Employer Bulletin

Our Weekly News Digest for Employers

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In this Issue

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Cases

Employment Relations Authority: Six Cases

Personal grievances raised out of 90-day statutory time frame

Ms Addy was employed as a Hostel Manager by The Great Adventure Tourism Company Limited (Great Adventure) from 27 October 2017 until her resignation on 2 December 2018. After her employment ended, Ms Addy filed a claim with the Employment Relations Authority (the Authority) to recover wage arrears from Great Adventure. 18 months after her employment ended, Ms Addy sought to enlarge her claim against Great Adventure to include personal grievances for unjustified action causing disadvantage and unjustified constructive dismissal. Great Adventure claimed that Ms Addy failed to raise any personal grievances within the statutory 90-day time frame, and it did not consent to the personal grievances being raised out of time.

Section 114 of the Employment Relations Act 2000 provides that a personal grievance must be raised with the employer within a period of 90 days. The period begins with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is later, unless the employer consents to the personal grievance being raised outside the timeframe.

Ms Addy claimed that she was unjustifiably disadvantaged by Great Adventure for a number of reasons. Ms Addy claimed that Great Adventure failed to provide support and resources necessary for her job, did not pay her for hours worked in excess of her agreed weekly hours and failed to pay for respite weekends and bonuses. She said she raised these concerns with Great Adventure's owner, Mr MacDonald once in 2017 and numerous times in 2018. She relied upon emails between Great Adventure's then Director of Operations to support her claim that she had raised personal grievances.

The Authority held that the emails did not raise a personal grievance either by explicit reference or otherwise. The Authority accepted that Ms Addy raised deficiencies in Great's Adventure's management, however there was insufficient evidence to amount to the requirements needed to raise a personal grievance.

On 19 October 2018, Ms Addy met with management and told them she was wanting to resign. She said she wanted to earn more money and was worried about the stresses of her relationship. Following that conversation, Great Adventure decided to offer Ms Addy a $5,000 pay increase and a paid trip to Rarotonga. On 28 October 2019, Ms Addy resigned from her employment and her last day was to be 2 December 2018. The resignation letter was silent on the reasons for resignation and did not, either explicitly or by implication, raise personal grievances for unjustified action causing disadvantage or unjustified constructive dismissal.

Ms Addy raised an issue with Great Adventure regarding the calculation of bonus payments. Management responded in an email stating that Great Adventure would not be offering the paid trip anymore as it was conditional on her continuing to work for the company. Great Adventure claimed that when Ms Addy decided to resign, this invalidated the offer.

There was no dispute that Ms Addy raised her dissatisfaction with her employment at the meeting on 19 October 2018 and told her employer she was considering resigning. Great Adventure offered the trip and pay increase to persuade Ms Addy not to resign. The offer was not to resolve a personal grievance. The Authority was not satisfied that personal grievances were raised at any of the meetings between Ms Addy and management. Concerns may have been raised but not in a manner which amounted to a personal grievance.

Ms Addy's application was unsuccessful as she did not raise a personal grievance for unjustified action causing disadvantage or unjustified dismissal within the statutory 90-day period.

Addy v The Great Adventure Tourism Company Limited [[2020] NZERA 423; 14/10/2020; M Urlich]

Employer's decision to dismiss unjustified as management processes could have maintained relationship

Mr Longson worked as a Community Residential Support Worker for Insight New Zealand 2007 Limited (Insight) from 2010 until his summary dismissal on 11 January 2019. Mr Longson raised a personal grievance of unjustified dismissal and also claimed he was unjustifiably disadvantaged by Insight breaching its good faith obligations.

Mr Longson was a Support Worker for G, who was a client and the sole resident in a property. When Mr Longson finished his shift on 28 November 2018, he handed over to Ms Pederson, another Community Residential Support Worker. During the hand-over, there was an incident between Mr Longson and Ms Pederson.

