Business Canterbury
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Case Law

Employment Court: Two Cases

The Authority erred in finding employee was entitled to receive parental leave payments

Ms Duan was pregnant but did not apply for parental leave until after her baby was born and after she returned to work. Her baby was born on 1 April 2021. After the birth, she took a short period of annual leave and then started working from home mid-April. She was the primary carer and in mid-September 2021, she got a family friend to help her care for her baby.

On 29 August 2021, Ms Duan applied for paid parental leave and the application was declined. In mid-September, Ms Duan resigned from her employment when her child was more than five months old to care for her child full-time. She rejoined the workforce in February 2022 and filed an application with the Employment Relations Authority (the Authority) for a review of the decision to decline her application. The Authority reversed the decision to decline the application and granted Ms Duan an entitlement to paid parental leave from mid-September 2021 to February 2022.

The Ministry of Business, Innovation and Employment (MBIE) challenged the Authority's decision in the Employment Court (the Court) on the basis that her application to take paid parental leave was for a period starting more than five months after her baby was born, during which Ms Duan had returned to work, which meant she was no longer entitled to parental leave payments. MBIE did not seek to recover the monies paid to Ms Duan in relation to the determination. Ms Duan did not participate in the challenge before the Court. However, a full Court convened to determine the challenge.

For Ms Duan to be entitled to paid parental leave, she needed to be an "*eligible employee*" under part 7A of the Parental Leave and Employee Protection Act (the Act). An eligible employee must be the primary carer of a child and meet the parental leave payment threshold. She was the primary carer and did work an average of 10 hours a week in the 6 months just before the due date.

While she was eligible, she was only entitled to receive parental leave payments if, during the relevant period, she took parental leave from her employment or self-employment. Ms Duan took a period of annual leave after the birth of her child and then returned to work. By taking paid leave, Ms Duan could have elected to delay the start of her parental leave payment period to the day after the date on which her paid leave ended. However, by returning to work immediately after her paid leave ended in mid-April 2021, Ms Duan did not take advantage of that ability to elect. Thus, the second limb of the section 71D test in the Act was not met.

The next step was for Ms Duan to make an application for parental leave payments. An application for paid parental leave by a biological mother had to be made before the earliest of the date on which they returned to work or the date on which the child turned 12 months. She only made an application several months after she returned to work. Section 71K states that parental leave payments start on the earlier of the date of confinement or the date the person commences parental leave. The "*date of confinement*" was accepted as "*the date on which the process of giving birth begins"*. Section 71K(2)(a) allowed a person to delay the start date of their parental leave payment period until the end of other paid leave, but no longer than that.

One of the events that gave rise to the end of a person's parental leave payment period was the date the person returned to work. An employee was treated as having returned to work if they performed paid work for their employer within 28 days of the date of birth, or performed more than 64 hours of paid work during the parental leave payment period.

The Court found that Ms Duan was eligible but not entitled to receive the parental leave payment when she applied for it in August 2021 as she had already returned to work by the time she applied for it. Her application was also out of time and not due to any irregularities. MBIE did not have discretion to move the start and end dates of Ms Duan's parental leave payment period to another time period not provided for by the legislation. It was concluded that the Authority erred in finding that MBIE could (or should) have exercised its discretion to grant Ms Duan a parental leave payment in her circumstances. Costs were not sought by MBIE so there was no issue of costs.

Ministry of Business, Innovation and Employment v Duan [[2023] NZEmpC 232; 18/12/2023; Holden J, Beck J, King J]

Employment Court upholds unjustified dismissal ruling of the Authority

The Employment Relations Authority (the Authority), in its rulings of 2022 NZERA377 and 2022 NZERA515, ruled that Ms Yoon had been unjustifiably dismissed from her employment with MGK Homes Limited (MGK). MGK was ordered to pay lost wages, compensation, costs for Ms Yoon's immigration lawyer and an award for costs.

MGK challenged some aspects of the rulings in the Employment Court (the Court). Their view was that Ms Yoon left by mutual agreement and that she was not dismissed. It was also claimed that Ms Yoon's employment ended on 12 May 2020 and so the grievance she raised on 1 October 2020 was out of the statutory timeframe for raising a grievance. Finally, it was claimed that Ms Yoon contributed towards the situation.

The relevant background is that Ms Yoon commenced work for MGK in November 2020 in the role of office manager under a work visa. In this role she also completed tasks for Astoria Developments Limited, which shared offices with and was closely linked to MGK. Both companies have Mr Kang as the sole director and shareholder. In April 2020, while working from home, Mr Yoon made a clerical mistake with the payments task she was working on. Mr Lee, Ms Yoon's manager, raised this with her a couple of days later and the matter was not raised again.

