Autumn Newsletter:

Case Law Update

dundas street

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Case law update

The beginning of 2024 has seen a number of interesting employment cases, and a continuation of the trend for increasing compensation awards in the employment jurisdiction in the wake of the Employment Court revising its compensation bands upwards in *GF v Customs*.

In December last year, for instance, the Employment Court awarded over $1.8 million to two school counsellors (*Cronin-Lampe v The Board of Trustees of Melville High School*). Of that amount, $123,500 was awarded to one claimant and $92,625 to the other, for 'non-economic' loss (the contractual equivalent of compensation for hurt and humiliation).

Earlier this year, the Employment Relations Authority awarded a former employee more than $100,000 in compensation for humiliation, loss of dignity and injury to feelings after successfully arguing that he had been bullied, unjustifiably suspended and constructively dismissed (see *Parker v Magnum Hire Ltd* discussed below).

In another case this year the Authority made a point of noting that the $14,000 compensatory sum it had awarded was "a very modest sum" (see *Spotswood v Concrete Structures (NZ) Ltd* also discussed below).

While the facts in all of these decisions are at the more extreme end of the spectrum in various ways, employers need to be aware of the rapidly changing direction of travel after many years of relatively low monetary awards from the Authority and Employment Court. In particular, negotiated settlements may become more expensive as more employees or former employees consider it worthwhile to take their chances through litigation.

A number of other interesting cases that have come out of the Authority or Court are also discussed below.

Increasing compensation awards – *Parker v Magnum Hire Ltd* [2024] NZERA 85

Mr Parker, a General Manager at a heavy machinery equipment hire company, claimed to have been bullied by a director of the company (Mr Field) over a period of nine years. He told the Authority that he had experienced a range of conduct in that time, including verbal abuse, excessive and unprovoked personal criticism, public humiliation and denigration. He also claimed that Mr Field had engaged in manipulative and psychologically abusive behaviours towards him, such as denial, obfuscation and false flattery.

The situation came to a head in 2021. Mr Parker contacted Mr Field a few days after having surgery to update him on his recovery. During that conversation, Mr Field attacked Mr Parker, calling him useless and telling him that it was his fault the company was losing money. Mr Field said that he had employed a CEO to take Mr Paker's place, and that Mr Parker's employment was now at risk. The call was so traumatic that Mr Parker had a panic attack, which ruptured the incision from his recent surgery.

Following the call, Mr Parker's doctor recommended he work from home while he recovered. Mr Field refused to allow him to do so, which was later found to be an unlawful suspension. Lawyers became involved in an unsuccessful attempt to resolve the situation, and personal grievance claims were raised. Ultimately, Mr Parker resigned, claiming that he had been constructively dismissed.

Having succeeded in his claims, and in addition to lost wages ($32,462.68) and other amounts relating to unpaid bonus and holiday pay entitlements, the Authority awarded Mr Parker:

- $50,000 for unjustified disadvantage (bullying);
- $50,000 for unjustified dismissal; and
- $5,000 for unjustified disadvantage (suspension).

Penalties ($1,000 to Mr Parker and $3,000 to the Crown) were also awarded for failures associated with wage, time and holiday records.

Increasing compensation awards – *Piacun v Raukura Hauora O Tainui Trust* [2024] NZERA 46

Ms Piacun was employed by Raukura Hauora O Tainui Trust. She first raised concerns about bullying in 2018 and eventually resigned in 2020. The unjustified dismissal claim that Ms Piacun attempted to raise was out of time and the Authority therefore only considered her unjustified disadvantage personal grievance in relation to bullying.

Bullying does not, on its own, give rise to a personal grievance. However, bullying can form the basis for a disadvantage grievance based on an unjustified failure to provide a safe workplace. Key to this potential cause of action is that an employer is only bound to provide a safe workplace in terms of protecting an employee against foreseeable risks of harm.

The Authority first established that bullying had occurred.

The behaviour included swearing at and ridiculing Ms Piacun in front of others; making unreasonable and unnecessary demands of her; undermining her work to her directly and to others; making derogatory remarks about her to others; excluding her from meetings; and being overly critical and unsupportive. The Authority considered this behaviour to be repeated and unreasonable, directed at Ms Piacun both directly and indirectly, and capable of leading to psychological harm – and in fact did

lead to psychological harm in that Ms Piacun was undermined, lost confidence, and became anxious and stressed to the point she was unable to work and had to take time off.

The behaviour was therefore held to amount to "bullying".