On 29 November 2018, G texted Ms Stewart, the Residential Support Manager, and expressed concern about the incident the previous morning. Mr Longson refused to speak to Ms Stewart about the incident and stated that he would only meet with Ms Knowles, sole Director and Shareholder. On 30 November Mr Longson had a phone call with Ms Stewart regarding the incident. He allegedly spoke over Ms Stewart, which caused her to feel intimidated. On 11 January 2019, following an investigation and disciplinary meeting, Mr Longson was summarily dismissed.

The Employment Relations Authority (the Authority) held that the difficulty for Insight was that a fair and reasonable employer could not have concluded that Mr Longson's behaviour had become "*unmanageable*" so much to destroy the employment relationship, which is what they concluded. Insight had not taken any steps to manage his perceived difficulty taking instruction from women. His conduct on 28 and 30 November 2018 towards Ms Pedersen and Ms Stewart, though unacceptable, could not reasonably be regarded as serious misconduct entitling Insight to terminate employment without notice. Mr Longson had not earlier been warned for misconduct. A concern that Mr Longson had difficulty taking instruction from women was something that could have easily been raised through a performance management process. The intimidation experienced by colleagues and managers caused by his size, tone and mannerisms could have also been raised. These steps of management could have maintained a productive employment relationship.

Walker v Procare Health Ltd, is a case the Authority referred to where an employer took substantial steps over a period of time to manage an incompatibility in working relationships, but it was irreconcilable. The employer dismissed the employee due to irreconcilable incompatibility. Insight took no such steps. The Authority found that Insight's decision to dismiss Mr Longson was not justifiable.

The Authority did not question the 5 December 2018 medical certificate deeming Mr Longson was unfit for work between 4 December and 14 December, which stated that Mr Longson was "*extremely stressed at present because of workplace difficulties*" but he had not shown that this was attributable to an unsafe working environment. The Authority did not find Mr Longson had a personal grievance under section 103(1)(b) of the Employment Relations Act 2000.

Mr Longson's evidence was that he was too depressed to work for three to four months following his dismissal. Mr Longson claimed he lost wages and incurred significant legal costs. Mr Longson claimed he became anxious about his financial situation, having to borrow money from family to survive. The Authority accepted the financial impact of the dismissal was significant.

Mr Longson was prescribed medication on 5 December 2018 however, Mr Longson had been taking this medication for 15 years and the dose prescribed in December was not an increased amount. Insight argued known side effects of the medication include sleepiness, nausea and loss of appetite. Mr Longson claimed that the dismissal exacerbated his anxiety and depression. The Authority noted that sleeplessness and loss of appetite are not uncommon reactions to a personal grievance. The Authority held that the unjustified dismissal exacerbated, but did not cause, his medical condition. Compensation of $15,000 was awarded on that basis.

The Authority held that Ms Pedersen's complaint, supported by her daybook entry and G's text message, lead the Authority to conclude that Mr Longson did raise his voice and display body language Ms Pedersen found intimidating, causing her to feel unsafe. Mr Longson's conduct also upset G. Mr Longson refused to meet with his direct manager to discuss the hand-over and said he would only meet with Ms Knowles. The Authority also held that Mr Longson spoke over the top of Ms Stewart and that she found the tone and volume of his voice intimidating.

Mr Longson's actions were found to have contributed in a blameworthy manner to the situation giving rise to the grievance, to a moderate extent. His conduct was such that could have supported a warning or other corrective action by Insight. The Authority held this resulted in it not exercising discretion under section 128(3) of the Act to order a sum greater than required under section 128(2) of the Act.

A penalty for breach of good faith obligation was sought. Proof must show the failure to comply with the duty of good faith was deliberate, serious and sustained. Parliament set a high threshold before a breach of good faith renders a party potentially liable for the imposition of a penalty. These circumstances, though resulting in a personal grievance, fell short of showing a deliberate and sustained breach of good faith. A penalty was not available as this claim was dismissed.

The Authority held that Mr Longson was unjustifiably dismissed. Insight was ordered to pay Mr Longson compensation of $15,000 and reimbursement of $16,750. The parties were encouraged to resolve costs between themselves.

