Employer Bulletin

Our Weekly News Digest for Employers

Friday, 12 June 2020

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Employment Relations Consultants
Health & Safety Consultants
Legal Team

Contact Us

NZ 0800 300 362
AU 1800 300 362
E advice@ema.co.nz
ema.co.nz

Cases

ADVICELINE UPDATE: To assist members the AdviceLine has currently extending their services to include Saturday. Saturday hours are 9am – 5pm.

Employment Court: One Case

Level of Control determined employment relationship with employer

Mr Leota was a driver for courier company Parcel Express Limited (Parcel). Mr Leota asked the Employment Court (the Court) for a declaration that he was an employee of Parcel. Parcel claimed that Mr Leota was an independent contractor, not an employee.

The status of employee is the gateway to accessing various statutory entitlements including holiday pay, minimum wages, KiwiSaver, parental leave and personal grievance procedures. Determining whether a worker is an employee or contractor is an intensely fact-specific inquiry. The Court is required to determine the real nature of the relationship and there is no presumption that entire categories of workers are contractors.

The Court noted that numerous factors are relevant to this determination, such as the agreement between the parties, the way the relationship operated in practice, any features of control and integration and any indication as to whether the person had been effectively working on their own account. The fundamental question is whether the worker serves their own or someone else's business.

Parcel relied on the fact that Mr Leota signed an agreement that referred to him as an independent contractor and that he knew this was the situation. The Employment Relations Act 2000 is clear that the fact a working relationship is described in a particular way is not determinative. The Court stated there was nothing to suggest that Mr Leota was given a copy of the agreement, advised to go away and read it, or take advice on it. The Court noted that English was Mr Leota's second language and had little doubt that Mr Leota had no real understanding of what his status was when working with Parcel. He did not understand the difference between a contractor and employee, nor did he understand the agreement Parcel drafted and asked him to sign.

Parcel required Mr Leota to buy his own van, which needed to have Parcel signwriting added at his expense. However, Parcel facilitated this purchase and arranged for monthly deductions to be taken from Mr Leota's pay to cover the purchase price. Mr Leota was assigned a route that was set by Parcel, in which he had no say. He was required to work where and when directed by Parcel and to work in Parcel's best interests at all times. He was obliged to wear a uniform and observe and comply with Parcel's procedure manuals. He was required to

comply with any directions or requests of the CEO or any other manager or officer of Parcel. He was obliged to hold insurance with a company approved by Parcel. Mr Leota did not have any control over the times and days on which he worked. He was not able to exceed 20 working days holiday in a 12 month period without the prior approval of Parcel and he was required to organise a relief driver, approved by Parcel, during any period of leave. The agreement also contained a restraint of trade clause.

The Court found that Parcel exerted a high level of control over Mr Leota's work and determined that the evidence strongly indicated that Mr Leota had no business of his own, he was solely in the business of Parcel. The Court held that the real nature of the relationship between Mr Leota and Parcel was an employment relationship and found that Mr Leota was an employee of Parcel. The Court noted that combined weight of all the relevant factors, particularly the way in which the relationship operated in practice, tilted the scales firmly in favour of finding an employment relationship.

Leota v Parcel Express Limited [[2020] NZEmpC 61; 7/5/2020; Chief Judge Inglis]

Employment Relations Authority: Five Cases

Penalty sought for breach of settlement agreement

A settlement agreement of an employment problem was signed by the parties on 30 January 2020. A Ministry of Business Innovation and Employment (MBIE) mediator certified the agreement in terms on section 149 of the Employment Relations Act 2000 (the Act). The mediator had the parties confirm that they understood the terms of settlement were final, binding, enforceable and could not be brought before the Employment Relations Authority (the Authority) expect for enforcement purposes.

The Applicant Hosie claimed that Styrobeck Limited (Styrobeck) had not complied with the terms of the settlement. Hosie sought orders to require Styrobeck to comply with the settlement, to pay costs and to enforce a penalty for breaching the settlement agreement. Styrobeck claimed that since Hosie filed the statement of problem that it had complied with the settlement implying that the proceeding was irrelevant. Despite the settlement payment having been made, Hosie still sought costs, a penalty and compliance order in respect of the provision of a compliant Certificate of Service. There had been some issue between the parties regarding the wording of the Certificate of Service required by the record of settlement. Styrobeck submitted that it had fixed this issue and would have done so earlier had the issue been brought to its attention.

