Autumn Newsletter

dundas street

April 2025

Announcement

The Partners at Dundas Street are delighted to announce that Megan Vant has been promoted from Special Counsel to Partner with effect from 1 April 2025.

A highly skilled lawyer Megan has significant experience in all aspects of employment law. She has a special interest in pay equity and has become the “go to” lawyer in the areas of pay equity and equal pay. She is the recognised subject matter expert in this specialised and complex area and has represented clients in leading edge litigation in this novel area of law.

Megan is also an experienced investigator, well versed in undertaking external investigations in an employment context. She is skilled in handling complex and sensitive situations, and writing clear, well-reasoned reports that enable employers to make good decisions about how to proceed.

Her approach is both practical and academic, providing straightforward advice on all aspects of employment law with the ability to delve more deeply into emerging issues where necessary.

Megan has been with the firm since its inception in 2013, returning twice from extended periods of parental leave, and has previously worked in-house in both central and local government.

Proposed employment law changes

Between the coalition government and individual member bills, there have been several proposed significant changes to employment law in 2025.

In our last newsletter, we provided a brief overview of these proposals. While there has been little movement regarding the majority of the proposals, below is a quick reminder of what has been announced and the status of the proposals.

Personal grievances: high-income threshold

The government has proposed amendments to the Employment Relations Act 2000 that would prevent anyone earning $180,000 (base salary) or more a year from pursuing unjustified dismissal grievances. The threshold would be updated annually based on upward (but not downward) changes in average earnings.

The proposed changes would allow an employer to negotiate an “exit package” with an employee that could not later be challenged. However, these changes would not prevent employees from raising other types of personal grievances or any statutory or contractual claims.

The income threshold would apply to all new employment agreements once the law is passed. For existing employment agreements, this threshold would take effect one year later.

The proposed law would allow parties who reach that income threshold to negotiate and include their own customised dismissal provisions, essentially allowing parties to “opt back in” to the personal grievance scheme for unjustified dismissals, or create their own customised dismissal provisions, if they wanted to.

A bill setting out this proposed change has not yet been introduced to the House.

Changes to employee remedies

The Government has also announced plans to amend the Employment Relations Act 2000 to require the Employment Relations Authority and Employment Court to give greater consideration to an employee's behaviour when determining remedies for personal grievances. The proposed changes include the following key points:

1. An employee may lose their right to a remedy if their behaviour is deemed to amount to serious misconduct.

2. Employees will be prohibited from seeking reinstatement or compensation for hurt and humiliation if their conduct contributed to the issue that gave rise to their grievance.

Additionally, Minister Brooke van Velden has indicated there will be several more “technical changes” regarding how an employee's contributory behaviour is assessed when awarding remedies:

- Remedies may be reduced by up to 100% based on contributory conduct.

- The Employment Relations Authority and the Employment Court will need to consider whether the employee’s actions hindered the employer's ability to fulfil specific obligations.

- The threshold for identifying a “procedural error” will be raised, provided the employer's actions are deemed fair in all circumstances.

Ms van Velden has explained that these changes are being introduced due to a number of cases in which an employee who was at fault (i.e. committed some form of serious misconduct), was nonetheless awarded financial remedies because the employer had failed to follow a fair and reasonable process, despite the employer having strong grounds for the actions that it took.

These changes could significantly impact the well-established process that the courts use to evaluate "contributory fault". Currently, s124 of the Employment Relations Act 2000 requires the courts to consider the extent to which the actions of the employee contributed towards the situation that gave rise to their personal grievance when considering remedies. The proposed changes could dilute this discretion and may lead to a reduced ability for employees to seek remedies.

Whilst there are a number of pending questions as to how this amendment will work in practice, we will have greater clarity once a bill is introduced.

Contractor gateway test

The Coalition Government has also proposed to introduce a 'gateway test' for businesses to distinguish between an employee and a contractor.

The proposed gateway test is:

1. A written agreement with the worker, specifying they are an independent contractor, and
2. The business does not restrict the worker from working for another business (including competitors), and
3. The business does not require the worker to be available to work on specific times of day or days, or for a minimum number of hours or the worker can sub-contract the worker, and
4. The business does not terminate the contract if the worker does not accept an additional task or engagement.

