Employer Bulletin

Our Weekly News Digest for Employers

Friday, 2 February 2024

CANTERBURY EMPLOYERS' CHAMBER OF COMMERCE

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Case Law

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Employment Court overturns Authority on matter of agreement interpretation

Mr Le Gros worked for Fonterra Co-op Group Ltd (Fonterra) since 2003 under an individual employment agreement. In June 2021, through a restructure, Mr Le Gros accepted a new role which was covered under a collective agreement and became employed under those terms and conditions.

While the individual employment agreement did not contain long service leave provisions, the company issued a directive that provided for recognition benefits after ten, twenty-five and forty years of service for all employees. Mr Le Gros's collective agreement included long service provisions in clause 6.4 of the agreement. Mr Le Gros sought to take advantage of the provision that set out that he could receive two weeks' long service leave after 15 and before 25 years' continuous service.

Fonterra declined his request because he was not under the collective agreement terms and conditions in 2018 when it would have been due. Mr Le Gros pursued a dispute in the Employment Relations Authority (the Authority). There the E Tū Union (the Union), on his behalf, argued that he became entitled to two weeks' long service leave on gaining coverage under the collective, having had 15 years' continuous service and less than 25 years' continuous service. The Authority agreed with Fonterra, observing that it accorded with "*business sense*" for Fonterra to seek to incorporate limits on the banking of long service leave (and the reference to "*before 25 years*" in clause 6.4 reflected that). The interpretation by the Union was "*contrary to good business common sense*" and would enable employees to "*game the system*".

Mr Le Gros, through the Union, sought a determination at the Employment Court (the Court). The first matter considered was the interpretation of clause 6.4. This provided that any employee of Fonterra who has had 15 years of continuous service and was covered by the collective agreement was entitled to two weeks of special leave. The Court made two observations.

First, there was no expressly stated caveat to the phrase "*any employee*", such as a stipulation that the employee must have been covered by the collective as at the date of their 15th anniversary. Secondly, the reference to "*entitled*" was not caveated either. Nor was it stated that the special leave became due on any particular date, as the reference to leave being taken on a date or dates mutually agreed with the manager was clear. Further, it was notable that the phrase "*recognition of long service*" was not qualified. Any service for Fonterra was regarded as service for the purposes of long service recognition, whether that service was performed under a collective agreement or an individual employment agreement or a varying combination of both.

The Court further reflected that the clause did not make clear if the parties intended to limit recognition of 15 years of continuous service to those who celebrated their 15th anniversary on or after becoming covered by the collective agreement. Particularly if limiting contingent liabilities and avoiding "*gaming*" by employees was, as Fonterra said, perceived to be an important factor.

The Court then considered the arguments put forward by Fonterra and supported in the Authority. It stated it was logical that Fonterra would seek to incorporate limits on the banking of long service leave by providing time frames within which it could be taken. The Authority held that the systems adopted by Fonterra to record long service leave entitlement on each applicable anniversary, depending on whether an employee was on an individual or collective agreement, and adopting Fonterra's interpretation would be inefficient and costly. It would inject a degree of inconsistency between groups of employees, which would be contrary to good business common sense, and would enable employees to "*game*" the system which would also be contrary to business common sense. The Court did not agree with these arguments by the Authority.

The concerns identified by Fonterra essentially arose from a directive it unilaterally chose to introduce, which conferred long service leave entitlements on employees on individual employment agreements. The wording and entitlement dates for those on an individual employment agreement significantly differed from those on the collective agreement. The Court stated that although it remained open to Fonterra to take steps to revisit the directive and to minimise the issues it complained about, it did not do so. Rather, Fonterra sought to rely on the business difficulties which it created to support a favourable interpretation of the collective agreement. The Court did not see that as an appropriate interpretative approach.

In conclusion, the Court ruled that the plain and ordinary meaning of clause 6.4 when read in context was that it conferred two weeks' long service leave on an employee who has completed over 15 years of continuous service for Fonterra. An employee in Mr Le Gros' position was eligible for such recognition, despite not being covered by the collective agreement at the time his 15-year anniversary occurred. He was entitled to a declaration accordingly. The Court did not anticipate any issues as to costs.

Le Gros v Fonterra Co-op Group Ltd [[2023] NZEMPC 193; 08/11/23; Inglis CJ]

Flawed investigation leads to unjustified dismissal

Mr Appleton was employed by Tasman Cargo Airlines PTY Ltd (Tasman Cargo), a freight service engaged in commercial operations, as a plane captain from 2012 to 2020. He was dismissed for serious misconduct after Tasman Cargo found that he had failed to conduct a compliant pre-flight inspection before a flight on 10 December 2019.