Longson v Insight New Zealand 2007 Limited [[2020] NZERA 381; 24/09/2020; P Cheyne]

Holiday pay must be paid in money, not company products

Mr Pan worked for Juyi International Limited (Juyi) from 29 August 2017 until 15 March 2019. Mr Pan claimed that he was not provided with all his statutory entitlements by Juyi, including holiday pay. Juyi largely denied that Mr Pan did not receive his entitlements, claimed that he was treated well and had pursued Juyi to fund a competing business he set up after leaving Juyi.

Juyi, trading as Eden Cabinets, is operated by Director and Shareholder Ms Yang, along with her husband General Manager Mr Zhang. Mr Zhang believed there was a written employment agreement, but Juyi was unable to produce one. Ms Yang and Mr Pan did not think there was a written agreement. Mr Pan usually worked eight hours a day, but no adequate wages and time records were provided by Juyi. Juyi used a timecard system with staff clocking in and out and Juyi provided what it had of Mr Pan's timecards. Mr Pan did not receive payslips while working at Juyi and Juyi only gave payslips to staff who wanted them, but not otherwise.

Mr Pan claimed that for a total of seven weeks he was not offered work despite being available. He was not paid for that time. Juyi was entitled to close down over Christmas, but it should have made annual leave available and did not always do so. Juyi said that it did not owe Mr Pan any holiday pay because there was an agreement that Mr Pan's holiday pay for an initial period would go towards buying a kitchen, which Juyi supplied to him and in 2018, Juyi began paying staff 8% holiday pay on top of wages. Mr Pan disputed these claims while Mr Zhang said that he and Mr Pan reached an agreement that Mr Pan would use two years' holiday pay in exchange for receiving kitchen cabinetry and a bench top.

The Employment Relations Authority (the Authority) found Mr Pan's evidence regarding this evasive. He insisted that there had to be a contract document for the supply of kitchens, rather than just a quotation. He noted that the quote was not signed. The Authority found it more likely than not that there was an agreement to use a bench top and cabinetry to offset holiday pay, however this does not comply with the Holidays Act 2003 (the Holidays Act). Juyi gave Mr Pan goods in exchange for his entitlement and he was not paid money. Holiday pay and leave pay are to be treated as salary or wages

and under the Wages Protections Act 1983, salary and wages must be paid in money, therefore Juyi did not meet its obligation to pay Mr Pan holiday pay in money.

The Authority concluded that Mr Pan was owed holiday pay and the provision of the kitchen could not be taken into account to reduce that amount. Requirements of the Holidays Act were also not met when paying 8% on top of wages. Under the Holidays Act there are only two situations where holiday pay can be paid on top -this is where an employee is employed on a fixed–term agreement to work for less than 12 months, or works on such an intermittent or irregular basis that it is impracticable for the employer to provide four weeks' annual holidays. Due to not meeting either of these requirements, Mr Pan remained entitled to paid annual holidays and not having taken them, should have been paid out when his employment finished.

The Authority ordered Juyi to pay Mr Pan the sum of $12,454.31 gross as holiday pay.

Pan v Juyi International Limited [[2020] NZERA 369; 14/09/2020; N Craig]

Compliance order appropriate as no awards had been complied with

On 20 February 2020, the Employment Relations Authority (the Authority) held that Mr Brobyn was successful in his personal grievance claims. Having established the personal grievance claims, the Authority ordered TSSR Group Limited (TSSR) to pay Mr Brobyn compensation of $15,000, lost wages of $2,040, wage arrears of $5,553.56 and legal costs of $2,321.56.

Mr Brobyn claimed that TSSR had not paid these awards and sought a compliance order for the monies to be paid for the determination of 20 February 2020. Mr Brobyn applied to the Authority pursuant to section 137(1) of the Employment Relations Act 2000 for the compliance order.

TSSR failed to respond to Mr Brobyn's Statement of Problem and failed to attend a directions conference or appear at the investigation meeting. The Authority was satisfied that TSSR was served the matters of the proceedings at their company address.

Mr Brobyn had provided the Authority with detailed evidence outlining the unsuccessful attempts to contact TSSR to retrieve the monies owed under the determination.

