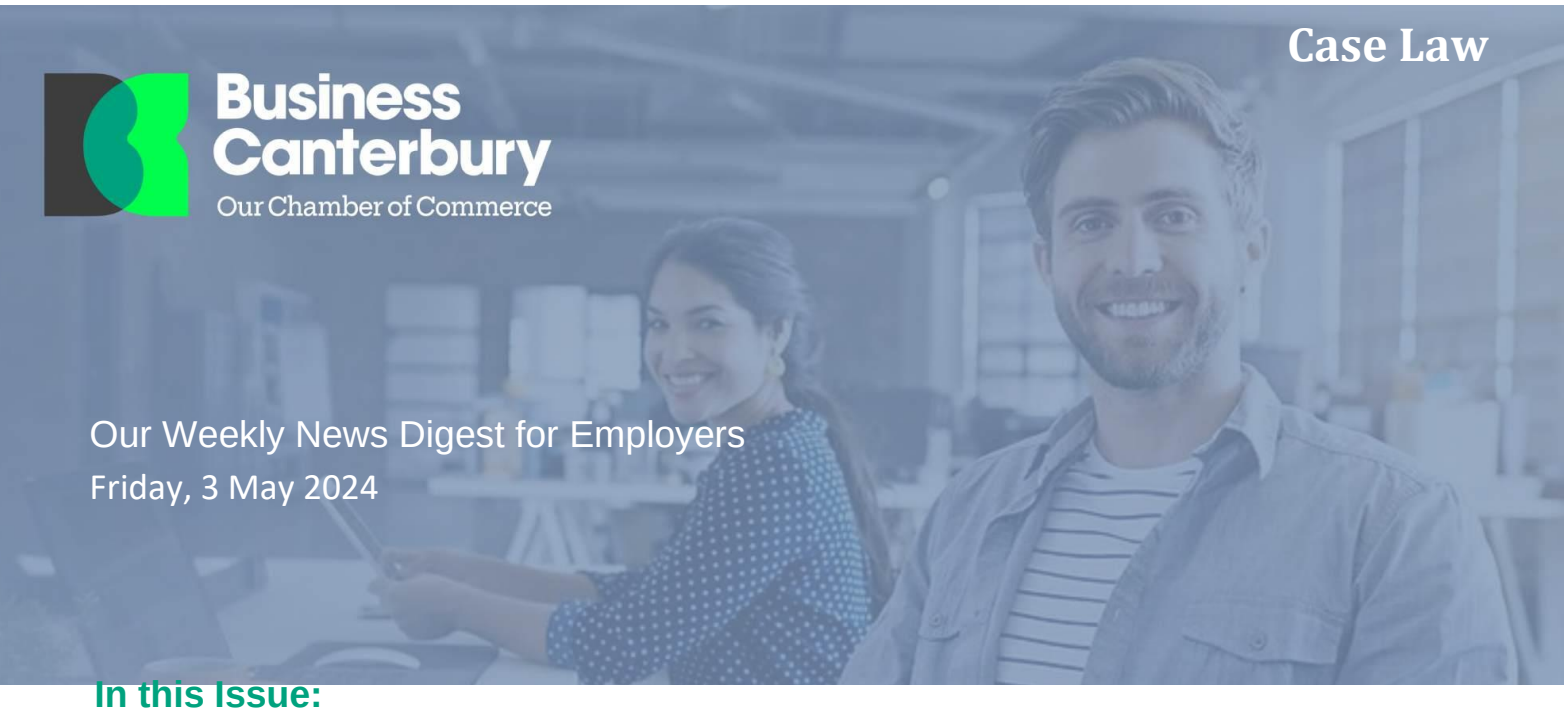

Business Canterbury
Our Chamber of Commerce

Our Weekly News Digest for Employers
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## In this Issue:



# Case Law

## Employment Relations Authority: Six cases

### Employer wins constructive dismissal

Mr Bhojwani was the area manager for the Bay of Plenty region working for Baker Property. He worked alongside Mr Baker, the director, and Ms Baker, the general manager. Mr Bhojwani was on a work visa and Baker Property supported him in his applications.

