Employer Bulletin

Our Weekly News Digest for Employers

Friday, 26 June 2020

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Cases

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

Employment Relations Authority: Seven cases

Removal to the Employment Court sought for an important question of law

The New Zealand Professional Fire Fighters Union (the Union) and Fire and Emergency New Zealand (FENZ) were parties to a collective agreement. FENZ is a Crown Entity within the meaning of the Crown Entities Act 2004. The collective agreement contained various terms requiring FENZ to notify vacancies or new positions and to then give full consideration to the union's members. The agreement also contained a requirement that no less than 14 days' notice shall be posted with these vacancies or positions, inviting applications from the workers to fill the positions. It also provided an obligation to give full consideration to these applicants.

The Union argued that FENZ's proposed appointment practice for two roles, District Manager and Group Manager, did not comply with the collective agreement. The Union stated that section 29 of the Fire and Emergency New Zealand Act 2017 (the Act) required FENZ to put in place a procedure to review the appointments that were subject to complaints by employees. The Union also stated that section 30 of the Act provided that section 26 and 29 of the Act did not apply if the person appointed was an employee who received a notice of redundancy. The Union argued that there was conflict between the Act and the collective agreement.

It was argued by the Union that there was an important question of law that would likely arise in the proceedings. The Union was of the mind that the matter should be removed to the Employment Court (the Court). The important question of law was whether the effect of section 30 of the Act removed the contractual appointment and review entitlements which should be enjoyed by the Union's membership because of the provisions in the collective agreement. FENZ was in agreement with the Union, that this matter should be removed to the Court. Both parties filed submissions in support of the removal to the Court.

Section 178(2)(a) of the Employment Relations Act 2000 (the ERA) provided the ability for the Employment Relations Authority (the Authority) to remove a matter to the Court if an important question of law was likely to arise in the matter.

Section 174E of the ERA states that a written determination provided by the Authority must state findings of fact, explain issues of law, make a conclusion and specify any orders required. The Authority did not have an obligation to record all of the evidence or submissions given by the parties or conclusions on those matters. In light of this, the Authority did not provide a determination for all submissions filed, but recorded that they considered them. The Authority noted that principles involved in assessing conflicts between statute and collective agreements were well established and frequently practiced in the Authority.

Though both parties agreed to have the matter removed to the Court, they still had to satisfy the statutory test. The Authority was unconvinced that the case between these parties would give rise to an important question of law. The Authority concluded that the matter should not be removed to the Court and denied the application.

Costs were reserved.

New Zealand Professional Fire Fighters Union v Fire and Emergency New Zealand [[2020] NZERA 123; 18/03/2020; G O'Sullivan]

Principle for costs well established

In its determination dated 4 March 2020, the Employment Relations Authority (the Authority) found that Mr Nicklin was unjustifiably dismissed by J K J Oborn Limited (Oborn). It also found that Oborn had not paid Mr Nicklin the holiday pay due to him and that a penalty was justified. Costs were reserved.

Mr Nicklin's representative, Robert Morgan, provided details of costs incurred in bringing the employment relationship problem to the Authority.

The Authority may award such costs and expenses as it feels are reasonable. The principle that costs follow the event is well established, as is the notional daily tariff. Mr Nicklin was entirely successful in his original claim, which took half a day. Therefore, the Authority ordered that Oborn pay Mr Nicklin $2,250 as a contribution to costs, within 28 days of this determination date.

Nicklin v J K J Oborn Limited [[2020] NZERA 182; 5/05/2020; A Fitzgibbon]

Non-publication order granted in relation to alleged settlement agreement breaches

TBN sought a non-publication order which UQE did not oppose. The Employment Relations Authority (the Authority) has discretion to grant non-publication orders under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act). Clause 10(1) of the Schedule 2 states that an Authority may order evidence, pleadings, or parties names not to be published to such conditions the Authority thinks fit.

