Employer Bulletin

Our Weekly News Digest for Employers

Friday, 6 August 2021

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Cases

Employment Relations Authority: Five Cases

Determination of confidential information in mediation

New Zealand Public Service Association Incorporated Te Pukenga Here Tikanga Mahi (the Union) and Inland Revenue Department (IRD) were in dispute over the meaning of various words contained in the management of change provisions in their collective agreement. The parties attended mediation on 7 December 2020 to try and resolve the dispute and there were various references to what occurred during mediation in documents lodged with the Employment Relations Authority (the Authority). The Union objected and wished to see the references redacted. IRD believed their evidence was accurate.

After mediation on 7 December 2020, the Union delegate, who had been present at mediation, sent an email to some affected union members. The details included a brief reference to the parties' position during mediation. On 9 December 2020, the Union sent a more widely distributed notice to its union members which again referred to the parties' position during mediation.

The following day, the Union's National Secretary wrote a letter to the Commissioner of IRD. The response from IRD contained a detailed chronology of the dispute, the parties' actions, and their understanding as to the meaning of the disputed provisions. The letter contained three paragraphs which referred to exchanges during mediation.

The Union claimed that the mediation was not on the record unless the parties agreed otherwise. Furthermore, that it was without prejudice with an agreement that any comment to represented parties would be agreed at the conclusion of the mediation. The Union asked IRD to resend their letter with redactions. In support of its position that mediation was not confidential, IRD relied on the evidence of one of its staff who was present. The evidence was that the Union raised the issue of whether it could report back to its union members and the outcome was an agreement the parties could report back but any actual offers would be privileged. It was common ground there were no formal record of the purported agreement.

The Union relied on submissions, having chosen not to give any evidence, being of the view that to do so would constitute a breach of section 148 of the Employment Relations Act 2000 (the Act) which covers confidentiality.

The Authority outlined that the statutory presumption, and therefore the starting point, that except with the consent of the parties, what occurred in mediation was confidential and statements and submissions made orally at mediation came within

the provisions of the Act with the parties therefore required to keep them confidential.

The Authority considered the arguments of the parties and accepted the Union's claim that mediation was, with the exception of offers, confidential and certain evidence lodged with the Authority in respect to the substantive application should be inadmissible and be redacted from the file. That meant that as the Authority Member had seen evidence they were precluded from considering, the substantive claim and the file would be reassigned to another Authority Member.

New Zealand Public Service Association Incorporated Te Pukenga Here Tikanga Mahi v Chief Executive of the Inland Revenue Department [[2021] NZERA 233; 31/05/2021; M Loftus]

Personal grievance raised against employer for discrimination and a breach of a Record of Settlement

TBN worked for UQE and participated as a union delegate for UQE. On 6 November 2021, TNB raised a personal grievance against UQE, claiming that they had breached the terms of a Record of Settlement and had discriminated against TBN on the basis that he was involved in union activities. UQE denied TBN's claims.

In February 2019, UQE had commenced an employment investigation into the activities of TBN and others. This investigation, and a subsequent disciplinary meeting, resulted in UQE entering into a Record of Settlement with TBN. On 18 April 2019, the Record of Settlement had been signed by TBN, EDR, the General Manager for UQE, and other employees. It was later signed by a Mediator from the Ministry of Business, Innovation and Employment.

In March 2019, before the Record of Settlement was signed, TBN had applied for a job at another company, POS. ZUD, the Maintenance Manager at POS, was TBN's uncle and ZUD was also part of the interview panel for the vacant role for which TBN applied. One month before TBN's 4 July 2019 interview, ZUD had met with DHD, an individual who worked for UQE. ZUD had asked whether TBN had a good work ethic and whether he was reliable. ZUD was surprised to hear that according to DHD, TBN was "*disruptive*" and union orientated.

