Employer Bulletin

Our Weekly News Digest for Employers

Friday, 23 April 2021

In this Issue

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Cases

Privacy Commissioner: One Case

Disclosure of job interview by prospective employer breached privacy

The complainant resigned from his job and attended a job interview with the company during his notice period. He expressly told the interview panel that he did not want them to contact his current employer. The complainant subsequently learned that a person from the interview panel had a discussion with the complainant's Manager shortly after the interview.

The complainant submitted a formal complaint to the Office of the Privacy Commissioner (the Office) that there had been a disclosure of information in breach of principle 11 of the Privacy Act 2020. Principle 11 states that an agency that holds personal information shall not disclose the information unless the agency believes, on reasonable grounds, that one of the exceptions applies.

The company advised the Office that the person from the interview panel had a close friendship with the complainant's Manager and that she had simply met with the complainant. The company did not offer the complainant a position as his experience was not as wide as the company required. The company advised that the decision was made before the discussion with his Manager. The complainant's Manager recalled that the person from the interview panel had told him that the complainant had interviewed for a position. The Office found that the person from the interview panel had provided the context for meeting the complainant and that they had interviewed the complainant for a position. Therefore, the Office found that there had been a breach of principle 11.

For there to be an interference with privacy, there must be a breach of a principle and harm resulting from the breach. Harm can include significant injury to feelings. The complainant advised that when he discovered that the person from the interview panel had spoken with his Manager about the interview, he felt extremely worried, upset, and anxious. He was concerned that his Manager had given him a poor reference as he had been experiencing a difficult job situation.

The Office decided that the feelings experienced by the complainant met the threshold for harm. The Office was guided by the decision in *Winter v Jans*, where the Human Rights Review Tribunal found that injury to feelings could include anxiety and stress.

The Office facilitated a settlement of the complaint and closed the file.

Case Note 287445 [[2021] NZPrivCmr 4; 19/03/2021]

Employment Relations Authority: Five Cases

Application for removal to the Employment Court granted by the Employment Relations Authority

Mr Lawton claimed that Steel Pencil Holdings Limited (Steel Pencil) breached his employment agreement by failing to pay wages, holiday pay and other expenses during his employment. In his application to the Employment Relations Authority (the Authority), Mr Lawton included Mr Stock, the Director and Shareholder of Steel Pencil, to proceedings under section 142Y of the Employment Relations Act 2000. Mr Lawton claimed that Mr Stock was a person involved in the breach and liable to pay should Steel Pencil fail to pay any sums owing.

Steel Pencil denied it owed any money to Mr Lawton and argued Mr Lawton was employed by another company, Steel Pencil Philippines Limited. However, evidence showed that this arrangement was a sham designed to circumvent Philippine government requirements.

Mr Lawton's statement of problem was accompanied by an application for removal to the Employment Court (the Court). Mr Lawton believed that it was inevitable Steel Pencil would try to delay proceedings while moving assets and funds. On 26 February 2021, Steel Pencil was placed in liquidation and on 2 March 2021, the Liquidator advised he was exercising his rights and requiring a stay of proceedings against Steel Pencil. The Authority considered it appropriate for the removal to be brought to the attention of the Ministry of Business, Innovation and Employment as it could be interested in acting as an intervener given its responsibility for the legislation in question.

Mr Lawton and Steel Pencil had raised various issues of substance which they considered the Court should hear to answer the question of law. It is well established that once the Court already has before it proceedings which involve the same, similar or related issues, it is prudent for the Court to deal with all matters. The rationale behind that is that it removes the potential confusion and the avoidance of duplicity in effort and cost. By removing the matter to the Court there was also a possibility to discuss further issues concerning immigration and the company structure.

Having considered the issues, the Authority concluded that removal to the Court appropriate in the circumstances.

Lawton v Steel Pencil Holidays Limited [[2021 NZERA 92; 08/03/2021; M Loftus]

Employee able to pursue personal grievances as settlement agreement not signed

Ms Carter lodged an employment relationship problem with the Employment Relations Authority (the Authority). In the Statement of Problem, she stated that Mr Anderson had not complied with a Record of Settlement under section 149 of the Employment Relations Act 2000 (the Act) dated 11 November 2019.

