Employer Bulletin

Our Weekly News Digest for Employers

Friday, 23 July 2021

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Cases

Employment Relations Authority: Six Cases

Employee was not paid wages during entire employment relationship

Mr Fuller claimed that he was owed wages by, Little Creek Limited (Little Creek), for the period from 30 January 2018 until May 2019. Mr Fuller met Mr Foley, Shareholder of Little Creek, prior to commencing employment in February 2018. Mr Fuller understood him to be acting on behalf of Little Creek when they entered into an individual employment agreement which was signed by both parties on 30 January 2018.

Little Creek claimed that when it was sold to Mr Hogg in May 2018, Mr Hogg was unaware that Little Creek had any employees, including Mr Fuller with whom he had no contact. In July 2018 Mr Fuller was made aware that Mr Foley was unable to be, and had not been, the Director of Little Creek since May 2017. He was therefore unable to act in an executive capacity on behalf of Little Creek in relation to Mr Fuller's employment.

Mr Fuller's role was a Business Development Manager which involved him contacting, and visiting farmers throughout the upper North Island, identifying opportunities to sell hydro plants and effluent systems. Mr Fuller claimed that he purchased a vehicle to carry out his job. Mr Fuller was not paid by Little Creek for the first few months during which time Mr Fuller repeatedly sent Mr Foley text messages requesting payment.

The Employment Relations Authority (the Authority) found no evidence that Mr Fuller had tried to contact Mr Hogg, the sole Director of Little Creek, about the non-payment of his salary. Mr Fuller eventually accepted and commenced employment in an alternative part-time role, which signalled to the Authority that he viewed his employment with Little Creek as unsustainable and not financially viable.

Little Creek was ordered to pay Mr Fuller the sum of $25,410.96 in respect of unpaid wages for the period 30 January 2018 until 31 May 2018. Little Creek was also ordered to pay Mr Fuller the sum of $2,311.54 in respect of unpaid wages for the period 1 June 2018 to 31 July 2018. Mr Fuller was entitled to statutory annual leave entitlement for that period.

Little Creek also had to pay Mr Fuller the sum of $5,769.23 in respect of four weeks contractual notice period, and $4,500.00 in respect of the vehicle allowance. The Authority ordered Little Creek to pay interest on the outstanding sums from the date of the determination until payment was made in full.

The Authority also penalised Little Creek for breaches of the Employment Relations Act 2000 and the Wages Protection Act 1983 which totalled to $2,500. Of this amount, $1,250 was paid to Mr Fuller, and $1,250 to the Crown. Costs were reserved.

Fuller v Little Creek Limited [[2021] NZERA 228; 27/05/2021; E Robinson]

Employee quit after receiving help to improve performance

Mr Mishra began working at Ryan Investment NZ Limited (Ryan Investments) as a Driver in November 2019. Mr Mishra claimed that after working only three days, Mr Kapoor, the Shareholder and Director of Ryan Investments, allegedly confronted him over his performance at work, attempted to assault him and then tell him to leave. Mr Mishra claimed that he then left the workplace, not only because he felt that he had been dismissed, but also because he was afraid of Mr Kapoor.

Ryan Investments disputed Mr Mishra's version of events. It claimed that it first engaged Mr Mishra as a contractor and not an employee. Ryan Investments claimed that it initially offered Mr Mishra full time employment, but subsequently offered him a temporary contractor role after it found out that he did not have a full driver's licence. Ryan Investments claimed that on the third day of Mr Mishra's work, Mr Mishra became angry at Mr Kapoor and two other employees who were trying to assist him with deliveries. Ryan Investments stated that it was then when Mr Mishra allegedly resigned.

The Employment Relations Authority (the Authority) had to determine whether Mr Mishra was an employee or a contractor. That Authority held that from the evidence, it was clear that Mr Mishra was an employee, as the only reason he was engaged as a contractor was due to the issue about his driver's licence. Furthermore, the work Mr Mishra performed was the same work he would have undertaken as an employee.