When Bhojwani's work visa expired, he applied for an Essential Skills category visa, which could give him working rights for three years. Immigration New Zealand (INZ) learned through Mr and Ms Baker that he did not make any final decisions, so his role was more supervisory. On that basis, INZ declined his application as the visa required him to occupy a managerial role. His work visa was approved for one year.

Mr Bhojwani was disgruntled at the outcome and through his representative sent a letter alleging bullying and various other complaints. Before Baker Property could finish investigating and responding to the allegation, he resigned and began working elsewhere.

At the Employment Relations Authority (the Authority), he raised a personal grievance for unjustifiable constructive dismissal. He alleged that Baker Property "*followed a course of conduct with the deliberate and dominant purpose of coercing*" Mr Bhojwani to resign. Mr Bhojwani also claimed he was unjustifiably disadvantaged and made claims about his visa status, Ms Baker and Mr Baker bullying him and health and safety breaches by Baker Property.

Mr Bhojwani claimed Mr and Ms Baker were dishonest with INZ as he was responsible for placing job advertisements, interviewing staff, making rosters and managing the stores in his region. He only took on these tasks after INZ reviewed his visa applications, so Mr and Ms Baker were not dishonest. They said that that Mr Bhojwani continued to develop his skills but the ultimate control of the company remained with Mr Baker as Director.

Baker Property was not in control of the final outcome of Mr Bhojwani's visa application. The visa being granted for less time than was hoped and expected was not a "*term and condition*" of employment. Mr Bhojwani's job description stated that staff would report to him. In practice, nobody reported to him because these positions were not filled, but this did not equate to an obligation on Baker Property to hire more staff than needed.

Mr Bhojwani claimed he had to work excessive hours. While he worked seven days a week, he could not provide any supporting evidence to say that Baker Property required him to do so. There were also systems in place to help with timekeeping of staff, so that Mr Bhojwani could take advantage of his days off. This claim was not made out.

Mr Bhojwani also complained about a lack of training, lack of manuals at a particular site, confusion of reporting lines, health and safety breaches, poor communication, and that he felt undermined by Ms Baker. However, he did not give evidence to show that he was disadvantaged by any of this. Email correspondence between the parties showed that Mr and Ms Baker communicated with Mr Bhojwani in a way that was supportive, respectful, and recognised his managerial position. They generally agreed with his judgements and were willing to offer practical solutions to identify problems.

There were no breaches by Baker Property, much less breaches of the type that would indicate to a reasonable employee that the employer did not intend to continue to honour the employment relationship. On 8 January 2021, Mr Bhojwani secured new employment and resigned. By this stage, he had been aware of the circumstances that he said led to his resignation between 9 to 16 months. Baker Property were also working with him and his representatives to resolve the disputes. None of the claims succeeded so Mr Bhojwani was not unjustifiably dismissed or disadvantaged by Baker Property. The Authority did not make any orders and costs were reserved.

*Bhojwani v Baker Property Services Limited* [[2023] NZERA 673; 13/11/23; C English]

### Inadequate investigation leads to unjustified dismissal

Ms Gunter worked for Kids World Childcare Lower Hutt Limited (Kids World) from 13 January 2020 until her dismissal. Ms Gunter raised a grievance with the Employment Relations Authority (the Authority) for unjustified dismissal. Kids World accepted it dismissed Ms Gunter but believed its decision was justified.

On 18 May 2020, Ms Gunter claimed she saw Ms Hancock, Centre Manager, grab a child in a rough and aggressive manner, then take the child into the sleep room to calm down. Ms Gunter said she spoke to Ms Hancock about the incident, who acknowledged she shouldn't have acted as she did. On 21 May 2020, Ms Gunter raised the incident with Ms Reder, the head teacher, who said, "*Just leave it for now. She (Ms Hancock) has a lot to deal with*."

On 9 June 2020, Ms Gunter attempted to call Ms Tuki, Operations Manager, after feeling that her concerns were being dismissed. She did not get through to Ms Tuki so left a message asking for her to call back, but claimed she never received a response. By 16 June 2020, Ms Gunter said her feeling of frustration still continued and she therefore raised her concerns with Kids World's owner Mr Juneja. Mr Juneja assured her the incident would be investigated.