DHD claimed that UQE was in the process of terminating TBN's employment agreement which had a cost of "*around $100,000*" and that TBN had threatened to take strike action. DHD claimed he was not aware that TBN had been applying for a position at POS. On 5 June 2019 KZO, TBN's brother, attended a tangihanga where he spoke with ZUD. ZUD had allegedly told KZO about the negative comments made by DHD and KZO had then informed TBN. TBN argued that they undermined his reputation in a small town and that he felt he could no longer trust UQE.

On 4 July 2019, TBN attended the job interview at POS. ZUD claimed that TBN was not the successful candidate for the vacant role. After not receiving the position, TBN then contacted Mr Phillips, the Union Secretary, and raised the issue of DHD's adverse comments. Mr Phillips then received an email from ZUD dated 2 October 2019, confirming the comments made by DHD.

Mr Phillips met with SIO, UQE's Central Plateau Regional Manager, informing SIO that DHD's comments had been an attack on the Union and then provided SIO with ZUB's email on or about 7 October 2019. SIO had noticed that the email did not state when the conversation between ZUD and DHD had taken place furthermore, that Mr Phillips had avoided providing information on when it had taken place. SIO then informed DHD, who then confirmed there had been a casual conversation with ZUD, but that the content of it and the date when it had occurred were not clear. On 10 October 2019, a meeting was then held between SIO, Mr Phillips and TBN, TBN then proceeded to raise his personal grievance.

SIO indicated that DHD's comments were not the view of UQE. SIO also explained that UQE would investigate the claims before trying to resolve matters. Mr Phillips had asked for $50,000 to resolve the matter in addition to a formal apology to be published in the local paper, and TBN's employment record being deleted.

On 6 November 2019, TBN raised a personal grievance against UQE. The personal grievance was acknowledged, and on 27 November 2019, a Statement of Problem was filed in the Employment Relations Authority (the Authority). The personal grievance was raised outside of the 90-day statutory period, but TBN submitted that UQE consented to the late raising of the personal grievance by its attempt to resolve it, having followed the steps set out in the employment agreement. UQE submitted that TBN was out of time to raise the personal grievance.

The Authority held that UQE had consented to the personal grievance being raised out of time. The Authority concluded that UQE had not breached the Record of Settlement, nor had DHD's comments negatively affected the recruitment process for the vacant role with POS. In response to TBN's claim that he had been discriminated against, the Authority did accept that TBN experienced a reduction in job satisfaction and a detriment to employment.

UQE was ordered to pay TBN the sum of $3,000 in respect of injury to feelings. Costs were reserved.

TBN v UQE [[2021] NZERA 219; 21/05/2021; E Robinson]

The Employment Relations Authority referred bargaining to facilitation

Reunited Employees Associated Inc (the Union) and Nelmac Limited (Nelmac) had, over the years, encountered difficulties in agreeing to the terms of the collective agreement between them. The current collective agreement, covering the period 1 July 2019 to 31 August 2020, which remains in force until 31 August 2021 pursuant to section 53 of the Employment Relations Act 2000 (the Act), was only agreed after a protracted period of bargaining and intervention by the Employment Relations Authority (the Authority) in various forms including facilitation.

The bargaining between the parties for renewal of the collective agreement commenced with pre-bargaining discussions in June and July 2020. From the outset, bargaining was fraught even the notices of commencement of bargaining and negotiation over a bargaining process agreement or a code of good faith for bargaining were problematic.

By the eighth meeting both parties had come close to agreeing to the collective agreement. Nelmac believed that the Union had backtracked from an almost agreed position, with only a few matters to be settled which they believed they had accounted for with their last offer. In the eighth meeting, the Union had tabled a counter offer that Nelmac believed amounted to "*cherry pick*" and added in new claims, including a claim for an across-the-board wage increase which had not been previously raised.