The Authority submitted that Styrobeck complied at least substantially with the record of settlement. The parties agreed that compliance only occurred after Hosie filed for enforcement. The Authority found the reasons for delay reasonable, however the Authority stated that if Styrobeck had difficulties in finding Hosie's account details it could have been resolved quickly had Styrobeck contacted Hosie's representative. The Authority also declared that Styrobeck could have at least informed Hosie's representative that there would be a delay. Hosie's representative in fact emailed Styrobeck regarding the lack of payment, but received no reply. The Authority found that as payment was made no later than eight days after receipt of invoice, Styrobeck did not act unreasonable.

The Authority thought that little would be served by ordering compliance in respect of payments already made. However, with the issue of the Certificate of Service, Styrobeck was ordered to ensure it had provided a Certificate of Service for Hosie that covered the dates of his employment, position held, description of duties and confirmation of resignation. Styrobeck was ordered to do this within seven days of that date of this determination.

Under section 149 (4) of the Act, a person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority. There was no dispute that a breached occurred regarding failing to pay the full amounts due by the agreed dates. An object of the Act is to promote mediation as a primary solving mechanism which includes section 149 for final and enforceable certified agreements. Strict compliance with the record of settlement is expected and both parties should be able to rely on this. It is not open to one party to change the terms of settlement, including dates for payment. The Authority noted that there had since been substantial if not complete compliance with the record of settlement. Styrobeck needed to take steps such as contacting Hosie's representative for account details. There appeared to be no oversight even when Styrobeck was notified of non-payment. The maximum penalty of a single breach could be up to a $20,000 penalty. A penalty is to recognise a breach and to act as a deterrent. The Authority felt in this case that a penalty of $1,000 was appropriate.

Hosie was justified in filing for compliance. He was entitled to an order for a contribution towards his costs of representation and for reimbursement to apply in the Authority. The Authority's usual daily tariff for an investigation meeting is $4,500. This case did not require an investigation meeting but did require provision of attendance at a telephone conference together with preparation of submissions. The appropriate award of costs was $1,000.

Styrobeck was ordered to comply with the Certificate of Service, to pay for costs and reimbursement $1071 and to pay a penalty of $1,000 to the Crown with $500 to be paid to Hosie and $500 to the Crown.

Hosie v Styrobeck Limited [[2020] NZERA 171; 29/04/2020; G O'Sullivan]

Unpaid wages lead to a constructive dismissal

Mr Euston was employed to work as a painter/decorator with Moore Decorating Limited (Moores) from 24 January 2019. Mr Euston was paid for his first four weeks of work, but was not paid his wages for his fifth week of work. This was then paid in April 2019, but then he did not receive his wages for the last three weeks of April 2019.

Mr Euston spoke to Moores about his wages and was not given a satisfactory response, leaving him unsure if he would be paid for the work he had done and unsure if he would be paid for any future work. Mr Euston resigned; his last day of work with Moores was 26 April 2019.

As well as wage arrears, Mr Euston says that he resigned because Moores did not pay his wages in April 2019 and therefore he was constructively dismissed. Mr Euston seeks compensation and reimbursement for the dismissal. Mr Euston also claimed he was not given an employment agreement. Mr Euston said a penalty should be imposed on Moores for this failure.

Moores was invited to participate in the investigation process and the case management and was sent a Notice of Investigation and Notice of Direction to lodge their wages and time records. Despite this, Moores did not provide the records and did not make a representative available for the Investigation Meeting. As a result, the Authority member proceeded with the investigation without Moores.

Turning first to the wage arrears claims, as Moores failed to provide wage and time records, the Authority member relied upon Mr Euston's records of hours worked and wages owed. Moores was ordered to pay Mr Euston $2562 in wage arrears; $1050 for public holidays he did not work, but were otherwise working days for him; and $1261 for holiday pay.

Mr Euston also claims his resignation was in response to Moores failure to pay his wages and that this is therefore a constructive dismissal. In order to determine if Mr Euston's resignation amounts to a constructive dismissal the Authority member had to consider, if there was a breach of duty by Moores. Whether that breach was serious enough that is was reasonably foreseeable that there was a substantial risk that Mr Euston might resign in response to that; and did Mr Euston resign in response to that breach of duty.The Authority member was satisfied that Moores failed to pay Mr Euston's wages and this is a breach of duty owed to him. Further that it is a serious breach and that it was foreseeable that Mr Euston might resign in response to it. And finally, the Authority member accepted that Mr Euston did resign because of this breach of duty.