Tasman Cargo had "*standard operating procedures*" (SOPs) in the form of their Policy and Procedures Manual (PPM) and the Flight Crew Operations Manual (FCOM). The SOPs set out the requirement for pilots in command of an aircraft to undertake a pre-flight inspection irrespective of whether it was "*extended diversion time operations (EDTO)"* or non-EDTO. In general, flights were considered EDTO if the plane was more than 60 minutes away from an alternative airfield or non-EDTO where the plane was within 60 minutes of an alternative airfield. Tasman Cargo treated all flights as EDTO

flights, so they required all flights to be subject to a pre-flight inspection of the aircraft by an engineer and then a pre-flight inspection by the pilot in command.

On 10 December 2019, Mr Appleton was captaining a flight as the pilot in command. This required him to check key areas of the plane to ensure there was no damage. There was no concern that Mr Appleton undertook the pre-flight inspection as required until it was discovered that the main cargo door of the aircraft was damaged. CCTV footage showed that Mr Appleton failed to inspect several key locations on the aircraft.

Pending an investigation, he was stood down from flying duties to allow for a safety investigation in relation to his conduct. The Employment Relations Authority (the Authority) noted that the suspension caused a disadvantage and so his claim succeeded but his personal grievance in relation to the dismissal failed as it was an action a fair and reasonable employer could have done in the circumstances.

Mr Appleton challenged the Authority's determination at the Employment Court (the Court) as he claimed he was unjustifiably dismissed. The Court found that the investigation process was flawed and agreed that he was unjustifiably dismissed. Ms Stanton, Tasman Cargo's safety and airline QA Manager, prepared the investigation report. While she had proof that Mr Appleton was aware of the SOPs that laid out his obligations to carry out a pre-inspection check and that he admitted that he failed to do so on 10 December 2019, proof that he underwent pre-flight training was vital.

It was found that on 11 and 12 November 2019, Mr Appleton had undergone pre-flight training duties with Mr Rhind, an experienced pilot, but the training was not documented. This was discovered during the investigation and so Mr Rhind was asked to fill out the relevant training form and backdate it to 11 and 12 November 2019. Mr Rhind completed the form but incorrectly dated it as 11 and 12 September 2019. This error went unnoticed, and the report was used as part of the disciplinary investigation.

Mr Appleton was not aware that the form was filled late by Mr Rhind well after the training but contested the date and contents of the record were incorrect. He alleged that there was no focus on walkaround or external inspection training. At Court, he said that now knowing that the record was created long after the event, it deprived him of the opportunity to raise these matters and put him in a serious disadvantage. The Court agreed and concluded that the dismissal was procedurally flawed.

Tasman Cargo confirmed that they operated a "*just culture*" which meant that where a person made a mistake, they would be coached and trained rather than disciplined. It was common ground that just culture applied in the circumstances, even to a breach of safety, so the decision to dismiss was not one a fair and reasonable employer in the circumstances could have made.

Reinstatement was sought by Mr Appleton as it was difficult to attain a job in the aviation field, but it was not reasonable and practical given that he showed little respect for Tasman Cargo's management pilots and their SOPs in the Court hearing.

He remained unemployed for three years and claimed lost remuneration for it. The Court only ordered 12 months with a 20 per cent reduction for contribution to the situation which totalled 10 months of lost remuneration with interest on top. $14,4000 was ordered as compensation for hurt and humiliation. Costs were reserved.

Appleton v Tasman Cargo Airlines Pty Limited [[2023] NZEmpC 191; 03/11/23; Holden J]

Employee's interpretation of when notice period ended successful

Ms Sheridan was dismissed from her role as a community support worker at Pact Group (Pact) for medical incapacity. The Employment Court (the Court) had to decide exactly when Ms Sheridan's employment ended. Pact argued it ended the day her notice period ended, which was 10 August 2021. If Pact's interpretation was correct, then under the Employment Relations Act 2000 (the Act), Ms Sheridan would only have had until 7 November 2021 to raise a personal

grievance claim. Unfortunately, she raised her claim on 8 November 2021. However, she argued her employment had in fact ended on 11 August 2021 meaning she had until 8 November 2021 to raise her claim. The Employment Relations Authority (the Authority) sided with Ms Sheridan's position, so Pact appealed to the Court to determine the matter.

