Employer Bulletin

Our Weekly News Digest for Employers

Friday, 20 October 2023

In this Issue:

Case Law

Employment Court: One Case

Employment Court declines claim to overturn decision of the Authority

Ms Turner was employed by the Wairarapa District Health Board, now known as Te Whatu Ora, as a registered palliative care nurse working in the community from May 2015 until her summary dismissal on 23 April 2021. The dismissal was a result of the Te Whatu Ora learning of various Facebook posts made by Ms Turner that were considered to be contrary to Te Whatu Ora's interests and/or offensive.

In her employment, Ms Turner was subject to the standards set out in the New Zealand Nursing Council's code of conduct. The standards stated that registered nurses were not to impose their political, religious and cultural beliefs on consumers, and that they should intervene if they see other health team members doing this, they were to reflect on and address their own practice and values that impact on nursing care in relation to the health consumer's age, ethnicity, culture, beliefs, gender, sexual orientation and disability, and they must maintain a high standard of professional and personal behaviour, including when they use social media and electronic forms of communication.

Ms Turner claimed that Te Whatu Ora had no substantive reason to justify summarily dismissing her and that this was preceded by an unjustifiable suspension effected in a procedurally unfair manner. She also claimed that Te Whatu Ora acted in a discriminatory manner and ignored her rights to privacy and freedom of expression. Ms Turner's claims to the Employment Relations Authority (the Authority) were unsuccessful and she sought a determination from the Employment Court (the Court).

On review, the Court found Ms Turner had a genuine opportunity to respond to the proposed suspension and the suspension was justified substantively in the circumstances. The Court also found the process that led to Ms Turner's dismissal was procedurally justified.

The statements that Ms Turner made on her Facebook page, both in respect of Muslims and on the issue of vaccination, ran directly contrary to the interests of Te Whatu Ora. Te Whatu Ora, quite understandably, had policies in place to ensure that its staff respected the rights, interests and diversity of their colleagues and health consumers; worked harmoniously and courteously with others; and avoided activities, work or non-work related, that may harm the reputation of Te Whatu Ora or the state services. The evidence showed that Te Whatu Ora was open to hearing Ms Turner's feedback but she could not give Te Whatu Ora confidence that her behaviour would not be repeated in the future. She lacked understanding on the gravity of the posts and showed no regret for having posted them. In those circumstances, not only was the conduct serious misconduct, but there was also no basis for Te Whatu Ora to find any mitigation in the comments made by Ms Turner at the meetings. The decision to dismiss Ms Turner was justifiable. It was one that was open to Te Whatu Ora as a fair and reasonable employer.

Ms Turner asserted her rights to freedom of thought, conscience and religion, and to freedom of expression. She referred to sections 13 and 14 of the New Zealand Bill of Rights Act 1990 (BORA). The Court did not accept, however, that the BORA applied to employment decisions, even if made by public entities or entities operating in the public sector that happen to perform a public function. This is because employment does not involve the "*performance of any public function, power or duty*". Employment matters were ancillary to Te Whatu Ora's public functions, and more properly governed by the principles of general private law. In any event, the rights under the BORA are not absolute; they are subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Even if the BORA applied, the rights contained within it do not protect everything that an employee might say, particularly if it is contrary to the interests and actions of the employer. The Court found that Ms Turner could not use the BORA as a shield to protect herself from the consequences of her statements.

The Claim was unsuccessful and no remedies were awarded. Te Whatu Ora was entitled to costs and the parties were encouraged to come to an agreement.

Turner v Te Whatu Ora Health New Zealand (formerly Wairarapa District Health Board) [[2023] NZEmpC 158; 21/09/23; Holden J]

Employment Relations Authority: Four Cases

Successful claim for leave payments and penalties for not paying employee leave

Ms Kaur worked for Mr Gergoz in his kebab store from January 2016 to August 2021. When she left her employment, she said that Gergoz Limited, her employer, and Mr Gergoz, did not pay her what she was owed under the Holidays Act 2003 (the Holidays Act).

Her representative wrote to Gergoz Limited requesting payment of Ms Kaur's entitlements, and wage and time records in accordance with the Employment Relations Act 2000 (the Act), and the Holidays Act. Gergoz Limited and Mr Gergoz did not respond. When contacted, the accountant for Gergoz Limited stated he had advised Mr Gergoz to pay what was owed to Ms Kaur, but that he was otherwise unable to progress the matter. Ms Kaur then received payments of $1,500, $1,000, and $1,000. She received no response to her other claims or the request for wage and time records.

Ms Kaur then brought her claims against Gergoz Limited to the Employment Relations Authority (the Authority). The claims were for payment of annual leave entitlements payable on the termination of employment, payment for certain public holidays worked at the rate of time-and-a-half, payment for alternative holidays, interest on unpaid moneys, penalties for failures to produce wages and time records on request, failures to pay holiday entitlements when due, and costs. She also claimed that Mr Gergoz was a person involved in a breach and sought orders that any arrears awarded to her that were not paid to her by the company, should be payable by Mr Gergoz in his personal capacity.

Neither Gergoz Limited, nor Mr Gergoz, responded to the claims or attended the scheduled investigation meeting. The Authority proceeded on the basis it was satisfied that Gergoz Limited and Mr Gergoz were made aware of the claims against them and of the investigation meeting.

Ms Kaur worked in the kebab store six days per week, from 11am until closing at 10pm. She said Mr Gergoz was responsible for setting her hours of work and paying her wages. Ms Kaur should have been paid on a weekly basis, but she said that her pay was often late by a couple of days and sometimes late by up to three weeks. She routinely worked on public holidays and gave evidence that the shop was open all the time, including Christmas Day. The only public holidays she did not work were any holidays that fell on her Sundays off, and any holidays that fell while she was taking leave. Ms Kaur said she asked Mr Gergoz about additional payment for working on public holidays, and at first, he asked what that was. He then said that he did not believe in that stuff, and he did not pay attention to it.

During her employment, Ms Kaur took three periods of annual leave. These were four weeks in 2017, four weeks in 2019, and six weeks in 2020 to fly to India to visit her family. She asked Mr Gergoz for time off in advance, and about holiday pay, and he told her that she did not get holiday pay. That was despite Ms Kaur's employment agreements providing for annual leave in accordance with the Holidays Act. During her periods of annual leave, Ms Kaur was unpaid. When Ms Kaur's employment came to an end her payslip showed a final pay of $4,235.76 in holiday pay. Her bank statements showed that it was not in fact paid to her. Ms Kaur said that over October and November 2021, Mr Gergoz paid an additional $3,500 into her bank account without otherwise contacting her or her representative. The Authority found that Ms Kaur was successful in her claims.

Gergoz Limited was ordered to pay Ms Kaur $19,604.24 for annual leave owing at the end of her employment, $5,724.00 for work done on public holidays, $11,448.00 for alternative holidays not taken, $1,810.08 without deduction, being interest on unpaid monies. Additionally, a payment of $7,500 was ordered to be paid to Ms Kaur as part of penalties for breaches of the Holidays Act and the Act, with a further $2,500 to be paid to the Crown Account. Mr Gergoz was found to be a person involved in a breach of the Act and so if Gergoz Limited defaulted in the payment of wages or other money due to Ms Kaur in accordance with the determination, then any shortfall could be personally recovered from Mr Gergoz. Costs were reserved.

Kaur v Gergoz Limited [[2023] NZERA 358; 06/07/23; C English]

Personal grievances found not to be vexatious or frivolous

Ms Rebecca and Ms Christina Nyberg (the Nybergs) raised various personal grievances against their former employer, Tai Tapu Hotel Limited (Tai Tapu) including an alleged unjustified dismissal by reason of redundancy. The employment of the Nybergs ended in May 2020. Tai Tapu denied all claims and sought that they be dismissed as out of time, frivolous and/or vexatious.

Ms Rebecca Nyberg commenced employment in April 2018, initially working in Tai Tapu's bar and restaurant as a duty manager then shortly thereafter as a functions and restaurant manager. Tai Tapu's director claimed Ms Rebecca Nyberg resigned in February 2020. Ms Rebecca Nyberg claimed the director dismissed her on two separate occasions in November 2019 and February 2020. They then agreed for her to return to work for Tai Tapu in early March 2020 for 25 hours per week. She was then made redundant with effect on 10 May 2020 due to the negative impact of COVID-19 on the business.

Ms Christina Nyberg started working for Tai Tapu in October 2019, progressing to become a 'front of house' duty manager. The employment ended when she was also made redundant on 10 May 2020.

The Employment Relations Authority (the Authority) set aside the matter of whether the grievances should be heard out of time. It focussed its attention on the narrow issue of whether the claims against Tai Tapu were frivolous and/or vexatious and potentially should be dismissed pursuant to the Employment Relations Act 2000 (the Act).

Tai Tapu suggested the Nyberg sisters were not truthful in their account of the facts and had no basis for their claims. It was also alleged that over the previous three years, the sisters did not constructively engage in resolution attempts. Tai Tapu believed the claims were being advanced to impugn the reputation of Tai Tapu and its Director.

The Authority found that the totality of the documentation before it at this stage, did not dissuade them from the need to explore matters further by exchanges of evidential briefs and oral evidence at an investigation meeting. The Authority had no cause to consider the claims to be frivolous or vexatious and ruled that Tai Tapu's claim to dismiss failed.

The Authority undertook to contact the parties shortly to progress the matter regarding dealing with progressing the Nyberg sisters' application to have their claims dealt with out of time pursuant to section 114(3) of the Act. Costs were reserved.

Nyberg and Anor v Tai Tapu Hotel Limited [[2023] NZERA 355; 04/07/2023; D Beck]

Decision to terminate employment found to be procedurally sound

In July 2020, UCF joined B Limited as the general manager of HR. The company owned and operated a manufacturing business with operations in New Zealand and in the Pacific Islands. It employed approximately 1500 staff. It was a group member of C Limited, which was headquartered in Australia. C Limited had a comprehensive code of conduct which it described as a foundational policy. It also had a diversity and inclusion policy and social media policy.