Mr Brobyn sought costs contribution of $500 for his action of applying to obtain a compliance order. The Authority has the discretion to award costs and noted the Mr Brobyn's application of a costs contribution of $500 was a modest sum. The Authority held that Mr Brobyn should recover the amount claimed as well as the application fee.

The Authority found that TSSR had not paid Mr Brobyn any of the compensatory awards awarded by the Authority in the determination of 20 February 2020. As a result, the Authority thought that the compliance order Mr Brobyn sought was appropriate and the Authority granted it.

The Authority ordered TSSR to comply with the determination issued on 20 February 2020 and pay Mr Brobyn compensation of $15,000, lost wages of $2,040, wage arrears of $5,553.56 and original legal costs of $2,321.56. TSSR was also ordered to pay $500 for legal costs for this proceeding as well as a $71.56 filing fee. These sums were ordered to be paid within 14 days of this determination being issued.

Brobyn v TSSR Group Limited [[NZERA] 419; 13/10/2020; D Beck]

Employee disadvantaged by employer restricting ability to work, but dismissal was justified

Ms Stenhouse began working for Towman Towing Group Limited (Towman) in July 2017. Ms Stenhouse raised a personal grievance for unjustified action causing disadvantage and unjustified dismissal.

In May 2018 difficulties arose with Ms Stenhouse's work. Difficulties coincided with increased work and a new employee starting. Difficulties arose from Towman's perspective when it discovered that Ms Stenhouse had forwarded business sensitive and confidential information to her own personal email address and from Ms Stenhouse's perspective, when she felt she was being bullied by the new employee.

Things between both parties did not improve. Consequently, Mr Saul's, Director and sole Shareholder of Towman decided to remove all access for Ms Stenhouse to Towman systems, documents, and equipment from 21 August 2018. By this time, Ms Stenhouse was working from home and was subsequently unable to access Towman accounts and payroll system. Ms Stenhouse was unable to complete her administrative role because of being locked out and she became frustrated, which she expressed by sending out various emails raising issues with the way the administrative functions were being carried out.

Ms Stenhouse carried out no work for Towman through to December 2018, when Towman commenced a disciplinary process with Ms Stenhouse, which concluded in her dismissal.

Mr Stenhouse was unhappy with how the bullying and access issues were resolved and raised a personal grievance for unjustified action causing disadvantage. Ms Stenhouse also raised a claim for unjustified dismissal.

The Employment Relations Authority (the Authority) held that Towman unilaterally changed Ms Stenhouse's work conditions and her ability to work. By implementing the changes and restrictions that it did, Towman caused disadvantage to Ms Stenhouse's employment.

There were two elements to Ms Stenhouse's unjustified dismissal claim. The Authority needed to first determine whether it was raised within the 90-day timeframe and secondly, whether Towman's dismissal of Ms Stenhouse was justified.

Firstly, Towman claimed that Ms Stenhouse's personal grievance letter dated 18 April 2019 was not sent to Towman's registered office, or even its general Towman email, but that it was sent to Mr Saul's personal email. Towman says Mr Saul was no longer using that email so the personal grievance did not come to its attention until it was presented by Ms Stenhouse's advocate after the expiry of 90 days from the dismissal.

Ms Stenhouse claimed she instructed her advocate to send her personal grievance letter to that email address because Mr Saul had previously told her to use that email address instead of the general Towman one. The reason being was to maintain confidentiality around personal employment issues as other employees had access to all emails sent and received using the Towman email address. Ms Stenhouse had also used Mr Saul's personal email address to raise complaints about her employment. That complaint was received and actioned by Towman through Mr Saul.

The Authority accepted that Ms Stenhouse was right to think a personal grievance should be raised through Mr Saul's personal email address, therefore her grievance was not out of time.

Secondly, the Authority was satisfied that Towman had met all the requirements for justification under sections 4(1A) and 103A of the Employment Relations Act 2000. A letter to Ms Stenhouse which set out Towman's concerns together with the additional information, was comprehensive and was the product of a full investigation. It left Ms Stenhouse with no doubt or confusion about what the allegations were and the possible consequences. Further, she was given a real opportunity to respond to the allegations and seek advice before Towman made its decision.