The Authority then considered whether that bullying was foreseeable to Raukura, such that it should have taken steps to protect Ms Piacun. Based on the evidence before it, the Authority concluded that Ms Piacun had told Raukura of her concerns, and on numerous occasions, and that the foreseeability test was therefore met.

The necessary chain of events was held to have occurred: Ms Piacun was bullied; Raukura was told about this so most of the bullying was foreseeable; Raukura did not do enough to protect Ms Piacun from that foreseeable harm; therefore Raukura failed to provide Ms Piacun with a safe workplace. This caused an unjustifiable disadvantage to Ms Piacun in her employment.

The Authority quantified the loss suffered by Ms Piacun as a result of the harm caused by the failure to provide her with a safe workplace, and landed on a compensatory payment of $36,000 for humiliation, loss of dignity, and injury to feelings.

A 'modest' compensation award – *Spotswood v Concrete Structures (NZ) Ltd* [2024] NZERA 9

This case about purported abandonment provides two very helpful reminders for employers:

- The obligations of good faith require an employer to make reasonable efforts to contact an absent employee before invoking an abandonment provision; and
- The quantum of compensation for hurt and humiliation is trending upwards, even when the hurt and humiliation suffered is minimal.

Mr Spotswood did not turn up to work or notify his absence to his employer on Saturday, Monday and Tuesday, and on Wednesday, the company deemed him to have abandoned his employment as a result.

The Authority found that as Mr Spotswood was not expected to work on Saturdays, had never done so, and had not been personally instructed to work on this particular Saturday, he had only been absent from work for two days (the Monday and Tuesday), before abandonment was invoked. This did not meet the "three consecutive working days without notification" specified in his employment agreement for abandonment. The situation was therefore one of dismissal, and was unjustified.

The abandonment clause in the employment agreement did not place any requirement on the employer to try and contact an absent employee. However, the Authority considered that minimal attempt had been made by the company to contact the absent Mr Spotswood to ascertain his

intentions or reason for his absence, and that this was unreasonable, insufficient, and not consistent with the company's good faith obligations.

The Authority's comments relating to compensation for hurt and humiliation for Mr Spotswood are worth noting. The Authority accepted the dismissal had "some impact" on Mr Spotswood, but was "not satisfied that the impact was such that would warrant an award of any more than **a very modest sum** of compensation".

That very modest sum awarded: $14,000 (subsequently reduced by 25% due to Mr Spotswood's contributory conduct).

This serves as a reminder that even "very modest" compensation awards are trending upwards.

Vaccination policy dismissal – *Basher v Big Chill Distribution Ltd* [2024] NZERA 63

Mr Basher was a truck driver for Big Chill Distribution Ltd. He was dismissed from his employment in January 2022 for failing to be vaccinated in line with Big Chill's internal vaccination policy.

In December 2021, and following consultation with staff, Big Chill had introduced a COVID-19 vaccination policy that confirmed all roles as 'high risk' and implemented mandatory vaccination as a condition of employment for all roles. The timeframes required staff to have their first vaccination by 31 December 2021, and their second vaccination by 30 January 2022.

Big Chill did not provide its full health and safety risk assessment to staff, either as part of consulting about the policy in draft, or as part of the final policy.

Mr Basher refused to be vaccinated, noting that the majority of his time at work was spent alone, driving, that he was not public facing and could minimise contact with others and not work in close proximity to others. He requested Big Chill have a full risk assessment on his role undertaken by an independent person.

Big Chill declined to carry out an individual risk assessment for Mr Basher because it considered that it had already carried out a comprehensive risk assessment for all driver roles. However, it did not advise Mr Basher of this, or provide him with that full risk assessment.

Big Chill told Mr Basher that it had undertaken a review of the risk assessment for Mr Basher's role and concluded that as his role involved loading and unloading at depots with limited air flow, and the need to work alongside other store people and drivers, his role remained in the high-risk category and requiring of vaccination. The Authority referred to this 'review' as "little more than a perfunctory paper-based exercise that essentially came to the same conclusion as the outcome document had" –

that Mr Basher's role was high risk because it involved driving between communities, working in cool store environments, and interacting with other employees.

Ultimately, Mr Basher was given notice of the termination of his employment, but not required to work out his four week notice period as he could not safely perform his duties unvaccinated. He was advised that if he received the vaccination during the notice period, the notice would be withdrawn.