On 8 May 2020, Ms Yoon was asked to post a job advertisement for an administrator to work at Astoria, which but for a few details was largely the same as the role she already held. On 12 May 2020, Ms Yoon was asked to attend a meeting with Mr Kang on 12 May 2020. This meeting lasted around 10 minutes. What happened at this meeting is disputed. Following the meeting, Ms Yoon agreed to work from home until the end of June 2020. After this time, and having concerns for her work visa, MGK agreed to allow Ms Yoon to have unpaid leave from 1 July 2020 until her final day on 31 August 2020.

While there was acceptance that the event that led to the termination of employment took place on 12 May 2020, the employment relationship did not end until 31 August 2020. Given the grievance was raised on 1 October 2020, the Court ruled that the Authority did not err in fact or law when it ruled the grievance had been raised within 90 days.

With regard to the 12 May 2020 meeting, Mr Kang gave evidence that, following the meeting, Ms Yoon told Mr Lee that she was resigning. Ms Yoon said she was told she was no longer needed because a person had been employed to replace her and she should discuss the timing of her leaving with Mr Lee. The Court preferred the evidence of Ms Yoon. It was noted that the evidence of Mr Kang has varied both in terms of the nature of the meeting itself and the nature of the meeting outcome. On the other hand, the Court found the evidence of Ms Yoon to be consistent.

The Court found that Mr Kang advised Ms Yoon that he had employed other experienced employees, that she was no longer required, and that she should talk to Mr Lee about the timing of her leaving due to her visa issues. Ms Yoon was adamant she did not resign, and the Court agreed. Mr Kang initiated the termination of Ms Yoon's employment. She left the meeting knowing that her employment was to come to an end, an outcome that had not been agreed to by her.

While Mr Kang said the purpose of the meeting on 12 May 2020 was not disciplinary, on Ms Yoon's evidence (which the Court preferred), the issues of the payments and her alleged lack of ability were raised after she was told about the employment of replacements. There was no process of any sort in this instance. While concerns may have been raised, there was no opportunity for Ms Yoon to respond. With no opportunity to respond, there can be no consideration of such a response. Ms Yoon was simply told that she was being replaced. The Court found that her dismissal was both procedurally and substantively unjustified. The Authority did not err in fact or law.

The challenge failed and the Authority's substantive ruling was upheld in full including determination for costs. The amount of $46,997.40, held by the Court, was ordered to be released to Ms Yoon along with interest. Costs were reserved.

Rosie v Dogterom Geddes Limited [[2023] NZERA 518; 11/09/2023; P Cheyne]

Employment Relations Authority: Three cases

Reliance on invalid trial period leads to unjustified dismissal

Mr Rosie was employed by Dogterom Geddes Limited (DGL) as a dairy farm worker from September 2021 until he was dismissed in November 2021. Mr Geddes was the managing equity partner in the business and both he and his wife, Mrs Geddes, worked in the company. On 11 November 2021, Mr Rosie saw a job advertisement for the farm where he worked and assumed this was his job. After unsuccessfully trying to raise the issue with Mr Geddes that day, Mr Rosie returned to work the next day. After a lunch break, Mr Geddes gave him a letter terminating his employment noting the trial period but without further explanation.

Mr Rosie raised a personal grievance alleging an unjustified dismissal and advanced claims through the Employment Relations Authority (the Authority) for compensation and lost remuneration.

The first matter the Authority reviewed was the validity of the trial period. The employment agreement correctly set out the details for the trial provision. However, there was contention as to whether Mr Rosie had commenced work before signing the employment agreement which would invalidate the provision. There was an initial interview on 11 September 2021. Later that evening, DGL replied to Mr Rosie's continued interest with approval and a promise of a "*contract*". On 14 September 2021, the contract was given to Mr Rosie. The inclusion of the 90-day trial period was mentioned for the first time here. The agreement was open for acceptance until 5pm on 16 September 2021. Mr Rosie was asked to sign and return it before he started work on 17 September 2021 but did not. DGL nonetheless had Mr Rosie work on 17 and 18 September 2021. Mr Rosie signed the agreement on the evening of 17 September 2021 and left it for DGL the next day. The Authority found that Mr Rosie had previously been employed by DGL at the time the parties entered into that form of written employment agreement. For that reason, DGL was not able to rely on the 90-day trial period.

The next matter for consideration was whether the dismissal was justified. The Authority noted that on about March 2022, DGL wrote a document entitled "*Blair Rosie – Incidences of Serious Misconduct (SM) and General Misconduct (GM))*". There were 13 allegations in total, with some only arising after Mr Rosie had left DGL. The Authority observed that these matters had not been investigated by DGL nor had they sought feedback from Mr Rosie. DGL had also not complied with the minimum steps set out in the employment agreement. For these reasons the Authority found Mr Rosie had established a claim for unjustified dismissal.

