crest Commercial Cleaning Limited [[2023] NZEmpC 237; 22/12/23; Judge K G Smith]

Employment Relations Authority: Four cases

Uncommunicative and unresponsive employer taken to Employment Relations Authority

Mr Reu commenced employment with WSP Limited (WSP) on 1 September 2022 as an installation worker. He was verbally advised that he would work 40 hours per week, Monday to Friday. He was not provided with an employment agreement nor told what his pay would be other than it would be above the minimum wage. On 9 September 2022, he received pay of $526.35 for 1 September to 7 September 2022, but no payslip was provided.

Mr Reu repeatedly asked Mr Walker, the sole director and shareholder, for an employment agreement and wage and time details. These were not supplied to him. Although the role was full-time, there were days when Mr Walker told Mr Reu to take the day off, as there was no work for him. Mr Reu did not receive payment for these days. Mr Reu received a further payment on 21 September 2022 of $366.56, for the period 8 to 21 September 2022. There was no payslip provided. Mr Walker continued to be difficult to communicate with and unresponsive to questions about Mr Reu's wage and time records.

On 28 September 2022, after further communication issues with Mr Walker, Mr Reu submitted his resignation. There was then disagreement about the wages owing to Mr Reu. When they did not reach an agreement, he lodged a personal grievance on 2 November 2022. Mr Walker declined to engage with the mediation process and consequently the matter was considered by the Employment Relations Authority (the Authority). Mr Reu raised a claim for unjustified disadvantage and unjustifiable constructive dismissal, relating to WSP not providing him with an employment agreement and breaches of his wage payments.

Despite numerous efforts to include WSP and Mr Walker in its investigation process, the Authority ultimately had to make a determination on the evidence to hand. Mr Walker advised the Authority he would not participate.

The Authority determined that Mr Reu was employed as a permanent employee for 40 hours per week. Following this determination, it became clear that WSP had breached its obligations to pay wages to Mr Reu under the Wages Protection Act 1983, the Minimum Wages Act 1983 and the Holidays Act 2003. Mr Reu successfully argued that a compliance order should be made out against Mr Walker for arrears and wages if WSP was not able to make good on these payments.

The Authority commented on the communication style of Mr Walker, observing that this was not the behaviour one would or should expect from an employer acting in good faith. Mr Walker ignored Mr Reu's reasonable requests for a written employment agreement, his time and wage record, and queries on wages paid, despite several opportunities to respond.

Mr Walker also breached the terms of Mr Reu's employment agreement and failed to pay Mr Reu his agreed hours at the agreed hourly rate. In these circumstances, the Authority considered it entirely foreseeable that Mr Reu would resign and therefore found that he was unjustifiably constructively dismissed by WSP. This finding absorbed the claim for unjustified disadvantage.

WSP was ordered to pay Mr Reu the sum of $28,739.55. This was comprised of $2,925.99 in arrears of wages including annual holiday pay and statutory holiday entitlements, $11,492 as compensation for 3 months of wages lost as a result of the dismissal, $12,000 as compensation for hurt and humiliation, $2,250 in costs and the $71.56 filing fee.

Reu v WSP Limited [[2023] NZERA 600; 16/10/23; D Tan]

Authority finds in favour of employer regarding employee benefit

Mr Martin applied to the Employment Relations Authority (the Authority) regarding a problem with his employment by the Priory in New Zealand of the Most Venerable Order of the Hospital of St John of Jerusalem (St John). Mr Martin raised his personal grievance to St John in October 2018. He complained St John had unjustifiably disadvantaged him, by refusing a request to join a subsidised medical insurance scheme available to other St John employees, in July 2018. Mr Martin sought a determination that he had a personal grievance, with compensation of $91,935 for loss of a benefit of employment, and legal costs and expenses.

Mr Martin's grievance arose from the fixed term employment he had from July 2018 until September 2018, under an individual employment agreement (the agreement). In late July 2018, shortly after commencement of employment, Mr Martin asked St John if he could join the subsidised Major Medical Insurance scheme (MMI) available to other St John employees. St John declined the request.

Mr Martin's agreement and memorandum made no express provision for MMI or any other subsidised medical insurance as an entitlement. Mr Martin's request for the benefit seemed to have been based on a MBIE website which stated that fixed-term employees have the same employment rights and responsibilities as permanent employees. The Authority explained it was important to read the website extract in context. The website actually referred to '*minimum*' rights and responsibilities. It referred to entitlements such as minimum wages, holiday, and sick leave entitlements.

The parties to an employment agreement can negotiate subsidised medical insurance, and it may become a term through their offer and acceptance, respectively. There was no indication that St John offered Mr Martin subsidised medical insurance as a term of employment, or that he accepted such an offer. Therefore, the Authority felt it could be reasonably inferred there was no mutual agreement to include such a term in the agreement. It also was not in the employer's general rules or policies outside the written agreement, which could have been incorporated into the agreement by reference to them.

