Employer Bulletin

Our Weekly News Digest for Employers

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In this Issue:

Case Law

Employment Relations Authority: Five Cases

Breach of record of settlement leads to financial penalty

Ms Langford was employed by Ngāti Kahu Social and Health Services Incorporated (Ngāti Kahu) in the role of chief executive officer (CEO) from May 2011. Issues arose in the employment relationship in 2020 between the board and Ms Langford which ultimately resulted in the parties attending a mediation on 12 January 2021. The parties entered into a Record of Settlement (ROS) pursuant to section 149 of the Employment Relations Act 2000 (the Act).

The ROS set out the manner in which the employment agreement would end, provided for a hand over process, described the return of the employer's property and set out an agreement about not making disparaging comments about either party. The ROS was recorded as a full and final settlement.

Ngāti Kahu was part of the collaboration of various Māori social service providers known as the Collab. The members of the Collab had a Memorandum of Understanding (MOU) between themselves and a MOU with Oranga Tamariki. Between 2020 and 2021, the Collab was working on signing a special partnership agreement between themselves and Oranga Tamariki. After Ms Langford had entered into the ROS and resigned from Ngāti Kahu, her husband sent a letter to the Collab asking for their new company, Tuiata Mahi Ora (TMO) to be considered for membership. Ms Langford was invited to the Collab's hui on 19 January 2021. Ms. Langford attended the Collab hui and was invited to join its executive group. The Collab decided to remove Ngāti Kahu from its membership in favour of TMO pending a new Chief Executive being appointed by Ngāti Kahu.

Ms Langford became aware of emails dated 26 February 2021 and 11 March 2021, along with a letter dated 9 May 2021, being sent to different parties alleging Ms Langford had not returned, or had destroyed, her employer's property.

Ms Langford took the matter to the Employment Relations Authority (the Authority) claiming Ngāti Kahu breached the ROS they entered, by making disparaging comments about her to third parties. She applied for a compliance order that Ngāti Kahu comply with the non-disparagement clause in the ROS, and for penalties to be imposed on it, payable to her. Ngāti Kahu countered saying Ms Langford breached the ROS by failing to return all Ngāti Kahu property within the time agreed in the ROS. Ngāti Kahu also claimed that a subsequent investigation revealed Ms Langford breached her employment agreement by taking steps including to set up her organisation, Tuiata Mahi Ora (TMO) which was a breach of her duty of fidelity to Ngāti Kahu.

The Authority found the remarks Ngāti Kahu made were disparaging because they were negative and conveyed that there were grounds to investigate Ms Langford for activities that could amount to inappropriate, "*mischievous*" or potentially criminal behaviour. The Authority was satisfied the performance and employment relationship problems discussed between the parties leading up to the ROS being entered into were intended to be fully and finally settled in the ROS. It was clear the disparaging statements constituted a breach of the non-disparagement clause of the ROS.

Ngāti Kahu was ordered to pay a penalty of $15,000. 75 per cent of the penalty amount was ordered to be paid to Ms Langford, and 25 per cent to the Authority to be transferred to the Crown. Further, Ngāti Kahu was ordered to comply with the non-disparagement clause in the ROS.

With regard to the counterclaim of property not returned to Ngāti Kahu, the Authority found the evidence simply did not establish on the balance of probabilities that Ms Langford failed to return the property alleged. Records were not kept of what was returned and a significant period of time had passed making it difficult for Ms Langford to fairly defend herself. The application for a compliance order for the return of property was not made out. For the same reasons, the application for reimbursement of physical assets was not made out.

With regard to the penalty claims brought by Ngāti Kahu relating to TMO, the Authority found the claims were not commenced within 12 months after the earlier of the date when the penalty causes of action first became known to Ngāti Kahu or the date when the cause of action should reasonably have become known to it. The penalty claims were therefore declined. Costs were reserved.

Langford v Ngāti Kahu Social and Health Services Incorporated [[2023] NZERA 444; 14/08/23; S Blick]

Unsuccessful constructive dismissal claim

At the Employment Relations Authority (the Authority) Ms Francis claimed that she was constructively dismissed by Seafood Central Limited trading as Scott Seafood (Scott Seafood). Scott Seafood denied the claim and said that she voluntarily resigned from her employment.