On 26 October 2022, Ms A telephoned her direct manager at C Limited. The manager's notes of the conversation said Ms A advised she had been messaging UCF for a few months but reported that their interactions had started to make her feel uncomfortable and she asked UCF to give her space, and that he agreed to that. Ms A said UCF kept trying to engage with her but she started to ignore his messages, and that he was often viewing her LinkedIn profile. After receiving further information about the matter, C Limited engaged a senior associate from an Australian law firm to conduct an investigation. In mid-November 2022, the Chief Executive of C Limited instructed the investigator to further investigate and a draft allegation letter was prepared.

On 17 November 2022, the Chief Executive arranged for B Limited's counsel to accompany him to what would otherwise have been a scheduled monthly catch-up meeting with UCF. At this meeting, the allegation letter and evidence were provided to UCF, and he was advised an investigation would be undertaken. He was advised that if some or all of the allegations were substantiated, the conduct may be regarded as serious misconduct and could justify dismissal without notice.

On 18 November 2022, UCF responded to the allegation letter. He said he was acutely aware of his position within C Limited, hence his "*extreme caution*" in establishing this as a non-work friendship in which work was not discussed. He believed Ms A had no concerns about a power imbalance between them, with no fear of his position due to her openness and the content of her messages. UCF said he went to some lengths to keep the interactions not associated to work and regularly checked in if Ms A was okay. Further unsolicited letters were provided by UCF on 21 and 22 November 2022.

The investigator met with UCF on 23 November 2022 and then with Ms A on 29 and 30 November 2022. A draft report was prepared for C Limited on 6 December 2022 which was then shared with UCF and he was asked for his response. On 8 December 2022, UCF made a personal disclosure to the Investigator which was followed up by more written feedback on 12 December 2022. On 15 December 2022 UCF was provided with a copy of the final report which set out a number of breaches of the company's code of conduct.

A discipline meeting was held on 19 January 2023. After considering the feedback from UCF a decision was made to terminate his employment without notice on 25 January 2023.

UCF raised a personal grievance alleging that B Limited's investigation and disciplinary process was procedurally flawed and the dismissal substantively unjustified leading to his unjustified dismissal. He sought reinstatement,

reimbursement of lost wages, compensation for loss of benefits, interest and compensation for humiliation, loss of dignity and injury to feelings. UCF also sought a penalty for an alleged breach of good faith and non-publication orders relating to his identity. B Limited agreed to retain UCF on the payroll so the motion for reinstatement was removed. The Employment Relations Authority (the Authority) decided to give urgency to this matter.

In its deliberation, the Authority considered UCF's criticism of the investigator and her methods. The Authority observed that while there were some aspects in the investigation which an expert New Zealand-based workplace investigator may not describe as best practice, those aspects did not result in any discernible unfairness to UCF.

With regard to procedural fairness, the Authority observed that when considering the investigation and disciplinary process as a whole and in context, the Authority was satisfied B Limited carried out a procedurally fair process. The Authority was satisfied it was within the range of reasonable responses, and after considering the investigation report and hearing from UCF on 19 January 2023, for B Limited to conclude UCF's actions amounted to a serious and sustained breach of his obligations. The Authority concluded the decision to dismiss was one a fair and reasonable employer could have made in all the circumstances at the time the dismissal occurred. Costs were reserved.

UCF v B Limited [[2023] NZERA 362; 07/07/2023; S Blick]

Employer and director breached minimum employment standards and failed to provide records

A Labour Inspector brought claims of breaches of minimum employment entitlements against MAH Enterprises Limited (MAH), a construction company solely directed by Mr Herbert. The Inspector also sought for Mr Herbert to be joined to the proceeding, which could result in him being personally liable for the breaches. The Authority considered if MAH and Mr Herbert caused breaches and would receive penalties.

In May 2021, a MAH employee reported that he did not receive payment for his annual holidays. The Labour Inspector requested information from MAH on its employees and their payment. Mr Herbert provided a list of employees on 21 September 2021. This contained only one current employee and seven past employees and did not include the relevant complainant. He provided four employees' employment information in November 2021, some incomplete. He also gave a USB that had a virus and was inaccessible. Mr Herbert said his computer was stolen and that the Napier floods impacted his obligation to provide further documents but did not provide information on this. The Labour Inspector advised what information was missing and gave Mr Herbert an opportunity to provide it. He did not respond or sought extended deadlines that he missed.

The Labour Inspector completed a report on 14 March 2022 of breaches by MAH. The Inspector confirmed MAH failed to keep wage, time, holiday and leave records, and a current list of employees. It incorrectly paid out 13 employees' annual leave with their pay when they were permanent staff, so these employees did not receive their annual leave entitlements. Finally, one employee's fixed-term employment agreement contravened the law, by not including the way employment would end or the reasons for ending employment. Additional issues were that the wage and time records did not contain the detail to prove MAH had complied with law, and that MAH's payslips did not provide core information on the employees' employment, where it gave them at all.

The Employment Relations Authority (the Authority) accepted these breaches and MAH's failure to provide records. It decided to impose penalties that punitively condemned the behaviour, to enforce employment duties and employees' entitlements and promote good faith. MAH committed 42 breaches, but the Authority globalised these down to the four types of breaches involved. It considered these breaches serious, being ongoing systemic failures from MAH rather than isolated incidents. They were aggravated by the employees being vulnerable migrants, who also were tied to MAH for accommodation, causing a distinct power imbalance. MAH's record-keeping breaches prevented the Labour Inspector from assessing whether MAH met employment standards, or even whether theInspector had found all the breaches. Therefore, it took the maximum of $20,000 per company breach and set the penalty at a high 80 per cent, resulting in MAH being liable for $64,000.

The Authority also found Mr Herbert to be directly involved in the breaches. He achieved the criteria of having knowledge of the essential facts. He solely directed MAH, handling record keeping and payroll. He signed the employment agreements, was on the documents as Work Site Manager, and employees only reported to him. He also signed variations to these agreements, like applications for visa extensions. Based on this involvement, the Authority applied the same 80 per cent calculation to the possible $10,000 per breach, resulting in Mr Herbert being liable for $32,000.

The Authority could reduce the penalties by considering ameliorating factors and liable parties' ability to pay. It found that Mr Herbert should have been familiar with employment standards, due to directing other current and past companies, and being involved in three previous Authority hearings. Because MAH and Mr Herbert did not participate in the hearing and submit anything, the Authority had no information for assessing if they had an ability to pay. This meant it did not calculate any reduction.

The Authority considered if any amount of the penalties should be paid to the employees. It decided based on it not being able to accurately calculate arrears, and the employees' suffering from sporadic payment of wages, that the Labour Inspector would divide half the total penalty between the 14 employees proportionately, based on full months worked for MAH. The Inspector would try to contact all employees for the six months of the Authority's decision, then apportion any remaining penalty to those the Inspector successfully contacted. Costs were reserved.

Labour Inspector v MAH Enterprises (Fiji) Limited [[2023] NZERA 360; 6/07/2023; S Kennedy-Martin]

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: Twelve Bills

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

Family Proceedings (Dissolution For Family Violence) Amendment Bill (20 October 2023)

Electoral (Lowering Voting Age For Local Elections And Polls) Legislation Bill (20 October 2023)

Victims Of Sexual Violence (Strengthening Legal Protections) Legislation Bill (20 October 2023)

Victims Of Family Violence (Strengthening Legal Protections) Legislation Bill (20 October 2023)

Ram Raid Offending And Related Measures Amendment Bill (20 October 2023)

Employment Relations (Protection For Kiwisaver Members) Amendment Bill (30 October 2023)

Whakatōhea Claims Settlement Bill (31 October 2023)

Inquiry into seabed mining in New Zealand (1 November 2023)

Inquiry into climate adaption (1 November 2023)

Hauraki Gulf / Tīkapa Moana Marine Protection Bill (1 November 2023)

Fair Digital News Bargaining Bill (1 November 2023)

Emergency Management Bill (3 November 2023)

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

Employer Bulletin

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Friday, 27 October 2023

In this Issue:

Case Law

Employment Relations Authority: Five Cases

Application for interim reinstatement failed

Ms Yang was employed by the Northland District Health Board, now called Te Whatu Ora Te Tai Tokerau (Te Whatu Ora), from November 2006 until March 2023 when she was dismissed. Ms Yang alleged she was unjustifiably disadvantaged from a breach of good faith through the implementation of an unreasonable training/performance management process and by Te Whatu Ora unjustifiably suspending her. She also alleged she was unjustifiably dismissed. Ms Yang applied to the Employment Relations Authority (the Authority) for interim reinstatement. Te Whatu Ora denied Ms Yang's claims and opposed her application. The determination dealt only with Ms Yang's application for interim reinstatement.

Ms Yang worked in the Whangārei Hospital Medical Laboratory. In January 2020, the laboratory services were restructured, and Ms Yang commenced work as a Medical Laboratory Scientist (MLS) working within the microbiology department. In November 2021, the new head of the department of microbiology had an informal meeting with Ms Yang and proposed to offer Ms Yang additional training, which she declined. In April 2022, Ms Yang was informed via email that a training plan would be established, which was confirmed in June 2022. Ms Yang alleged that Te Whatu Ora did not consult with her regarding the implementation of the training plan or its structure. From June to December, Ms Yang underwent an extensive structured training plan to achieve competency sign-off from the heads of departments in their discipline. At the conclusion of the training plan, Ms Yang was signed off in only two of the eight sections she needed to complete.