At the end of Mr Mishra's first day of employment, it was noted that Mr Mishra was slow, he took too many breaks and needed time out of work to manage various tasks. Mr Mishra allegedly struggled with the workload the next day as well. The Authority heard evidence from Mr Mishra, Mr Kapoor and two other Drivers who were at the workplace when the alleged confrontation occurred on 11 November 2021.

On 11 November 2021 Mr Kapoor allegedly confronted Mr Mishra about his underperformance and the requirement for him to be more efficient and communicate better about deliveries. Mr Mishra allegedly became angry at this comment and the situation was further exacerbated when another Driver offered to help with the afternoon deliveries. Mr Mishra allegedly then became aggressive and threw a punch at the Driver. When Mr Kapoor came back to intervene, Mr Mishra told Mr Kapoor that was he was leaving.

Based on these facts, the Authority held that Mr Mishra had resigned and was not dismissed. Therefore, his unjustified dismissal claim failed. Costs were reserved.

Mishra v Ryan Investments NZ Limited [[2021] NZERA 226; 25/05/2021; P van Keulen]

Employer sought interim injunction to enforce restraint of trade provision in employment agreement

Du Val Management Limited (Du Val Management) claimed that Mr Henderson, a former employee, breached a restraint of trade provision in his employment agreement by working for William Corporation Limited (William Corporation), a competitor. Du Val Management claimed William Corporation aided and abetted Mr Henderson's breach and lodged a claim in the Employment Relations Authority (the Authority).

Du Val Management sought various orders and remedies for the alleged breach and sought an interim injunction preventing Mr Henderson from working for William Corporation pending the determination of its substantive claims. Mr Henderson opposed the interim injunction on the basis that the restraint of trade clause was unreasonable and unenforceable. The Authority received affidavits from Ms Gibson, Sales Manager for Du Val Management and Mr Pike, Sales Manager for William Corporation.

Mr Henderson resigned from his Property Advisor position on 19 January 2021. Mr Henderson told Ms Gibson that he was not receiving sufficient income or stability in the short term to support his lifestyle and financial obligations. In his letter of resignation, Mr Henderson advised Du Val Management that he had not accepted any alternative offers of employment.

Ms Gibson became aware that Mr Henderson was working for William Corporation in early February 2021. She was concerned Mr Henderson was in breach of the terms of his employment agreement and on 9 February 2021, Du Val Management wrote to William Corporation raising its concerns. Mr Henderson advised Du Val Management that he was not employed by William Corporation, but was an independent contractor and that he had no intention of soliciting Du Val Management's clients.

William Corporation confirmed to Du Val Management that Mr Henderson had been engaged as an independent contractor in the role of Property Sales Consultant based in Auckland. William Corporation agreed it would not aid or abet Mr Henderson to solicit any clients or employees of Du Val Management for the 12-month restraint period.

On 15 February 2021, Ms Gibson was advised that Mr Henderson had contacted Mr Pike on three separate occasions during his employment at Du Val Management. Ms Gibson was concerned that these communications were inconsistent with Mr Henderson's claim that had not accepted any alternative offers of employment.

In order for the Authority to override the prima facie position rendering a restraint of trade unenforceable, Du Val Management needed to show that it had a legitimate propriety interest, and that the restraint was no wider than was reasonably necessary to protect that interest. Du Val Management sought to protect its former and current customer base from unfair competition. Du Val Management argued that competition could arise because Ms Henderson had knowledge about Du Val Management's customers.

Du Val Management claimed that Mr Henderson had been exposed to its sales and marketing strategies and that these were discussed during daily sales meetings. Mr Henderson argued that these were generic marketing techniques with no noticeable differences between Du Val's Management approach and other property developers in the market.

Du Val Management is a real estate development company which largely focuses on large apartment developments in South Auckland. William Corporation is a property development company based in Auckland, Wellington and Christchurch. It mainly develops terraced houses in the Auckland areas of West Auckland and Mount Albert. Mr Henderson submitted that he was not in direct competition with Du Val Management because he was selling properties in a different geographical area.