The Authority did not have jurisdiction to fix new terms and conditions of employment, thus could not impose or introduce a term into the agreement that the parties had not consented to. The Authority could not determine that St John should have let Mr Martin and others enter into a fixed term agreement bargain for subsidised medical insurance, just because it was offered to permanent employees too.

The St John Operational Collective Agreement, in force in 2018, stated it applied to all employees who were members of the relevant union and that the MMI scheme would be '*available to all permanent employees*'. The collective

agreement defined *'permanent employee'* as one employed on an indefinite basis. Mr Martin was not an employee in the context of MMI scheme availability.

The Act prohibits preference in terms and conditions of employment by reason of a person's union membership or lack thereof. The Authority found that the preference against access to MMI from Mr Martin's terms and conditions was not because of union membership, but because his particular employment agreement was for a fixed term rather than permanent employment. But for the fixed term of employment, Mr Martin would have been entitled to MMI, whether a member of the union or not. Therefore, the selection of fixed term instead of permanent employment did not give rise to a prohibited preference under the Act.

The Authority considered whether there was discrimination in employment exercised by St John, when it did not offer Mr Martin the same access to subsidised medical insurance as other employees were given. Although Mr Martin was technically treated differently, for an employer's actions to be unlawful, discrimination in employment must be because of employment status. The Human Rights Act 1993 defined this as being unemployed or the recipient of a benefit. Hence, this situation was not unlawful discrimination.

For the above reasons, the Authority agreed with St John that it did not act unjustifiably towards Mr Martin in his employment or terms and conditions of employment. The Authority determined that Mr Martin did not have a personal grievance. An application of costs was to be made by St John within 21 days of the date of the determination.

Martin v The Priory in New Zealand of The Most Venerable Order of The Hospital of St John of Jerusalem [[2023] NZERA 592 11/10/23; A Dumbleton]

Absence of an individual employment agreement

From 10 September to 25 October 2022, Ms Choi worked full-time as a kitchen hand for HSK Limited (HSK), a restaurant in Albany. HSK was operated by Mr Ryoo, his wife, and their son Mr Young Woo Ryoo, also known as Ben. Ms Choi claimed she was not provided with a written employment agreement by her employer, that it failed to set up a payment plan into her KiwiSaver, and that she was forced to resign because of the company's actions in reducing her employment from five to two days of work per week.

No written employment agreement was provided when Ms Choi started her employment, but they shared a consistent idea of the oral terms and conditions of her employment. Both parties agreed Ms Choi was employed as a kitchenhand and required to work full-time, for approximately 32 to 33 hours per week, over five days from Tuesday to Sunday. She would be paid $22 an hour.

The parties disagreed as to how the employment relationship ended. On 18 October 2022, Ms Choi met with Mr Ryoo and Ben to discuss the proposal to reduce her workdays. First, HSK asked if she could work part-time for only two days per week, but Ms Choi did not agree. It then asked whether she could work during the evening. Ms Choi explained that she could not do so because of her family situation. The meeting ended with no agreement being reached between the parties, but they continued to text each other later that evening.

Later that night, Ms Choi claimed HSK told her not to come into work the following day. Ms Choi received a text from HSK stating that she had been asked to work part-time and that she had not been dismissed.

On 24 October 2022, HSK texted that what Ms Choi was asking from the business was difficult. Consequently, she was asked to work the same hours during the day, but for only two days per week. Later that same day, Ms Choi requested that she be given three weeks' notice (working five days per week) because she did not feel comfortable "*fighting over this*". The employer's response was that if Ms Choi wished to quit, she could work two days per week for the next three weeks. This was not accepted by Ms Choi.

On 25 October 2022, Ms Choi returned to work, which was her last day of employment at HSK. On 26 October 2022, Ms Choi raised a personal grievance with her employer for failing to provide her with a written employment agreement and for changing her work hours.

HSK said that Ms Choi's failure to provide her passport meant that it could not prepare a written employment agreement for her. The legal minimum requirements for form and content of an employment agreement did not

require Ms Choi's passport to complete her employment agreement. A written employment agreement could have contained a provision that the employee needed to be lawfully entitled to work in New Zealand, such as being a citizen, resident, or the holder of a valid work visa. Ms Choi stated at the investigation meeting that if she had a written employment agreement, HSK may not have changed her workdays from five to two days per week. A written employment agreement may have contained a provision that before any subsequent variation or change could be made, the agreement of both parties evidenced in writing was required.