If all four criteria were met, the worker would be considered a contractor. If one or more factors were not met, then the existing text in the Act would apply.

It is intended that these changes will be included in the same Amendment Bill that is discussed above (in relation to the personal grievance regime).

Protected exit discussions

Since our last newsletter, we have had some movement in regard to Laura McClure's Members Bill, as we now have a first draft of the Termination of Employment by Agreement Amendment Bill.

In its current form, the bill would establish a new section in the Employment Relations Act, allowing employers to make an offer to an employee to terminate their employment by "mutual consent" in exchange for specified compensation.

This bill would protect employers who partake in such pre-termination negotiations, rendering these discussions generally inadmissible, and would not require an employment relationship problem for such negotiations to be initiated.

Whilst the amendment does include a provision which states that negotiations which have been conducted for a "dishonest purpose" will not be inadmissible, in practice, the nature and fairness of such protected conversations will be inherently difficult to challenge.

Whilst the bill is based on similar legislation from the United Kingdom, which enables employers to have protected conversations with employees about terminating the employment relationship, the UK law offers more safeguards for employees than what is proposed in the member's bill.

New Zealand law already allows for parties to an employment relationship to agree to explore resolution of an employment relationship problem on a "without prejudice" basis, provided both parties agree to this in advance. However, this bill, which does not require there to be an employment relationship problem before these protected exit discussions can be initiated, makes the bill very much a "one way" proposition in favour of employers.

The bill has passed its first reading and is now at the select committee stage. We expect it to be heavily scrutinised due to the potentially significant and wide-reaching effects it would have on the rights of employees.

Pay transparency

Labour Party MP Camilla Belich has introduced a bill which proposes to add a personal grievance to s103 of the Employment Relations Act 2000 if an employer has engaged in "adverse conduct" against an employee for a "remuneration disclosure reason". The Employee Remuneration Disclosure Amendment Bill, if enacted, would protect employees from being subject to "adverse conduct" for discussing and/or disclosing their remuneration to others.

In essence, if an employer dismissed or disadvantaged an employee (e.g. gave them a warning) because they had inquired about another employee's remuneration, discussed remuneration with another employee, or disclosed their remuneration to any other person, the employee would have grounds for a personal grievance.

The bill has passed its first reading and is in the select committee stage, with the select committee report due on 6 May 2025.

Pay deductions for partial strikes

The government plans to reintroduce the ability for employers to deduct pay from employees during partial strikes, reinstating the legislative provisions that were removed by the previous government in 2018. The change is described as implementing government policy aimed at incentivising parties engaged in industrial action to reach an agreement sooner, by providing employers with a specific response to partial strikes (i.e. cessation of certain tasks but not a full withdrawal of labour).

The bill sets out two ways to calculate pay deductions, being either proportional to the work not performed or capped at 10%, with unions able to dispute the employer's calculations.

The bill is at the second reading stage in the legislative process.

Holidays Act reform

On 13 December 2024, Minister Van Velden announced a shift in the direction of the proposed reform of the Holidays Act 2003. Following recent targeted consultations on the exposure draft bill, concerns were raised regarding its complexity and the costs of compliance.

The Minister has instructed officials to develop an hours-based accrual model for annual leave, acknowledging that this approach was preferred across various sectors and working arrangements. She also emphasised the need for greater simplicity in the reform.

Minister Van Velden expressed her hope to pass the new legislation by the end of the current parliamentary term, with Cabinet decisions expected in 2025. We will be closely monitoring these developments to understand the impact of the proposed reforms.

Health and Safety at Work Act reforms

Last week, Minister for Workplace Relations and Safety, Hon Brooke van Velden, announced proposed reforms to the HSWA aimed at reducing compliance costs and providing greater certainty for businesses. These reforms support the National-ACT coalition agreement and are intended to be implemented through legislation later in 2025. Key proposals include:

Simplifying risk management for small, low-risk businesses

Small, low-risk businesses would only need to manage critical risks (risks causing death, serious injury, or illness) and provide basic worker welfare facilities. Full details, including definitions of "small" and "low-risk", are still to come.

Clarifying landowner responsibilities for recreational activities

Landowners will not be responsible for injuries from recreational activities on their land; responsibility will fall to activity organisers. Landowners will still be responsible for risks from their own work operations nearby.