Mr Juneja advised Ms Tuki to investigate the matter. This led to a disciplinary meeting with Ms Hancock. The ultimate outcome was that no action was warranted. They advised Ms Gunter the investigation was complete, though she was not told of the outcome. On 19 June 2020, Ms Gunter said she again saw Ms Hancock grab the same child aggressively and take her to the sleep room to calm down.

On 22 June 2020, the mother of the child came into Kids World demanding to speak to the teachers as she was concerned that her child had been mistreated. Ms Gunter said that while she had to explain things carefully as she knew she had a duty to the business, she felt compelled to explain the child was being removed from the room at the time, which is why she was resisting and scratching. She said she told the parent she had informed management of an earlier incident.

The mother then chose to raise her concerns more formally. On 29 June 2020, Ms Tuki called the mother. Ms Tuki said it was at that point the parent disclosed that Ms Gunter had informed her of the incident, and she then described what was alleged to have been said. Ms Tuki claimed "*it was evident Ms Gunter had breached policy in informing the parent about the incident".*

On 15 July 2020, a letter was sent to Ms Gunter inviting her to attend a disciplinary meeting. On 20 July 2020, Ms Gunter attended the disciplinary meeting. Ms Gunter said she tried to explain that there had been no breach of confidentiality, but Ms Tuki interrupted her explanation and said that she had enough information regarding the allegation. On 23 July 2020, Ms Gunter received a letter advising her of Kids World's preliminary decision. The letter advised that the breach of confidentiality constituted serious misconduct warranting summary dismissal in accordance with company policy. Ms Gunter was then given 24 hours to respond.

The next morning, Ms Gunter emailed her response to Ms Tuki. She re-explained that she thought she was doing the right thing for the safety of the child and that dismissal was too harsh of an outcome. Ms Gunter said that, at the end of that day, Ms Hancock asked for her keys and uniform. She told Ms Hancock that she had not yet received any formal notification of dismissal.

Ms Gunter then received an email from Ms Tuki stating she had received Ms Gunter's response to the preliminary decision and would take it into consideration. The letter also advised a final determination would follow. That occurred 29 minutes later when Ms Gunter received a letter terminating her employment.

Ms Tuki admitted she was only one of the decision makers and that she had fed information to the businesses owners who had been part of what she described as a joint committee decision. It has long been accepted that an employee accused of transgressions warranting disciplinary action has a right to address all decision makers. That did not occur here.

Further, Ms Gunter was not given a copy of the parent's complaint and while she accepted she received copies of Kids World's policies, they were not provided to the Authority. That left questions as to whether or not the policies even addressed questions of privacy and confidentiality in this manner. The Authority concluded the investigation was inadequate and the outcome was not therefore one a fair and reasonable employer could safely reach. The dismissal was unjustified.

Ms Gunter's loss exceeded three months, with her attaining replacement employment on 9 November 2020. Her actual loss was therefore 15 weeks, but she restricted her claim to 13 weeks. The Authority ordered Kids World to pay $13,000 in lost wages and $18,000 in hurt and humiliation. Costs were reserved.

*Gunter v Kids World Childcare Lower Hutt Limited t/a All About Children [[2023] NZERA 686; 20/11/23; M Loftus]*

### Unilaterally changing the employment agreement leads to constructive dismissal

On 17 May 2021, Mr Samuelson was employed by Mr Halse as an assistant painter. Mr Samuelson resigned from his employment after a dispute with Mr Halse about a unilateral change to his pay rate and payment of his sick leave. At the Employment Relations Authority (the Authority) he sought orders requiring Mr Halse to pay arrears of wages, remedies for unjustified disadvantage and unjustified dismissal. He also sought penalties against Mr Halse for breaches of good faith and minimum employment standards.

On 29 November 2021, Mr Samuelson was scheduled to take sick leave for his wisdom teeth surgery. He did not recover fully from the surgery and took sick leave for the remainder of the week. He requested further sick leave. In response, Mr Halse texted that they would have a meeting on his return but did not specify what the meeting would be about.