The Authority found HSK's action in failing to provide Ms Choi with a written employment agreement was not what a fair and reasonable employer could have done in all the circumstances. HSK's failures towards Ms Choi directly contributed to the circumstances which resulted in her dismissal. The Authority did not consider it fair that HSK must pay significantly in lost wages, when it had not been shown that Ms Choi sufficiently mitigated her losses. It determined Ms Choi experienced loss of dignity and injury to feelings.

HSK was ordered to pay Ms Choi the Authority's filing fee of $71.55 and a hearing fee of $153.33, $715 in lost wages from the date of dismissal until the date Ms Choi found alternative employment, and compensation of $10,000 for hurt and humiliation. As the parties were self-represented, each party was ordered to carry their own costs.

Choi v HSK Limited [[2023] NZERA 593; 12/10/23; P Fuiava]

Faulty investigation of serious allegations leads to unjustified dismissal

Mr Hynes was employed by One Pure Limited (One Pure) as the procurement and logistics manager at its Napier factory. In late 2020, One Pure appointed Mr Yu to the One Pure factory, first as the production manager, and then as plant manager overseeing the entire factory. The two had a clash of working styles and communication between them became poor.

On 3 February 2022, an employee in the factory, Mr Costello, sent an email to One Pure's human resources manager, Ms Shan. He accused Mr Hynes and three other staff of a variety of serious offences, including racist comments, destruction of stock, theft of time, and variously undermining One Pure's commercial operations. Ms Shan forwarded this email to the general manager responsible, Mr Bolmatis. Mr Bolmatis looked into the matter and began disciplinary proceedings against Mr Hynes. During the investigation, Mr Hynes requested that other witnesses be interviewed and that he receive copies of these notes. Mr Bolmatis said he conducted these interviews; however, no records were kept and One Pure did not share information from them with Mr Hynes.

On 9 March 2022, Mr Hynes was summarily dismissed for serious misconduct by Mr Bolmatis and given less than an hour to leave the premises. During the very brief handover and return of property, it became clear to Mr Hynes that his dismissal came as a surprise to Mr Yu. Mr Hynes had to return his work boots and, with no vehicle, had to depart the site in his socks.

Mr Hynes raised a personal grievance alleging unjustified dismissal. In his claim he raised concerns about the procedure used by One Pure. Following unsuccessful mediation, the matter was considered by the Employment Relations Authority (the Authority).

The Authority found that there was no evidence that Mr Bolmatis assessed Mr Costello's allegations critically, or that he weighed comments against Mr Costello's own knowledge, qualifications, and experience. Further, the Authority found Mr Costello's allegations - that Mr Hynes undermined the production and manufacturing activities of One Pure - to be unreliable. By his own admission, Mr Costello lacked the requisite qualifications and experience to comment about such matters. Mr Costello admitted himself that the comments he alleged were racist were instead not overtly so. Mr Costello's evidence was fundamentally unreliable as, by his own admission, he was not around in the break room enough to hear what others were saying.

The Authority found significant flaws with the investigation process undertaken by Mr Bolmatis. There appeared to be no proper basis for the allegations put to Mr Hynes and no evidence that his explanations were genuinely considered.

The dismissal was not considered the actions of a fair and reasonable employer and consequently Mr Hynes's claim for unjustified dismissal was established.

The Authority found Mr Hynes was entitled to remedies of lost wages and compensation for humiliation and injury to feelings. He claimed for a penalty for alleged breaches of the Employment Relations Act and his employment agreement, but the Authority considered these duplicate claims, so they did not succeed.

One Pure was ordered to pay to Mr Hynes the sum of $37,673, being 23.5 weeks lost remuneration, and the sum of $25,000 without deduction as compensation for humiliation, loss of dignity, and injury to feelings. Costs were reserved.

Hynes v One Pure Limited [[2023] NZERA 599; 16/10/23; C English]

Minimum Wage Increase

From 1 April 2024, the adult minimum wage rate will increase from $22.70 to $23.15 per hour. The starting-out and training minimum wage rates will also increase from $18.16 to $18.52 per hour (80 per cent of the adult rate).

Further details about the minimum wage increase can be found on Employment New Zealand website: https://www.employment.govt.nz/

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: Ten Bills

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

Pae Ora (Healthy Futures) (Improving Mental Health Outcomes) Amendment Bill (28 March 2024)

Gangs Legislation Amendment Bill (5 April 2024)

Courts (Remote Participation) Amendment Bill (5 April 2024)

Firearms Prohibition Orders Legislation Amendment Bill (5 April 2024)

Inquiry into the 2023 General Election (15 April 2024)

Parole (Mandatory Completion of Rehabilitative Programmes) Amendment Bill (16 April 2024)

Fast-Track Approvals Bill (19 April 2024)

Budget Policy Statement 2024 (24 April 2024)

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

Report of the Controller and Auditor-General, Making Infrastructure Investment Decisions Quickly (8 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/

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

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