The discretion the Authority has been given must be exercised on a principled basis. The Employment Court (the Court) in *Crimson Consulting Limited v Berry* [2017] NZEmpC 94, summarised a recent Authority's order regarding non-publication in the employment jurisdiction. The Court recognised the general principle that justice should be administered openly was strong. A party seeking to depart from the fundamental principle of open justice would be required to provide evidence identifying specific adverse consequences that should result in a non-publication order being issued.

The onus, therefore, was on TBN to show that a non-publication order should be made because it would be in the overall interests of justice to do so. The Court recognised that every case would be fact specific and that all factors would need to be carefully assessed in a principled manner.

TBN filed claims in relation to alleged breaches of a settlement agreement that was signed by a mediator from Medication Services under section 149 of the Act. Publishing the parties names in this matter would likely have rendered some if not all of the benefits or the confidential settlement nugatory. That was found to not be in the overall public interest.

Equally, there was strong public interest in preserving the confidentiality of settlement agreements that are entered into under section 149 of the Act. Maintaining public confidence in mediation as an appropriate forum that assists parties to resolve their problems without the need for litigation.

The overall public interest in open justice and the public interest in maintaining confidentiality in mediation should be maintained by a public determination by the Authority that did not identify the parties by their actual names in this case.

The Authority exercised its discretion to order that the parties names should not be published in connection with these proceedings, until further order of the Authority. By using the term 'until further order' it left open the possibility that new evidence may make it appropriate for the non-publication order to be reviewed. It also left open the possibility that when issuing a substantive determination, the Authority considered one or both parties to be named. This may arise if the penalties sought by TBN were imposed on UQE, then that may be a material factor that would change the Authority's assessment of where public interest may lie.

Costs were reserved pending the outcome of the substantive mater.

TBN v UQE [[2020] NZERA 135; 31/03/2020; R Larmer]

Authority adopted principles to determine costs

On 23 December 2019, the Employment Relations Authority (the Authority) found Mr Walford had been unjustifiably dismissed by the Department of Corrections (DoC), however no remedies were ordered due to Mr Walford's own "*egregious conduct*".

This determination dealt with Mr Walford's application for a contribution towards his legal costs in the amount of $8,000. Under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act), the Authority has power to award costs. The Authority adopted principles set out in *PBO Ltd v Da Cruz* in respect of this power. The case set out that awarding costs is discretionary, and that this discretion cannot be exercised arbitrarily. It also set out that the statutory jurisdiction to award costs should be consistent with the Authority's jurisdiction of equity and good conscience and to be considered on a case by case basis. It was stated that costs could not be used as a punitive measure and that it is open to the Authority to consider whether all or any of the costs were unnecessary or unreasonable. Costs were stated to generally follow the event and without prejudice offers can be taken into account. It was also set that awards of costs will be modest, frequently costs are judged against notional daily rates. Furthermore, the nature of the case can also influence costs resulting in the Authority ordering "*costs lie where they fall in certain circumstances*".

The Authority held that the two parties both had a measure of success. In this, Mr Walford having obtained a declaration that he was unjustifiably dismissed and DoC in not having to meet remedies due to Mr Walford's own conduct. Whilst DoC submitted that as the Authority found egregious conduct by Mr Walford, this should have led to "*costs lying where they fall*", the Authority held that as per *White v Auckland DHB*, the Authority "*cannot take into account Mr Walford's egregious behaviour in awarding remedies*".

Therefore, the Authority ordered that when "*standing back and looking at matters 'in the round'*", Mr Walford was entitled to 80% of the costs and DoC was entitled to 20% for its own legal fees. Applying such percentages to the legal costs claimed, the Authority ordered DoC to pay $4,800 as a contribution towards Mr Walford's legal costs together with $71.56 of the Authority's filing fee and $306.66 of the Authority's hearing fees. The total sum of $5,178.22 was payable within 28 days of this determination.