Mr Samuelson returned to work the following week and was given his payslip. The payslip showed that he was only paid for two days' sick leave and that his pay rate was changed from $23 per hour to $20 per hour. When Mr Samuelson inquired about the payslip, Mr Halse said it was because he did not provide a medical certificate as well as his lack of productivity. Mr Samuelson responded by sending through a copy of his medical certificate. Mr Samuelson told the Authority that he had never had any previous discussions or issues with Mr Halse about his work productivity.

The issues were not resolved and on 8 December 2021, Mr Samuelson sent Mr Halse a text message saying he had no choice but to resign. In response, Mr Halse asked him to email him his resignation. The Authority said that the steps Mr Samuelson took to end the employment relationship on or around 8 December 2021 were readily foreseeable, and that Mr Samuelson was constructively dismissed by Mr Halse.

Mr Samuelson claimed he was also unjustifiably disadvantaged when Mr Halse unilaterally changed his pay rate and did not properly pay his sick leave. The Authority did not accept this claim because the unjustified disadvantage was not separate and distinct from the successful constructive dismissal.

The abrupt dismissal left Mr Samuelson feeling betrayed, stressed, and reliant on the Ministry of Social Development benefits for nearly five months. For suffering humiliation, loss of dignity and injury to his feelings, the Authority awarded $5,000 as compensation. It also awarded three months of lost wages of $11,247.20.

Mr Halse was ordered to pay Mr Samuelson $2,923.52 for sick leave and annual leave arrears with interest. The Authority ordered a penalty of $5,000 for the unlawful deductions from wages breaching the Wages Protection Act 1983, failure to provide wage and time records and the breach of good faith. Costs were reserved subject to further confirmation from Mr Samuelson.

*Samuelson v Halse [[2023] NZERA 682; 17/11/23; A Leulu]*

**Personal grievance claim for unjustified action causing disadvantage upheld**

Mr Johnston was employed as an office administrator with Dacombe Motor Company Ltd (DMC) from 9 July 2018. Mr Johnston did not have a written employment agreement with DMC, but he worked 30 hours per week, Monday to Friday, and was paid hourly. On 8 July 2020, Mr Johnston left work and did not return. Mr Johnston said he was dismissed, whilst DMC said he resigned, after taking up its offer to receive two weeks' pay in lieu of notice. Mr Johnston raised personal grievances for unjustifiable dismissal and unjustified disadvantage based on the failure to provide him with a written employment agreement.

During late 2019 and early 2020, DMC was having ongoing discussions with Mr Johnston about his employment coming to an end. It expected that its business would close by the end of 2020 due to the ill health of the owner-operator, Mr G Dacombe. Mr G Dacombe's son, Mr T Dacombe, and grandson, Mr J Dacombe, planned to cut down staff and take over the business while Mr G Dacombe was undergoing surgery.

On 7 July 2020, Mr Johnston and Mr T Dacombe met. Mr Johnston believed he was told his employment was coming to an end and it would be good if he could finish at the end of the week. He thought his employment was terminated. Whereas DMC argued that it only raised the possibility of Mr Johnston finishing early so that he might move on with some certainty over his future.

The Authority found that, in the meeting, Mr T Dacombe discussed that it was no longer possible for Mr Johnston to work until Christmas 2020 as previously discussed. If he wanted to leave early, then Mr Johnston should work out how much time he needed; DMC would accommodate him through that time, and it could pay him two weeks' wages in lieu of work so he could use that time to look for work. Mr Johnston came into work on 8 July 2020 and told Mr T Dacombe he would accept the offer of two weeks' payment in lieu of working and would finish up at the end of the week. Mr Johnston and Mr T Dacombe then had a text exchange over the provision of payslips and the notice of termination, on 9 July 2020. In that exchange, they agreed that Mr Johnston's end date for his employment would be 8 July 2020.

The Authority concluded that DMC's actions in the 7 July 2020 meeting did not equate to an unambiguous sending away of Mr Johnston. Mr Johnston believed that his employment was terminated on 7 July 2020. Mr T Dacombe's statement, on Mr Johnston's employment being able to finish at the end of that week, could not be understood to be a sending away. It also found that the offer of payment in lieu of working did not confuse that position. The additional statement that Mr Johnston would not be able to work until the end of 2020, which Mr Johnston had previously discussed with Mr G Dacombe and accepted, was not a sending away either. The Authority concluded that DMC did not dismiss Mr Johnston.