Given the circumstances of the dismissal, the Authority member determined that Mr Euston had been unjustifiably dismissed by Moores. In addition to the wage arrears, Mr Euston was awarded lost wages of $3,400. He was also awarded $5,000 for hurt and humiliation. Mr Euston was also awarded costs of $2,250 and $71.56 for his filing fee.

Euston v Moore Decorating Limited [[2020] NZERA 143; 8/04/2020; P Van Keulen].

Leave sought to recover wage arrears

Ms Gardner worked for Swim Lovers School Limited (Swim School) for around 12 years. Her weekly wages were constantly in arrears for up to five weeks at a time, this led to her resignation on 24 April 2019. Ms Gardner claimed she was still owed wage arrears of $1509.40 which consisted of unpaid holiday pay.

Swim School admitted to the wages arrears, but said that it did not pay Ms Gardner as it was having cashflow problems. Swim School had almost a year from the ending of Ms Gardner's employment to address the cashflow problems.

Holiday pay is a minimum legal entitlement for an employee. Ms Gardner was entitled to be paid her holiday pay arrears. Ms Gardner, being the successful party in the claim, was entitled to also recover the $71.56 filing fee from Swim School.

The Employment Relations Authority (the Authority) ordered Swim School to pay Ms Gardner $1,580. This sum consisted of $1,509 wage arrears plus $71.56 to reimburse Ms Gardner's filing fee for the application within 30 days of this determination date.

The Authority noted that should Swim School fail to pay Ms Gardner within the 30 days, then Ms Gardner could then apply to the Authority for a compliance order.

Should Swim School default on the payment she was awarded, then Ms Gardner would be granted leave under section 142Y(2)(a) of the Employment Relations Act 2000 (the Act) to apply to the Authority under section 142Y(1) of the Act to recover the money owed from Swim School's sole director and shareholder Ms Rheinfrank.

This leave was granted on the basis that Swim School's failure to pay Ms Gardner's holiday pay she was owed, was a breach of employment standards and Ms Rheinfrank was a person involved in the breach by Swim School under section 142X of the Act.

Ms Gardner would need to file a new Statement of Problem should she need to pursue further Authority claims against Swim School for compliance and/or Ms Rheinfrank to pay the money that Swim School had defaulted on paying.

Gardner v Swim Lovers School Limited [[2020] NZERA 153; 16/04/2020; R Larmer]

Urgent facilitation order

The Association of Professionals and Executive Employee Incorporated (APEX) represents a number of medical laboratory workers employed by the New Zealand Blood Service and Auckland District Health Board, Northland District Health Board, Waitemata District Health Board, Counties Manukau District Health Board, Waikato District Health Board, Taranaki District Health Board, Hawkes Bay District Health Board, Canterbury District Health Board and West Coast District Health Board (the DHBs).

The parties are currently bargaining for a renewal of the multi-employer collective agreement known as MECA which expired on 6 September 2019. APEX's statement of problem detailed issues with the process and also significant attempts to resolve the bargaining disputes through mediation services.

Given the effects of COVID-19 pandemic and that the workers are essential to fight against a community outbreak of the virus, New Zealand Blood Service and the DHBs supported APEX's application for both urgency and facilitation. This matter was heard "on the papers" being the application for the urgency and the statement of problem and the statement of reply.

Regardless of the COVID-19 pandemic, it was clear that the bargaining between APEX, New Zealand Blood Service and the DHBs is significantly dysfunctional. The purpose of facilitation is to provide a process that enables parties to bargain if they are having serious difficulties in concluding a collective agreement. They can seek assistance of the Employment Relations Authority (the Authority) in resolving the matters.

The Authority is satisfied that on the ground set out in section 50(c)(i) of the Employment Relations Act 2000 (the Act) that assistance was required. Bargaining between APEX, New Zealand Blood Service and the DHB's

were referred to another Member of the Authority for facilitation. An Authority Officer will contact the parties to discuss preparation for an urgent facilitation in Auckland commencing without delay. There is no order for costs.

