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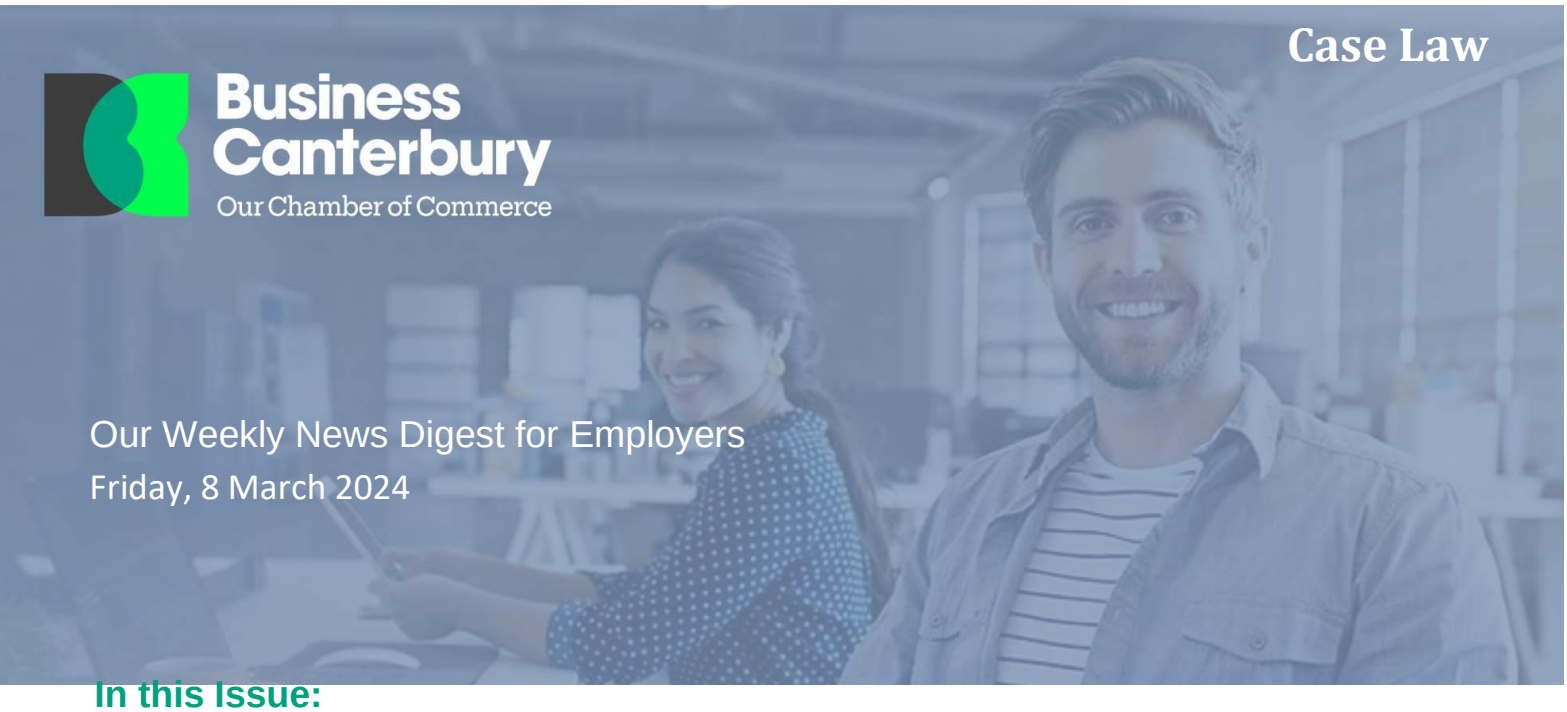

Our Weekly News Digest for Employers
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In this Issue:

Case Law

Employment Relations Authority: Five cases

Constructive dismissal after employer failed to pay wages

Ms Byun was employed by F&B Vulcan Limited (F&B) as a café lead from 30 August 2021 until her employment ended on 15 May 2022 when she resigned because of repeated failure to pay wages. She sought orders for payment of arrears of the unpaid wages, findings that F&B had breached duties owed to her and an award of penalties. Ms Byun also said she was unjustifiably constructively dismissed and sought remedies for associated losses.

The Employment Relations Authority (the Authority) considered Ms Byun's claims, and outlined the law on constructive dismissal and the fact an employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. If the dismissal was caused by breach of duty, the questions for consideration were then whether the breach of duty by the employer caused the employee's resignation - and if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow.