Ms Yang was invited to an investigation meeting to discuss a range of issues, including her competency levels. Te Whatu Ora alleged that at the meeting Ms Yang agreed for her training records to be reviewed by a consultant clinical microbiologist. Ms Yang said she was instructed to stay away from work and was not consulted about being stood down. She alleged she was unjustifiably suspended.

The review of Ms Yang's training records stated that although the training was appropriate, Ms Yang failed to achieve competency in any of the fields that were required to work as an independent scientist in microbiology or in an unsupervised role. In February 2023, Te Whatu Ora communicated its preliminary decision to terminate Ms Yang's employment. The parties met before the decision to terminate Ms Yang's employment was confirmed. Ms Yang alleged the lack of communication, and continued failure to warn her that punitive action may occur at the conclusion of the training plan, was a breach of Te Whatu Ora's duty of good faith to her.

The first question for consideration was whether Ms Yang had an arguable case that she was unjustifiably dismissed and that she would be permanently reinstated. The Authority accepted that Ms Yang had an arguable case that Te Whatu Ora did not act as a fair and reasonable employer could have done with respect to the question of redeployment. This could render her dismissal unjustified. However, the case was not a particularly strong one because it was not entirely clear whether Ms Yang would have reached the required competency levels even with further training.

Consideration on the balance of convenience required an assessment regarding the impact on each party if interim reinstatement was granted. The Authority's preliminary view was that the claim of unjustified dismissal was not strong but was arguable, however, the claim for permanent reinstatement was weak. That weighed against interim reinstatement when assessing the balance of convenience. The Authority accepted the impact on Ms Yang the longer she was not working and also considered the potential disruption for Te Whatu Ora if interim reinstatement was granted. To have Ms Yang reinstated, it was made clear that the process would not only be expensive, but time-consuming and would put a strain on limited resources. The Authority found that the balance of convenience weighed in favour of Te Whatu Ora. In relation to the overall justice of the case, the Authority considered an order for interim reinstatement was not in the interests of justice.

The Authority was satisfied that there was a serious question to be tried regarding whether Ms Yang was unjustifiably dismissed by Te Whatu Ora. However, Ms Yang had established a very weak case for permanent reinstatement. The balance of convenience and overall justice did not support Ms Yang being permanently reinstated. Ms Yang's application for interim reinstatement was not successful. Costs were reserved pending the outcome of the substantive investigation of Ms Yangs's grievance application.

Yang v Te Whatu Ora – Health New Zealand Te Tai Tokerau (Northland) [[2023]; 27/07/23; A Gane]

Outcome of breach of contract claim

In a previous determination from the Employment Relations Authority (the Authority), Ms McDonald was found to have breached the terms of her employment agreement when she tendered invoices to KML (her employer) under the name of a company of which she was the sole director and shareholder. The invoices included a claim for GST input credits, which could not be claimed under the employment agreement between Ms McDonald and KML. Because the claim was made under the name of a different entity, KML did not know about the breach at the time it was made.

In response, KML voluntarily approached and discussed the issue with the Inland Revenue Department (IRD) and took steps to unwind and rectify the tax implications of the invoices. KML sought compensation for the costs incurred in dealing with Ms McDonald's breaches of the employment agreement.

Following past case law, the general principles that apply for damages claims include the following. First, damages are intended to compensate an injured party that has suffered loss. Second, injured parties are not entitled to a windfall; respondents should only be held liable for what can convincingly be said to be the results of their conduct, and the onus is on the injured party to prove the extent of their loss on the balance of probabilities. The objective of paying damages would be to put KML in the position it would have been in had Ms McDonald not breached her employment agreement.

KML sought an award for damages of $11,077.50, representing accounting fees incurred during their investigation into Ms McDonald's conduct. Ms McDonald argued that the steps taken by KML to rectify the consequences of her conduct were unreasonable. She believed only 3.5 hours was necessary to properly investigate the matter.

The Authority decided that it was reasonable for KML to take Ms McDonald's breaches seriously once they were discovered. It was not unreasonable to hire outside experts to help conduct multiple investigations and make the necessary rectifications. The Authority noted that it was uncertain whether KML could have hired outside experts at a lesser rate and held that Ms McDonald could not be expected to pay for costs that may have been secured at a lesser rate. To account for that, it decided to award KML $8,000 as compensation for costs incurred rectifying the consequences of Ms McDonald's conduct.

KML also sought an award for legal fees worth $2,250. Because it was likely that the time spent with lawyers would not have focused solely on the issues relating to Ms McDonald, the Authority decided to award $500 compensation. KML then went on to claim $17,645.41, which was the amount paid to the IRD by KML to rectify Ms McDonald's breaches. Ms McDonald argued that because KML delayed in addressing the issue, she should not be liable for all the costs incurred, considering the delay. The Authority held that Ms McDonald had not sufficiently proven that KML's delay increased the costs payable to the IRD and decided that she was liable for the entire $17,645.41 claimed. Costs were reserved.

Kevin McKerrow Limited v McDonald [[2023] NZERA 375; 17/07/23; M Urlich]

Claim for unjustified disadvantage found to be lodged within statutory timeframe

Mr Jeffery was initially engaged by Appliances Galore & More Limited, trading as Refresh Appliances (Refresh), by way of a letter of offer dated 27 October 2021. This letter described the role as "*Trainee Service Technician, Sales, Promotion, Customer Acquisition"*. The prime intent of the role was expressed as to "*support Mr Jeffery's Electrical Certification and Training"*. However, the description of the role also envisaged Mr Jeffery would be trained in Refresh's product, sales and systems, customer acquisition and promotion work. Mr Jeffery disclosed he had just been accepted into an electrical engineering pre-trade course at a local tertiary trade training provider (Ara) that he envisaged commencing in mid-October 2021. He began work for Refresh around 10 January 2022 and signed an employment agreement on 17 February 2022, which included a position description and the job title: "*Sales, Service, Promotion, Sales Support".*

During the first six weeks, Mr Jeffery was expected to "*gain competency in each facet of the position requirements*" (that were not set out in the job description). The second six weeks was described as a "*consolidation period*" in which Mr Jeffery was to "*demonstrate and maintain the level of competency required"*. Thereafter, Mr Jeffery was expected to be fully trained. To achieve these stated objectives, the agreement noted regular appraisal meetings would occur and that full training would be given.

In March 2022, Mr Jeffery raised concerns with Mr Carpenter, Refresh's sole Director, about the lack of service work he had been given. He noted he had only completed around one hour's service work in seven weeks. He also set out that Ara had declined to allow him to continue with his "*level 3 electrical engineering theory course*" for "*lack of engagement*". Mr Jeffery was then given work in the company's workshop. However, there was no structured learning with qualified personnel.

Matters deteriorated until, in August 2022, Mr Jeffery, in an email exchange with Mr Carpenter, indicated he was no longer available for work due to his return to studies. No further contact occurred until Mr Jeffery became aware that his student allowance application had been declined on the ground he had not completed over 50 per cent of his previous study course.

On 14 August 2022, Mr Jeffery raised a personal grievance with Mr Carpenter. The remedy initially identified that Mr Jeffery was seeking reimbursement of his lost student allowance. The correspondence concluded with reference to him having previously raised issues of the lack of training by appropriately qualified people during his employment at

Refresh. Broadly, the issues concerned were a suggestion that the job was misrepresented to him, or he was misled. Once he began, he said he was given insufficient time and technical support to pursue his expressed goal of advancing his trade qualification and that led to him resigning. By contrast, Refresh maintains that before engaging in technical training, Mr Jeffery had to satisfactorily demonstrate a knowledge of Refresh's sales and promotional procedures and that he was later provided with support in technical areas. Refresh contended that Mr Jeffery "voluntarily" resigned to pursue his trade qualification at a tertiary provider and therefore Mr Jeffery was not disadvantaged in his employment. Refresh further contended that Mr Jeffery had not identified a viable cause of action and that the claims advanced are frivolous and should be struck out as lacking legal merit.

The parties were not able to resolve the matter through mediation and Mr Jeffery then filed an application with the Employment Relations Authority (the Authority) alleging unjustified disadvantage.

The first task for the Authority was to determine if the grievance had been raised within the statutory timeframe. In considering the evidence, it was apparent that Mr Jeffery used the employment problem resolution process in his employment agreement, and he properly identified his issue as access to training by a qualified person. Mr Jeffery first raised the issue in writing with Mr Carpenter on 15 March 2022. The Authority found the grievance had been raised within the statutory timeframe.

In considering the motion to dismiss the claim, the Authority, after reviewing substantive issues and having had the ability to question both parties and examine documentation, concluded Mr Jeffery's case was not trivial and could not be dismissed. The parties were directed to further mediation. As Mr Jeffrey was not represented and was the successful party, there was no issue as to costs.

Jeffery v Appliances Galore & More Limited T/A Refresh Appliances [[2023] NZERA 366; 11/07/23; D Beck]

Personal grievance raised successfully considering the totality of communications by employee

Matthew Biddle was employed by iDesign Architecture NZ Limited (iDesign) from 11 October 2021. In July 2022, following the publication of a newspaper article naming Mr Biddle, it came to iDesign's attention that Mr Biddle had been involved in proceedings before the Employment Relations Authority (Authority) relating to a previous employment relationship that was not listed on his curriculum vitae (CV) when applying for his role at iDesign. iDesign commenced an investigation process, and ultimately Mr Biddle was summarily dismissed from his employment on 2 August 2022. Mr Biddle claimed that he was unjustifiably dismissed.

On 28 July 2022, Mr Biddle sent an email to iDesign expressing concerns about the conduct of a meeting he had attended earlier that day. He asserted the conduct was unfair and raised issues relating to representation and breach of good faith. The next day, iDesign communicated its preliminary decision that the allegations were substantiated and amounted to serious misconduct, and that Mr Biddle should be dismissed without notice. On 1 August 2022, Mr Biddle responded to iDesign's preliminary findings, further raising procedural concerns regarding the investigation and disciplinary process in some reasonable level of detail. On 2 August 2022, Ms Carleton, general manager, communicated iDesign's final decision that Mr Biddle was summarily dismissed to him.