Walford v Department of Corrections [[2020] NZERA 138; 01/04/2020; J Trotman]

Installments agreed to in Record of Settlement intentionally breached

Ms Kim sought compliance with a Record of Settlement agreed between her and her previous employer, Ms Lion. She asked the Employment Relations Authority (the Authority) to order Ms Lion to pay all monies due under the settlement agreement, penalties for ongoing breaches and costs associated with her application before the Authority.

The Record of Settlement was certified by a mediator in October 2018. Ms Lion complied with some immediate fixed payments specified under the settlement agreement. However, weekly payments of $350 scheduled to continue until late April 2019 quickly became intermittent and were often paid below the sum agreed, or not at all. Ms Kim lodged a Statement of Problem with the Authority in early April 2019 and the parties altered their arrangements with the weekly payments reduced to $200 each week until the outstanding sum was paid. However, Ms Lion again fell behind with the weekly payments and Ms Kim resurrected her application for compliance. Ms Lion did not challenge Ms Kim's position, but asked that the Authority allow her to pay the debt at the rate of $100 per week until the outstanding amount was paid.

The Authority considered whether an order for full and immediate compliance be made, or whether the order should allow for instalment payments. The Employment Relations Act 2000 (the Act) provides that the Authority may order compliance by ordering payment by instalments "*but only if the financial position of the employer requires it*".

Ms Lion sought to make instalment payments because she did not have the funds to pay the full sum at once. The Authority considered the information available and was mindful there had already been two prior agreements where Ms Lion agreed to make weekly payments to Ms Kim. The Authority on balance was unwilling to order payment by way of instalments due to concerns that the pattern of non-compliance would continue if a third instalment regime was formulated. Ms Lion was ordered to comply with the settlement agreement and pay Ms Kim the sum of $3,500 within 30 days of the determination.

The Authority then considered whether a penalty should be imposed and outlined that settlement agreements under the Act are a critical means by which parties to an employment relationship may resolve a problem. A breach of a mediated settlement impacted not only on the parties directly involved, but also any individual contemplating resolution of a dispute by the same method. The Authority found a penalty was warranted in the circumstances, but said it was appropriate to take Ms Lion's particular circumstances into account in determining the amount of penalty. Ms Lion's circumstances were adversely altered soon after the parties' agreement for reasons largely out of her control. Her business partner became seriously unwell and could not contribute to the business. However, to the extent Ms Lion preferred to direct monies to other creditors rather than Ms Kim, the Authority found the breach of her obligation to make weekly payments was intentional and could not be regarded as minor.

The Authority considered a penalty of $600 was proportional to the seriousness of the breaches and harm occasioned and that it was just that the full amount be awarded to Ms Kim. Ms Lion was also ordered to contribute $750 towards Ms Kim's costs.

Kim v Lion [[2020] NZERA 169; 28/04/2020; M Ryan]

Authority determination whether parties were owners or employees

Ms Lyu and Mr Chen claimed they were unjustifiably disadvantaged and then unjustifiably dismissed by Bear Paw Café Patisserie Sandwich Limited (Bear Paw). They also said wages remained to be paid and these were sought. Bear Paw said they were incapable of bringing their claims as they were never employees of the business.

Bear Paw was incorporated in December 2016 for the purpose of purchasing and operating a café. Its sole director and shareholder was Ms Lin who was of the view that both applicants were active partners. Ms Lin said she mooted the idea of owning and running a café over a period of nearly two years and this led to the purchase of a suitable business in February 2017. Both Ms Lin and Ms Lyu contributed money to the project, although the business was purchased in Ms Lin's name as Ms Lyu had advised that her immigration status prevented her from being identified as an owner. This, according to Ms Lin, led to her agreeing to cover Ms Lyu's involvement by concluding an employment agreement. It was Ms Lin's view that regardless of the employment agreement, the business operated as if both were owners and partners therein.