Furthermore, Mr Pike claimed that William Corporation was not in direct competition with Du Val Management because of their size, building products and geographical location. There was no evidence to indicate that Du Val Management lost any customers as a result of Mr Henderson providing services to William Corporation. In his affidavit to the Authority, Mr Henderson made it clear that he did not intend to contact any of Du Val Management's clients or take any steps in breach of non-solicitation provisions.

The Authority held that Du Val Management had an arguable case however, there were elements of the restraining covenants that were potentially unreasonable. Unlike other cases where restraining covenants were investigated, there were no allegations that Mr Henderson had taken or used confidential information which belonged to Du Val Management. The overall justice of the case favoured declining Du Val Management's application for interim orders. Costs were reserved.

Du Val Management Limited v Henderson [[2021] NZERA 218; 21/05/2021; V Campbell]

Interim injunction inconsistent with the maintenance of productive employment relationships

UZD engaged an external Investigator to investigate a complaint made anonymously by LMS, a former employee of UZD, to WorkSafe New Zealand (WorkSafe) who then referred it to UZD.

LMS claimed that UZD breached its good faith obligations and was not active and constructive in establishing a productive employment relationship with him. LMS claimed that two of UZD's Managers did not raise with him at the time alleged, concerns they had disclosed to the Investigator. LMS claimed that UZD acted in a misleading and deceptive manner when

it consulted with him about terms of reference for the Investigator without disclosing the existence of the Managers' concerns. LMS argued that had he known of these concerns, he would have taken a different approach when consulted about the terms of reference.

LMS sought an interim compliance order prohibiting UZD from proceeding with the investigation under the terms of reference, pending substantive determination of his personal grievance and breach claims. UZD claimed that it acted in good faith, had treated LMS fairly and reasonably and did not breach any terms of LMS's employment. UZD argued that the Employment Relations Authority (the Authority) lacked jurisdiction to grant an interim compliance order and that grounds for an interim injunction, if granted, were not made out.

An interim injunction was potentially available as a remedy. The Authority accordingly found that LMS had established there was a serious question to be tried. LMS claimed that WorkSafe's complaint form did not reasonably establish a threshold to conduct an investigation.

The Authority accepted it was arguable that LMS might establish a personal grievance on this basis but did not consider it strongly arguable. Despite requests, the complaint was not disclosed to LMS for some weeks. Later, LMS had learned of an email exchange between two Line Managers about verbal complaints regarding LMS' behaviour. The Authority accepted there was a strongly arguable case that UZD breached statutory and contractual obligations by not following up those concerns at the time.

LMS also claimed UZD had breached good faith by not disclosing the existence of the email and file notes. UZD responded that the decision maker had no knowledge about the email or file notes. The Authority accepted that it was strongly arguable that UZD breached the good faith obligations by not ensuring that LMS was aware of the email and file notes before consulting with him on the terms of reference for the external ınvestigator.

LMS claimed that the Investigator had demonstrated apparent bias by accepting the Line Managers' accounts. The Investigator had also mischaracterised an employee's reason for not proceeding with a complaint about LMS. LMS suggested it was "*grossly unfair*" for the proposed investigation to proceed. However, the decision maker decided that the Investigator should continue with the investigation and authorised the Investigator to disclose a redacted version of the anonymous complaint.

The Authority accepted there was an arguable case, albeit not a strong one, that the Investigator demonstrated apparent bias so any factual conclusions expressed as a result of his investigation may be challenged. Overall, the Authority determined that LMS had met the threshold of there being an arguable case.

Although there was no reason to think UZD and the Investigator would not comply with confidentiality obligations, the Authority felt there was a risk of LMS being publicly identified. This would potentially have serious effects on LMS's wife and family, especially if in relation to a bullying investigation. Compensation for LMS was unlikely to be an adequate remedy. However, the risk of this occurring was significantly reduced by the non-publication order the Authority made.