The failure by F&B to pay wages in full when due and owing was a serious breach of the duty owed to Ms Byun. F&B first failed to pay Ms Byun in the period from 5 to 11 December 2021. On 13 December 2021, the people & culture team messaged Ms Byun and other affected staff about the delay, offered an apology, advised any bank dishonour costs would be met by the business and paid within 24 hours. That did not occur, and the wages remained unpaid. For the period 27 February 2022 to 2 April 2022 and 10 April to 4 May 2022, F&B again failed to pay Ms Byun wages when they were due and owing.

On 28 April 2022, Ms Byun was advised at a meeting that F&B had ceased trading from 1 April 2022, her role was redundant and the arrears owing her would be paid when the COVID-19 government wage subsidy had been received. She was offered employment with Grind Café Grey Lynn Limited (Grind Café) in the same position and advised her leave balance would be transferred to that entity. Ms Byun was offered

a new employment agreement, which she did not sign. For completeness, the Authority said Ms Byun's employment did not transfer to Grind Café because she did not consent to being employed by that entity.

Ms Byun did not return to work after 4 May 2022. She wrote that day to F&B asking for her pay and advised she could not work until she got paid, but she did not receive a response to her letter. Ms Byun's employment ended by way of resignation on 15 May 2022.

The Authority said the failure to pay in the circumstances was a breach of duty of sufficient seriousness to make it reasonably foreseeable Ms Byun would resign. Ms Byun made it clear to F&B that her personal circumstances were such that she could not work without pay and that she did not agree to further delay in payment of the wages that were due and owing. The steps she took to end the employment relationship were readily foreseeable. Ms Byun was unjustifiably constructively dismissed.

The Authority was satisfied Ms Byun had experienced harm and said an award of $16,000 compensation was appropriate. F&B was ordered to pay Ms Byun wage arrears totaling $6,744.40 for the hours she worked between the pay periods 4 December 2021 and 7 May 2022. In addition, the Authority was satisfied that, but for F&B's breaches of duty, Ms Byun would have worked her usual days and hours in the pay period 8 May to 15 May when she resigned. She was entitled to be paid arrears of $1,170 for that period. F&B was ordered to pay Ms Byun $2,830.87 in holiday pay.

F&B was responsible for payments of wages and holiday pay and the failure to do so was a serious breach. Based on the information before the Authority, the failures were intentional actions in breach of obligations owed by F&B to Ms Byun. F&B was ordered to pay a penalty of $8,000 with half the penalty to be paid to Ms Byun and half to be paid to the Crown.

F&B was also ordered to pay Ms Byun $1,500 as a contribution towards her costs.

Byun v F & B Vulcan Limited [[2023] NZERA 606; 17/10/23; M Urlich]

Employment Relations Authority considers whether employer undermined a collective agreement

The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi Incorporated (PSA) raised claims of unlawful preference and breaches of good faith relating to bargaining with the Chief of Defence Force (CDF) for a collective agreement for the years 2020 and 2021. It argued these were caused by backdating pay increases for non-union members of the civilian staff in both 2020 and 2021, and increasing pay rates for non-union members of the civilian staff in 2021 to match (or pass on) PSA negotiated rates. CDF denied the claims and said the increases were in line with Te Kawa Mataaho Public Service Commission (PSC) guidance. It replied that in 2020 the only pay increases for non-union members of the civilian staff were those needed to raise the lowest paid staff to the rate of the living wage. In 2021, there was a yearly remuneration review for non-union members that did not constitute a passing-on, with PSA members of the civilian staff being eligible for both a yearly remuneration review and also receiving a lump-sum increase that had been negotiated for them by the PSA the previous year. The Employment Relations Authority (the Authority) was asked to make a determination.

The relevant history of pay movements was noted. The PSA and the CDF were parties to a previous collective agreement that came into force on 1 December 2017 and expired on 30 June 2019. Bargaining for a subsequent collective agreement was initiated by the PSA on 1 May 2019 but did not result in a ratified collective agreement until November 2020. In the intervening period there were two remuneration rate reviews announced by the CDF, which took effect on 1 July 2019 and 1 July 2020. When the new collective agreement came into effect, PSA members who earned less than $100,000 received an increase, however this was not backdated. A further remuneration review in 2021 provided for an increment for non-union members from July 2021. However, the CDF declined to pass this increase on to union members until November 2021, noting that this was what had been negotiated in the collective agreement.