Mr Chen was in a personal relationship with Ms Lin, which had commenced when the two lived in Taiwan. Mr Chen joined Ms Lin in Wellington in 2016 and, according to Ms Lin, expressed an interest in being involved in the business. She said this made sense given Mr Chen was her partner and she and Ms Lyu had earlier

involved a third business partner, though that person subsequently chose to withdraw. Ms Lin said Mr Chen did not put any money into the business' establishment with the plan being that his share would be earnt through time and effort in the business. Mr Chen denied this. He said Ms Lin told him about the proposed café in mid-2016 and suggested he complete a barista's course so he could perform that role. Mr Chen said he only joined the business to work for Ms Lin because he wanted to help her business do well. He claimed he understood he did so as an employee having agreed with Ms Lin that he would be paid the minimum wage for each hour worked.

The business was not operating well and in June 2017, Ms Lin was reviewing security footage and saw what she considered inappropriate conduct between Ms Lyu and Mr Chen. According to Ms Lin, she felt disrespected because she saw her boyfriend of eight years and her friend of four years inappropriately touching. She raised her concerns which led to arguments and the opinion that there was a total destruction of the trust that had earlier existed between the three. Ms Lin ceased to participate in the business's day to day operations which she said was at the request of Mr Chen. However, Mr Chen said she abandoned the business and that he and Ms Lyu continued to work in the business until it ceased operating.

In order to determine if Ms Lyu and Mr Chen were employees the Authority had to determine the nature of the relationship. This meant looking at the intentions of the parties. The Authority considered whether there was anything written that indicted terms of the relationship between the parties. The Authority also considered how the relationship operated in practice and whether the applicants were effectively working on their own account.

There was some documentary evidence suggesting Ms Lyu was employed including the employment agreement and business contracts that were entered into using Ms Lin's name. The Authority however, concluded the bulk of evidence strongly pointed the other way and led to the conclusion that Ms Lyu was not an employee, but an equal owner and equal partner in the business. There were documents that suggested employment was necessary to maintain an image for immigration purposes. There was also a large number of documents which showed Ms Lyu's involvement in establishing the business and its ongoing operation, direction and management. There was also evidence in how the business was run with Ms Lyu making many of the necessary arrangements for the business. An example provided was continued participation in discussions about the business purchase. Another decision was to renovate with the interior designer liaising with Ms Lyu and saying it was her vision they were bringing to life.

In regard to Mr Chen, the evidence of Mr Chen's intent was highlighted when written evidence showed that Mr Chen expected recompense via either money paid after a profit was attained, or a share of the proceeds of a sale if that eventuated. This was not how an employee would expect to be paid. There was no employment agreement and his explanation for not having one was that he was a business partner, so it was not necessary to have one. In terms of control and how the arrangement worked in the workplace, Mr Chen accepted that he actively participated in decision making and acted in what he thought were the businesses best interests as opposed to being instructed. One of the decisions he took credit for was changing the name of the businesses trading name.

These were not the actions of an employee and an employee would never be capable of effectively removing his employer and taking over. They are the possible actions of a business partner. The Authority member determined that neither Ms Lyu nor Mr Chen were employees. The Authority lacked the jurisdiction to consider their claims and therefore they were dismissed.

Lyu v Bear Paw Café Patisserie Sandwich Limited [[2020] NZERA 141; 6/04/2020; M Loftus]

Bonding agreement not documented deemed void

Mr Sinton was a qualified mechanic and worked for Coatesville Motors 2013 Limited (Coatesville Motors) from 5 March 2018 to 21 December 2018. There was no written employment agreement between the parties. Mr Krinkel was a director and shareholder of Coatesville Motors and his partner Ms Gardner also worked in the business doing admin.