Clarifying governance vs operational health and safety responsibilities

The reforms aim to clearly separate directors' governance roles from managers' operational responsibilities, reducing over-compliance and director anxiety. The proposed change is that the HSWA would specify that the day-to-day management of health and safety risks is the responsibility of managers, so that directors and boards can focus on governance and the strategic oversight of the business.

Greater use of Approved Codes of Practice (ACOPs)

Compliance with ACOPs will be recognised as meeting health and safety duties. Industry groups, not just WorkSafe, can now propose ACOPs, ensuring they are practical and high-quality.

While many of the key proposed changes, have a lot of detail to come, the proposal appears to have two central aims. Firstly, reducing compliance costs and secondly, providing greater certainty for businesses. Whether these proposed changes achieve these goals remains to be seen, but we will be watching any changes closely.

Removing the 30-day rule

The Coalition Government has proposed to repeal the 30-day rule, which applied the terms of any existing collective agreement to new employees.

The repeal would allow employees and employers to negotiate personalised terms from day 1 of employment, rather than adhering to collective agreement terms for the first 30 days. The Coalition Government's view is that this change will allow for greater flexibility and individual choice.

With the removal of the 30-day rule, there is the ability for the 90-day trial period to be expanded to employees employed on individual terms, even if their role falls within coverage of a collective agreement.

Brooke van Velden has also announced that there will be further changes to the way employers communicate and report back on union membership for new employees, signalling that employers will no longer have to use the active choice form.

This proposal is set to be introduced as part of the other proposed amendments to the Employment Relations Act (outlined in further detail above).

Theft by employer

The Crimes (Theft by Employer) Amendment Act 2025 has officially become law, introducing a new section into the Crimes Act, making it an offence for an employer to intentionally fail "without reasonable excuse" to pay money owed to an employee.

Individuals convicted of this crime may face up to one year of imprisonment, a fine of up to $5,000, or both. In certain cases, the fine could amount to $30,000.

The wording "without reasonable excuse" was introduced by New Zealand First's Casey Costello in an amendment paper, in an attempt to ensure situations such as payroll glitches, delayed time sheets, or cash-flow issues are not captured.

So, whilst the language of the Amendment is intended to capture those bad faith actors, given the potentially serious penalties contained in the amendment, employers should review their policies and processes to ensure compliance and implement measures that reduce the risk of criminal prosecution for wage theft.

Case law update

***New Zealand Tramways and Public Passenger Transport Employees' Union Wellington Branch Inc v Tranzurban Hutt Valley Ltd* [2025] NZCA 1**

Tramways bus drivers can be rostered to work for a period in the morning and a period in the afternoon, with a time in the middle of the day when they are not rostered to work. This arrangement is known as a "split shift".

Pursuant to the Employment Relations Act 2000, an employee is entitled to rest breaks and meal breaks depending upon the length of their "work period".

The Court of Appeal was asked to determine whether, when considering rest and meal breaks, a split shift amounts to two discrete work periods or one work period.

Tranzurban's approach was to treat a split shift as two separate work periods when the non-working time in the middle of the split shift exceeded two hours. The union disagreed with this approach, arguing the split shifts should be considered as a single work period for the purposes of rest and meal breaks.

The Court of Appeal noted that a bus driver on a split shift was free to do whatever they wished during the middle period as they were signed off from work. The evidence demonstrated that many go home, play golf, or swim. The Court of Appeal considered the key factor to be that they could do what they wished to refresh for the second part of their split shift because they were not under the control of their employer.

The purpose of rest and meal breaks is to give employees time to rest, refresh, and eat during working hours. Bus drivers working split shifts did not need to be provided with a further opportunity to rest, refresh and eat due to the middle period in the shift as that middle period was "already their own".

The Court of Appeal therefore found that Tranzurban's approach was appropriate and the middle period of a split shift did not count towards the period of work for the purposes of an employee's entitlement to rest and meal breaks.

***Kinzett v Fire and Emergency New Zealand* [2025] NZERA 132**

Russell Kinzett was a long-serving firefighter, having been employed by Fire and Emergency New Zealand and its predecessor for over 30 years. Difficulties arose between Mr Kinzett and other staff resulting in Mr Kinzett making formal complaints about his co-workers, and co-workers laying formal complaints about Mr Kinzett.