A preliminary issue in the case was whether Mr Biddle had raised the personal grievance within the 90-day period as required by section 114 of the Employment Relations Act 2000 (the Act). iDesign submitted that Mr Biddle did not raise a personal grievance within the 90-day period, which expired on 31 October 2022. Mr Biddle submitted he did raise the grievance within the required 90-day period and relied upon a text message sent on 2 August 2022, correspondence sent on 4 August 2022, and his submitting a request for mediation on 5 August 2022 to support his claim.

To determine this matter, the Authority considered whether any communication in isolation raised a personal grievance and if not whether a personal grievance was raised having regard to the *"totality of the communications".* The Authority found that although Mr Biddle's email of 2 August 2022 contained some content reflecting disagreement, the substance of the matter being raised was unclear. The email did not raise a personal grievance and instead only indicated that a personal grievance may be raised in the future.

After his email on 4 August 2022, however, it was clear that Mr Biddle had raised issue with an assertion made by iDesign regarding the design plans, and more broadly regarding the fairness of the dismissal. Mr Biddle did not elaborate on his asserted unfairness in the email but did advise iDesign that he was going to lodge an application for "*unfair*" dismissal and that he would be taking the matter further. The Authority did not accept that the reference to future lodgement of application meant that Mr Biddle was not raising a personal grievance. In fact, the suggestion that an application would be lodged in the future, viewed objectively having regard to the context, indicated that a grievance had been raised, or at least that Mr Biddle thought it had, and that further action would be taken to progress it.

The Authority concluded that by sending the email of 4 August 2022, Mr Biddle had taken reasonable steps to make iDesign aware that he had a personal grievance that he wanted it to address. It was sufficient that Mr Biddle had raised his disagreement with at least one factual finding relevant to the dismissal. Mr Biddle had also raised the issue with the procedural steps taken by iDesign during its investigation prior to the dismissal. Further, Mr Biddle's indication that an application would be made for unfair dismissal was found to have put iDesign on notice that Mr Biddle considered he had been unjustifiably dismissed and wanted iDesign to address his concerns that the dismissal was unfair.

Additionally, iDesign's response to Mr Biddle's email on 4 August 2022 was in effect iDesign defending the steps they had taken in dismissing Mr Biddle. Mr Biddle's request for mediation also put iDesign on notice that Mr Biddle considered his dismissal unfair, had issues with both iDesign's substantive findings and procedure and wanted these issues addressed. After considering the totality of the communication, the Authority found Mr Biddle raised a personal grievance for unjustified dismissal within the statutory 90-day period. Costs were reserved pending consideration of Mr Biddle's claim of unjustified dismissal.

Mathew Biddle v Idesign Architecture NZ Limited [[2023] NZERA 361; 07/07/23; R Anderson]

An employer's failure to discuss changes disadvantaged employee

Ms Zhang was employed by Health New Zealand - Te Whatu Ora (Te Whatu Ora) as a senior financial analyst. She worked in the analytics and insights division providing accounting and analyst services to an operational team. Te Whatu Ora wanted Ms Zhang to change where she worked to the corporate and compliance services team in centralised tasks. Ms Zhang said the work she did for a division is fundamentally different to the work performed in centralised tasks.

Ms Zhang opposed the change and sought orders from the Employment Relations Authority (the Authority) to prevent it permanently. She also sought a finding that actions by Te Whatu Ora unjustifiably disadvantaged her in her employment and that Te Whatu Ora breached the duty of good faith.

Te Whatu Ora said the change was within the contemplation of the parties' individual employment agreement and job description and it had acted fairly and reasonably towards Ms Zhang. Ms Zhang's primary submission was the change amounted to a unilateral variation to her employment agreement. Te Whatu Ora suspended the change pending the Authority's determination of the employment relationship problem.

The Authority confirmed that an employment agreement cannot be unilaterally varied. The question was whether the proposed change was within the terms of the parties' employment agreement. The Authority considered the employment terms and referred to the words in the position description "*that functions, duties, and responsibilities may be changed from time to time by the employer, after discussion with you, in order to meet its operational requirements".*

Te Whatu Ora emphasised the change was motivated by an issue of fit and it had no concerns about Ms Zhang's work performance. The change was first raised with Ms Zhang on 23 May 2022 in a telephone call with Mr Hix, her manager. Ms Zhang said he told her the business partners were not happy because month-end reporting packs had not been delivered. He asked why. But before she could explain, he said she was to change to a role in the corporate and compliance team. Mr Hix's recollection of the conversation was different. He said they discussed the reasons for the

late return of the month-end reporting packs and the change being necessary because in his opinion the relationship with the division business partners and Ms Zhang was not working well and she would benefit from the support he could provide her if she was working more closely with him. He said the call ended with him suggesting a meeting to discuss the change in more detail.

The Authority said the conversation between Mr Hix and Ms Zhang did not discharge Te Whatu Ora's obligation to discuss the change. Given the contractual requirement to discuss a change to meet operational needs, Te Whatu Ora was obliged to engage Ms Zhang in a more careful conversation that identified the issue, proposed a resolution in the context of the needs of the organisation and sought Ms Zhang's comment. Such a discussion could have avoided Ms Zhang understanding the change was proposed due to a hidden performance concern, or at least meant Te Whatu Ora could have satisfied its contractual obligation in the face of Ms Zhang's opposition to the change.

The Authority discussed whether an order be made preventing Te Whatu Ora from making the intended change and said the effect of such an order would be to freeze Ms Zhang's functions, duties and responsibilities. The order would be inconsistent with both the terms of the parties' employment agreement and the ongoing nature of the employment relationship. The order sought was declined.

The Authority determined Te Whatu Ora could make changes to Ms Zhang's functions, duties and responsibilities within the scope of the employment agreement and the job description if the changes were first discussed with Ms Zhang and met its operational requirements.

The Authority considered whether the actions of Te Whatu Ora unjustifiably disadvantaged Ms Zhang in her employment. Te Whatu Ora was obliged to discuss a change in functions, duties, and responsibilities with Ms Zhang but did not do so. The flaw was at the heart of the employment relationship problem. There was no doubt Ms Zhang had concerns about the change and she was entitled under the express terms of her employment agreement, read through the lens of good faith, to discuss those concerns with Te Whatu Ora. It was clear to the Authority that Ms Zhang was profoundly upset by the situation and the circumstances of her personal grievance had a negative impact on her. The Authority ordered Te Whatu Ora to pay Ms Zhang $10,000 in compensation.

The Authority declined Ms Zhang's claim for a penalty for breach of the duty of good faith. It was also noted that her actions in secretly recording a meeting she had agreed to attend for the purpose of advancing an issue between the parties was not consistent with good faith obligations. Costs were reserved.

Zhang v Health New Zealand-Te Whatu Ora [[2023] NZERA 363; 10/07/23; 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: Seven Bills

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

Employment Relations (Protection for Kiwisaver Members) Amendment Bill (30 October 2023)

Whakatōhea Claims Settlement Bill (31 October 2023)

Inquiry into seabed mining in New Zealand (1 November 2023)

Inquiry Into Climate Adaptation (1 November 2023)

Hauraki Gulf / Tīkapa Moana Marine Protection Bill (1 November 2023)

Fair Digital News Bargaining Bill (1 November 2023)

Emergency Management Bill (3 November 2023)

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/

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Employer Bulletin

Our Weekly News Digest for Employers

Friday, 3 November 2023

In this Issue:

Case Law

Employment Court: One Case

Interim injunction ordered against strike action by essential workers

On 15 September 2023, the Employment Relations Authority (the Authority) made an order that an interim injunction be issued restraining the New Zealand Public Service Association. Te Pūkenga Here Tikanga Mahi Inc and New Zealand Nurses Organisation Inc (the Unions) notified strike action for 15 September 2023, in relation to the roles of emergency teletriage paramedic, emergency teletriage nurse and Early Mental Health Response (EMHR) clinician.

On 6 September 2023, the Unions each notified Whakarongorau Aotearoa New Zealand Telehealth Services LP (Telehealth) of a strike scheduled to take place on 15 September 2023. On 12 September 2023, Telehealth emailed the union, identifying the employees engaged in the EMHR team who Telehealth considered were providing life preserving services under the Employment Relations Act 2000 (the Act). Telehealth proposed that those employees rostered to work should continue to provide life preserving services.

Between 12 September and the morning of 13 September 2023, correspondence was exchanged between the parties in which the Unions disagreed that the particular employees noted were engaged in life preserving services. On 13 September 2023, the parties met but were unable to agree on a contingency plan for life preserving services.

Telehealth initially applied for an interim injunction preventing 34 staff who worked as emergency teletriage nurses at all levels of seniority, emergency telegriage paramedics at all levels of seniority, and EMHR nurses/clinicians at all levels of seniority, from undertaking strike action.

The Court had jurisdiction to determine proceedings issued for the grant of an injunction to stop a strike under the Act if there was an arguable case. Where the interim application would effectively dispose of the defendants' substantive right to strike on the basis of notices already issued, or about to be issued, something more than a barely arguable case was required. The Court must then consider where the balance of convenience lay. Finally, it must make an assessment of the overall justice of the situation following analysis of the first two issues.

The Authority considered whether Telehealth established that there was an arguable case that the strikes would be illegal in relation to the particular categories of the workers. This turned on whether the work undertaken by them was an essential service under the Act. Telehealth submitted that because the employees were employed in an essential service, they were required to give 14 days' notice of strike action. Only eight days' notice was given of the strike action.