The first matter for the Authority to consider was whether there was a breach in the prohibition on preference in Section 9 of the Employment Relations Act (The Act). The PSA submitted that backdated payments to non-union members in 2020 conferred an unlawful preference. Being a member of the union precluded a New Zealand Defence

Force employee from receiving backdating. The reason non-union employees received backdated pay was because they were not members of the union. The CDF submitted that there was no unlawful preference in either 2020 or 2021. The PSA was offered the same increase effective 1 July 2020 for low-paid employees, as was applied to the low-paid employees on the individual employment agreement. This offer was never accepted and instead the PSA negotiated a pay increase that applied to all PSA members up to $100,000.

The Authority found that the actions of the CDF were unlawful preferences in terms of section 9 of the Act. It noted that CDF's actions deliberately implemented pay increases for non-union members for each year. The parties disagreed about whether compliance orders should be applied. The CDF felt that any such orders should be limited to those who were low paid and would have received a pay increase between 1 July 2020 and 15 December 2020, and then those PSA members who would have been eligible for a pay increase effective 1 July 2021 based on meeting the performance criterion that applied to non-union-members. The Authority considered that a compliance order was warranted.

The Authority then turned its attention to whether the CDF had breached good-faith obligations under the Act. After hearing arguments, the Authority found that while the CDF intended to undermine the collective agreement, their actions did not support a finding that they had undermined the collective agreement. Therefore, no penalty was available under section 4 of the Act.

The CDF was ordered toconsult with the PSA and identify which PSA members were eligible for payments for each of the periods between 1 July 2020 and 15 December 2020, and between 1 July 2021 and 11 November 2021, and make payments to these individuals equivalent to the pay increase non-union employees received for that time period. These payments were also to include interest.

Costs were reserved.

New Zealand Public Service Association Te Pukenga Here Tikanga Mahi Incorporated v Chief of Defence Force [[2023] NZERA 558; 27/09/23; S Kinley]

Employee resigned without constructive dismissal or reasonable foreseeability

Mr Borland worked for Higgins Contractors Limited (Higgins) from 2015, and worked as a health and safety coordinator from 2019. During a restructure process and then a discussion about work issues, Mr Borland resigned. He raised a personal grievance for constructive dismissal and sought compensation and lost wages.

Mr Borland's historic shoulder injuries affected his performance at Higgins' asphalt plant before he moved to the health and safety role. A previous manager ran one investigation of health and safety issues with him. He also experienced a work vehicle accident in 2017.

On 17 July 2019, Higgins sent out its restructure proposal, which included proposing to disestablish Mr Borland's role. Mr Borland claimed that Higgins gave an ultimatum, saying his role was at risk and therefore to stay, he would have to work back in the asphalt plant. Mr Borland's injuries still prevented him from doing the heavy work, but Mr Dexter, Mr Borland's manager, seemed unaware of this.

Mr Borland had gone on holiday and returned three days earlier than the leave he requested. Upon his return on 24 July 2019, Mr Dexter asked him about this inconsistency. Mr Dexter also checked Mr Borland's timesheet records in light of GPS history showing his car parked at his home. Mr Borland felt Mr Dexter was confrontational and became angrier as the discussion went on.

Mr Borland decided to resign while Mr Dexter left to retrieve evidence. Mr Dexter felt Mr Borland had become agitated when re-entering the room and he had to be asked repeatedly to calm down. At this point Mr Borland told him of his decision to resign. Mr Dexter provided Mr Borland with a pen and paper to write, "*I Kevin Borland resign from my position of HSE at Higgins Contractors Nelson Ltd effective immediately due to personal reasons*" and he signed and dated it. In light of the suddenness, Mr Dexter called twice to double check the resignation the next day, although he did so through an unidentified landline and did not leave a message. The next contact was Mr Borland's personal grievance two months later.

The Employment Relations Authority (the Authority) considered the context of a stressed exchange but found in the end the resignation was unequivocal rather than in the *'heat of the moment*'. Mr Borland's extended silence indicated he continued to intend resignation. The Authority then considered if the intentional resignation was constructive dismissal. This would be the case if Higgins performed a coercion, ultimatum of employee's resignation versus being dismissed, or breach of duty serious enough that the employer ought to have reasonably foreseen that the employee would resign as a result.