FENZ appointed an experienced senior employment lawyer to independently investigate the complaints. The investigator's report concluded that Mr Kinzett had breached FENZ's bullying and harassment policy. FENZ undertook disciplinary action, and Mr Kinzett was ultimately dismissed from his employment.

Mr Kinzett raised personal grievances for unjustified disadvantage and unjustified dismissal.

Mr Kinzett claimed that he was unjustifiably disadvantaged by the investigation, including that it was not timely, and that it included historical complaints. The Authority held that whilst Mr Kinzett was disadvantaged in his employment by the investigation, this was not unjustifiable. Mr Kinzett agreed to the investigation approach proposed by FENZ, and the length of the investigation was caused, at least in part, by the investigator's difficulty in interviewing witnesses that Mr Kinzett had requested be interviewed. Further, a fair and reasonable employer receiving complaints is obligated to address those.

In relation to the unjustified dismissal claim, rather than simply accepting the investigation report without question, FENZ approached the situation appropriately by conducting its own disciplinary investigation, putting allegations to Mr Kinzett and inviting his response.

FENZ's decision-maker considered that Mr Kinzett's behaviour had deeply impaired the basic trust and confidence essential in the employment relationship. The decision-maker considered alternatives to dismissal but determined that there were no alternatives that would address the concerns as to the issue of trust and confidence in Mr Kinzett as an employee, and in his ability to work with other employees in potentially life and death situations. Mr Kinzett's employment was therefore terminated.

However, there had been a period of 14 weeks and six days between when FENZ received the investigation report and Mr Kinzett's employment was terminated. Mr Kinzett had continued to work during this period with FENZ considering that it had reasonable conditions in place to ensure everyone's safety.

The Authority found that FENZ did not act as a fair and reasonable employer in dismissing Mr Kinzett because he was allowed to remain in the workplace, performing his usual duties in full knowledge of the allegations. This severely undermined FENZ's claim to have lost trust and confidence in Mr Kinzett. The decision to dismiss was therefore not one that a fair and reasonable employer could have taken. The dismissal was held to be unjustifiable and the Authority reinstated Mr Kinzett to his role with FENZ.

Mr Kinzett also received compensation of $12,000, reduced by 20% for his contributory conduct; and lost wages from the point of his dismissal to the point he was reinstated.

Employers considering raising 'trust and confidence' concerns with an employee should be mindful of this decision.

***BNM v Stonewood Group* [2024] NZHRRT 64**

A recent decision from the Human Rights Review Tribunal ("Tribunal") highlights the importance of complying with the Privacy Act 2020 and the significant costs that could be imposed on an employer should they be found to have interfered with an individual's privacy.

Stonewood Group Limited ("Stonewood") were ordered by the Tribunal to pay an employee $60,000 in compensation for interfering with his privacy. The employee, who received name suppression, and is referred to as "BMN" in the judgment, was invited for coffee by the company's Chief Operating Officer, at the direction of the company's Director. While he was away from the office having this coffee, the company's Executive Director removed BMN's work laptop, personal USB flash drive, and personal cell phone from his desk.

Upon returning to work, BMN immediately noticed his devices were missing and requested their return. He explained that these devices contained important personal information, including tax returns, case studies, research, and medical information. Despite his repeated requests, the company only returned his personal cell phone and refused to give him access to his personal information. Stonewood then sent the laptop to a forensic company for data copying. A week later, BMN was dismissed. After his dismissal, he continued to request the return of his personal information, but to no avail. The company claimed the information would be provided after the forensic examination was completed, yet this still did not happen.

BMN later engaged legal representation and offered to provide a personal USB stick for his information to be downloaded onto, but the material was still not provided. By the time he filed his claim with the Tribunal, two years later, his personal information had still not been returned. An incomplete portion of his data was finally provided about three months after proceedings were initiated.

BMN alleged that Stonewood had interfered with his privacy by collecting information for unlawful purposes and through unfair means, which constituted an unreasonable intrusion into his personal affairs. He also argued that the company failed to provide him access to his personal information upon request and unlawfully disclosed it to third parties.