It was necessary for the Authority to consider what impact, if any, Mr Rosie's conduct played in the circumstances that led to his dismissal. While a general concern was confirmed about Mr Rosie's demeanour towards the farm cows, his blameworthy contribution to the circumstances giving rise to the personal grievance was relatively modest. The overwhelming responsibility rested with DGL, which did not properly take up with Mr Rosie any grounds for dissatisfaction as matters arose during the employment. It then wrongly relied on the non-applicable trial period provision. The Authority considered remedies should fairly be reduced by 15 per cent

DGL was ordered to pay Mr Rosie $14,875 reimbursement for lost remuneration and $12,750 compensation pursuant to the Employment Relations Act 2000.

Rosie v Dogterom Geddes Limited [[2023] NZERA 518; 11/09/2023; P Cheyne]

Unjustified dismissal claim successful but unsuccessful unjustified disadvantage

Mr Khan commenced employment with Hazara Auto Recyclers Limited (Hazara) in September 2018. Mr Khan claimed he was unjustifiably disadvantaged in his employment and unjustifiably dismissed in May 2021.

Mr Khan said he was involved in a traffic accident in January 2021. On 19 February 2021, he provided a medical certificate, relating to the January accident, stating he was unable to work from 19 February through to 4 March 2021. He claimed Hazara had said he could take as much time off to recover as he wished, and his job would be waiting for him when he was ready to return.

Mr Khan later provided a further medical certificate confirming he was unable to return to work until 25 May 2021. On 23 May, he received an email from Hazara stating that he had not attended work since 22 April 2021, and that Hazara had been advised by ACC that his medical certificate had expired on 13 April 2021. Hazara said the employment agreement enabled it to dismiss him as he had not attended work for three days.

On 25 May 2021, Mr Khan met with Hazara and was told that he was being dismissed in reliance of his employment agreement. He was made to leave the premises and was not given an opportunity to clear his desk of any personal items. Mr Khan said his dismissal under the circumstances was unjustified. Further, he said it had been agreed between himself and Hazara that in February 2020 his hourly rate would increase to $32 an hour, and that had not occurred.

Hazara initially claimed the dismissal was justified, but it conceded during the investigation meeting that the dismissal was unjustified. However, it disputed the wages or other moneys claimed by Mr Khan because of the grievance.

Dismissal in this way would always be difficult to justify. Because Hazara correctly conceded the dismissal was unjustified, the Employment Relations Authority (the Authority) did not need to explain why Mr Khan could never have been held to abandon his employment under such circumstances and why it could not constitute serious misconduct entitling an employer to dismiss.

Mr Khan claimed he was to be paid a bonus of $1,000 for every $10,000 of parts he sold, but this was not paid. Further, he said that it was agreed between the parties that, in February 2020, his hourly rate would increase to $32 an hour, which did not happen. Mr Khan also said it was agreed he would receive a further $250 per vehicle sold and after the first year, this was to increase to $350 per vehicle. He estimated he sold between 250 to 280 cars and accordingly was owed in the vicinity of $40,000. Coupled with the $1,000 bonus due for each $10,000 of parts sold. He claimed to be owed approximately $100,000.

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Mr Vakali, General Manager for Hazara, negotiated Mr Khan's terms when he commenced employment. He prepared the employment agreement and gave it to Mr Khan to review. On 4 September 2018, Mr Khan signed that agreement. In the first agreement the agreed wages were $24 per hour. There was no provision for anything extra such as commission. On 20 September 2019, both parties signed a further agreement which showed $28 per hour as remuneration and the wage records confirmed that Mr Khan's hourly rate did increase.

However, the agreement Mr Khan said was the true agreement between the parties was a photocopy of the document he signed on 20 September 2019. The photocopied version included an increase to $32 per hour and bonus payments. The alterations in the photocopied agreement were signed only by Mr Khan.

Mr Vakali confirmed under oath that he had never seen a copy of the amendments. Mr Khan reluctantly agreed that Mr Vakali's evidence was likely correct, namely that the original had been sent to him and he did not agree with it so added his changes, which he may not have sent back.

The rate that Hazara agreed to pay Mr Khan was $28 an hour. The Authority held there was no agreement to pay $32 an hour or for any bonus or commission payments. The employment agreement signed on 20 September 2019 by both parties, provided for four weeks' notice of termination of employment. Mr Khan had a contractual right to be paid for that notice period.