Mr Anderson was largely uncommunicative with the Authority. He did not lodge a Statement of Reply and he did not answer his phone for a telephone conference with the Authority on 5 March 2021. The Authority was satisfied from the administrative file that Mr Anderson was advised of the date and time of the telephone conference. During the telephone conference with the Authority, the issue at hand was whether there was an enforceable settlement. It was agreed that the Authority would investigate and determine that matter.

In a Notice of Direction dated 5 March 2021, the Authority timetabled for submissions to be lodged and served by both Mr Ingram, advocate of Ms Carter, and Mr Anderson no later than 5.00pm on 19 March 2021. It also asked Mr Ingram to supply the letter raising the personal grievance by that same date. The Authority was satisfied that the notice of direction was served on Mr Anderson, however, he did not provide submissions to the Authority by the required time. Mr Ingram provided submissions on behalf of Ms Carter.

The parties attended a phone mediation. The Authority found it more likely that having attended the phone mediation with a Mediator from the Ministry of Business, Innovation and Employment, the parties intended to use the process in section 149 of the Act. The Authority noted that there was also a written Record of Settlement prepared to be signed by both parties to be then certified by a Mediator.

The Record of Settlement was only signed by Mr Ingram on behalf of Ms Carter, Mr Anderson did not sign. The Mediator had not signed the Record of Settlement to certify that they had explained the effect of section 149(3) of

the Act and that the parties had affirmed their requests to sign. The Authority held it to be likely there were preliminary discussions which resulted in some formalisation about the settlement but the process under section 149 was not completed for the Authority to order compliance.

Mr Ingram had attached a copy of the letter to his submissions that raised the personal grievance with Mr Anderson dated 25 February 2019. In that letter, a personal grievance was raised for unjustified disadvantage about a warning given on 17 January 2019 and unjustified dismissal the following day.

The shape of the employment relationship problem had changed. Ms Carter was not bound by a full and final settlement agreement with Mr Anderson. Ms Carter was therefore allowed to pursue her grievance. If the grievances were to be pursued, Mr Ingram was then able to lodge a Statement of Problem. Mr Anderson would then have 14 days from service on him of the amended Statement of Problem to lodge a Statement of Reply. The Authority were to hold a telephone conference with the view to set the matter down for an investigation meeting shortly after.

Costs were reserved.

Carter v Anderson [[2021] NZERA 126; 01/04/2021; H Doyle]

Failure to confirm valid 90-day trial period led to unjustified dismissal

Mr Wright worked as a Tradesman Painter for Maiden Construction Limited (Maiden Construction), a Christchurch construction and contracting company that is part of an umbrella group of companies called Maiden Group Limited (Maiden Group). At the time of the investigation meeting, Maiden Construction employed 29 people. Mr Wright said he was employed from 3 February 2020 until he was unjustifiably dismissed on 10 February 2020. Mr James, a Director of Maiden Group, acknowledged that Mr Wright was dismissed in circumstances where Maiden Construction wrongly believed that he was the subject of a 90-day trial period provision that was not detailed in Mr Wright's employment agreement. Otherwise, Maiden Construction asserted that the reasons for the dismissal were justified.

Mr Wright's employment agreement stated the role was a Tradesman Painter and that the employment was of a fixed term duration to complete a specified project that was estimated to last 14 weeks and was based. The employment agreement did not contain a 90-day trial period, but Mr James claimed that he mentioned that a trial period would apply in the job interview. Mr Wright commenced worked by travelling to Blenheim on 3 February 2020 with six co-workers. Two vans were taken, Mr Wright drove one and the other was driven by a co-worker, Mr Yeatman. Mr Wright claimed his co-workers purchased alcohol along the way and consumed this in the vehicle during the rest of the drive. This continued to a motel and cannabis use took place thereafter. Mr Wright claimed that alcohol and cannabis use persisted for the whole week after work and that his co-workers appeared "*hung over*" on the following days.