Mr J Mullany and his son Mr P Mullany were joint shareholders of Scott Seafood, a supplier of fish to both wholesalers and retail customers. Mr J Mullany was director while Mr P Mullany was the manager. Ms Francis was engaged to build the Scott Seafood small retail unit. She had two employees who reported to her. Scott Seafood was adversely affected during the COVID-19 pandemic and experienced a downturn in revenue. The Mullanys discussed the situation with their accountant and employment advisor and then initiated a restructuring proposal for the retail team.

The Mullanys held a meeting with Ms Francis and her team during which Ms Francis presented her feedback on the proposal. An outcome of the restructuring proposal was sent to Ms Francis on 27 April 2022 which outlined that under the proposed structure her current role would disappear but advised there was a team leader position available if she was interested and available for it. Ms Francis said she was shocked to find

her position as retail manager was being made redundant and replaced with a team leader position because it was the first time she had been advised that redundancy was a possibility. She advised via email that she might need to seek more information and take advice. Ms Francis said she believed that the team leader job description and the list of tasks she was provided with were either identical to the role she was currently performing, or in the case of the task list, did not currently occupy a significant part of her role. Her conclusion was that Scott Seafood wanted to take her off a salary and put her on a lower hourly rate.

On 3 May 2022, Mr P Mullany spoke with Ms Francis as he heard she was unhappy and asked what the problem was. She told him she needed to get some advice on the matter. Mr P Mullany was then told that Ms Francis had left work taking all her personal belongings with her but leaving the company laptop and mobile phone, which she would usually take home with her, behind. He later followed up and received an email from her representative advising that Ms Francis was unwell and unable to attend work. On 20 May 2022, the representative advised that Ms Francis had not resigned but had reached the view that Scott Seafood had repudiated her contract with it and on 24 May 2022 they advised Scott Seafood "*Our client has no choice but to resign, resignation to take effect immediately*".

The issue requiring investigation by the Authority was whether Ms Francis was unjustifiably constructively dismissed by Scott Seafood. Ms Francis claimed a breach of the duty of good faith on the part of Scott Seafood. The Authority outlined the law on constructive dismissal and case law under the breach of duty heading. The Authority also referred to *Harrod v DMG World Media (NZ) Ltd* where the then Chief Judge observed that the unsuccessful plaintiff failed in her claim of constructive dismissal in circumstances in which: "*… she knew or ought to have known that it could have been discussed further if it was troubling her*".

The Authority referred to the restructuring proposal and observed that whilst the retail manager position was being proposed to be disestablished, that decision had not been confirmed as finalised at that stage, and no date for that to occur had been advised. Scott Seafood also advised Ms Francis in writing of the opportunity to discuss the matter further and that it was keen to retain her employment.

Ms Francis concluded that the decisions had been made and believed that she was being offered a position with a lower hourly rate which would impact her remuneration level adversely. Despite being given the opportunity to meet and discuss the situation, Ms Francis did not raise either of her concerns with Mr P Mullany before leaving the workplace on 3 May 2022.

The Authority found that an employee acting in good faith would have been responsive and communicative and would have advised Scott Seafood of her concerns and that she was unhappy and resentful about the information. Acting in good faith, the Authority considered Ms Francis should have given Scott Seafood the opportunity to address her concerns.

In the circumstances, the Authority found that Scott Seafood did not breach the duty of good faith to Ms Francis in regard to the proposed change in her employment which had not actually occurred, let alone that it had foreseen that it was of sufficient seriousness as to cause her to resign. The Authority determined that Ms Francis was not constructively dismissed by Scott Seafood. Costs were reserved.