The Unions argued that the services provided by Telehealth in relation to those roles were not essential services for the purposes of the Act. In relation to the teletriage nurses and paramedics, their position description referred to them working with St John and Wellington Free Ambulance, triaging and deciding the needs of service users. In some cases, they could dispatch an ambulance or refer service users to an emergency department. EMHR clinicians were responsible for assisting service users who contacted the service from police and ambulance services and after-hours services for district health boards. The Authority considered all three kinds of roles came under the definition of an *"essential service"* under the Act.

Fourteen days' notice was not provided pursuant to the Act. On that basis, there was an arguable case that the strike in relation to those particular positions was unlawful. By the time this matter came before the Court, the parties had agreed on an appropriate contingency plan in relation to the provision of life preserving services of the teletriage and the EMHR roles for the period of the strike. Despite this, Telehealth submitted that the balance of convenience favoured the granting of interim orders. This was because there was public interest in parties having 14 days' notice in order to reach agreements in relation to life preserving services and to attend mediation.

The requirements in relation to notice for strikes in essential services are mandatory. Once an essential service status is established, the Act restricts strikes. Further, the impact of the injunction sought was narrow (only 34 of approximately 300 employees). There was no impact on other employees covered by the strike notice. They could continue to strike. Accordingly, the overall balance of convenience favoured Telehealth and the granting of an interim injunction.

The Court's formal order was that an interim injunction be issued restraining the defendants' notified strike action on 15 September 2023, in relation to the roles of emergency teletriage paramedic, emergency teletriage nurse and EMHR clinician. Costs were reserved.

Whangarongorau Aotearoa New Zealand Telehealth Services LP v NZPSA [[2023] NZEmpC 157; 15/09/23; J Beck]

Employment Relations Authority: Four Cases

Shareholders of franchise found to be employees

Mr and Mrs Chauhan and Mr and Mrs Kolluru were introduced to each other by a mutual friend. In July 2020, Mr Chauhan and Mr Kolluru both applied for a franchise agreement with Chicking. In August 2020, SD & SD Investments Limited (SD) was incorporated with those two as directors and each of the four individuals holding a 25 per cent shareholding. SD, with the Kollurus and Chauhans as guarantors, entered into an agreement to lease Taupō premises intended for the store.

On 7 October 2020, a Memorandum of Understanding (MOU) was entered into between the shareholders of SD. This document set out the roles of the Directors and established that all the shareholders could work a maximum of 40

hours per week with a remuneration of $25 an hour, paid fortnightly with strict maintaining of roster hours. No reference was made to an employment agreement.

Once the store opened, Mr Chauhan worked from open until close most days of the week most likely between 10am to 10pm, possibly until midnight on weekends. Mrs Chauhan retained her job at another company, but she claimed to have also worked, in her free hours, at the store.

In 2021, a dispute arose about a capital injection and the business relationship was dissolved. The Chauhans raised a grievance claiming to have been employees of SD. The Kollurus and SD opposed these claims arguing there was a business relationship but not an employment relationship. The Employment Relations Authority (the Authority) was asked to rule on the matter. It was agreed that the preliminary issue of whether Mr Chauhan or Mrs Chauhan were employees of SD would be investigated first.

With regard to Mrs Chauhan, it was not accepted by SD and the Kollurus that she undertook work in the store, whether as an employee or in some other capacity. However, documents referred to as shift time records show her, from the third week after the store opened, working a variety of times. The Authority concluded that Mrs Chauhan did undertake periods of work at the store.

In consideration of Mr Chauhan's employment status, the Authority observed that focus of the employment status assessment included determining whether the business had control over Mr Chauhan or if he had control over himself. Mr Chauhan was the store manager and therefore had quite a lot of control over the day to day running of the store. He made decisions about hiring staff and accepted that he decided how many hours he worked. The Authority observed that Mr Chauhan did not have absolute autonomy since numerous decisions were made by, and in consultation, with the Kollurus. Another factor to consider was the degree to which the Chauhans were integrated into the business. The Authority noted the Chauhans, including Mrs Chauhan while she did work at the store, were integrated in the business, although it was accepted that there were also other motivations for their involvement than an employment relationship.

The Authority considered whether the Chauhans could be seen as volunteers and thus excluded from the definition of employees. The two factors identified in the Employment Relations Act 2000 (the Act) were those who, for their volunteer work, did not expect to be rewarded for work and those who receive no reward for work performed. Given that Mr and Mrs Chauhan were both 25 per cent shareholders in SD it could make sense for them to be volunteers for the business. Their efforts could have been compensated by an increase in the value of the company and withdrawal of amounts up to the annual profit level. This was envisaged in two clauses of the MOU. However, the MOU provided remuneration to shareholders including directors. On that basis, the Chauhans expected to be rewarded for work in the business. The MOU also contained a number of references that suggested an employment arrangement.

The Authority observed that there was a number of factors that did not support an employment relationship. But looking at the totality of the evidence, the Authority concluded that both Mr Chauhan and Mrs Chauhan were employees of SD.

Along with the Chauhans' substantive claims the Authority left two questions to be dealt with later. The first was whether Mr Chauhan's work in addition to the 40 hours was as a volunteer rather than as an employee. The second was whether Mrs Chauhan's employment was of a casual nature. The Authority determined to seek feedback from both parties as to their willingness to participate in further mediation. Costs were reserved.

Chauhan and Anor v SD & SD Investments Limited and Ors [[2023] NZERA 369; 12/07/23; N Craig]

Personal grievance for an unjustified dismissal was raised within the 90-day period

Ms Seymour was employed as a youth worker for Oranga Tamariki in Wairoa from May 2021. Ms Seymour's last day at work was 10 January 2022 and on 25 January 2022 she was issued a letter giving one months' notice of dismissal. The dismissal followed as a result of the introduction of the COVID-19 Public Health Response (vaccinations) Order

2021 (Public Health Order). Ms Seymour chose to remain unvaccinated despite Oranga Tamariki warning her that it could not legally permit Ms Seymour to perform her role.

Ms Seymour claimed she was unjustifiably dismissed, disadvantaged, and coerced by Oranga Tamariki. She also alleged that Oranga Tamariki breached the Health and Safety at Work Act 2015. She sought interim reinstatement which was declined by the Employment Relations Authority (the Authority). Oranga Tamariki said that Ms Seymour did not raise any of her claimed personal grievances within the statutory 90-day period. This determination dealt only with the issue as to whether Ms Seymour raised her claimed personal grievances within the 90-day period as required by the Employment Relations Act 2000 (the Act). The question was whether Ms Seymour made Oranga Tamariki aware, or took reasonable steps to make Oranga Tamariki aware, that she alleged personal grievances that she wanted it to address.

A personal grievance could be raised orally or in writing. There is no particular formulation of words that must be used as it is designed to be accessible. The test is "*whether to an objective observer the communication was sufficient to elicit a response from the employer*". The substance of the grievance must be clear, but the relief sought does not need to be specified. It is insufficient for an employee to only advise that they have a personal grievance. More information must be given so the employer can know what they are responding to.

On 19 November 2021, Ms Seymour wrote to Mr Severinsen, acting regional manager of Youth Justice Central for Oranga Tamariki, recording that she was seeking an exemption from the Director of Health in relation to the Public Health Order. The letter was accompanied by a letter dated 11 November 2021 asking Mr Severinsen to forward a "*conditional acceptance"* to the Minister of Health for an exemption for the vaccination order to be waived on her case. That same day, she received a letter from Oranga Tamariki about the requirements of the Public Health Order and the impact of that in relation to her role.

By letter dated 25 January 2022, Oranga Tamariki wrote to Ms Seymour giving her one months' notice of her termination of her employment from 21 January 2023. The letter also responded to various proposals as an alternative to dismissal. On 10 February 2022, Ms Seymour received a letter from the Ministry of Social Development stating that Ms Seymour's manager had advised that her employment had concluded and detailing Ms Seymour's final pay. On 11 February 2022, Ms Seymour sent an email to Mr Severinsen and another employee of Oranga Tamariki stating that she will be "*filing a Personal Grievance*" regarding her employment. She said that she was "*just giving notice before the ninety days period is up from the 20th of January 2022*" and that she sought to have her "*position and employment reinstated as part of the PG*." She warned that as other world leaders were dropping their mandate to be vaccinated, "*it was only a matter of time that this happens in NZ*."

Mr Severinson emailed back seeking the return of their company equipment and property. Ms Seymour responded that her laptop and phone would be returned after the personal grievance was actioned in court.

The Authority declared that the email dated 11 February 2022 did not establish that she felt disadvantaged in her employment, that she disputed the application of the Public Health order to her role, that she considered Oranga Tamariki to be acting in breach of the Health and Safety at Work Act 2015 or held concerns about coercion. The email only demonstrated that she was against mandatory COVID-19 vaccination but did not raise a personal grievance relating to an unjustified disadvantage, statutory breaches or coercion that she wanted Oranga Tamariki to address.

However, she sufficiently identified the nature of her personal grievance as an unjustified dismissal by referencing reinstatement in the email. From that, it was clear that Ms Seymour wanted Oranga Tamariki to address her concerns. This left no doubt that she raised a personal grievance for an unjustified dismissal, and it was raised within the 90-day period. The parties were encouraged to attend mediation and the Authority scheduled an investigation meeting. Costs were reserved pending investigations into the substantive claims.

Ms Seymour v The Chief Executive of Oranga Tamariki – Ministry for Children [[2023] NZERA 364; 10/07/23; R Anderson]

Successful unjustified disadvantage claim

Ms Wilson worked as a social services worker for Presbyterian Support (Northern) (PSN). Before she decided to resign, several issues had arisen between her and PSN. At the Employment Relations Authority (the Authority) she claimed she had been unjustifiably disadvantaged in multiple ways, as well as unjustifiably dismissed. PSN opposed her application.