While admitting that the use of cannabis had been occurring, Mr Yeatman gave evidence that Mr Wright did not fit in well with his co-workers. Furthermore, that Mr Wright was viewed as being confrontational, opinionated and not willing to share the burden of difficult tasks and he tried to openly undermine Mr Yeatman in his role of Foreman. Mr Wright vigorously disputed this opinion. Mr Fahey, Maiden Construction's Business Development Manager, and Mr James invited him to a meeting indicating that they were about to terminate his employment. However, after Mr Wright then raised allegations that his co-workers were using cannabis and drinking heavily in the work vehicle and motel. Mr Wright was told by Mr James that his concerns would be investigated, with the outcome of the investigation would be relayed to him on the following Monday and that he could retain the work vehicle over the weekend. Mr Wright claimed that during the meeting he was not apprised of why Maiden Construction was contemplating dismissing him.

Mr James said he ascertained by interviewing Mr Wright's co-workers over the weekend that Mr Wright's allegations of cannabis use were established. However, Mr James explained that he had a dilemma that despite a company drug policy, a dismissal of all employees involved would leave him with no painting team to complete the project. Furthermore, that retaining Mr Wright, in his opinion, would cause disruption and potential resignations. Mr James believed that the dilemma would be resolved by dismissing Mr Wright and retaining the other employees giving

suitable warnings over drug use. Mr James was at that time under the assumption that Mr Wright was on a 90-day trial period. Mr James did not provide any notes of interviews conducted during his investigation. On 10 February 2020, Mr James invited Mr Wright to a meeting and dismissed him with no discussion. Mr Wright claimed he was threatened when he raised the unfairness of the decision and was told if he went to court, he would lose. Mr James refused to engage further with him on his claims of the unfairness of the decision. The decision to dismiss was not confirmed in writing.

The Authority determined Maiden Construction breached good faith obligations in their approach to the dismissal. The Authority held that Maiden Construction communicated a preliminary decision to dismiss before investigating or hearing from Mr Wright and did not, initially identify specific concerns or put them to Mr Wright for consideration before the disciplinary meeting. Maiden Construction also failed to document the investigation or disclose the results prior to final meeting and was not given the opportunity to seek advice.

Maiden Construction concluded that after only one week of employment that Mr Wright was incompatible. Mr James provided no opportunity for Mr Wright to reflect upon and address the concerns of co-workers. Maiden Construction failed to check Mr Wright's employment agreement for a 90-day trial clause and ignored Maiden Construction's drug and alcohol policy. The Authority held that Mr Wright was unjustifiably dismissed in a summary manner and he was successful in his personal grievance and was entitled to remedies.

Maiden Construction was ordered to pay Mr Wright the sum of $5,000 in lost wages and $12,000 compensation. Costs were reserved.

Wright v Maiden Construction Limited [[2921] NZERA 114; 23/03/2021; D Beck]

Employer ordered to pay compensation and penalty for not having clear bonus parameters

VR Group Limited (VR Group) operates in the area of hotel management. It has two Directors, one of which is Mr Sharma. On 11 June 2018, Mr Shetty commenced employment with VR Group as National Head of Strategies and Business Development. Mr Shetty was provided with an employment agreement which included a salary of $90,000 plus $30,000 on achieving targets set by management. The employment agreement did not go into detail of what those targets were.

Mr Shetty said there had been no discussion or agreement about the targets either verbally or in his employment agreement. However, Mr Chaturvedi, VR Group's Director of Group Operations and Sales, Marketing and Revenue, told the Employment Relations Authority (the Authority) the bonus was dependent solely on financial targets. Mr Shetty said while he had received budgets during his tenure, he had not been told they were the basis for his bonus targets.

On 5 January 2019, Mr Shetty was invited to attend a performance appraisal meeting. There were different views of the purpose for the meeting. Mr Shetty claimed the meeting had taken place because he had requested a salary increase, and the purpose of the meeting was to discuss that request. However, VR Group claimed the meeting was to discuss concerns of financial targets not being met.

A meeting document provided to the Authority recorded Mr Shetty's performance ratings as predominantly "exceptional" or "above expectations". Another document had various notations including the words "budget" and "actual", and the word 'bonus' with the number 100 below it. Mr Chaturvedi argued that this confirmed Mr Shetty understood he had to achieve 100 per cent of the budget to be paid a bonus. However, VR Group failed to provide any evidence to the Authority confirming what exactly had been discussed at the meeting, or proof that the two parties had reached an agreement over how the target would be measured.