The Union believed Nelmac was being unreasonable and was manoeuvring it into a "*take it or leave it*" ultimatum position. It also believed that Nelmac was using bargaining tactics that amounted to a breach of good faith, which included walking out of the eighth meeting. On the evening of 14 September 2020, the Union sent an email to Nelmac advising it that they would lodge an application with the Authority to fix the terms of the collective agreement based on Nelmac's breaches of good faith in bargaining.

On 15 September 2020, Nelmac sent Reunited its final offer asking the Union to put it to its union members to ratify the collective agreement. Nelmac denied the alleged breaches of good faith and advised that the Union's repeated threats to lodge claims in the Authority during the bargaining process was difficult to reconcile and if the offer was not accepted then Nelmac would apply to the Authority for a reference to facilitation.

Nelmac's offer was not negotiated further so the Union lodged an application in the Authority which alleged that Nelmac had breached the duty of good faith. The Union asked the Authority to impose penalties and fix the terms of the collective agreement. Nelmac responded, denying the allegation, and sought a reference to facilitation.

The Authority held that it could not fix the terms of the collective agreement as the evidence did not indicate that the parties had exhausted all other avenues for reaching agreement, primarily because they had not been to facilitation. The Authority reserved their determination on the question of breaches of good faith pending written submissions by the parties. The Authority was only focused on the reference to facilitation in this determination.

There are four grounds under which the Authority may refer parties to bargaining and facilitation. In this case, the application was made pursuant to section 50C(1)(b) of the Act. Section 50C(1)(b) stipulates that for the Authority to accept a reference for facilitation, bargaining needs to have been unduly protracted and extensive efforts have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement.

In this case, the parties had attempted bargaining since July 2020. There had been miscommunication and misunderstanding about what was offered, what had been negotiated and what was agreed. There was, at times,

too much focus on formal requirements and expectations of the bargaining process and unnecessary arguments over breaches of expectations and obligations.

The Authority noted that the level of mistrust and scepticism between the parties was made worse by the history of bargaining. While the parties had not attended mediation, the Authority made note that in the previous round of bargaining the parties did attend mediation. However, no resolution was made last time and the same dysfunctions that impaired bargaining previously had continued. The Authority was satisfied that the parties had used mediation to try and resolve the issues, albeit in a prior round of bargaining.

Given the parties' history, the Authority accepted that bargaining between the parties had become unduly protracted and was satisfied those extensive efforts had been undertaken, but the parties were still unable to reach an agreed collective agreement. Therefore, the application for reference to facilitation was accepted. Costs were reserved.

Reunited Employees Association Incorporated v Nelmac Limited [[2021] NZERA 241; 03/06/2021; P Van Keulen]

Employees' breach of implied terms in employment agreement led to loss of clients for the employer

Blackburn Transport Limited trading as Urban Carriers (Urban Carriers) employed Mr Smith from July 2015 until his employment was terminated on 30 August 2019 following his resignation. Urban Carriers claimed Mr Smith set up another business in competition with Urban Carriers and in doing so, breached express and implied terms of his employment agreement and the duty of good faith. Mr Smith denied the claims made against him.

Mr Blackburn is the sole Director of Urban Carriers and has owned and operated the business since 2009. Mr Smith booked jobs, allocated work to drivers, and wrote up daily run sheets for drivers. Mr Smith oversaw all new work and was the only person, along with Mr Blackburn, who had access to the general email address into which new jobs were received. Mr Blackburn claimed customer turnover was low until Mr Smith left the business.

In April 2019, Mr Smith purchased a commercial truck suitable for carriage work. When Mr Blackburn became aware of this, he asked to meet with Mr Smith on 29 April 2019 to question his intentions. Mr Smith told Mr Blackburn he wanted to set up his own business and subsequently resigned at the meeting.

Mr Blackburn told Mr Smith he had no issues with this so long as he did not work for any Urban Carriers' customers. He reminded Mr Smith of his contractual obligations including the restraint of trade provision in his employment agreement. Mr Smith said he was only interested in house moves, promised not to compete with Urban Carriers and that he would comply with his obligations.