In July 2019 Mr Sinton claimed one or more conditions of his employment had been affected to his disadvantage by the unjustified actions of Coatesville Motors. Mr Sinton argued that he had been unjustifiably dismissed and that he was owed arrears of wages for an unlawful deduction made from his final pay. On 12 August 2018, Coatesville Motors lodged its Statement in Reply, denying Mr Sinton's claims. Coatesville Motors also raised counter claims for breaches of duties when he failed to return company property, failed to pay his parts account and failed to reimburse Coatesville Motors for his warrant of fitness (WOF) course undertaken. It sought damages from Mr Sinton.

Mr Sinton claimed that on 21 December 2018 Coatesville Motors deducted $2,066 from his final pay. He said he was told at the time the money was to pay for the WOF course. He sought payment of the $2,066 and in addition the payment of a fuel allowance in the amount of $1,750, which he said was owed to him when his employment ended. The documents produced to the Authority did not support Mr Sinton's claim about deduction from final pay. Ms Gardner had provided a clear breakdown and calculations of Mr Sinton's final pay as well as a bank statement showing Mr Sinton received full payment of his final pay including holiday pay.

Mr Sinton said he was entitled to a fuel allowance and stated that this was not paid but instead retained by Coatesville Motors as payment towards the WOF training payment due. In the absence of a written term of employment requiring the payment of a fuel allowance the Authority had considered whether there was a verbal agreement between the parties. The Authority was satisfied there was no contractual requirement for Coatesville Motors to pay Mr Sinton a fuel allowance, and there was no deduction made from Mr Sinton's final pay. Accordingly, his application was declined.

Coatesville Motors claimed that on termination of his employment Mr Sinton was obliged to return company property and to settle his employment-related debts. In this case property referred to a uniform as well as keys. Mr Sinton told the Authority he had put these items in a plastic bag, which he left hanging over Mr Krinkel's letter box. The Authority member accepted the evidence from Coatesville Motors that it never received the uniform items or the key. Leaving the uniform in a bag hanging over a letter box provided no guarantee that they would remain there until Mr Krinkel or Ms Gardner returned from work.

The Authority was satisfied Mr Sinton was aware of the need to return the company property as he had been asked by Ms Gardner in a text message in January 2019. His failure to ensure the items were returned and received by Coatesville Motors was a breach. Coatesville Motors produced evidence of the costs associated with the purchase of replacement uniform items, which totalled $380. It was also mentioned, without evidence, that the locks and alarms were changed due to the misplace key. Due to lack of evidence, damages cannot be claimed for the locks. The Authority ordered Mr Sinton to pay to Coatesville Motors the sum of $380 in damages for his failure to return company property at the end of his employment within 30 days of the date of this determination.

The Authority was not satisfied, due to lack of evidence, to make the orders sought by Coatesville Motors in relation to the parts account debt. While the parts account was made available to Mr Sinton as a result of the employment relationship, the obligation to pay the account was not founded on an employment agreement.

Mr Krinkel said he and Mr Sinton discussed the cost of the WOF course being in the region of $2,000 and they agreed that if Mr Sinton left within 12 months, he would repay the cost of the course. Mr Krinkel told the Authority member that when Mr Sinton left his employment, he asked how and when the money for the course would be paid. Mr Sinton denied this discussion. The discussion was not documented in writing and Coatesville Motors did not have any documentary evidence of the amount paid for the training. The Authority declined orders sought by Coatesville Motors.

Costs were reserved.

Sinton v Coatesville Motors 2013 Limited [[2020] NZERA 166; 24/04/2020; V Campbell]

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

Individual Employment Agreements

Employment Relations Act

Employer Bulletin

Friday, 26 June 2020

Employer News

Keeping work safe and fair during and post COVID-19

The Government is supporting fair and safe workplaces as more and more New Zealanders get back to work in Level 1.

We are investing in programmes to ensure employers and employees know their rights and obligations and at the same time we are supporting two new health and safety initiatives that will maintain the momentum to cut work-related harm, Workplace Relations and Safety says Minister Iain Lees-Galloway.