If an interim order was made, UZD would be restrained from continuing any aspect of its investigation pending final resolution of the claims. The Authority noted there is a high hurdle to overcome before an employer's entitlement to investigate concerns can be displaced, especially when regarding health and safety issues.

Overall, the Authority concluded that the balance of convenience did not support LMS's claim for interim orders. Furthermore, an order from the Authority restraining the proposed investigation would be inconsistent with the maintenance of productive employment relationships. The overall justice of the case therefore counted against interim orders. The claim for interim injunction was dismissed.

Costs were reserved following determination of the substantive claims.

LMS v UZD [[2021] NZERA 225; 25/05/2021; P Cheyne]

Agreed payment not made in time resulted in compliance order and penalty imposed on employer

Mr Khomeini and Mr Thakur signed a settlement agreement on 19 January 2021. A Mediator from the Ministry of Business, Innovation and Employment certified the settlement agreement pursuant to section 149 of the Employment Relations Act 2000 (the Act). Mr Khomeini lodged a claim with the Employment Relations Authority (the Authority) alleging that Mr Thakur had breached the settlement agreement by not paying the agreed lump sum payment by the prescribed deadline. Mr Khomeini sought a compliance order and a penalty for the breach as well as costs to bring legal proceedings against the breach.

The relevant facts that gave rise to this claim was that Mr Khomeini and Mr Thakur had an employment relation problem which they resolved and recorded in a settlement agreement. Clause 1 of the settlement agreement provided that Mr Thakur pay Mr Khomeini $7,500 pursuant to section 123(1)(c) of the Act by 18 February 2021. When the amount payable was not paid by the due date, Mr Khomeini followed up with Mr Thakur and received two separate emails advising that the payment would be made. The first email stated that payment would be made by the end of February 2021. When no payment was made, a second email stated that payment would be made in the following two weeks.

Although the Statement of Problem was served on Mr Thakur, he did not respond to it by lodging and serving a Statement of Reply with the Authority. Mr Thakur was notified of the case management conference however he did not participate. During the conference, the Authority set the matter down for an investigation meeting and Mr Thakur was subsequently served with a Notice of Investigation which set out the date and time for the investigation meeting.

The Notice of Investigation meeting advised Mr Thakur that if he chose not to participate, then the claim by Mr Khomeini would be determined in his absence. Mr Thakur did not attend the investigation meeting and did not contact the Authority to explain why he could not or would not attend. Considering all of this, the Authority proceeded with the investigation meeting pursuant to clause 12 of the Schedule 2 of the Act.

In considering all of the facts, the Authority held that Mr Thakur breached clause 1 of the settlement agreement by not making payment as required. The Authority held that a compliance order and a penalty for the breach was necessary in the circumstances. It was concluded that $1,000 was an appropriate penalty to compensate Mr Khomeini for some of the inconvenience, distress and costs he suffered as a result of Mr Thakur not meeting his obligations under the settlement agreement. Mr Thakur was also ordered to pay $71.56 for the filing fee.

Khomeini v Thakur [[2021] NZERA 227; 25/05/2021; P van Keulen]

Interim order awarded to restrain employee from working for a competitor

In May 2021, Mr Musson's employment ended with LiftX Limited (LiftX) following his resignation on notice. LiftX claimed Mr Musson breached the restraint of trade provision in his employment agreement by taking up employment with a competitor, ESPNZ Limited (ESPNZ), and sought a permanent injunction. LiftX also sought an interim injunction prohibiting Mr Musson from working for ESPNZ, pending an order from the Employment Relations Authority (the Authority).

Mr Musson gave assurances to the Authority of compliance with the confidentiality and non-solicitation provisions in his employment agreement however, he claimed that the restraint of trade provision was unenforceable. The restraint of trade provision stated that Mr Musson was not allowed to be "*employed or engaged"* by a competitor. The evidence provided to the Authority indicated that Mr Musson was not yet employed by a competitor at the time of this determination. However, the Authority accepted it was arguable that Mr Musson was going to be imminently employed or engaged by a competitor.