Francis v Seafood Central Limited [[2023] NZERA 442; 14/08/23; E Robinson]

Employer addressing anonymous complaints found to have created some disadvantage

Ms Harte worked for Te Whatu Ora Nelson/Marlborough in Nelson Hospital, as a midwife and coordinator for nine years. In 2022, Te Whatu Ora began an investigation which did not follow its procedural policy. In January 2023, Ms Harte resigned and raised personal grievances at the Employment Relations Authority (the Authority). She alleged she suffered an unjustified disadvantage from the investigation. She also alleged unjustified constructive dismissal as a result of Te Whatu Ora failing to address an unsafe workplace

and the behaviours of managers during the investigation. Lastly, she claimed that Te Whatu Ora breached good faith.

On 6 December 2021, 13 April 2022 and 27 April 2022, Te Whatu Ora received complaints about Ms Harte, including one from the Midwifery Employee Representation and Advisory Service (MERAS) aggregating concerns from its members. These were bullying and unsupportive behaviours, insults and put downs, and poor role modelling. MERAS felt Te Whatu Ora had historically not taken action to address the behaviour. In response to these, the HR business partner said that based on natural justice, Ms Harte needed to know who made the allegations, and some specifics. None of the complainants provided further information or felt safe to identify themselves.

Te Whatu Ora thought witnesses might come forward if it ran an investigation under its bullying and harassment prevention policy. The policy referred to the rights of those accused and managers' responsibilities. It required discussion with complainants and exploration of complaints, to fully understand the situation. Decision-makers would consider whether to undertake an investigation, run by an external investigator. The Policy also allowed for informal resolution.

Te Whatu Ora gave Ms Harte the complaints anonymously on 22 July 2022. She felt she could not reply because they lacked specifics and were "*anonymous gripes about her personality and performance*", rather than bullying. On 9 August 2022, the HR department said that its decision to investigate came by reviewing the letters of complaint and holding a meeting on 20 July 2022. However, there was no meeting in reality. The HR business partner reiterated the existence of this meeting later. Based on a privacy request for the HR emails in November 2022, Ms Harte was concerned that the department noted the lack of specifics but proceeded with investigation under the policy anyway.

On 14 October 2022, Te Whatu Ora ended the investigation with no finding of bullying. It acknowledged and apologised for the process mistakes including misleading her on the meeting, and offered $15,000 in a without-prejudice conversation, which Ms Harte did not accept.

In January 2023, Ms Harte's counsel wrote that Te Whatu Ora had not taken any actions to make the workplace safer for her. The parties agreed to paid special leave for three weeks. At the stage of organising another meeting, Ms Harte resigned. Te Whatu Ora replied that it was still making plans to address the concerns and took them seriously. It gave her until 8 February to reconsider her decision, which she did not.

Ms Harte made a number of other allegations that the Authority did not find to be unjustified disadvantage. However, it found a fair and reasonable employer would have clearly identified its concerns, to enable proper response and consideration on how to proceed. Te Whatu Ora did not do more to ascertain whether the complaints fit with its policy's definition of bullying. The vagueness meant Ms Harte did not have an opportunity to respond to the allegations. Te Whatu Ora did not use the safeguards in the policy that could have overcome some investigative difficulties and identified informal resolution; it did not act fairly and reasonably by deviating from its policy. It also most likely intentionally misled Ms Harte on the decision-making meeting, which breached good faith. As a result of not knowing who had complained about her, Ms Harte experienced distress and unease and concluded Te Whatu Ora was building a case against her. The Authority awarded Te Whatu Ora's open offer of $15,000 as compensation, noting this to be higher than usual for purely procedural failures. It also awarded a penalty of $4000 for the breach of good faith, $3000 to be paid to Ms Harte.

The workplace and communication failings could have been easily resolved. Te Whatu Ora took the matter seriously and offered to extend time to reconsider the resignation. The breaches were not so serious that Te Whatu Ora could have foreseen the resignation. The Authority held the resignation was premature. Te Whatu Ora did not constructively dismiss Ms Harte. Costs were reserved.

Harte v Te Whatu Ora - Health New Zealand [[2023] NZERA 421; 08/08/23; H Doyle]

Invalid trial period leads to unjustified dismissal

Ms Branford worked for The Pho House Limited (Pho House) from 1 June 2022 until her dismissal on 11 July 2022. In 2022, Pho House started trading as the Zeke Café. Ms Branford was notified of her dismissal by an email from "*Zeke Management*" in reliance on a trial period in her employment agreement. Ms Bradford claimed that her trial period was invalid and her dismissal unjustified.