Under the collective employment agreement, the parties were required to give two weeks' notice. Pact wrote to Ms Sheridan on 28 July 2021 giving two weeks' notice and stating the last day of employment would be 10 August 2021, which implied the day notice was given was meant be included as part of the two weeks' notice period. The termination clause in the collective agreement read "*two weeks' written notice shall be given by the employee or the employer. If the employee does not give full notice, they will not be paid for any period of notice not worked. A lesser period of notice can be negotiated*." There was no clarification as to what "*two weeks' written notice*" meant elsewhere in the agreement.

Pact argued that additional phrases should not be read into the termination clause, such as "*a full two weeks' notice*" or "*clear days' notice*", which might imply the notice period began the day after notice was given. Pact acknowledged that the letter to Ms Sheridan, because it included the phrase "*from today*", was open to interpretation. The day notice was given could either have meant to have been included or excluded from the two weeks' notice period and it was unclear which was meant. Pact also pointed to a letter Ms Sheridan sent after she was dismissed which stated her dismissal occurred on 10 August 2021 implying both parties understood that the two weeks' notice period was meant to end on that date. To support their position, Pact also referred to case law where the Court had accepted that the day notice was given was included as part of the notice period. Pact acknowledged that those cases did not involve the use the phrase "*from today*" by any party, meaning they were not exactly relevant.

Ms Sheridan argued the collective agreement ought to be read to mean 14 full consecutive days, beginning at midnight on the day notice was given and ending at midnight 14 days later. Ms Sheridan accepted that it could also be read to mean that the notice period began at the exact time notice was given and so ended at that exact time 14 days later. Ms Sheridan's point was that regardless of which of the two interpretations was taken, both meant the notice period would have ended on 11 August 2021 regardless of what the parties understood or wrote in their correspondence.

The Court found that the principles relating to the interpretation of contracts generally applies to employment agreements. An objective approach must be taken, with the aim to ascertain the meaning the document would convey to a reasonable person with all the background knowledge that would reasonably be available to the parties considering the situations they were in at the time of the contract. The Court found that in ordinary usage, a week is understood to be a period of 7 consecutive days, meaning two weeks would be 14 consecutive days. Considering the plain wording of the collective agreement, the Court decided a minimum of 14 full consecutive days would need to pass from the time notice was given before the notice period ended, meaning Ms Sheridan's final day of employment could not have been 10 August 2021. Ultimately, the Court decided in favour of Ms Sheridan's case and dismissed Pact's appeal.

Pact Group v Sheridan [[2023] NZEmpC 235; 20/12/23; Smith K G]

Employment Relations Authority: Three Cases

Employer followed due processes when issuing a warning to employee

HKL made a request for non-publication orders. The Authority accepted it as there was a material risk of adverse consequences for HKL if it was named in the determination, such as negative publicity resulting in potential loss of reputation and goodwill and loss of business.

HKL said OIT's role specifically included responsibility for site security and safety, adding a layer of supervision to these aspects. On 16 May 2022, OIT decided he would like to leave work early on Friday 20 May 2022. This was not normal practice for HKL employees in general. The construction manager was also not there on 20 May 2022 but agreed that OIT could leave early on that day. In terms of site security in OIT's absence (and the construction manager), OIT delegated this responsibility to relevant foremen, advising them to ensure each building site they were working on was secure at the end of the working day on 20 May 2022. On 21 May 2022, HKL was advised of two separate site

security issues. On 23 May 2022, the managing director spoke to OIT and the construction manager about the site security issues over the weekend. OIT told the managing director that he had left early on Friday 20 May.

The managing director identified two concerns and outlined them in a letter to OIT dated 23 May 2022. These included that OIT had taken time off from work and had not applied for leave and because of taking this time off work, OIT had been negligent in his obligation to ensure site security was satisfactory at the end of each working day. In this letter HKL invited OIT to attend a disciplinary meeting, cautioning him that if, because of that meeting, HKL decided his behaviour amounted to misconduct he might receive a written warning. The letter also set out that OIT was entitled to bring a representative or support person with him to the meeting. In the disciplinary meeting, OIT was given an opportunity to provide his explanation for the events that occurred and his response to the concerns as set out in the letter of 23 May 2022. OIT explained that he had been around all the building sites on the morning of 20 May 2022, telling all the foremen to ensure sites were left clean and secure as he was leaving at 2:30pm. OIT said in evidence he did not accept responsibility for the site security failings as he had delegated the responsibility to the foremen and they had failed, not him.