The Tribunal upheld BMN's claims. It ruled that the attempt to justify the company's actions based on the forensic report was inadequate. The Tribunal rejected Stonewood's argument that it had a legitimate right to remove and examine the laptop, given that it owned it, and it was provided for work purposes.

BMN's lawyer argued that had Stonewood taken a moment to consider its obligations under the Privacy Act, "it would have been deflected from its high-handed and impulsive reaction". The Tribunal agreed, stating that the method of information collection was unfair and unreasonably intrusive.

BMN provided evidence of the significant impact the company's actions had on him, including a formal diagnosis of acute anxiety and depression. In awarding $60,000 in compensation, the Tribunal acknowledged that BMN suffered significant humiliation and distress and noted that the award should be at the higher end of the scale. The Tribunal characterised the company's actions as orchestrated and not merely "intentional and without negligence." Their conduct was found to have worsened BMN's humiliation and distress, particularly due to their disregard for his privacy interests. Stonewood was also ordered to return BMN's personal information and to delete any copies.

While the facts of this case are extreme, it serves as a clear reminder that employers cannot disregard employees' rights under the Privacy Act by taking what they consider to be theirs. It is not uncommon for employees to store personal information on work-provided laptops, and these privacy rights must be respected.

***Cummings v KAM Transport Ltd* [2025] NZHRRT 8**

In another recent Human Rights Review Tribunal decision relating to privacy, the Tribunal held that it is possible for an agency that holds private information to breach an individual's privacy by disclosing that information to other staff within the agency.

Mr Cummings had refused to undergo a drug test when requested to do so by his employer, KAM Transport Ltd. This refusal was disclosed internally to another staff member and a rumour appears to have spread that Mr Cummings was a drug dealer.

The disclosure of Mr Cummings' personal information caused him harm in the form of considerable anxiety, shock, confusion and humiliation. The disclosure was causally connected to the harm caused and therefore amounted to an interference with his privacy. Mr Cummings was awarded $30,000 for humiliation, loss of dignity and injury to his feelings.

This is a timely reminder that an agency that holds personal information should only share that information internally to the extent necessary.

***Whakaari Management Ltd v WorkSafe New Zealand* [2025] NZHC 288**

In this decision, the High Court allowed an appeal by Whakaari Management Ltd (WML) and quashed its conviction under s37 of the Health and Safety at Work Act 2015 (HSWA).

In December 2019, Whakaari White Island erupted while tourists and their guides were on the island. Twenty-two people died and twenty-five others were injured, many with life-changing injuries. The owner of the island, WML, was convicted in the District Court of breaching the HSWA.

WML was charged under s48 for failing to comply with the duty in s37 of the HSWA, as being a PCBU who "manages or controls a workplace" and who must ensure "so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace, and anything arising from the workplace are without risks to the health and safety of any person". WML was fined $1,045,000 and ordered to pay reparation of $4,880,000.

WML claimed for the purposes of s37 it was not, as a matter of law, a person conducting a business or undertaking (PCBU) who "managed or controlled" the walking tour workplace and even if it was it did not breach that duty.

In their assessment the High Court had to address three key questions:

- Did WML owe a duty under section 37?
- If WML did owe a duty under section 37, did it breach that duty?
- Would compliance with that duty have prevented the risks of death or serious injury?

With regard to the first question, the High Court considered that the legislative history showed that the District Court was right to say that s37 is concerned with "active" control or management, "in a practical sense". The High Court considered that a cautious approach was necessary.

The parties rightly acknowledged that it would be entirely contrary to the purposes of the HWSA if PCBUs could avoid any duty simply by being inactive or passive. The High Court said the inquiry must therefore be one of whether the PCBU has the power or capacity to actively control or manage the particular workplace in a practical sense.

In their assessment the High Court found that WML did not manage or control the walking tour workplace, based on these following considerations:

- *Grant of access*: While WML controlled the walking tour workplace by granting access to the island so that tour operators could carry out tours, the granting of licences did not give WML an ability to manage or control what happened at the walking tour workplace in an active or practical sense. That duty fell to the tour operators to discharge.
- *The terms of the licence agreements*: The license agreements did not give WML the authority to direct and control daily operations at the walking tour workplace. Instead, the agreements placed obligations on the tour operators to ensure that their operations were conducted safely. There was no practical way for WML to verify whether its licensees were complying with these obligations or to be informed of any breaches.