The parties had previously accepted the employment relationship would end on Christmas 2020, but DMC subsequently concluded Mr Johnston's employment would end before then. DMC made this decision unilaterally without properly investigating the factors that informed that decision, and without discussing those and the possible conclusion with Mr Johnston. This made DMC's action unjustified. DMC then acted on its decision in a way that caused a disadvantage to Mr Johnston, when it engaged with him over the possibility of him leaving early.

The Authority concluded that on 7 July 2020 DMC acted unjustifiably and caused a disadvantage to Mr Johnston. This was when it decided Mr Johnston's employment would end before Christmas 2020 without any consultation, then engaged with Mr Johnston on this basis to persuade him to finish work before Christmas 2020. The Authority awarded Mr Johnston $7,000 for the humiliation, loss of dignity and injury to feelings. Costs were reserved.

*Johnston v Dacombe Motor Company Ltd [[2023] NZERA 653; 06/11/23; P Van Keulen]*

### Unresolved complaint leads to successful unjustified disadvantage

Ms Faraimo was employed by the Virtuoso Strings Charitable Trust Board (the Trust) on a fixed-term basis from 1 April 2020 to 31 March 2022, as an events and public relations co-ordinator. She alleged that her co-worker was verbally abusive to her on two separate occasions. She made a written complaint to board members of the Trust in April 2021. This resulted in a meeting with two members of the board, and a facilitation with the co-worker, which ended badly. No further action was taken until August 2021. Ms Faraimo inquired with the board in August 2021 about whether it intended to follow its formal complaints process to resolve matters. She was then advised that the board determined no further action was necessary, and they had already closed her complaint, which it said had been resolved.

Following a period of sick leave, the board wrote to Ms Faraimo suggesting there was no work for her to do, which led her to raise a personal grievance. In January 2022, Ms Faraimo was cleared to return to work by her doctor. When she arrived back at work after the holiday break, she found that the locks had been changed, she could not enter the building, and her telephone calls to her manager went unanswered. At the conclusion of her fixed-term agreement, Ms Faraimo lodged a claim with the Employment Relations Authority (the Authority) for unjustified disadvantage in relation to the way the board handled her complaint, breaches of her employment agreement, discrimination and racial harassment, and breaches of good faith.

The Authority could not find any evidence that the Trust had adequately investigated the complaint raised by Ms Faraimo. The Trust felt it had concluded the matter yet could not provide any evidence to support this position. The Trust failed to engage with Ms Faraimo, especially once her August 2021 emails made clear she felt her complaint was not yet resolved. This constituted an unjustified disadvantage.

Complaints made by Ms Faraimo's manager and the co-worker were not presented to Ms Faraimo. Withholding this information denied her the opportunity to comment and provide her own explanation. The Authority ruled this to be an unjustified disadvantage.

The Trust put forward the view that there was no work for Ms Faraimo and that, if she tried harder, she would have been able to access the building. The Authority did not agree. By changing the locks for the workplace, and then refusing to give Ms Faraimo a new key when she had held one previously, the Trust breached Ms Faraimo's right to work and unjustifiably suspended her.

Ms Faraimo also claimed discrimination and racial harassment, but the Authority ruled these had been raised outside of the statutory 90-day period. Ms Faraimo argued she included these in her complaint of April 2021. The Authority ruled the complaint provided insufficient information to the Trust to allow it to adequately investigate the concerns at that time. The specifics only arose in a letter from Ms Faraimo's lawyer in November 2021, well outside the window for raising a grievance.

Claims for a breach of good faith were ruled to be covered by the unjustified disadvantage claims. For the claims that succeeded, the Trust was ordered to pay to Ms Faraimo $10,571.70 for lost wages, and $25,000 as compensation for humiliation, loss of dignity, and injury to feelings. Costs were reserved.