The Authority accepted that awarding wage losses can raise the spectre of a duplication of payments for lost wages as Mr Khan was receiving ACC compensation payments. However, the liability to pay a contractual entitlement to wages fell on Hazara. The question of any repayment in respect of ACC payments also received by Mr Khan fell to the Corporation and Mr Khan to deal with. Hazara was ordered to pay Mr Khan four weeks wages in lieu of notice to be paid at a rate of $28 per hour for a 40-hour week. Hazara was further ordered to pay $17,000 to Mr Khan as compensation for hurt and humiliation for the unjustified dismissal. Costs were reserved.

Khan v Hazara Auto Recyclers Limited [[2023] NZERA 525; 14/09/2023; G O'Sullivan]

Trial period not valid

Mr Knowles worked in a mechanical engineering role for CF Automotive & Engineering Limited (CF Automotive) in Christchurch from 5 August 2022 until 25 August 2022 when his employment ended under disputed circumstances. Mr Knowles said he was unjustifiably dismissed. The Employment Relations Authority (the Authority) was hampered in assessing CF Automotive's view of the situation and any disputed facts by its failure to file evidential statements, despite being directed to do so, and not attending the investigation meeting. The Authority carefully considered the available correspondence and assessed Mr Knowles' evidence given during the investigation meeting.

On 5 August 2022, Mr Knowles commenced employment with CF Automotive. He recalled signing the employment agreement the following week. The agreement set out that Mr Knowles would be working Monday to Friday and be paid $29 an hour. However, after two days of employment, Mr Knowles said Mr Fitzsimon's, the sole director of CF Automotive, told him he was not happy with the standard of his work, and he was given an ultimatum of resign and go back to his previous job or sign another employment agreement that reduced his hourly pay rate to $26. Mr Knowles said he reluctantly accepted the pay reduction as he was still interested in the role. He recalled Mr Fitzsimon giving him a new employment agreement to sign a few days later, which he signed on presentation but was not provided a copy to keep.

Mr Knowles was supervised and trained in the workshop by a co-worker with superior qualifications, but Mr Knowles said the co-worker was volatile and constantly critical in a less than constructive manner. On 25 August 2022, Mr Knowles said matters came to a head when he was called to an impromptu meeting with Mr Fitzsimon and the co-worker supervising him. The meeting commenced with criticism of his work and when he asked how he could improve, Mr Fitzsimon told him to just give up and seek a different career path. At the end of the conversation, Mr Knowles recalled he sought clarity on his ongoing employment and was told, the next day, a Friday, would be his last day. The dismissal was not confirmed in writing.

In an unacknowledged email, Mr Knowles' advocate raised a personal grievance of unjustified dismissal and sought payment of wages owed. Mediation was sought and later directed but CF Automotive's Mr Fitzsimon did not attend.

The Authority firstly considered whether Mr Knowles' unjustified dismissal grievance was prevented by the operation of a 90-day trial period. The evidence suggested that Mr Knowles, although aware of the 90-day trial provision, did not sign the employment agreement until after he had commenced employment. There was confusion over whether the agreement provided a trial period, or a probation period, as both were referenced in the employment agreement. However, a further hurdle was that the evidence suggested the parties then entered a second employment agreement on or around 9 August 2022 that reduced Mr Knowles' pay rate. Thus, a new period of employment commenced from that point and a trial period was not possible as Mr Knowles had worked previously for CF Automotive.

The Authority found in all the circumstances identified that the 90-day trial period was not a valid one and CF Automotive was unable to rely upon it to prevent Mr Knowles advancing an unjustified dismissal claim. The Authority then considered whether Mr Knowles' dismissal was unjustified. In the absence of any evidence from CF Automotive, the Authority said it could only conclude from Mr Knowles' evidence that his former employer became quickly dissatisfied with his skill level and decided the employment could not continue and dismissed Mr Knowles on 25 August without providing adequate notice.

Given that the employment duration was three weeks, the Authority found CF Automotive gave Mr Knowles insufficient time to demonstrate his skill level. The manner of the dismissal was abrupt with no practical opportunity for Mr Knowles to obtain representation or have any input into the decision. The procedural defects were not minor and did result in Mr Knowles being treated unfairly. The Authority acknowledged that CF Automotive was a small company with no human resource support but found nevertheless that no fair and reasonable employer could have concluded that dismissal was warranted in the circumstances.

The Authority found Mr Knowles was unjustifiably dismissed. CF Automotive was ordered to pay Mr Knowles lost wages and arrears in the total sum of $4,502.52 gross including holiday pay, $9,000 compensation and $2,250 as a contribution to costs.

Knowles v CF Automotive & Engineering Limited [[2023] NZERA 519; 11/09/2023; D Beck]

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 one Bill open for public submissions to select committee:

European Union Free Trade Agreement Legislation Amendment Bill (16 Feb 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

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