By 15 May 2019 the parties had agreed Mr Smith would remain an employee on reduced hours and salary while he established his business. Urban Carriers made it clear to Mr Smith he was not to compete with it while he remained employed. Mr Smith repeatedly assured Urban Carriers he would not compete with it and would abide the restraint provisions in the employment agreement.

On 19 July 2019 an employee of one Urban Carriers' key customer told Mr Blackburn that Mr Smith had approached them and offered a lower price to do their carriage work. Mr Blackburn subsequently began an investigation into the matter. In August 2019, Urban Carriers' staff reported seeing Mr Smith doing work for three of Urban Carriers' customers. On 30 August 2019, Urban Carriers wrote to Mr Smith giving him a *"full and final warning to cease doing any work for any past and or present Urban Carriers customers."* The letter also said that *"any further work done by you/SS Movers from the 1st September 2019 will be deemed to be a serious breach of contract and appropriate legal action will be taken against you."* The letter outlined the fact that Urban Carriers had clear evidence it had suffered a loss of business due to Mr Smith's actions.

On 9 October 2019, Urban Carriers wrote to Mr Smith setting out alleged breaches of restraint of trade, duty of confidentiality, fidelity and loyalty, his misuse of confidential information and solicitation of customers obligations to launch a competing business. Mr Smith denied all alleged breaches. He claimed he turned down Urban Carriers' customers wishing to transfer to his business. Furthermore, he claimed that Urban Carriers' customers contacted him because they saw his red truck on the road with contact details written on it or they saw his advertising on Facebook.

The Employment Relations Authority (the Authority) received relevant evidence from key customers of Urban Carriers. They heard via Urban Carriers' employees that Mr Smith was setting up his own company and moved their business to him because they liked dealing with Mr Smith and stated that a smaller company has more flexibility and had therefore stopped using Urban Carriers after receiving a threating email from them. Mr Smith said he did not contact any customers. He got on well with them and he was able to offer a better and more cost-effective service because of his business set up.

The Authority stated that it was clear from the evidence that Mr Smith had used his knowledge of Urban Carriers' key customers and pricing to establish his business in Auckland and gained this knowledge whilst employed by Urban Carriers. Furthermore, that it was reasonable for Urban Carriers to have sought to restrain their information around its customers and negotiated prices.

The Authority found Mr Smith had breached implied terms of his employment with Urban Carriers and breached the statutory duty of good faith. A subsequent determination was to be held to determine orders for this breach. Costs were reserved.

Blackburn Transport Limited trading as Urban Carriers v Smith [[2021] NZERA 213; 20/05/2021; M Urlich]

Employer's mistreatment of employee resulted in successful constructive dismissal claim

Starting in Fencourt Limited (Starting in Fencourt) own and operate Flaggies Café and Bar. Mr Rangihuna was the sole Director and Shareholder of Starting in Fencourt. Ms Dickson worked for Starting in Fencourt part-time as Duty Manager from February 2019 until she resigned in October 2019.

Ms Dickson claimed she was constructively dismissed because of events on and before 15 October 2019 and raised a personal grievance of unjustified dismissal. Ms Dickson claimed that Starting in Fencourt did not pay her all the wages she was due for the time she had worked and that she was never provided with a written employment agreement. Starting in Fencourt admitted that it had not provided Ms Dickson a written employment agreement but claimed it had paid her all wages owed.

From late May 2019, several non-work events caused Ms Dickson to take time off work at short notice. The events included a bereavement, a brief illness and a medical emergency. Ms Dickson claimed that the attitude of Mr Rangihuna and another employee towards her became negative as those events arose. Diary entries from Mr Rangihuna demonstrated how he communicated in a vulgar and offensive manner. Ms Dickson claimed that Mr Rangihuna usually told the employees when kegs were due and gave instructions about what to do with them. On one occasion when he left no instruction, Ms Dickson text Mr Rangihuna asking for instructions. Mr Rangihuna's reply was of a critical tone which upset Ms Dickson.