*Faraimo v Virtuoso Strings Charitable Trust Board [[2023] NZERA 701; 24/11/23; C English]*

**Company unjustifiably disadvantaged employee by not readily providing tools of the trade**

Ms Darvill was employed by Targetti (NZ) Limited (Targetti) as a senior lighting consultant from 26 August 2019. On 24 March 2020, Mr Lay, a sales consultant, met with Targetti staff members to organise work arrangements during the COVID-19 lockdown. Part of the discussion included an agreement on reducing staff pay while staff worked from home. Although Ms Darvill and Targetti agreed on reducing her pay, they disagreed on aspects of how her pay would be reduced and whether her pay would be restored to its original amount. Ms Darvill returned to work in the Targetti offices in May 2020. The matter remained unresolved, and she went on parental leave in October 2020.

On 4 October 2021, Ms Phillips, the owner of Targetti, called Ms Darvill to discuss arrangements for her return to work. As part of the discussion, Ms Phillips explained the implementation of the new remuneration structure and expectations around overnight work travel outside of Auckland. Under the new structure, staff would be paid a base salary of $50,000 and receive a five per cent commission on sales over $60,000.

On 12 April 2022, Ms Darvill returned to work. The parties had agreed she would receive her original salary of $80,000 and a company vehicle upon her return. However, she did not receive a company vehicle. On 26 May 2022, Ms Darvill went on a work trip to Tauranga. The trip led to a dispute between her and Targetti as to whether she was authorised to go on the trip and whether she was entitled to be paid expenses for the trip.

On 7 June 2022, Targetti sent Ms Darvill a letter proposing to make her role redundant because her role was not efficiently meeting its commercial requirements. Targetti sought feedback from Ms Darvill before making its decision. On 20 June 2022, Targetti wrote to Ms Darvill answering her concerns and confirmed its decision to terminate her employment on the grounds of redundancy.

Ms Darvill claimed she was unjustifiably disadvantaged and dismissed as Targetti did not have lawful justification for terminating her employment. The Authority found that Ms Darvill accepted the salary reduction and continued to work for Targetti on the reduced salary. After her return from parental leave, they agreed to restore her full salary. Because she had agreed to the earlier reduction and eventually negotiated a restoration of her full salary, she was not disadvantaged by the salary reduction. For the same reason, she was not entitled to payment of wage arrears for outstanding wages. Ms Phillips was not aware of an email from Mr Phillips, the managing director, saying a vehicle could only be removed due to serious misconduct. She only became aware when Ms Darvill gave her a copy. Ms Darvill was entitled to be provided a work vehicle, which she needed to carry out her work. She was therefore unjustifiably disadvantaged when she was not provided a work vehicle upon her return.

The Authority found that Ms Darvill was unjustifiably disadvantaged when she was not provided her tools of the trade, access to her previous email and access to the quotation system within a reasonable time upon her return to work. Out of town travel was always a feature of Ms Darvill's role, so she was entitled to expect the same or a similar arrangement after parental leave. For this reason, Ms Darvill was unjustifiably disadvantaged when she was required to travel more than previously agreed.

The Authority awarded Ms Darvill compensation for humiliation, loss of dignity and injury to her feelings of $18,000. Ms Darvill was self-represented and did not incur costs of professional representation, but she was entitled to recover the filing fee of $71.56 she incurred in lodging her application, to be paid by Targetti.

*Darvill v Targetti (NZ) Limited [[2023] NZERA 699; 23/11/23; A Leulu]*

## 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: Nine Bills**

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

Corrections (Victim Protection) Amendment Bill (6 May 2024)

Report of the Controller and Auditor-General, Making infrastructure investment decisions quickly (8 May 2024)

Regulatory Systems (Primary Industries) Amendment Bill (9 May 2024)

Fisheries (International Fishing and Other Matters) Amendment Bill (15 May 2024)

Te Pire Whakatupua mō Te Kāhui Tupua/Taranaki Maunga Collective Redress Bill (22 May 2024)

Te Korowai o Wainuiārua Claims Settlement Bill (26 May 2024)

Restoring Citizenship Removed by Citizenship (Western Samoa) Act 1982 Bill (31 May 2024)

Contracts of Insurance Bill (3 June 2024)

Te Pire mō Ō-Rākau, Te Pae o Maumahara/Ō-Rākau Remembrance Bill (14 June 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