The programmes will provide:

- Health and safety leadership by industry
- Health and safety promotion and technical information
- Employment Services support and contestable fund

“During Alert Levels 2, 3 and 4, we saw countless examples of businesses, workers and industry organisations stepping up and taking their health and safety responsibilities seriously. This has been critical in slowing the spread of COVID-19.

“We need to continue to be vigilant. To support ongoing efforts, we are investing in industry-led health and safety leadership groups; a WorkSafe campaign promoting safely getting back to work and providing technical health and safety advice to support businesses.”

Iain Lees-Galloway says health and safety at work continues to be essential during the recovery and rebuild of New Zealand’s economy.

“COVID-19 has affected many workers and workplaces, and as a result the Employment NZ 0800 line has seen a 49 percent increase in the number of calls from the same time last year. We expect this demand will continue and are investing additional resources to support everyone that calls the line with queries.

“We are also establishing a $3 million contestable fund for business organisations, unions and community providers to access funding for initiatives that support workers and workplaces to manage employment impacts and position themselves for recovery following COVID-19.”

Editor’s note

These initiatives are funded from the Covid-19 Response and Recovery Fund.

For further information, click here.

New Zealand Governement [22 June 2020]

Student seriously injures finger in pre-trade carpentry course

Otago Polytechnic has been convicted for health and safety failings after a student's finger was partially amputated during a pre-trade carpentry course.

The tertiary institute appeared at the Dunedin District Court on May 29 and was sentenced to a Court Ordered Enforceable Undertaking (COEU) under the Health and Safety at Work Act 2015 (HSWA) in lieu of a fine – the first to be ordered under the HSWA.

In April 2018 the student was using a draw saw to cut a length of timber. A WorkSafe investigation found the machine wasn't adequately guarded, allowing the student's fingers to slip in front of the blade. The student sustained partial amputation to his middle finger on his left hand as well as cuts and grazes in the incident. His finger was later re-attached in hospital.

The COEU will see Otago Polytechnic spend a minimum of $275,000 on health and safety measures and initiatives, including scholarships, awareness campaigns and safety training.

WorkSafe's Chief Inspector Steve Kelly said learning institutions offering these kinds of courses should be held to the highest health and safety standards.

"As part of WorkSafe's investigation it was discovered that Otago Polytechnic's risk assessments for that machine were ineffective and the machine was not adequately guarded.

"Otago Polytechnic should have been well aware of health and safety risks. Instead they were allowing students to operate machinery that was not up to industry standards, which is entirely unacceptable.

Mr Kelly said the terms of the COEU require Otago Polytechnic to report to the court every six months over a two year period, with additional reporting from an independent auditor as to Otago Polytechnics completion and compliance with the terms of the COEU.

"This is a landmark decision. The COEU will support higher standards of health and safety at Otago Polytechnic and hopefully prevent further incidents of a similar nature from occurring again."

Otago Polytechnic was also ordered to pay the victim $15,000 in reparation.

Notes:

- COEU in lieu of a fine.
- Reparation of $15,000 were ordered.
- Costs of $3,432.45 ordered.
- Otago Polytechnic was sentenced and convicted under sections 36(2), 48(1) and (2)(c) of the Health and Safety at Work Act 2015.
    - Being a PCBU having a duty to ensure, so far as reasonably practicable, the health and safety of other persons, is not put at risk from work carried out as part of the conduct of the business or undertaking, namely operating the Wadkin draw saw in the carpentry department, did fail to comply with that duty, and that failure exposed any individual, to a risk of serious injury arising from exposure to a cutting hazard created by inadequate machine guarding.
- S 48(2)(c) carries a maximum penalty of $1,500,000.

WorkSafe New Zealand [23 June 2020]

Effects of COVID-19 on trade: 1 February–17 June 2020 (provisional)

Effects of COVID-19 on trade is a weekly update on New Zealand's daily goods trade with the world from 1 February 2020. 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 review the data available, click here.

Statistics New Zealand [24 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: Seven Bills

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

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)

New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (11 August 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

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