Ms Wilson claimed that her privacy was breached when the identities of those who completed an internal staff survey could be easily discerned by her colleagues even though PSN had promised that they were completed anonymously. When Ms Wilson expressed concern about the issue, PSN failed to provide an adequate response. Also, as part of her job, Ms Wilson filed a "*report of concern"* regarding a child who was experiencing abuse and suicidal thoughts to Oranga Tamariki. That child's parents made a formal complaint against Ms Wilson that stated she had inappropriately shared information with a Ministry of Education official before filing the report. PSN decided to address the complaint by pursuing a disciplinary process.

Ms Wilson explained that she had merely been following long established practices within PSN regarding how to file reports. At the outcome meeting, PSN accepted her explanation. However, PSN also set out six "*expectations*" which Ms Wilson was to abide by in the future. Ms Wilson also raised that her colleague, Ms Fairs, had bullied her. When her superior, Ms McLeod, asked for information relating to her bullying claim, she expressly declined to provide it.

The Authority had to determine whether Ms Wilson was unjustifiably disadvantaged. It addressed each of her claims separately. First, she claimed PSN had failed to address her concerns around confidentiality and privacy when the identities of those who completed the internal survey were revealed to staff. The Authority found PSN had failed to adequately address her concerns. It decided Ms Wilson was unjustifiably disadvantaged as PSN had reduced her sense of security in relation to her personal information.

Second, Ms Wilson claimed that following the disciplinary process, PSN had imposed "*adverse outcomes*" which constituted an unjustified disadvantage. PSN argued they had nothing to answer for as they had not given a formal punishment. The Authority found the expectations were, in essence, unilateral variations to Ms Wilson's employment agreement. It decided PSN had failed the statutory test of justification, and unjustifiably disadvantaged Ms Wilson during the disciplinary process.

Third, in relation to Ms Wilson's bullying claim, the Authority decided she was not able to prove PSN had engaged in "*repeated and unreasonable behaviour towards a worker or group that created a risk to health and safety*". There was also no breach of good faith when PSN decided not to attend mediation at Ms Wilson's request. PSN had fulfilled its obligations when they asked Ms Wilson for more information around her bullying claim which she had decided not to provide. It also decided PSN had not acted improperly by starting an investigation into Ms Wilson's bullying claims while she was on sick leave. She was sent a copy of the terms of reference which she commented on, but it was made clear that the investigation would not progress until she was well enough to return to work.

The Authority also had to decide whether Ms Wilson had been unjustifiably dismissed. It found there was no evidence that PSN committed a breach of duty so sufficiently serious that it was reasonably foreseeable that Ms Wilson would resign. Assessing her claim as a whole, it decided Ms Wilson was not unjustifiably dismissed.

Ms Wilson claimed $50,000 in compensation for hurt and humiliation but was only awarded $25,000, which PSN was ordered to pay. Ms Wilson attempted to claim compensation for loss of her entitlement to use of a work car, worth $1,057. The Authority was confused as to how Ms Wilson arrived at the figure considering there was no supporting evidence, and even if there was, such a claim would only be available had she been unjustifiably dismissed, which she had not been. Ms Wilson also sought to submit recommendations to PSN to improve their workplace conduct and practices. The Authority held such a remedy was only available where the workplace conduct and practices were a "*significant factor in the personal grievance*". It decided that, on the facts, Ms Wilson had failed to prove that PSN's workplace conduct and practices were a significant factor relating to her claim, and so it was disregarded. Costs were reserved

Wilson v Presbyterian Support (Northern) [[2023] NZERA 365; 11/07/23; C English]

Employee put on garden leave without any contractual or policy provision

Mr Whitley was employed as a food sales representative for Firstlight Frozen Limited (Firstlight) working 45 hours over Monday to Friday and some Saturday mornings. He was also paid overtime. Around October 2021, Firstlight was considering its stance in relation to the vaccination of its employees. This was necessitated by the COVID-19 situation at the time and enquiries made about by Firstlight's customers around their vaccination policy. Multiple staff had also contacted Mr Owen, Mr Whitley's manager and a director of Firstlight, about this.

On 12 October 2021, Mr Whitley wrote to Mr Owen that Firstlight's position was that all staff members should be vaccinated for COVID-19. It also mentioned that failure to comply could result in dismissal. On 18 October 2021, Mr Owen wrote to Mr Whitley that the business was still in consultation on this, and safety of all staff and the community was their priority. It also stated that long-term working from home was not sustainable for the business and offered to pay for Mr Whitley to visit his own GP to discuss the vaccine. Mr Owen attempted to discuss the issue of vaccination status with Mr Whitley multiple times, but Mr Whitley refused the topic. On 18 October 2021, Mr Whitley wrote again to Mr Owen. He declined to advise his vaccination status. He was and remained even at the time of the investigation meeting, unvaccinated.

On 15 November 2021, Firstlight formed a vaccine policy declaring that all roles within the company would need to be performed by vaccinated persons. But, also mentioned that employees were free to choose whether they were to be vaccinated.

On 17 December 2021, Firstlight wrote to Mr Whitley. They considered his view that he could safely perform his job by using additional PPE and working remotely. Mr Owen explained why it was not considered appropriate, especially given his job required travel and face-to-face client contact. They had also considered whether they had any redeployment options for him, which they could not find, considering the company's requirement for COVID-19 vaccinations. It mentioned that if Mr Whitley remained unvaccinated by 17 January 2022, his employment could be terminated with four weeks' notice paid out to him.

On 30 December 2021, Mr Whitely was placed on garden leave. He was asked to return his company property, including keys, company vehicle, laptop, and phone. Mr Whitley was paid an additional four weeks' salary, being more than his contractual 2 weeks' notice.

The evidence showed that Firstlight and Mr Owen did consult with Mr Whitley about the vaccination policy. Mr Owen made multiple attempts to do so both verbally and in writing to make it clear that Firstlight considered this to be a safety issue. The Authority declined to find that Mr Owen or Firstlight bullied Mr Whitley. In the end, as Mr Whitley was not prepared to abide by Firstlight's policy, his employment came to an end. The Authority found that the termination of Mr Whitley's employment was justified.

The Authority found that placing Mr Whitley on garden leave when there was no contractual or policy provision for such an action, and no consultation or forewarning, amounted to an unjustified disadvantage in Mr Whitley's employment. Mr Whitley said he found this unexpected, stressful, and humiliating. The Authority awarded him $10,000 for this.

There was a claim that, going back six years, Mr Whitley routinely worked more than his contracted 45 hours per week, and that he needed to be paid for hours worked more than 45 each week. There were no time records or other documents that supported this claim. It was more likely that he worked with a degree of flexibility that was consistent with his experience and the high degree of trust that Mr Owen placed in him as a long-serving employee. The Authority identified six public holidays on which Mr Whitley performed some work for which he needed to be paid $360.92. The Authority ordered Firstlight to pay Mr Whitley $1,545.60, for being unpaid alternative holidays owing on the termination of employment. The sum of $152.52 was also awarded for annual holiday pay on arrears at the rate of 8

per cent. A total of $4,000 in penalties were awarded, with half to be paid to the Crown Account and half to be paid to Mr Whitley. Costs were reserved.

Whitley v Firstlight Frozen Limited [[2023] NZERA 370; 13/07/23; C English]

Legislation

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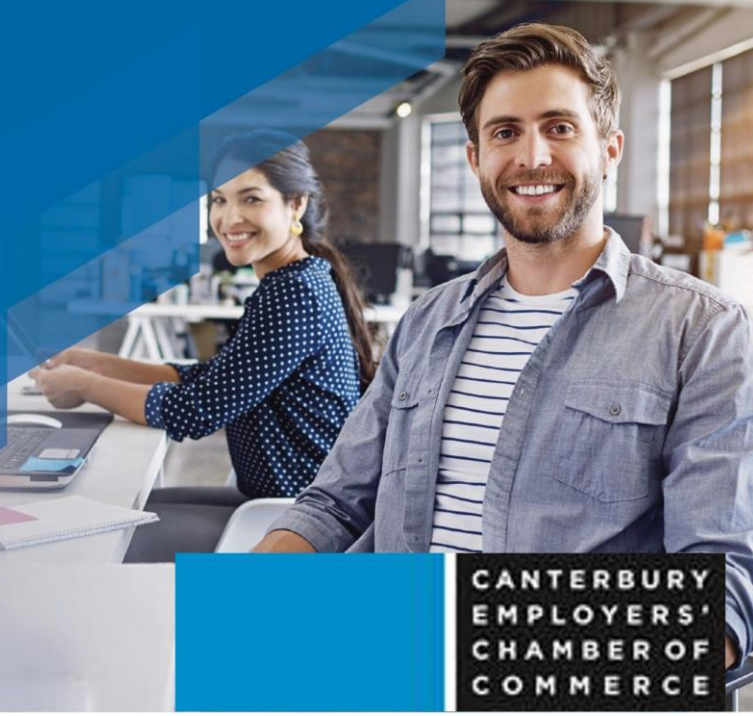

CANTERBURY EMPLOYERS' CHAMBER OF COMMERCE

In this Issue:

Case Law

Employment Relations Authority: Six Cases

Recommendation made for payment to former employee

Mr Smith was employed as a civilian member of the New Zealand Defence Force (NZDF) as a research and development lead. Following a fixed term of employment, he became a permanent employee in 2017 until he resigned in early 2023.

In July 2022, Mr Smith applied to the Employment Relations Authority (the Authority) for an investigation and resolution of two problems arising from the employment. He claimed a failure of the Chief of Defence Force (CDF) to give him an annual performance review in each year of service and a failure to pay him a 'Loyalty Payment' of $1,000 upon completing four years' service, while remaining a contributing member of the New Zealand Defence Force KiwiSaver scheme (NZDFKS). He later lodged an amended statement of problem seeking an order that CDF pay a penalty for the breach of good faith through failing to deliver annual performance reviews and for CDF to make a $1,000 Loyalty Payment to him.