- *WML's actions after granting access*: The High Court did not accept that WML's actions after granting access indicated that it "continued" to manage the walking tour workplace, even after the license agreements had been executed. There was no evidence showing that WML made decisions for the tour operators regarding their daily operations. Evidence from witnesses indicated that WML lacked the necessary control or management. Additionally, there was no evidence to suggest that WML was the primary operator in this situation.
- *Money and societal risk*: Generating revenue through its licensing operations did not make WML a PCBU with management or control over the workplace. The money earned merely allowed others to access the island and did not grant WML the ability to manage or oversee the walking tour workplace. Additionally, while the High Court acknowledged the importance of understanding and managing the "societal risk" associated with public access to the island, it was unwilling to reverse-engineer that conclusion to assert that WML managed or controlled the walking tour workplace when, in practical terms, it did not.

Despite finding that WML did not have a duty under s37 (for the reasons above) it considered whether it breached such a duty had it been owed.

The question for the High Court to consider was whether it was reasonably practicable for WML to have obtained a risk assessment for its business, and if so, whether WML should have undertaken further steps to respond to any risks identified.

The High Court considered it was not reasonably practicable for WML to obtain a risk assessment for its business for two reasons. Firstly, the nature of WML's business and secondly, because the HC did not consider its reliance on Government agencies to be unreasonable.

WML's business was to permit commercial walking tour operators to undertake walking tours. Its business was one of a landowner permitting access to other parties more specialised and capable of understanding the risks of the activity that those parties wanted to undertake on its land, to its land, for a price.

While the risk of a volcanic eruption was always inherent to the workplace itself, the risk that people might be on the island when this happened arose out of the work activity being undertaken by the tour operators. Imposing health and safety obligations on those tour operators through the licence agreements was sufficient to discharge any duty WML might have owed in these circumstances.

The High Court determined that it was reasonable for WML to rely on the Emergency Management Bay of Plenty (EMBOP) and the "Whakaari Response Plan" that EMBOP had developed in 2015, as well as the audits of White Island Tours from 2014 and 2017. Importantly, the Court noted that EMBOP was legally responsible for identifying, assessing, and managing the hazards and risks associated with Whakaari - White Island, under the Civil Defence Emergency Management Act 2002.

Moreover, although there had been an eruption in 2016 (i.e. after the production of the Whakaari Response Plan), WML could still reasonably rely on the consensus among several other agencies with leading health and safety expertise that walking tours could continue after the eruption.

The High Court then considered whether compliance with its duty would have prevented risks of death or serious injury. The High Court said that it was not a "but for" test but rather a test of whether the failure was a "substantial" or "significant cause" of exposing any individual to a risk of death, serious injury or illness.

It is clear from the Court's decision that whether a PCBU has the power or capacity to actively control or manage a workplace in a practical sense will be a fact-specific enquiry. Ultimately, the duty to manage health and safety at a workplace does not automatically attach to the landowner, even where the land itself presents inherent risks. The party actively managing or controlling the work in the workplace itself is going to be responsible under section 37 of the HSWA.

***Doria v Diamond Laser Medispa Taupo Limited & Ors* [2025] NZHRRT 12**

In this Human Rights Review Tribunal decision, significant damages were awarded to a woman who was unjustifiably ordered to go on parental leave only seven weeks into her pregnancy.

Zelinda Doria found out she was pregnant on or around 12 November 2016. She almost immediately informed her manager. In the two weeks following, Ms Doria was sent home early from work by her manager on two days, started late on two days and took six days of sick leave.

Ms Doria saw her doctor twice during this time, but did not suffer from any morning sickness or require any medical treatment for the morning sickness after 25 November 2016. However, whilst on sick leave, she was contacted by her manager, organising a meeting to discuss her "parental leave and employment situation".

Following the meeting, Ms Doria received an email saying that due to her comments and medical information, she would not be working until further notice. Another email stated that she was required to begin her primary carer leave the next day due to health risks from the workplace and was barred from returning. This was based on her recent absenteeism and her acknowledgement that she couldn't meet work hours in her early pregnancy. The action was said to be taken under the Parental Leave and Employment Protection Act (PLEPA).