HKL decided that a written warning was appropriate for OIT's failings in respect of the site security. OIT had been negligent in leaving work early when the construction manager was not at work and without informing the managing director so that a senior person was able to check site security at the end of the working day; leaving site security to the various foremen was not acceptable, and OIT knew that. HKL then gave OIT a written warning, dated 25 May 2022, which was to remain in place for 12 months. On 1 June 2022, OIT resigned, giving four weeks' notice without sharing any concerns regarding the warning.

The Authority was satisfied that HKL did enough to investigate the site security issues and OIT's involvement in those issues. The managing director undertook the investigation, and this involved assessing the advice he received from the person who attended to the site security issues on Saturday 21 May 2023 and his discussion with OIT and the construction manager on Monday 23 May. The site security issues that occurred on 21 May 2023 were a result of negligence by OIT, for which they were responsible. This amounted to misconduct by OIT. A 12-month warning was the appropriate sanction in line with HKL's employee handbook. The Authority observed that HKL acted justifiably and did not breach any of the duties it owed to OIT. OIT's claims were not successful. Costs were reserved.

OIT v HKL [[2023] NZERA 488; 30/08/23; P Keulen]

Employer did not give employee opportunity for feedback and conducted unfair dismissal

TAS Marine Construction Pty Limited (TAS Marine) employed Mr Farmer from 5 February 2021. On 31 July 2022, it stood him down based on perceived performance issues. After Mr Farmer refused instructions to perform other duties and attend work, it dismissed him. Mr Farmer lodged a personal grievance that he was unjustifiably dismissed. He sought reimbursement of 13 weeks' lost wages, compensation for the hurt and humiliation of the unjustified disadvantage and dismissal, payment of his notice period and holiday pay, and penalties for breaches of good faith.

TAS Marine operated from Australia under sole director, Mr Wilcox. It ran a vacancy for a "*Crane Operator/Rigger*". Mr Farmer and Mr C, the site manager, discussed his relevant qualifications and experience in the application stage. TAS Marine did not provide an employment agreement until after Mr Farmer's trial period, and it wrote his position as a civil construction worker rather than a crane operator. Mr Farmer disputed this throughout his employment.

During one project, the site manager at the time arranged for Mr Farmer to observe tugboat operators move a crane onto a barge, for safety purposes. This manager shortly left, so TAS sent over an Australian staff member to help with the project. On 29 July 2022, this staff member asked Mr Farmer to leave the barge to do other tasks. Mr Farmer replied stating he was intending to stay with the barge, for the purposes of daily crane paperwork and the safety protocol. The staff member did not agree with this response.

On 31 July 2022, the staff member told Mr Farmer he would give "*someone else a go at the crane*". Mr Farmer only found out at this point the staff member was a leading hand. When asked if he was "*refusing to do any other work than drive a crane*", Mr Farmer said he never refused any work and described unrelated tasks he had agreed to, but that TAS Marine employed him as a crane operator.

On 1 August 2022 the Australian staff member, Mr C, and Mr Farmer held a meeting. Here, the Australian staff member stood Mr Farmer down. Mr Farmer asked for reasons for this. The Australian staff member reiterated wanting to "*give someone else a go*", but also that they did not like Mr Farmer squeezing late starts and early finishes, "*stuff like that*." Mr Farmer asked and had confirmed to him that these issues had not been brought up. Mr Farmer did not return to work after this.

On 2 August 2022 Mr Wilcox, sole director of TAS Marine, contacted Mr Farmer. Mr Farmer had organised a meeting with Mr C with legal representation, but Mr Wilcox ordered him to no longer contact Mr C. He texted, "*Either you come back to work with a good attitude […] or you quit*." When Mr Farmer responded that he "*was employed only to operate cranes*", Mr Wilcox wrote on 3 August 2022, "*It's clear you don't want to come back. Thank you for your contribution and good luck in the future*."

The Authority found this to be an unjustified dismissal. While Mr Wilcox was unfamiliar with New Zealand law and did not have human resources or legal advice, he still undertook zero process. TAS Marine dismissed Mr Farmer's concerns about being stood down, without any consideration. It did not raise its own concerns to enable Mr Farmer to respond. It obstructed a meeting that would have discussed the issues and sent Mr Farmer away without further inquiries it might have made in good faith. The Authority also found standing down without consultation was an unjustified disadvantage. However, it incorporated the disadvantage into the dismissal to issue a single globalised remedy.