Higgins established that it had no issue with his vehicle accident, nor was the previous investigation held against him, since Mr Dexter had long replaced the involved manager. The Authority assessed the evidence to find Higgins did not give any ultimatum, and in fact did not discuss the asphalt plant on 24 July.

Mr Dexter's manner of spontaneously asking and following up questions caught Mr Borland unprepared, pressured him and put him on edge. However, this did not constitute coercion or a behaviour that reasonably, foreseeably preceded resignation. Mr Borland had felt Mr Dexter planned to dismiss him over the 24 July issues. He would struggle at the asphalt plant and was stressed about his employment, including hearing rumours of the future of the branch. The Authority found neither Mr Borland's own fear nor Mr Dexter's discussion equated to Higgins constructively dismissing him.

In the end, Higgins' acts did not have causal connection to Mr Borland's resignation. Costs were reserved.

Borland v Higgins Contractors Limited [[2023] NZERA 557; 27/09/23; A Baker]

Employee dismissed for failing to declare criminal history

In July 2022, Mr Roberts applied for the position of property manager in Barfoot & Thompson Ltd Meadowbank branch office (Barfoot). Mr Sykes, former general manager of Barfoot, made him a written offer of employment, which Mr Roberts signed on 7 August 2022. The offer of employment, included in Mr Roberts employment agreement, contained the clauses saying the offer was conditional upon a satisfactory criminal history check and for the employee to declare any information that may influence the employer's decision to employ them. This included a declaration of whether the employee had a criminal history.

Mr Roberts' employment commenced on 9 August 2022. On 16 August 2022, Barfoot sent him a link to authorise a criminal record check which he authorised on 18 August. On 24 August 2022, the certificate was issued and it recorded that Mr Roberts had multiple convictions, which included convictions for dishonesty in 1998, 2002 and 2011 and drink driving in 2013 and on 16 December 2021. However, the last drink driving conviction was entered late due to COVID-19 restrictions in place at the time, which affected the operations of the District Court.

On 25 August 2022, Barfoot wrote to Mr Roberts about its concerns regarding the outcome of the criminal record check and proposed a meeting on 26 August so that he could provide further comments. Mr Roberts explained that he did not declare that he had convictions because he did not consider them relevant to his role given that most were from 20 years ago. On 30 August 2022, Mr Isted, human resources manager, advised Mr Roberts in writing of Barfoot's preliminary decision which was to dismiss him for serious misconduct because he had not declared his criminal record and that he had a drink driving conviction within the last 12 months. Barfoots' letter stated that there was a significant breach of trust that amounted to serious misconduct. The letter invited Mr Roberts to a further meeting on 31 August to discuss the preliminary decision. Mr Roberts attended that subsequent meeting and provided an oral and written response which Mr Isted and Mr Sykes considered. However, by letter of 31 August 2022, Barfoot confirmed its decision to summarily dismiss Mr Roberts for serious misconduct.

Mr Roberts' claim against Barfoot was one of unjustified dismissal for which he sought compensation, lost wages, and costs. In response, Barfoot said that its decision to dismiss Mr Roberts for serious misconduct, for failing to declare he had criminal convictions, was substantively and procedurally justified.

In his written witness statement to the Employment Relations Authority (the Authority), Mr Roberts explained that he answered "*no*" because it was his belief that the question was subjective, which he honestly answered. He did not consider his convictions were relevant to his role. Mr Roberts further submitted that by answering in the negative, he was not in fact stating that he had no convictions but rather that he did not consider his convictions to be relevant. It

was Mr Sykes' evidence that the role required a high degree of trust as the property manager was required to prepare records for the receipt and payment of money, expected to appear in the Tenancy Tribunal on behalf of clients, and would have use of a Barfoot-branded vehicle. The Authority submitted that it was unfair to say Barfoot had set Mr Roberts up to fail by allowing him to work before it obtained his police certificate. As to whether Barfoot could have simply withdrawn its offer, the chronology of events indicate that Mr Roberts was already an employee by the time his criminal record came to light.

Mr Roberts' signed declaration indicated he was required to declare whether he had any convictions or not. It was up to Barfoot to ascertain whether those convictions were relevant to his role. Barfoot's decision to summarily dismiss Mr Roberts because he had failed to declare that he had convictions was a ground for summary dismissal, as it was serious misconduct. The claim was unsuccessful. Costs were reserved.