Association of Professionals and Executive Employees Incorporated v New Zealand Blood Service [[2020] NZERA 127; 20/03/2020; A Dallas]

Wage arrears claim granted for casual employee

Mr Huang claimed that he was employed by Mr Wu as a tour guide and driver. In February 2019, Mr Huang undertook two tours from Christchurch to Twizel, Wanaka and Queenstown at Mr Wu's request. Mr Huang was not paid for these tours and claimed $5950 in unpaid wages. Mr Huang approached Mr Wu for payment on numerous occasions and Mr Wu promised part-payment, but this was never made. Mr Huang sought an order for payment of wage arrears.

Mr Wu did not file a statement in reply, he did not respond to any contact from the Employment Relations Authority (the Authority) and did not file a brief of evidence. Mr Huang provided a statement of evidence, which included payments he received from Mr Wu for previous tour engagements in 2018, background information on their relationship and communications showing Mr Wu's acknowledgement of the amount owed and the various broken assurances to make payment.

For the Authority to have jurisdiction to determine the wage arrears claim, it was required to decide whether Mr Huang was Mr Wu's employee. The Authority examined the true nature of the relationship by considering the intention of the parties, any written documentation setting out the terms of the relationship, how the relationship operated in practice, any control in the relationship or integration into Mr Wu's organisation and whether it could be considered that Mr Huang was operating a business on his own account. Due to Mr Wu's lack of engagement with the Authority, this assessment was based on limited evidence.

The parties were introduced through a mutual friend. Mr Wu asked Mr Huang to assist with a tour group in October 2018 and text messages were exchanged whereby the parties negotiated a daily rate for each tour. A message from Mr Wu indicated that a monetary amount of 'salary 250 + meal supplement 50 + accommodation 100'. Mr Huang then supplied his IRD number and bank account details. Mr Huang was paid by Mr Wu for this tour and three further tours up until February 2019.

In the absence of an agreement determining the intentions of the parties, the Authority needed to analyse how the parties conducted their relationship in the context of the work that was undertaken. The Authority found that on the balance of the scant information provided, Mr Huang had no intention of entering into a contractual relationship and viewed the engagement as intermittent employment.

Mr Wu controlled the allocation of work and the timing, location and route of each engagement. While Mr Huang could have turned down the work, as there was no written agreement, the Authority considered that Mr Huang would have been unaware of the extent of such a right.

In the absence of any evidence from Mr Wu, Mr Huang was also viewed as an integral part of Mr Wu's business. The Authority noted that without casual drivers willing to work for Mr Wu, he had no business as he presumably had obligations under some form of contract with a tour operator to provide drivers on a regular basis.

The Authority found no evidence that Mr Huang ran a business on his own account. He did not own plant or equipment, he did not contract with other tour companies, all he had to offer was his driving and language expertise.

Further, Mr Huang did not invoice Mr Wu for his services, nor was there any evidence that he was asked to do so. Mr Wu simply paid money into Mr Huang's bank account for the tours undertaken. It was unclear whether Mr Wu deducted PAYE from the amounts paid. The Authority could only conclude that the money received by Mr Huang for the services he undertook was that described by Mr Wu as 'salary'.

The Authority concluded that Mr Huang was a casual employee of Mr Wu's driver supply agency and the Authority therefore had jurisdiction to determine the wage arrears claim. The Authority found that Mr Huang had established an arrear of wages claim in the amount of $5950 and ordered Mr Wu to pay that amount.

Huang v Wu [[2020] NZERA 161; 22/4/2020; D Beck]

For further information about the issues raised in this week's cases, please refer to the following resources:

Contract for Services

Full and Final Settlements

Collective agreements

Casual Employees

Employer News

Balance about right in Rebuilding Together budget

The EMA says the Government's budget amidst COVID-19 was always going to have to strike the right balance between spending and debt levels to regenerate the economy for the benefit of all.

Chief Executive Brett O'Riley believes it does provide a first step in doing this, but is keen to continue to work together with the Government on long term economic recovery and additional sector-specific plans.

"We are particularly pleased with the $4 billion business support package, the $3b for shovel-ready infrastructure projects, and the focus on innovation and digitisation and vocational education and training," he says.

"For businesses who have suffered a 50 per cent downturn since this time last year the extension of the wage subsidy by eight weeks will be welcome news, and for SMEs $10m target for them to improve their e-commerce offering and additional incentives and grants to encourage e-commerce adoption will be crucial."

The EMA says the combination of immediate and ongoing support, especially in the digital space, does help especially in the short term.

"We know it's hard for businesses, especially SMEs to look at innovation when they're struggling to stay solvent, but now is the time to capitalise on the things they've had to do differently and use the Government's support to do things better into the future," says Mr O'Riley.