The Authority accepted that LiftX was entitled to some form of post-employment restraint against Mr Musson. However, it held that a restraint of trade provision of six months was not required to protect LiftX's propriety information. The Authority accepted that LiftX had established an arguable case that it might be entitled to a restraint of trade for a lesser period.

The Authority also concluded that the balance of convenience favoured upholding the restraint of trade, pending the substantive determination of the claim. It stated that while LiftX was entitled to protect its confidential and commercially

sensitive information, it had sufficient protection through the confidentiality and non-solicitation provisions in the employment agreement.

In considering all of the circumstances, the Authority held that Mr Musson was aware of the restraint of trade provision in his employment agreement before his resignation and the Authority noted public interest in enforcing the sanctity of employment agreements. The Authority offered dates prior to the end of July 2021 for a substantive investigation hearing but made an interim order restraining Mr Musson being employed by a competitor. Costs were reserved.

LiftX Limited v Musson [[2021] NZERA 231; 28/05/2021; P Cheyne]

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

Performance Management

Restraints of Trade

Termination of Employment

Full and Final Settlements

Employer News

Holidays (Increasing Sick Leave) Amendment Act 2021

The Holidays (Increasing Sick Leave) Amendment Act will come into effect on 24 July 2021.

This means that when an employee becomes eligible for sick leave on or after this date, they will be entitled to 10 days' sick leave, instead of 5 days. An employee may carry over up to 10 days' sick leave to a maximum of 20 days' current entitlement in any year.

To read further, please click the link below.

New Zealand Legislation [22 July 2021]

Health and safety paramount on forestry sites

A tragic forestry fatality on the East Coast could have been avoided if industry guidance had simply been being followed, says WorkSafe.

Businesses are being reminded once again to make sure work is being done correctly, safely and to higher industry standards or risk seeing their workers injured or killed.

Two companies appeared in court on 24 March 2021 for sentencing following the incident with the sentencing decision being released on 16 July 2021. Ernslaw One Limited engaged Pakiri Logging Limited to assist with harvesting at West Ho forest in Tologa Bay.

In February 2019, a breaker out worker for Pakiri Logging Limited was struck by a log being hauled out of the valley on a skyline cable. The victim died at the scene as a result of his injuries.

A WorkSafe investigation found both parties had failed to ensure the dangerous work was being carried out safely.

"Pakiri were not ensuring crew were following correct protocols while breaking out and harvesting work was taking place," said WorkSafe's Area Manager Danielle Henry.

"Our investigation found that the parties' workers were not abiding to recommended safe retreat distances. At the time of the incident, the victim was 18-20 metres away from the skyline cable when he should have been at least 45 metres away.

"Audits commissioned by Ernslaw and Pakiri from May to September 2018 highlighted issues with the way in which a particular break out crew for Pakiri was operating. Despite issues identified in these audits being available to the companies months prior to the incident, the companies failed to take corrective action.

"Had the two companies discussed the audit results as and when they were provided and taken action as a result of the issues identified then this tragic incident could have been avoided.

"This highlights the importance of clear communication and the need to follow industry practice – especially in a high risk industry."

Pakiri Logging Limited was fined $468,000 and Ernslaw One Limited was fined $288,000 at the Gisborne District Court while the companies have been ordered to share in reparations to the families for a total of $256,408.

To read further, please click the link below.

Worksafe [19 July 2021]

Hundreds more hands funded to work for nature

What happened

A worker fell from four metres to the ground when completing a walkway improvement project. The worker was tasked with removing an elevated walkway that was fixed to the side of an aggregate screen, at a quarry operation.

The incident occurred when the worker was removing bolts securing the walkway to the structure, causing the walkway to fall. The walkway was partly held in place by a crane. Because of the crane support, the worker assumed that there was sufficient structural integrity and continued working on the walkway. The structure was in two parts and connected by a handrail and when the worker cut the handrail, part of the walkway failed causing the worker to fall to the ground with part of the walkway

This incident highlights the importance of managing contractors and Job Safety and Environmental Analysis (JSEA) documentation. The JSEA was signed off by senior quarry personnel and they did not challenge the lack of detail in the document.