The Authority was satisfied that Towman established that it had lost all trust and confidence in Ms Stenhouse and based on the breakdown in the relationship, immediate termination of Ms Stenhouse's employment was appropriate. Ms Stenhouse had been forwarding work related documents to her personal email, she had been disrespectful and unprofessional toward the colleague she complained about, she had inappropriately recorded additional work and therefore been paid wages for time not spent on Towman's work and she had disclosed confidential information to Towman's Accountant. As a result, the Authority member accepted that Towman's dismissal was justified.

Ms Stenhouse was awarded $10,500 for hurt and humiliation for unjustified disadvantage. Ms Stenhouse's claim for unjustified dismissal was dismissed.

Stenhouse v Towman Towing Group Limited [[2020] NZERA 426; 15/10/2020; P van Keulen]

Employer ordered to pay penalty for failing to comply with terms of settlement agreement

Ms Yongsirirungruang claimed Hollywood Bakery Holdings Limited (Hollywood) failed to adhere to the terms of a mediated settlement agreement entered into under the Employment Relations Act 2000. The issue for determination by the Employment Relations Authority (the Authority) was whether or not Hollywood failed to comply with clauses 2 and 3 of the Record of Settlement.

Under clause 2 of the Record of Settlement Ms Yongsirirungruang was to be paid a total sum of $10,000 in two instalments and under clause 3, a sum of $4,025, including GST, was to be paid to Gaze Burt law firm in respect of Ms Yongsirirungruang's legal costs.

The first instalment, which was due to be paid to Ms Yongsirirungruang on 14 May 2020 was in fact paid on 29 May 2020. Hollywood failed to pay the second instalment and the payment to Gaze Burt Lawyers by the due date. The Authority was satisfied from the evidence available that Hollywood had failed to comply with clauses 2 and 3. The Authority ordered Hollywood to pay $5,000 to Ms Yongsirirungruang in respect of the second instalment payment and pay to Gaze Burt Lawyers $4,025 plus GST, in respect of Ms Yongsirirungruang's legal costs. These payments were ordered to be paid no later than 14 days from the date of the determination.

The Authority also determined that a penalty of $1,000 was appropriate based on the circumstances of the case given the intentional nature of the breach of a term of a Record of Settlement freely entered by the parties.

Hollywood was ordered to pay a penalty of $1,000, 50 per cent to be paid to the Ministry of Business Innovation and Employment Trust Account, and 50 per cent to be paid to Ms Yongsirirungruang. Hollywood was also ordered to pay Ms Yongsirirungruang $2,250 towards her legal costs.

Yongsirirungruang v Hollywood Bakery (Holdings) Limited [[2020] NZERA 408; 8/10/2020; E Robinson]

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

Performance Management

Discipline

Incompatibility

Holidays Act

Full and Final Settlements

Employer News

Fast track referrals will speed up recovery and boost jobs and home building

The Government is taking action to increase jobs, speed up the economic recovery and build houses by putting three more projects through its fast track approval process.

"It's great to see that the fast-track consenting process is working. Today we have referred a mix of potential projects that, if approved, will support an Auckland development and provide a much needed boost to two of our provinces," Environment Minister David Parker said.

The projects approved for consideration under the fast-track consenting Act are the Dominion Road mixed use commercial and residential development in Auckland, the Ohinewai Foam Factory in Huntly and The Vines Subdivision in Richmond.

"Speeding up the consenting process means that these projects have the potential to sooner deliver much needed jobs and promote regional economic growth," he said.

"If the three projects gain approval, it is estimated together they could create more than 2000 jobs during the construction phase, and around 200 permanent jobs once the projects are completed, as well as enable up to 160 new dwellings.

"The projects will provide housing in a provincial area that is experiencing high demand, diversify economies and support well-functioning urban environments across the country."

The COVID-19 Recovery (Fast-track Consenting) Act 2020 is one of the Government's levers to boost jobs, speed up infrastructure development and improve environmental outcomes in response to the economic impacts of COVID-19.