On 15 October 2019, Mr Rangihuna told Ms Dickson they would meet after work. During the meeting, Mr Rangihuna criticised Ms Dickson, saying that she was not worth the $20 per hour he was paying her. He accused Ms Dickson of bullying staff and claimed that none of the staff liked working with her. Ms Dickson claimed she did not like being belittled in front of customers. Mr Rangihuna claimed that Ms Dickson had alienated herself from other staff and clients, had a bullying and grumpy demeanour, and had orchestrated her own demise.

Ms Dickson announced her resignation to Mr Rangihuna at the end of the meeting on 15 October 2019. When Ms Dickson got home after the meeting, she sent Mr Rangihuna an email resigning due to being verbally confronted in front of customers. Mr Rangihuna responded the next morning declining to accept the resignation stating *"I believe you have the experience and ability to right the things we discussed. I expect to see you on Thursday"*, and also claimed to have apologised in the meeting. Ms Dickson responded to Mr Rangihuna's email claiming there had been no apology.

The Employment Relations Authority (the Authority) did not accept Mr Rangihuna's claims as they lacked coherence and plausibility. The Authority found that Starting in Fencourt had breached its duty to not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage its duty of trust and confidence owed to Ms Dickson. The Authority also found Mr Rangihuna had left inappropriate diary and text messages, angry confrontations with Ms Dickson and baseless accusations, belittled Ms Dickson in front of customers, and failed to apologise to Ms Dickson.

The Authority held that those breaches of duties combined were sufficiently serious to make it reasonably foreseeable that Ms Dickson would not be prepared to continue working under those conditions. Ms Dickson also made it apparent that she was not prepared to tolerate Mr Rangihuna's abusive, belittling, and bullying behaviour, yet he persisted.

The Authority held that Starting in Fencourt's actions were not what a fair and reasonable employer could have done in all the circumstances at the time. Therefore, the Authority held that Ms Dickson was unjustifiably dismissed. Starting in Fencourt was ordered to pay Ms Dickson compensation of $15,000 for hurt and humiliation, reimbursement of $2,060 for lost wages and wage arrears of $97.20. Starting in Fencourt also had to pay a penalty of $1,000 for not providing Ms Dickson with an employment agreement, $500 of which was to be paid to the Crown and $500 payable to Ms Dickson. Starting in Fencourt was also required to pay a penalty of $200 for breaching section 134 of the Employment Relations Act 2000, $100 of which was to be paid to the Crown Bank, and $100 to Ms Dickson. Starting in Fencourt was ordered to pay Ms Dickson costs of $2,321.56.

Dickson v Starting in Fencourt Limited [[2021] NZERA 243; 09/06/2021; P Cheyne]

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

Union Rights

Full and Final Settlements

Restraints Of Trade

Mediation

Good Faith

Employer News

Effects of COVID-19 on trade: At 28 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 [4 August 2021]

Wages up, unemployment down

The Government's efforts to secure the recovery has seen more Kiwis in jobs and higher wages, with unemployment falling to pre-COVID levels and more people in work.

Stats NZ figures show unemployment rate fell to 4 percent in the June quarter from 4.6 percent in the March quarter, the lowest rate since December 2019. This compares with The Treasury's Budget 2021 Update forecast unemployment rate of 5.2 percent.

Employment rose by 28,000 in the quarter, and the total number of people in work is now 63,000 above where it was in the December 2019 quarter before COVID.

The average hourly wage rose 4 percent to $34.76 an hour, compared with a 3.3 percent rise in inflation, meaning more money in New Zealander's back pockets.

"This positive result shows the Government's plan is delivering, giving households and businesses the confidence to spend and invest and accelerate the recovery. An extra 63,000 people are in jobs since September 2020, when unemployment peaked at 5.2 percent," Grant Robertson said.