Mr Shetty resigned from his employment with VR Group with his last day being 5 July 2019. During his notice period Mr Shetty said he had a meeting with Mr Sharma regarding payment of his bonus. Mr Shetty claimed that during the meeting, Mr Sharma told him that he would consider paying a certain amount of the bonus, but no specific sum was mentioned. On 22 July 2019, Mr Shetty received an email from Mr David, VR Group's General Manager of Human Resource and Training, asking him to outline what he had done to justify being paid the bonus.

The Authority said that Mr Shetty's employment agreement contained no clause referring to the method of calculating the bonus, and there was no other written document which set out a formula for the bonus calculation. While budgets were drafted for part of the period Mr Shetty was employed at VR Group, the Authority found no evidence that financial budgets were the sole targets for the bonus, or that Mr Shetty was clearly informed this was the case. However, as no targets were set by management, Mr Shetty could not be assessed as having achieved them.

The Authority declined to require VR Group to pay out his bonus. However, the Authority agreed that Mr Shetty had been unjustifiably disadvantaged by VR Group's failure to create clear parameters for his bonus and the company had failed to act in good faith. VR Group was ordered to pay Mr Shetty $15,000 in compensation and a $2,000 penalty payable to Mr Shetty.

Shetty v VR Group Limited [[2021] NZERA 123; 30/03/2021; E Robinson]

Penalty and costs for non-compliance with record of settlement

Mr Tutagalevao claimed his former employer, Mr Wildermoth, trading as Stephen Wildermoth Transport (Wildermoth Transport), breached the terms agreed in a record of settlement. Mr Tutagalevao sought an enforcement order in relation to Mr Wildermoth's failure to comply with the record settlement, and the imposition of a penalty and costs.

Mr Wildermoth did not dispute that he owed money to Mr Tutagalevao under the record of settlement. He offered no explanation for not paying it and said he would pay the amount outstanding to Mr Tutagalevao on 22 February 2021. Mr Tutagalevao was prepared to waive his claims regarding a penalty and costs if all the outstanding monies were paid without the need for further intervention by the Employment Relations Authority (the Authority). However, he was not prepared to waive those claims if an Authority hearing proved necessary for enforcement of the outstanding monies.

The Authority informed Mr Wildermoth that an investigation meeting would take place on 26 February 2021 if Mr Tutagalevao had not received full payment of the outstanding sums prior. The issue of penalties and costs would be considered if an investigation meeting did take place. On 25 February 2021 Mr Tutagalevao confirmed that he had not received the outstanding monies from Mr Wildermoth.

The Authority did not accept Mr Wildermoth's claim that he did not know the investigation meeting was taking place because Mr Wildermoth had confirmed his availability. Furthermore, the Authority had sent him a Notice of Direction confirming the matters discussed in a conference on 9 February 2021. As the Authority was satisfied there was no good cause for Mr Wildermoth's failure to attend, the investigation meeting was held in his absence.

On 27 September 2019, the parties' agreed terms were recorded in a record of settlement signed by an MBIE Mediator. However, various agreed sums were paid to Mr Tutagalevao late, without the GST component, and only partially paid. The Authority agreed with Mr Tutagalevao's calculation that $8,007.22 remained outstanding from the record of settlement.

In March 2021, Mr Tutagalevao advised the Authority that Mr Wildermoth had paid him the outstanding monies. Nevertheless, he wished to continue with his claim for penalties and costs due to late payment. The Authority agreed it was reasonable for those to be considered because Mr Wildermoth had been informed that a consequence of not paying as agreed would be the inclusion of penalties and costs in the Authority's investigation.