The EMA believes that increased support for R&D including the short-term temporary loan scheme to incentivise businesses to continue with plans, with the help of one-off finance administered by Callaghan Innovation, is the key for many to be able to pivot and regenerate.

"We're also pleased to see the $216m boost to NZTE to expand its scope of support to businesses, particularly with digital services," says Mr O'Riley.

And although positive economic indicators are set to take a plunge in the short term – GDP will go down and unemployment and debt levels up – at least those who have lost their jobs have prospects for the future, although potentially doing different work.

The $1.6b Trades and Apprentice Package to provide training opportunities for people of all ages is a practical measure to get people back to work, and the $50m allocated for Maori Apprentice and Trades Training is also welcomed as we're already seeing younger people join the dole queues at a faster rate than others.

"It is also pleasing to see that the Government has balanced the economic need to the country with overall wellbeing, with it addressing housing with a $5b building package through Kainga Ora, $121m for community initiatives for at risk young people, and $1b for the environment," says Mr O'Riley.

But while there is cash for key sectors such as Export and Manufacturing, the key will be in the detail of these plans.

“Manufacturing is acknowledged as an essential plank of our economic recovery going forward, and we’re keen to work with the Government on a more detailed, future-focused plan for this sector, similar to the $400m Tourism Sector Investment Plan that has been announced,” says Mr O’Riley.

“We are also looking forward to providing any input we can to the Infrastructure Reference Group that will govern the projects that will literally help get our economy moving, for the good of all.”

EMA [10 June 2020]

Children are always at risk on worksites

WorkSafe is reminding everyone that children are always at risk if brought onto worksites, after an unsupported stack of wood at a Timaru lumber yard collapsed on a three-year-old, causing fatal injuries.

On Friday 5 June, Point Lumber Limited, a timber processing company, was fined $32,000 at the Timaru District Court under the Health and Safety in Employment Act 1992 (HSE), for failing to take a number of reasonably practicable steps to ensure the safety of people in the workplace.

In March 2016 a three-year-old boy was visiting his father for lunch at the lumber yard. The boy was climbing an unsecure stack of barn posts when they collapsed, causing fatal chest and lung injuries.

WorkSafe’s investigation found the timber had been stacked unsafely.

WorkSafe’s Chief Inspector Steve Kelly said this tragic incident was the result of a number of errors and was a devastating reminder that worksites were generally unsafe for children.

“Children want to explore, try new things and push boundaries. They perceive things differently to adults. The children of employees, even under supervision, should not have been allowed near these large piles of unsecured timber. Worksites are not playgrounds.

“Had the large piles of unsecured timber on the site been managed appropriately in the first instance, the incident could have been avoided. Businesses are required to have systems or policies in place to keep people safe. Ensuring they are implemented every day, and your workers are on board with them, is the key to good health and safety.”

The sentencing is one of the last prosecutions to go through the courts under HSE. Under HSE charges against Point Lumber Limited carry a maximum fine of $250,000. Had the company faced charges under the Health and Safety at Work Act 2015 they could have faced a fine of up to $1,500,000.

Notes:

- A fine of $32,000 was imposed.
- Reparation of $100,000 was ordered.
- Point Lumber Limited was sentenced under sections 15 and 50(1)(a) of the Health and Safety in Employment Act 1992.
- Being an employer failed to take all practicable steps to ensure no action or inaction of any employee while at work harmed any other person.
- Carries a maximum penalty of $250,000.

WorkSafe [8 June 2020]

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: Eight Bills

Four Bills are currently open for public submissions to select committees.

Veterans' Support Amendment Bill (No 2) (16 June 2020)

Child Support Amendment Bill (24 June 2020)

Inquiry into the operation of the COVID-19 Public Health Response Act 2020 (28 June 2020)

Inquiry into student accommodation (02 July 2020)

Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Bill (10 July 2020)

Gas (Information Disclosure and Penalties) Amendment Bill (16 July 2020)

Overseas Investment Amendment Bill (No 3) (31 August 2020)

Food (Continuation of Dietary Supplements Regulations) Amendment Bill (N/A)

Overviews of bills - and advice on how to make a select committee submission - available at: https://www.parliament.nz/en/pb/sc/make-a-submission/

Full text of bills available at: http://www.parliament.nz/en-nz/pb/legislation/bills

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