Pho House sent Ms Branford an employment agreement around 2 May 2022. The agreement made reference to a 90-day trial period. The trial period started when she commenced work and permitted Pho House to dismiss Ms Branford by giving the period of notice detailed in Schedule 1. However, seemingly accidentally, there was no Schedule 1. There had been no discussion between the parties about when the trial period would finish or how long the notice period was.

After a period, Ms Branford stopped getting paid. She enquired about this and was informed that the contract had missing information and she needed to sign an additional section of the contract. On around 7 or 8 June 2022, Pho House provided another version of the employment agreement. The second agreement was signed on 9 June 2022 by both parties. It included a Schedule 1 which contained a trial period. It did not specify when the trial period ended or what the notice period for a termination during the trial period was. The provision in the second agreement was still not adequate as it did not include when the trial started and finished. Further, Ms Branford was already an employee at the time she signed the second agreement. This prevented the trial period from being effective.

The Employment Relations Authority (the Authority) was not satisfied that Ms Branford was covered by a valid trial period in her employment with Pho House. Having concluded that she was not employed under a valid trial period, Pho House had to justify its dismissal of her in the usual way.

Ms Branford's first agreement contained no identified hours, as the Schedule where the hours would have been detailed was not attached to the agreement. The second agreement specified in Schedule 1 that Ms Branford's weekly hours were 15 to 25. In later weeks, Ms Branford was rostered for 15 hours a week. Given that the agreement specified a range of hours, the Authority considered that the bottom end of the range should be the minimum number of hours she was entitled to. Pho House admitted the reduction in hours was largely because of concerns about Ms Branford's work. On about five separate occasions, Ms Branford was late for work. Ms Nguyen, a shift manager, felt awkward about discussing Ms Branford's performance with her and instead reduced her work hours. Ms Branford enquired about her hours with the management team but felt like she was brushed off.

Ms Nguyen acknowledged that she had not raised performance concerns with Ms Branford. Ms Nguyen told the Authority that she was non-confrontational and wanted to create a safe environment where staff felt happy and at ease. The Authority accepted this was genuinely felt but it created a situation where the final outcome for Ms Branford came as a shock.

Ms Branford was rostered to work on the morning of 11 July 2022 but on the night of 10 July, she received an email telling her that Zeke Café had made a decision to terminate her employment effective from 11 July 2022. The reason given was that her performance was not satisfactory.

Ms Branford responded "*No worries at all. I will bring my uniform in tomorrow morning*". The relatively accepting response was explained by Ms Branford as a result of her panic and not knowing what to do. She did not receive any pay in lieu of notice.

The Authority held the dismissal was not the action a fair and reasonable employer could have taken and did not meet good faith obligations. Pho House unjustifiably dismissed Ms Branford.

Ms Branford sought 13 weeks of lost wages. However, she had been able to obtain other work relatively promptly. The claim was based on Ms Branford receiving the top end of the 15-to-25-hour range. The Authority held there was no requirement to pay the top range, instead lost wages were to be calculated on the average hours, being 18.72 hours.

Ms Branford was entitled to two weeks of wages before she got other work, totalling $793.72. She also received 11 weeks' worth of wages which was $141.06. This was the difference between the average Pho House rate and the average rate in her new job totalling $1,551.66. Ms Branford was awarded $12,000 compensation under the Act.

Ms Branford acknowledged that her five episodes of lateness over a four-week period was a lot. She was never warned that her lateness was problematic but that quantity over a short period of time could be regarded as reproachable. A deduction of 10 per cent of remedies was made for contribution regarding the lateness making the compensation $10,800 without deduction. Costs were reserved.

Branford v The Pho House Limited t/a Zeke [[2023] NZERA 427; 09/08/23; N Craig]

Employee without an employment agreement raised a personal grievance

In 2019, Ms Tran arrived in New Zealand from Vietnam. She had a bachelor's degree in business administration including marketing but no marketing work experience. She attended a job interview with Mr Diwan, representing International Brothers Limited (IBL), for a social media marketer and content marketer position. After the two-hour interview, she was under the impression that she received the job. From 18 May 2020, Ms Tran undertook work for IBL, managing their social media and creating content both at their premises and at home.