In this case, the Authority considered a penalty should be imposed on Mr Wildermoth because, having agreed to terms of settlement, it was not open to Mr Wildermoth to ignore them. All terms were agreed to be final, binding, and enforceable. The imposition of a penalty would clearly express to Mr Wildermoth that it was unacceptable to breach the terms of a mediated settlement agreement. Imposing a penalty would also act as a general deterrent to others who may believe they can choose not to abide by all terms of a mediated settlement agreement. Furthermore, Mr Tutagalevao gave persuasive evidence of the negative consequences he had endured as a result of Mr Wildermoth's failure to abide by the record of settlement. Being deprived of the use of the money owed to him resulted in significant and detrimental effects.

The breach of the record of settlement was considered by the Authority to be serious and significant. It took over a year for all payments under the terms of the record of settlement to be paid. Mr Wildermoth had ample opportunity to discharge his debt to Mr Tutagalevao but did not do so until after the Authority's investigation meeting. Although Mr Wildermoth had paid a large part of the money owing under the record of settlement, this was offset by his "*deliberate and flagrant*" refusal to pay the outstanding money owed.

In deciding on the quantum of the penalty, the Authority took into account the lengths Mr Tutagalevao had to go to in order to achieve that full payment. It also considered the delay in completing payments and the effect on Mr Tutagalevao of this delay. The Authority decided to impose a penalty of $4,000, of which $3,000 was to be paid to Mr Tutagalevao and $1,000 to the Crown. Costs were awarded to Mr Tutagalevao, based on the Authority's notional daily tariff of $4,500 for a one-day investigation meeting. Accordingly, the Authority ordered Mr Wildermoth to contribute $1,125 to the legal costs incurred by Mr Tutagalevao, within 28 days.

Tutagalevao v Wildermoth t/a Stephen Wildermoth Transport [[2021] NZERA 115; 24/03/2021; T MacKinnon]

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

Personal Grievances

Employment Relations Authority

Privacy Act 2020

Full and Final Settlements

Trial and Probationary Periods

Employer News

Consumers price index (CPI)

The consumers price index (CPI) is a measure of inflation for New Zealand households. It records changes in the price of goods and services. It influences interest rates and is used to calculate changes to benefit payments.

As of 21 April 2021, the CPI was updated to record a 1.5% increase with the next expected update to be 16 July 2021.

For further information, please click the link below.

Statistics New Zealand [21 April 2021]

Major reforms will make healthcare accessible for all NZers

- All DHBs will be replaced by one national organisation, Health New Zealand
- A new Māori Health Authority will have the power to commission health services, monitor the state of Māori health and develop policy
- New Public Health Agency will be created
- Strengthened Ministry of Health will monitor performance and advise Government

Putting a greater emphasis on primary healthcare and ensuring fairer access for all New Zealanders are two of the main drivers of health sector reforms announced today by Health Minister Andrew Little.

"We are going to put the emphasis squarely on primary and community healthcare and will do away with duplication and unnecessary bureaucracy between regions, so that our health workers can do what they do best – keep people well.

"The reforms will mean that for the first time, we will have a truly national health system, and the kind of treatment people get will no longer be determined by where they live," Andrew Little said.

To read further, please click the arrow below.

To read EMA's views on this please click here.

New Zealand Government [21 April 2021]

New Zealand to open new Trade Commission in Fiji

New Zealand will open a new Trade Commission in Fiji later this year, Trade and Export Growth Minister Damien O'Connor has announced.

"Fiji is New Zealand's largest trading partner in the Pacific region", Damien O'Connor said.

"Prior to the COVID-19 pandemic, annual two-way trade between New Zealand and Fiji was worth over $1.1 billion."

The new Trade Commission office in Suva will be responsible for helping grow New Zealand business in Fiji as well as across the broader Pacific region.

"Boosting the more than $3 billion in annual trade and investment flows between New Zealand and the Pacific will be critical for all economies in the region as we work to recover from the devastating economic effects of COVID-19.

"This aligns with the Government's commitment to renew and recharge our partnerships in the Pacific to support the region's security and prosperity.

"Like New Zealand, Fiji's health response to COVID-19 has been extremely successful. Our decision to open the new office in Fiji is testament to New Zealand's confidence in its economic resilience, as well as our commitment to the region's economic recovery.

To read further, please click the link below.

New Zealand Government [21 April 2021]

Apprenticeship numbers jump in 2020

The number of apprentices continues to grow, with people from across the community signing up for careers in the trades, Education Minister Chris Hipkins says.