Roberts v Barfoot & Thompson LTD [[2023] NZERA 560; 27/09/23; P Fuiava]

Employee's claim for unjustified dismissal upheld.

Ms Lee was employed by Yamaya NZ Limited (Yamaya) to work in its sushi shop from 19 June 2021 until her employment ended on 11 September 2021. Ms Lee said she was unjustifiably disadvantaged in her employment and unjustifiably dismissed during a telephone conversation with one of the owners of the business. Yamaya denied the claims Ms Lee brought before the Employment Relations Authority (the Authority).

Yamaya said Ms Lee's failure to provide her tax code meant it was unable to provide her a written employment agreement and that she resigned from her employment. The minimum requirements of form and content of such an agreement do not contain an employee's tax code. The Authority found that Yamaya had breached the statutory obligation to provide Ms Lee with a written employment agreement.

Ms Lee said Yamaya changed her day off from Thursday to Tuesday, then required her to work Tuesdays. Further, she was told to work an extra half hour at late notice on 2 and 10 July and 11 September. On 26 and 27 July, she received an hour's notice that her work was cancelled for the day for which she was not paid. As Yamaya failed to provide Ms Lee with an agreement, it left itself open to a claim that it had changed her hours and days of work without agreement or, without sufficient consultation. Yamaya failed to discharge its duty with respect to facilitating Ms Lee's rest and meal breaks. The statutory requirement was Yamaya's to provide rest and meal breaks. It was unable to satisfy the Authority that it discharged its obligation.

On 12 September 2021, Ms Lee insisted Ms Kang, owner of Yamaya, make time to speak with her. The telephone conversation lasted for about 12 minutes. Both parties agreed it ended with Ms Lee's employment ending. Ms Lee said Ms Kang dismissed her while Ms Kang said Ms Lee made it clear she was not coming back to work.

That afternoon, Ms Lee sent Ms Kang a message that read "*as you told me I shouldn't come to work from tomorrow, I will do so -Stay well*". Yamaya posted a job advertisement that evening for the role Ms Lee performed. Yamaya's actions in advertising Ms Lee's position the same day was consistent with the parties' joint understanding that Ms Lee's employment had ended with immediate effect. The Authority found Ms Lee's employment ended at the lead of Yamaya on 12 September 2021 and was an unjustified dismissal. It was more likely than not that Ms Kang told Ms Lee if she was not happy in her employment she should leave. Yamaya's immediate subsequent actions were to not respond to Ms Lee's message, confirming her employment had ended at its initiative, and to post an advertisement for her job. These were consistent with sending her away.

Ms Lee sought reimbursement of wages lost because of her dismissal. After the Authority reviewed the evidence of loss and Ms Lee's attempts to secure employment, she was entitled to an award of $5,520, being 12 weeks' ordinary wages calculated at $20 per hour for 23 hours per week.

Ms Lee sought a compensation of $20,000 for any established unjustified disadvantages and the unjustified dismissal. The evidence established Yamaya's failures towards Ms Lee directly contributed to the circumstances that resulted in her dismissal. The Authority awarded $18,000 to Ms Lee for hurt and humiliation. Ms Lee was entitled to be paid by

Yamaya for hours she would have worked, except for the three-week period from 17 August to 7 September 2021 when the business was locked down because of the COVID-19 pandemic response. Yamaya was ordered to pay Ms Lee wage arrears totalling $1380. The claim that termination holiday pay remained outstanding was not disputed. Yamaya was ordered to pay Ms Lee $368 in holiday pay entitlements.

A penalty was ordered for failure to provide wage and time records on request. Ms Lee first requested the wage and time records from Yamaya on 8 December 2021. The record was produced on 31 August 2022. Such a delay was not compliant with the statutory obligation to provide immediate access to such documents on request. Yamaya's actions were seen as intentional and its culpability high. A penalty of $6,000 was imposed on Yamaya with half of it paid to Ms Lee and half to the Crown. Costs were reserved.

Lee v Yamaya NZ Limited [[2023] NZERA 572; 02/10/23; M Urlich]

Legislation

Note: Bills go through several stages before becoming an Act of Parliament: Introduction; First Reading; Referral to Select Committee; Select Committee Report; Consideration of Report; Committee Stage; Second Reading; Third Reading; and Royal Assent.

Bills open for submissions: Four Bills

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

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

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