She was never provided with an employment agreement after several requests and resigned on that basis along with other reasons, such as being looked down on for her English, not having a roster or payslips and being asked to work from home without any compensation. She raised a personal grievance for unjustified dismissal and unjustified disadvantage at the Employment Relations Authority (the Authority) and sought arrears of wages and holiday pay.

Ms Tran claimed she worked for IBL from May 2020 while Mr Diwan claimed she started from July 2020. The Authority found that Ms Tran began undertaking work on 18 May 2020 onwards, by presenting her branding strategy and marketing plan for IBL and becoming an administrator of IBL's Facebook account. Records of wages and hours provided started from July 2020 and a reference letter written by Mr Diwan referred to a July start. Ms Tran could not be a volunteer as she made many requests to be paid and was led to believe that she would be paid so it was decided that she began employment from 17 May 2020.

Ms Tran was never provided with a written employment agreement which meant that she was never given the opportunity to seek advice about her employment agreement. While unfair bargaining was raised by the Authority, it could not set terms and conditions of employment except in identified situations. However, since Ms Tran did not have diminished capacity, did not reasonably rely on Mr Diwan for IBL or was induced to enter the agreement by undue influence or duress, the unfair bargaining claim was unsuccessful.

The Authority said Mr Diwan breached the Fair Trading Act 1986 by misleading Ms Tran into thinking she was going to receive an employment agreement. No penalty was ordered as the claim was brought over 12 months from when Ms Tran was aware or could reasonably have known of the cause of action.

Ms Tran sought payment for hours worked which she was not paid for at all and a top up to wage payments actually received. Mr Diwan's records showed that she was paid $20 an hour. Her wage claims were higher than this as she said her skills were developed.

The agreement about wage rates was that Ms Tran would be paid what her work was worth. A Government careers website showed that the salary range for a sales manager was between $96,000 and $230,000. Ms Tran saw herself as being somewhere between $100,000 to $200,000. Heavy reliance in submissions was placed on her reference letter Mr Diwan provided to help her purchase a car. However, there was insufficient evidence to assess whether her work was within the work undertaken by a sales manager so the Authority was undecided on whether she was likely to attract the same rate.

The Authority did not use its discretion to alter the terms and conditions of employment as this was not an exceptional case. An unjust enrichment quantum meruit claim was not allowed as the Authority could not decide "*what the work was worth*".

Ms Tran claimed to have worked 318 hours between 17 May and 19 July 2020, at least 30 hours a week. Mr Diwan accepted that she worked during that period but denied that she worked 30 hours a week. He only had time records beginning in July and under the Employment Relations Act 2000 (the Act) the Authority was able to accept the employee's claimed work time if the employer failed to keep wages and time records that prejudiced the employee's ability to bring accurate wages claim. A minimum wage rate of $18.90 per hour was ordered totalling $5,103.

From 20 July to 10 December 2020, Ms Tran estimated she worked 1,174.42 hours based on her own record of hours. She provided photos that she took while working to prove when she was working and correspondence from her customers which supported that she worked "*vigorously at times*". $9,029.30 was ordered for the hours paid at $20 minus her actual earnings from this period.

8 per cent holiday pay was ordered to be paid by IBL added to the amounts of $5,103 and $9,029.30 which totalled $1,130.58. While Ms Tran claimed to be paid less than minimum wage, based on the amounts to be paid by IBL, it ensured that she was paid at least minimum wage and so no penalty was sought.

Her constructive dismissal claim failed as it was not a single event that could foreseeably be seen to trigger the resignation but simply that she finally had enough. Ms Tran was disadvantaged in her employment by not having a written employment agreement. $10,000 was also ordered for compensation for hurt and humiliation. Costs were reserved.

Tran v Diwan and International Brothers Limited [[2023] NZERA 410; 01/08/23; N Craig]

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