In their assessment, the Tribunal noted that while s14 of the PLEPA states that employers can require pregnant employees to take primary care leave earlier than they may desire, this is only if the employee is unable to safely or adequately perform her work due to pregnancy.

The Tribunal noted that s56 of the PLEPA requires there to be a reasonable justification for such a decision, and that s22 of the Human Rights Act stipulates that if an employee is qualified for any type of work, it is unlawful for an employer or anyone acting on their behalf to take actions specified in this section based on a prohibited discrimination ground.

The employer argued that while Ms Doria was a qualified beauty therapist, she was not qualified to work at that time, explaining that they required her to take early leave because she was suffering from morning sickness and was “unable to do her job”.

The Tribunal expressed that such a narrow interpretation of “qualified for work”, implies that when any employee is sick, temporarily incapacitated, or on sick leave, they would lack protection from the potentially discriminatory actions outlined in s22 of the Human Rights Act. The Tribunal said the defendant’s argument would lead to the absurd situation where an employee with morning sickness could fluctuate in and out of being qualified for work at different times within the same week or even within a single day. They also said such an argument would not be workable for those who are unwell for non-pregnancy-related reasons.

The Tribunal also received evidence from Ms Doria's midwife, expressing her view that Doria was “fit and healthy and completely capable of performing her duties,” despite the morning sickness, which the midwife described as a common symptom of pregnancy.

Ultimately, the Tribunal concluded that the employer’s decision could not be justified based on this evidence and that its behaviour had “far-reaching consequences for the individual”.

The Tribunal noted that while employers can place pregnant employees on leave early, this is only permissible if no suitable alternative work is available. The Tribunal found that there had been no meaningful discussion regarding alternative work options for Ms. Doria to help her manage her pregnancy. The Tribunal emphasised that requiring a pregnant employee to take primary carer leave earlier than she wishes is a significant exercise of the employer’s authority and the decision to unilaterally ban her from the premises was not supported by any medical or health evidence.

The Tribunal agreed with Ms Doria that the company’s actions regarding her pregnancy caused her resignation. It said the decisions to place Doria on early primary carer leave with “no notice, no consultation, no medical information and no risk report” as well as repeatedly contacting her while on leave, reminding her of her employee obligations and the possibility of being disciplined, all arose because of her pregnancy and were collectively material causes of her ultimate decision to resign.

Ultimately, the Tribunal found that company and the director had discriminated against Ms Doria based on sex, which includes pregnancy and childbirth. As a result, Ms Doria was awarded damages

of $75,000 for her humiliation, loss of dignity and injury. She was also awarded another $15,467 in damages for pecuniary losses, and $9,303 for loss of benefit.

***The Chief of New Zealand Defence Force v Williams* [2025] NZEmpC 16**

A recent case in the Employment Court examined the situation of three employees from the New Zealand Defence Force (NZDF) who had an "hours of work" clause in their individual employment agreements (IEAs). This clause guaranteed them 40 hours of work per week but also required them to work additional hours when directed by their manager.

The employees argued that this provision in their IEAs was unenforceable because it did not offer reasonable compensation for being available for work, as required by s67D(3) of the Employment Relations Act 2000.

The Employment Court determined that the hours of work provision constituted an availability provision. This was because the clause specifically required the employees to be available outside their guaranteed core hours when reasonably necessary. The employees were expected to accept overtime work under these terms. Additionally, they were included on the on-call roster and were contacted to work outside of their regular hours.

The Court noted that the availability provision did not specify that the employees' salary included compensation for their availability, as required by the Act. Consequently, the Judge found that the provision did not comply with the legal requirements and ordered that the parties meet to agree on a reasonable amount of compensation for the employees.

This case highlights that availability provisions should only be included in employment agreements if there is a genuine reason to do so, and the employee is compensated.

It may be prudent for employers to review their employment agreements to ensure that if an availability provision is included, it clearly states that the salary covers reasonable compensation for this availability. Agreements that haven't been updated since 2016, when the requirement to include such a provision was introduced, may lack this necessary wording.

We look forward to further developments as 2025 progresses,
and we will keep you updated.