Ms Poulter, for NZDF, gave evidence about the remuneration review conducted by CDF as of 1 July each year. She said a remuneration review did not necessarily lead to a pay rise and could simply confirm that pay had been commensurate with performance for the assessment period. Mr Smith had difficulty with getting a review over several years and felt he may have missed out on a pay rise through a breach of a condition of his employment. The Authority accepted from the evidence of Ms Poulter, that this was unlikely in the circumstances. He did receive increases in most years and in other years there may have been little movement across the board for other employees. Although there was a breach of the employment agreement, from the evidence it seemed unlikely that the breaches resulted in financial disadvantage to Mr Smith. The claim for a penalty was not brought within the required 12-month period so it could not succeed. No order was made against CDF in relation to the failure to provide a remuneration review.

The Authority found that the intent was clear in Defence Force Order 3 (DFO 3), that contributory service to establish eligibility for an incentive payment was to be measured by the number of years over which an employee contributed by having a deduction made from their remuneration, through the NZDF payroll. Using that measurement, Mr Smith was not eligible to receive the four-year Loyalty Payment in 2020.

NZDF provided its own KiwiSaver scheme and promoted it by offering $1,000 Loyalty Payments after one, four and seven years of contributing membership. Early in his employment, after Mr Smith had transferred his existing KiwiSaver account to NZDFKS, he began making contributions to that scheme through NZDF payroll. Later, he decided he would pay directly from his bank account and was doingThe Authority found that the intent was clear in Defence Force Order 3 (DFO 3), that contributory service to establish eligibility for an incentive payment was to be measured by the number of years over which an employee contributed by having a deduction made from their remuneration, through the NZDF payroll. Using that measurement, Mr Smith was not eligible to receive the four-year Loyalty Payment in 2020.

Mr Smith told the Authority he did not dispute the meaning of DFO 3. His problem was that he was simply unaware of its existence, despite making reasonable efforts to find out the rules or requirements. The Authority found in the circumstances that the separate documentation or publication of the rule to some extent hindered Mr Smith from obtaining relevant information about an important aspect of his employment. The NZDF was not as open and communicative as it could have been with Mr Smith about the full extent of the scheme and its conditions. That failure was a breach of the good-faith duty imposed on parties not to mislead or deceive each other or do anything likely to mislead or deceive each other. The Authority considered it was likely that if the DFO 3 criterion had been referred to outside of the intranet, in places such as the NZDFKS Guide, Mr Smith probably would have seen it and become better informed of the Loyalty Payment eligibility requirements.

The Authority considered five potential avenues of remedies available under the Employment Relations Act: dispute, penalty, personal grievance, wage arrears and compliance. However, the Authority found that none of the remedies considered were available to Mr Smith on the facts of the case. The fundamental problem remained that whether classed as wages or anything else, the money was not payable because the DFO 3 condition of payment was not met. The real problem in the case was that Mr Smith was not made aware, and did not become aware early on, of DFO 3.

Bearing in mind the status of a Defence Force Order, the CDF was urged by the Authority to stand by the representation made in DFO 3, that NZDFKS incentive payments will be applied equitably and fairly for all members of the NZDF who belong to the NZDFKS.

In summary, no orders were made against CDF, but a recommendation was given for a Loyalty Payment to be made by CDF to Mr Smith.

Smith v Chief of Defence Force [[2023] NZERA 371; 13/07/2023; A Dumbleton

Claim for unjustified constructive dismissal upheld

Ms Hunter was employed by Medina Trading Ltd, which trades as Hotel DeBrett in Auckland (the Hotel), as a junior housekeeping supervisor between September 2019 and December 2020. Her employment agreement stated she was required to work an average of 40 hours per week. Ms Hunter took her claims to the Employment Relations Authority (the Authority) alleging she was the victim of bullying and harassing behaviour by the housekeeping manager and that her complaint to the General Manager was not taken seriously. Ms Hunter also alleged she was unjustifiably and constructively dismissed. Further claims were advanced for wage arrears and alleged breaches of the Holidays Act 2003 (the Act).

On 17 March 2020, Ms Hunter was challenged by the housekeeping manager about having a coffee while she was expected to be working. Ms Hunter felt that she was yelled at and complained to the general manager. An investigation was initiated by the general manager. However, this was not concluded, partly because of the COVID-19 level four lockdown and Ms Hunter being on annual leave.

The Authority identified two issues with the March 2020 coffee incident. First, Ms Hunter was not given an opportunity to comment on the statement of the two witnesses. Second, Ms Hunter was not advised of the outcome of the investigation. The Authority found that Ms Hunter's personal grievance concerning the handling of the coffee incident complaint was established on the facts. The effects of this on Ms Hunter was that she legitimately felt that her complaint was not properly resolved.

The Authority then considered a matter of alleged racism, arising from a WhatsApp message from the house keeping manager to Ms Hunter. The Authority, while noting it was unprofessional and inappropriate, found the comment was a spontaneous expression borne out of frustration with another employee, rather than rooted in ignorance and racism.

The Authority reviewed two instances of alleged sexual harassment by the house keeping manager. The first instance was not proven on the balance of probability, while the second was more representative of a reminder about appropriate work attire.

Ms Hunter raised several concerns about alleged workplace bullying. The Authority only found grounds for one event being substantiated. In this instance, the house keeping manager had used an emoji in a disparaging manner when referring to Ms Hunter within a Facebook Messenger post to the house keeping team.

In October 2020, the Hotel wrote to Ms Hunter alleging serious misconduct. This concerned allegations of taking an unauthorised break and not completing her required work duties to a satisfactory standard. The Authority ruled that these events did not meet the threshold for being considered serious misconduct.

In considering Ms Hunter's claim for 10 hours per week in wage arrears, the Authority ruled that despite offering her hours in the restaurant and bar, the Hotel consistently fell short of providing Ms Hunter with an average of 40 hours of work per week, resulting in Ms Hunter being owed wage arrears.

The Authority noted that Ms Hunter was required to work to her roster, which included TBA shifts. This meant that she was required to be available to work for the whole day but with no obligation on the Hotel to provide her with any work. The Authority ruled that Ms Hunter should receive some compensation in recognition that her time had value.

With regard to obligations under the Act, the Authority ruled that the Hotel failed to provide Ms Hunter with rest breaks and meal breaks in accordance with the Act.

When the various matters noted above were considered cumulatively, the Authority found these to be reasonably sufficient to justify Ms Hunter's decision to leave her employment at the Hotel. The claim of unjustified constructive dismissal was established on the facts.

Looking at matters holistically, the Authority was satisfied that Ms Hunter suffered humiliation, loss of dignity, and injury to feelings resulting from her work situation at the Hotel. The Authority ordered the Hotel to pay Ms Hunter the sum of $16,000 for humiliation, loss of dignity and injury to feelings. The Hotel was also ordered to pay Ms Hunter $3,774.73 plus interest in wage arrears, $205.81 plus interest as compensation for being available and $6,080 in lost wages. The Hotel was further ordered to pay Ms Hunter $2,500 for failure to provide rest and meal breaks, with an additional $500 payable to the Crown. Costs were reserved.

Hunter v Medina Trading Limited T/A Hotel DeBrett [[2023] NZERA 374; 17/07/2023; P Fuiava]

Flawed redundancy process leads to upholding of unjustified dismissal claim

Mr Kereopa-Rerekura was employed to work as a security guard at a nightclub operated by Cruz Bar Limited (Cruz Bar) from 12 August 2020 until March 2022. In early March 2022, Mr Kereopa-Rerekura had to isolate because of a family member

contracting COVID-19. He contracted it himself and when he was ready to return to work, another family member contracted COVID-19 so he had to continue to isolate.

Initially, Cruz Bar advised Mr Kereopa-Rerekura that his employment was terminated due to abandonment. However, when Mr Kereopa-Rerekura had to continue to isolate, he was advised he was made redundant. Mr Kereopa-Rerekura raised a personal grievance questioning the procedural fairness of the redundancy, claiming lost wages and compensation.

On reviewing the matter of Mr Kereopa-Rerekura's employment being terminated without notice, the Employment Relations Authority (the Authority) found Cruz Bar did not act in a way that a fair and reasonable employer could have done in the circumstances at the time. It ran a flawed consultation process including failing to provide information in support of their proposal and did not give consideration to redeployment options. The Authority also noted that Mr Kereopa-Rerekura's role continued after he left, which supported the claim that the role was not genuinely disestablished. The Authority ruled that Mr Kereopa-Rerekura was unjustifiably dismissed.

The Authority ordered Cruz Bar to pay Mr Kereopa-Rerekura $1,893.86 for lost wages, $1,458.00 for lack of notice period and $15,000.00 in compensation under the Employment Relations Act 2000. Costs were reserved.

Kereopa-Rerekura v Cruz Bar Limited [[2023] NZERA 376; 17/07/2023; A Baker]

Labourer found to have been unjustifiably dismissed due to predetermination

Mr Maguire was engaged by Concrete Limited t/a Concrete Unlimited (Concrete Ltd) as a labourer from early December 2021, until he was summarily dismissed on 23 February 2022. The dismissal arose from a 21 February 2022 meeting with the Berketts, the owners of the company.

Mr Maguire had been asked to attend this meeting to discuss some concerns the company held about his time management. While the facts were disputed, the reason given for dismissal was Mr Maguire's allegedly threatening behaviour at this meeting.

Mr Maguire raised a personal grievance with Concrete Ltd on 17 April 2022, alleging he had been unjustifiably dismissed. The matter came before the Employment Relations Authority (the Authority) for consideration. Mr Maguire sought lost wages and compensation. Concrete Ltd denied unjustifiably dismissing Mr Maguire, asserting the basis of his employment was casual and that he either resigned by conduct before he was dismissed or was later justifiably dismissed for serious misconduct.