Tertiary Education Commission (TEC) <data> for enrolments in tertiary and vocational study as at December 2020 shows that the number of apprentices increased by 17.6 per cent compared to 2019 (45,155 in 2019 and 57,035 in 2020).

"The Government has backed the trades with more than $320 million invested in free trades training (TTAF), and nearly $100 million going to support employers retain apprentices and take on new ones through Apprenticeship Boost," Chris Hipkins said.

"That investment has paid off with double digit growth in apprentice numbers during 2020, despite the impacts of COVID-19. We are seeing people taking the opportunity to becoming apprentices no matter what their age, gender or ethnicity.

"Apprenticeships are traditionally seen as something you do out of school, but with free trades training we are seeing a big jump (19.7%) in workers aged 25 to 39 taking the opportunity for a career change, and more than 1,500 additional apprentices aged over 40.

"The number of Māori and Pacific apprentices grew almost 30 per cent last year, which will benefit the economic development of their communities for years to come. And the number of women training to be apprentices is growing at nearly twice the rate of male apprentices.

"These numbers show we are producing a vibrant and diverse trades workforce that will support New Zealand's economic growth as we recover from the impacts of COVID-19.

"And we're seeing strong signs of continued growth in domestic enrolments at tertiary institutions," Chris Hipkins said.

"Indicative March 2021 data shows the number of domestic students increasing by 12%, compared with around 1% for each of the previous three years, and repeated falls in the full-year enrolment data in years before that.

"Again, the growth in 2021 is more pronounced among older people, with building courses and teacher training standing out.

To read further, please click the link below.

New Zealand Government [22 April 2021]

MBIE welcomes feedback on the Licensed Building Practitioners scheme

The Ministry of Business, Innovation and Employment (MBIE) is seeking feedback on how the Licensed Building Practitioners scheme is working.

"We want to hear from Licensed Building Practitioners (LBPs) and those who engage with them to find out if key elements of the scheme are working," said Amy Moorhead, MBIE's Building Policy Manager.

The LBP scheme was first introduced in 2007 and is the primary way the building regulatory system ensures that practitioners undertaking residential building work are competent.

"New Zealand needs Licensed Building Practitioners who are trained, skilled and accountable.

"We want to ensure the public and wider sector have trust and confidence in the people carrying out residential work that is integral to weathertightness and structural integrity."

Feedback is sought on three main areas of the scheme: LBPs' ability to supervise non-LBPs undertaking restricted building work; licensing classes; and if the minimum standards of competency remain appropriate.

To read further, please click the link below.

Ministry of Business, Innovation and Employment New Zealand [22 April 2021]

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: 13 Bills

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

Land Transport (Drug Driving) Amendment Bill (23 April 2021)

Harmful Digital Communications (Unauthorised Posting of Intimate Visual Recording) Amendment Bill (23 April 2021)

Girl Guides Association (New Zealand Branch) Incorporation Amendment Bill (28 April 2021)

Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill (28 April 2021)

Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill (29 April 2021)

Commerce Amendment Bill (30 April 2021)

Lawyers and Conveyancers (Employed Lawyers Providing Free Legal Services) Amendment Bill (7 May 2021)

Social Security (Subsequent Child Policy Removal) Amendment Bill (19 May 2021)

Mental Health (Compulsory Assessment and Treatment) Amendment Bill (19 May 2021)

Inquiry into congestion pricing in Auckland (20 May 2021)

Sunscreen (Product Safety Standard) Bill (26 May 2021)

Incorporated Societies Bill (28 May 2021)

Financial Sector (Climate-Related Disclosures and Other Matters) Amendment Bill (28 May 2021)

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/

The Employer Bulletin is a weekly update on employment relations news and recently published legal decisions. It is EMA's policy to summarise cases that contain legal issues relevant to employers. The purpose of the Employer Bulletin is to provide and to promote best practice in employment relations. If you would like to provide feedback about the Employer Bulletin, contact advice@ema.co.nz

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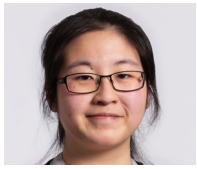

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