It does not replace or circumvent the current Resource Management Act 1991 environmental test, but it provides alternative pathways for speeding up decisions on resource consents and designations while ensuring that environmental safeguards and Treaty of Waitangi and Treaty settlement obligations are maintained.

The fast-track process has already seen the Matawii Water Storage Reservoir in Kaikohe approved by an expert consenting panel. The decision was made in about half the time it would have taken under the Resource Management Act, assuming there was no appeal.

A decision on the applications is expected to be made by the expert panel in early 2021.

New Zealand Government [23 November 2020]

Retail sales recover in the September 2020 quarter

Retail sales values recorded the largest September quarter rise since the series began in 1995, Stats NZ said today.

Spending on major household items, vehicles, and groceries contributed to the strong 7.4 percent ($1.8 billion) rise in total retail sales compared with the September 2019 quarter.

This quarter's rise indicates a recovery for retail businesses, but it does not make up for the historic fall of 15 percent ($3.6 billion) in the COVID-19-affected June 2020 quarter.

To read further, please click the link below.

Statistics New Zealand [23 November 2020]

Crown accounts reflect Govt's careful economic management

The better-than-expected Crown accounts released today show the Government's careful management of the COVID-19 health crisis was the right approach to support the economy.

As expected, the Crown accounts for the year to June 2020 show the operating balance before gains and losses, or OBEGAL, was in deficit. However that result was $5.2 billion better than the Treasury forecast in Budget 2020, due to a stronger-than-expected economy and careful management of Government spending.

Core Crown tax revenue of $85.1 billion was $2.8 billion higher than forecast in the Budget. This also reflects the stronger economy as New Zealand got on top of COVID-19 quickly and opened up the economy to give the recovery a head start.

"The Government's decision to act swiftly when COVID-19 was taking hold overseas has meant New Zealand's economy has bounced back better than the Treasury and many economists predicted.

"We were in a good economic position going into the COVID-19 health crisis which helped, but it was also the decisions made during that time which have meant the economy has not collapsed as predicted," Grant Robertson said.

Net core Crown debt as a percentage of GDP was 27.0% of GDP at 30 June, below the 30.2% forecast in the May Budget.

"The cost of servicing this debt remains very low by historical standards. During the 2019/20 year, the Government borrowed at record low interest rates for long-term infrastructure investments to future-proof the economy, boost productivity and create jobs," Grant Robertson said.

The Half-Year Economic and Fiscal Update will be released on Wednesday 16 December.

New Zealand Government [24 November 2020]

Linked employer-employee data: September 2019 quarter – NZ.Stat tables

Quarterly linked employer-employee data (LEED) provides statistics on filled jobs, job flows, worker flows, mean and median earnings for continuing jobs and new hires, and total earnings.

To read further, please click the link below.

Statistics New Zealand [25 November 2020]

Effects of COVID-19 on trade: 1 February–18 November 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.

To read further, please click the link below.

Statistics New Zealand [25 November 2020]

Overseas merchandise trade: October 2020

Overseas merchandise trade statistics provide information on imports and exports of merchandise goods between New Zealand and other countries.

To read further, please click the link below.

Statistics New Zealand [26 November 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: 13 Bills

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

Overseas Investment Amendment Bill (No 3) (N/A)

New Zealand Superannuation and Retirement Income (Fair Residency) Amendment Bill (N/A)

Protected Disclosures (Protection of Whistleblowers) Bill (N/A)

Education (Strengthening Second Language Learning in Primary and Intermediate Schools) Amendment Bill (N/A)

Rights for Victims of Insane Offenders Bill (N/A)

District Court (Protection of Judgment Debtors with Disabilities) Amendment Bill (N/A)

Arms (Firearms Prohibition Orders) Amendment Bill (No 2) (N/A)

Electoral (Integrity Repeal) Amendment Bill (N/A)

Child Support Amendment Bill (N/A)

Oranga Tamariki (Youth Justice Demerit Points) Amendment Bill (N/A)

Crown Pastoral Land Reform Bill (N/A)

Land Transport (Drug Driving) Amendment Bill (N/A)

Insurance (Prompt Settlement of Claims for Uninhabitable Residential Property) 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/

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