Firstly, the Authority needed to ascertain Mr Maguire's employment status. It was noted he signed an independent contractor agreement in December 2021, although he neither formed a company nor submitted any invoices. He only used tools provided by Concrete Ltd. In January 2022, Mr Maguire signed an agreement to become a casual employee. However, from his perspective, little changed aside from a small drop in his wages. Mr Maguire held the view that he was always an employee.

The Authority found that Concrete Ltd exercised absolute control over allocation of timing and work and where it was to be performed, they set remuneration at a fixed hourly rate, controlled information available on jobs and communication with clients. He was supplied with equipment and, when on the job, was working alongside other employees of Concrete Ltd. To a client, he would be indistinguishable from those employees. Taking into account the totality of the relationship and how it operated and the objective of the Employment Relations Act 2000 (the Act), the Authority concluded the real nature of Mr Maguire's initial engagement, up to 20 January 2022, was as an employee and not an independent contractor.

The Authority then needed to determine if the work was of a casual nature. After consideration of all the factors, the Authority found, by a narrow margin, that the employment was not genuinely casual as it was ongoing and there was an expectation created by Concrete Ltd that Mr Maguire make himself ready for work when available as opposed to the work being of an inherently casual nature.

While there was some contention about witness statements from the 21 February 2022 meeting, and whether the decision to terminate Mr Maguire's employment was predetermined, the Authority considered it more likely than not that the Berketts resolved to dismiss Mr Maguire for him not turning up for work on the Friday prior to the meeting, coupled with emerging difficulties they had identified in his timekeeping and this was communicated at the 21 February meeting before Mr Maguire reacted.

The Authority found the manner of the dismissal was more than likely pre-determined and abrupt with no opportunity for Mr Maguire to obtain representation and have input into the dismissal decision. Section 103A of the Act and good-faith considerations were absent in the decision to dismiss. The procedural defects were significant, including not affording Mr Maguire an opportunity to meet further and discuss potential reasons for dismissal as outlined in the dismissal letter. Overall, the Authority found Mr Maguire did not engage in misconduct sufficiently serious to warrant consideration of a sanction of summary dismissal before he was dismissed at the 21 February meeting. The dismissal in the circumstances was substantively unjustified due to relatively minor timekeeping issues.

Concrete Ltd was ordered to pay Mr Maguire $2,700 gross lost wages, $324 holiday pay on the lost wages and $10,000 compensation without deduction pursuant to the Act. Concrete Ltd was also directed to calculate holiday pay over the entire length of Mr Maguire's engagement and pay out the sum determined. Costs were reserved.

Maguire v Concrete Limited T/A Concrete Unlimited [[2023] NZERA 377; 18/07/2023; D Beck]

Breach of Employment Agreement leads to payout for Employee for Hurt and Humiliation

Mr Crudis worked as a farm hand and then farm and herd manager for Wharrie Farms Limited (Wharrie Farms). His employment ended by way of redundancy on 31 May 2021 because the farm was sold. The directors of Wharrie Farms were Mr and Mrs Wharrie, until January 2021 when Mrs Wharrie became the sole director. Mr Crudis said the way in which he was treated by Wharrie Farms, after Mr Wharrie left the farm in 2021, caused him to be disadvantaged in his employment, breached his employment agreement and the good-faith obligations on employers. This included being demoted between February and May 2021, dealing with a vehicle as if Mr Crudis had stolen it from Wharrie Farms, arranging for the sale of calves belonging to Mr Crudis, refusing to provide information to identify missing calves belonging to Mr Crudis, paying final wages excessively late and refusing to compensate Mr Crudis for additional hours worked during calving in spring 2020.

Mr Crudis' employment with Wharrie Farms spanned approximately 15 years, with some breaks in between. On 8 June 2020, Mr Wharrie, acting on behalf of Wharrie Farms, entered into a two-year fixed-term employment agreement with Mr Crudis. The 2020 employment agreement described Mr Crudis' position as both herd manager and farm manager. It was varied and several handwritten amendments to the terms were present. The stock allowance of 110 weaner bull calves was to help Mr Crudis build up funds to eventually purchase his own herd.

Mr Crudis said that by January 2021, while he was still the herd and farm manager, Mrs Wharrie started to treat him more like a farm hand. He felt he was treated like a newbie. Mr Slabbekoorn was appointed as the farm manager in January, something Mr Crudis says he was not informed about. From the list of duties Mr Slabbekoorn recorded, there was an overlap with Mr Crudis' role as herd and farm manager. It was clear from Mrs Wharrie's evidence that she did not accept Mr Crudis had the required skills and abilities despite the role description in the employment agreement. Mr Wharrie gifted a Land Rover to Mr Crudis before he left the farm in January 2021. Mrs Wharrie disputed this as it had been her understanding it belonged to Wharrie Farms. The Employment Relations Authority (the Authority) found that a fair and reasonable employer could be expected to deal with employees in good faith and to resolve disputes in a way that was responsive and communicative.

Mrs Wharrie again said she was unaware of the arrangement between Wharrie Farms and Mr Crudis in respect of Mr Crudis rearing calves, despite it being in the employment agreement. Mr Wharrie had created a list of National Animal Identification and Tracking (NAIT) numbers showing those owned by Mr Crudis and it was signed and dated. Mr Crudis had also received earlier calves to rear – the list recorded 131 bobby calves gifted by Wharrie Farms to Mr Crudis. Mr Crudis' evidence was that the calves were sold without his knowledge although he admitted signing a bank transfer form in April with Mr Lissington (Mrs

Wharrie's stock agent). The fact Mr Crudis had cancelled the first stock truck Mr Lissington arranged meant the Authority preferred Mr Crudis' evidence because that was consistent with him changing his mind.

Mr Crudis said he worked extra hours during the 2020 calving season that he was not compensated for. Mr Crudis claimed he worked 65 hours per week during calving. The employment agreement provided for a 40-hour week. To ensure compliance with minimum standards, it is appropriate that Mr Crudis receive payment for an additional 25 hours a week for 12 weeks at the minimum wage.

Wharrie Farms was unable to justify its actions in relation to the treatment of Mr Crudis as a farm hand. It appeared that the non-acceptance of Mr Crudis and his role, despite the plain words in the employment agreement, led to additional failures to constructively engage with Mr Crudis regarding multiple issues that arose between them during the period the farm was being prepared for sale. Wharrie Farms accepted that two calves were unaccounted for and Mr Crudis contested that it was eight. The Authority concluded that four calves remained unaccounted for and Wharrie Farms had to pay Mr Crudis the value of those four calves calculated in accordance with the average amount received on 21 May 2021 for 112 calves sold at the Feilding livestock market.

The Authority awarded Mr Crudis $20,000 as compensation for hurt and humiliation payable by Wharrie Farms. Payment for four calves in the sum of $1,443.56 and minimum wage arrears in the amount of $6000 were also awarded to Mr Crudis, payable by Wharrie Farms. Costs were reserved.

Crudis v Wharrie Farms Limited [[2023] NZERA 388; 20/07/2023; SK Martin]

Procedural flaw leads to established claim for unjustified dismissal

NHW was employed by SBK on a full-time basis in July 2019. His position in his employment agreement was described as a driver and plant operator who was also required to carry out work as a linesman and related duties. The two directors of SBK are NHW's mother and stepfather. NHW had a history of mental health issues due to circumstances in his childhood and was frequently given time off work to deal with these challenges.

In November 2020, following an incident at SBK, and a subsequent conversation about communication issues, NHW attended a church-based family relations programme for men. His photo appeared on the programme's Facebook page and one of his sisters made a comment which NHW took objection to. The comment was not approved by the programme's administrator. NHW then posted objectionable comments on the whanau page on the social-media platform Viber. Shortly after this time, NHW applied for, and was given, paid sick leave.

On 7 December 2020, NHW was invited to a meeting with SBK, largely to discuss the incident in November. SBK advised that the use of the family surname in the Viber posting affected the business and those working in it. Also raised at the meeting were issues of verbal abuse and threatening behaviour towards the company directors. The meeting did not go well and NHW left the meeting without any agreements or outcomes being reached. NHW remained on paid sick leave pending the outcome of an investigation.

On 11 December 2020, SBK wrote to NHW advising him his employment had been terminated due to ongoing verbal abuse and threatening behaviour, which the company considered serious misconduct. The directors decided to take this action without any further meeting with NHW or providing any opportunity for written comment or feedback about the prospect of dismissal. The directors felt fearful of how a further meeting may play out after the last one and they were concerned about how NHW may react. A fortnight later, NHW raised a personal grievance for unjustified disadvantage and unjustified dismissal.

In considering the matter, the Employment Relations Authority (the Authority) applied the statutory test of justification. This test asked whether what SBK did when addressing concerns with NHW's behaviour, and how it did so, were "*what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*".

The Authority took note of the concerns of the company directors about fears of verbal abuse and threatening behaviour that may have occurred in a further meeting. The Authority felt that, despite this, SBK could have given NHW an opportunity to comment before confirming their decision to terminate his employment. The company could have sent a letter, email or text asking for his comment before confirming a final decision. It would have been an opportunity for NHW to consider his own position, possibly get legal or other professional advice and to propose some alternative that may have addressed their legitimate concerns about his conduct and to draw clearer lines about what was reasonably expected of him in his working relationships with them. The Authority felt this was more than a minor defect in the process followed and found that NHW had established a personal grievance for unjustified dismissal.

The Authority found that NHW was entitled to compensation for lost wages and hurt and humiliation. In considering the appropriate remedies, the Authority noted that NHW had significantly contributed towards the situation that led to his personal grievance. The Authority found that a reduction of one third was appropriate and this should apply to both remedies, reducing the lost wages award to $9,706 (less any applicable tax) and the compensation award to $8,000, without further deduction. Costs were reserved.

NHW v SBK [[2023] NZERA 380; 18/07/2023; R Arthur]

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: One Bill

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/

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