The Authority awarded Mr Farmer three months' lost wages of $23,400, unpaid two weeks' notice of $3,600, and holiday pay of $2,420. It also considered compensation for hurt and humiliation. Mr Farmer searched for work for a long time and had to take government assistance for the first time. He was diagnosed with depression and said his partner left him for a time, due to not being the same person without the purpose his job brought him. He could not pay his rent for a month. Mr Farmer's landlord attested to the change in Mr Farmer. Based on this the Authority awarded $22,000 in compensation. Finally, the Authority did not award a penalty for breaching good faith, because Mr Wilcox was unguided in the correct law, acted from a distant context and believed he was acting properly. Costs were reserved.

Farmer v Tas Marine Construction Pty Limited [[2023] NZERA 489; 30/08/23; H Doyle]

Employee on a working visa unjustifiably dismissed

Mr Shamgunov worked for Ultimate Interior Solutions Limited (Ultimate) to apply and fix plasterboard under an Essential Skills Work Visa. His employment agreement stated that he would be paid $33.65 per hour and that the employment would cease if his visa expired.

The agreement was verbally varied so that Mr Shamgunov would work as a contractor only when work was available and that he would be paid at a piece rate of $5 per square metre. He was paid at the agreed hourly rate for all other work. Ultimate claimed that the written employment agreement was a sham designed for the purposing of satisfying Immigration New Zealand.

Mr Shamgunov was paid more under the piece rate than the rate in the written employment agreement as it covered sick leave and holiday pay. Ultimate's evidence was that the piece rate arrangement was the result of an original request by Mr Shamgunov that he be paid for the work he produced rather than at an hourly rate.

Mr Shamgunov denied that there was any conversation around it or that the verbal variation was agreed. But during the employment, he did not raise any objection or concern, but simply accepted it. The written agreement also did not contain an *"entire agreement*" clause which meant variation was permitted. While not being written was a breach of the Employment Relations Act 2000 (the Act), it did not mean that it was unenforceable, especially when Ultimate was able to provide clear and consistent evidence on it.

After an incident where Mr Shamgunov incorrectly prepared a timesheet where he noted higher piece rates than he was entitled to and received the payment for it causing Ultimate to deduct for overpayment, the employment relationship became tense. Ultimate decided to only provide 40 hours as the minimum stated in the employment agreement. This caused Mr Shamgunov to earn less than he previously was.

Things then escalated in May when Mr Shamgunov was sent a warning letter when Ultimate discovered Mr Shamgunov was performing casual work for another company during weekends and challenged this as being contrary to his obligations to his primary employer as his performance became poor. Concerns were also raised that Mr Shamgunov had failed to follow Ultimate's requests asking that he improve his performance.

Mr Shamgunov then became sick with COVID-19 and applied for four weeks' leave but only two weeks was approved as that was all he had accrued. After two weeks, Mr Shamgunov insisted that he take two more work weeks off to "*resolve all issues related to his visa status*" and said that this was a *"vacation from subsequent resigning*." Ultimate interpreted it as a resignation and asked for written confirmation. Mr Shamgunov replied stating "*once again I inform you that since June 8 I have been on vacation. Pay for my vacation in accordance with the applicable laws of the NZ*".

Ultimate wrote back *"your letter to us says that after your annual lave in four weeks you would like to resign … In light of this statement and your clear intent to leave, we will be considering this a notice of your resignation*."

Only two weeks of his time off was paid and Mr Shamgunov made it clear that he was just taking a vacation and not resigning. Nevertheless, Ultimate believed he resigned, told him that his last day would be 6 July and then stopped providing work after that date. Mr Shamgunov applied to the Employment Relations Authority (the Authority) for a personal grievance for an unjustified dismissal and sought monetary arrears.

The employment agreement stipulated that the employment would end if his visa expired. Ultimate could only rely on this clause if it conducted a fair process. No process was followed, and the Authority decided that Ultimate's declaration that 6 July was Mr Shamgunovs's last day was the act that constituted the termination. This was an unjustified dismissal.

Mr Shamgunov claimed two days of sick leave which were not paid out when he was sick. Ultimate argued that his pay rate was combined with his hourly rate but there were no legal grounds for an employer to subsume sick leave with an employee's hourly rate. $538.40 was therefore payable. Other claims of wage arrears were also raised, which totalled $3,932.22.

Mr Shamgunov did not get an opportunity to work out his notice period of four weeks so $5,384 was ordered to be paid alongside $5,000 for hurt and humiliation, $3,932.22 for unpaid wages and holidays and then $71.56 as reimbursement for the Authority's filing fee. Costs were reserved.

Shamgunov v Ultimate Interior Solutions Limited [[2023] NZERA 524; 14/09/23; M Loftus]

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