What we know

The JSEA was inadequate. It lacked critical steps involved in completing the work and did not include the critical controls for preventing falling objects or workers working at height. The sign off of a poor quality JSEA is an acceptance of controls that may not address all risks to workers. The operator did not maintain appropriate oversite of the plan and assumed the contractor would complete a full step by step JSEA and that this would be communicated to workers.

WorkSafe advice

- Operators should ensure that all work be effectively risk assessed with input from workers and appropriately detailed JSEA's are provided to workers to undertake work safely. Those that undertake risk assessments should be suitably trained in the process.
- There should be a competent person to approve the actual implementation of JSEA for any safety critical work.

- Any structure should be considered unstable after removal of any bolt or brace unless the integrity is confirmed by a suitably qualified person.

To read further, please click the link below.

Worksafe [20 July 2021]

Effects of COVID-19 on trade: At 14 July 2021 (provisional)

Effects of COVID-19 on trade is a weekly update on New Zealand's daily goods trade with the world. Comparing the values with previous years shows the potential impacts of COVID-19.

The data is provisional and should be regarded as an early, indicative estimate of intentions to trade only, subject to revision.

We advise caution in making decisions based on this data.

To read further, please click the link below.

Statistics New Zealand [21 July 2021]

Pause to Quarantine Free Travel from South Australia to New Zealand

Quarantine Free Travel from South Australia to New Zealand will be paused from 11.59am (NZT) tonight, COVID-19 Response Minister Chris Hipkins has announced.

However, people currently in the state who ordinarily live in New Zealand will be able to return on "managed return" flights starting with the next available flight, and are encouraged to do so, Chris Hipkins said.

A negative pre departure test taken within 72 hours of flying will be required for eligible passengers. They will also need to complete a health declaration confirming they have not been at a location of interest and the Nau Mai Rā travel declaration.

A stay in MIQ will not be required.

"The decision is based on public health advice from New Zealand officials and follows South Australia's announcement this afternoon that it would go into lockdown for seven days from 6pm tonight," Chris Hipkins said.

"The pause will run for seven days, to 27 July, to coincide with the timing of the lockdown and will be reviewed on that day.

"We acknowledge this will be disruptive for travellers and organisations.

"However, given the current uncertainty and our consistently cautious approach to prevent COVID-19 from entering the New Zealand community, we are confident it is the right approach.

"The pause means people cannot travel to New Zealand from South Australia after 6pm tonight for the duration of the pause unless they are normally resident here and wish to return.

"We encourage people in this category to consider the option that is available to them over the next seven days."

Queensland

At this stage, there is no change to QFT for Queensland.

For more information, visit Unite Against COVID-19: https://covid19.govt.nz/travel/quarantine-free-travel/australia/

New Zealand Government [20 July 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: Ten Bills

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

Construction Contracts (Retention Money) Amendment Bill (23 July 2021)

Ngāti Rangitihi Claims Settlement Bill (4 August 2021)

Inquiry of the Natural and Built Environments Bill: Parliamentary Paper (4 August 2021)

Inquiry into the Review of the Radio New Zealand Charter (13 August 2021)

Maritime Powers Bill (15 August 2021)

Biosecurity (Information for Incoming Passengers) Amendment Bill (16 August 2021)

Holidays (Parent-Teacher Interview Leave) Amendment Bill (18 August 2021)

Ngāti Maru (Taranaki) Claims Settlement Bill (18 August 2021)

Crown Minerals (Decommissioning and Other Matters) Amendment Bill (19 August 2021)

Inquiry into school attendance (31 August 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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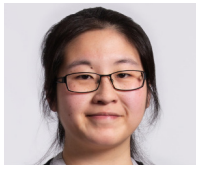

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