"Our focus remains on accelerating the recovery and dealing with the challenges that a fast growing economy brings. Our vaccination programme is ramping up and we'll have more to say on reconnecting to the rest of the world soon, which will provide further confidence to business as they plan ahead.

"Our critical worker scheme has seen 17,000 people enter New Zealand to support businesses and other organisations to keep the economy moving. We will continue to work with businesses on opportunities to expand the number of people we can bring in to support our recovering economy. We also continue to invest heavily in education, skills and training to build back better.

To read further, please click the link below.

New Zealand Government [4 August 2021]

Deadline for feedback on proposed decommissioning regulations extended

The deadline for consultation on proposals for regulations to support the Crown Minerals (Decommissioning and Other Matters) Amendment Bill has been extended from 24 August to 7 September 2021.

The extension is to provide submitters further time to comment on the proposals.

The Crown Minerals (Decommissioning and Other Matters) Amendment Bill (the Bill) was introduced in the House on 23 June 2021. The Bill proposes changes to strengthen the regulations for decommissioning petroleum infrastructure and wells, under the Crown Minerals Act 1991.

The Ministry of Building, Innovation and Employment (MBIE) wants your feedback on proposed regulations to support the Bill. The proposed regulations relate to the decommissioning of petroleum infrastructure and wells, and the development of a post-decommissioning fund.

To read further, click the link below.

New Zealand Government [3 August 2021]

Sharp falls in unemployment and underutilisation

The seasonally adjusted unemployment and underutilisation rates fell to 4.0 and 10.5 percent, respectively, in the June 2021 quarter, Stats NZ said today.

The unemployment rate continued to fall from its recent peak of 5.3 percent in the September 2020 quarter, dropping 0.6 percentage points in the June 2021 quarter, to reach 4.0 percent.

"The fall in unemployment is largely in line with other labour market indicators, including declining numbers of benefit recipients and increased job vacancies, and recent media reports of labour shortages and skills mismatches," work, wealth, and wellbeing statistics senior manager Sean Broughton said.

To read further, please click the link below.

Statistics New Zealand [4 August 2021]

Labour market statistics: June 2021 quarter

Labour market statistics provide a picture of the New Zealand labour market, including unemployment and employment rates, demand for labour, and changes in wages and salaries.

To read further, please click the link below.

Statistics New Zealand [4 August 2021]

Employment indicators: Weekly as at 2 August 2021

The experimental weekly series provides an early indicator of employment and labour market changes in a more timely manner than the monthly employment indicators series.

The weekly employment indicators use the timelier and more detailed payday filing that has been available from Inland Revenue since April 2019. Our experimental series includes number of paid jobs and earnings for three time-lag series that have different coverage of jobs depending on their pay period. The 6-day series includes jobs with a pay period equal to or less than 7 days, while the 20-day series covers jobs with pay periods of 14 days or fewer. The 34-day series includes all jobs regardless of their pay period.

Due to the nature of the administrative data that these indicators draw from, the accuracy of the data improves the further out from the reference week it relates to. These counts are published as they are, and no work has been done to adjust for seasonality or data flow issues. We advise strong caution in making decisions based on this data.

To read further, please click the link below.

Statistics New Zealand [4 August 2021]

Tightening labour market puts pressure on wages

Wage inflation was 2.1 percent in the year to the June 2021 quarter, while average ordinary time hourly earnings rose 4.0 percent, Stats NZ said today.

The labour cost index (LCI) all salary and wages (including overtime) increased 2.1 percent in the year to the June 2021 quarter, up from 1.6 percent in the year to the March 2021 quarter.

To read further, please click the link below.

Statistics New Zealand [4 August 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: Eight Bills

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

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)

Inquiry into the current and future nature, impact, and risks of cryptocurrencies (2 September 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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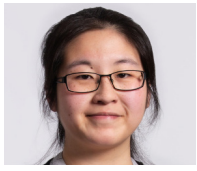

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