The Authority held that Big Chill's failure to provide Mr Basher with the comprehensive risk assessment for driver roles was not the action of a fair and reasonable employer. Further, the failure to provide this information and engage with Mr Basher on it was more than a minor technical flaw and had the effect of undermining the overall fairness of the process. As Big Chill had not properly engaged with Mr Basher on his concerns about the risk assessment, it could not genuinely engage with him on reasonable alternatives to the termination of his employment.

Further, Big Chill did not genuinely engage with Mr Basher in relation to potential alternative ways of working that could mitigate overall risk, or about how Mr Basher had carried out his work for Big Chill during changing alert levels, prior to vaccinations becoming widely available.

Big Chill also did not consider whether Mr Basher could use his accrued holidays, followed by leave without pay, as a reasonable alternative to his employment terminating. Given this, the Authority concluded that Big Chill did not exhaust all reasonable alternatives to termination, as required by Schedule 3A of the Employment Relations Act prior to terminating employment on the basis of COVID vaccination requirements. The Authority referred to the obligation to exhaust all other reasonable alternatives as "an onerous one".

The Authority found that as a fair and reasonable process had not been followed, and holidays and leave had not been considered as a reasonable alternative to termination, Mr Basher had been unjustifiably dismissed from his employment.

Mr Basher also claimed that he had a personal grievance under s103(1)(j)(ii) of the Employment Relations Act, which is a section which has been frequently raised by those opposing vaccination requirements. (Section 103(1)(j)(ii) refers to a claim that the employer has "contravened section 92 of the Health and Safety at Work Act 2015 (which prohibits coercion or inducement)".)

The Authority found that a personal grievance pursuant to s103(1)(j)(ii) was not raised within the statutory timeframe, but nonetheless went on to note that the legal basis for the claim was "misconceived" in that it requires not just general coercion or inducement, but coercion or inducement in relation to a function, power or role under the Health and Safety at Work Act. There was no link between the actions of Big Chill and a contravention in relation to a function, power or role under that Act.

Finally, the Authority found that there had been no breach of Mr Basher's employment agreement as a result of the introduction of the vaccination policy.

In relation to the unjustified dismissal, Mr Basher was awarded compensation of $15,000 for hurt and humiliation, and three months' lost remuneration.

Sexual harassment – *BGH v Kumar* [2024] NZHRRT 2

BGH was the only female employee at Viti Panel and Paint Ltd. Mr Kumar was the second in charge and a close family friend of the owner. BGH claimed she was sexually harassed by Mr Kumar over a period of two years, with the final incident of him allegedly peeping at her through a hole in the toilet wall being the catalyst for her resignation.

Initially, BGH filed a personal grievance claim against Viti Panel and Paint Ltd, but the grievance was not resolved, and the company was subsequently liquidated. In 2019, BGH filed a claim in the Human Rights Review Tribunal under the Human Rights Act 1993 against Mr Kumar and Viti alleging that Mr Kumar had sexually harassed her. The claim against Viti did not progress.

This was therefore a sexual harassment case in an employment context, but taken directly against the alleged sexual harasser, rather than against the employer.

Mr Kumar denied much of the behaviour referred to by BGH and / or said that what had occurred had been taken out of context. The Tribunal found it more probable than not that the behaviour BHG alleged that Mr Kumar subjected her to did occur, including comments, text messages, encroachment on her personal space, touching her shoulder, and singing Hindi love songs in her presence (which she felt were directed at her).

The Tribunal also found that Mr Kumar touched her waist, upper thigh, and buttock; and looked through a hole in the toilet wall when BGH was using that room.

The Tribunal considered the sexual nature of the behaviour, which had been repeated and sustained over nearly two years, and taking into account the power imbalance, to be very apparent. The behaviour was also unwelcome and offensive and had a detrimental effect on BGH. Consequently, sexual harassment was established.

The Tribunal consequently determined that Mr Kumar had sexually harassed BGH in breach of s62 of the Human Rights Act and awarded remedies.

Whilst the Tribunal did not award the full 37 weeks lost income sought by BGH, it considered that the sexual harassment meant she could not give a month's notice of her resignation and accordingly, that it was appropriate for her to be awarded pecuniary loss equivalent to four weeks' income. Mr Kumar was ordered to pay that amount to her.

The Tribunal also awarded $29,000 compensation for the humiliation, loss of dignity and injury to feelings experienced by BGH, payable by Mr Kumar.

This case is unusual as it was taken directly against the sexual harasser rather than against the former employer, and consequently the remedies awarded were payable by the individual harasser. It also demonstrates that where an employer goes into liquidation, there may be other alternatives to a personal grievance claim if the alleged behaviour amounts to a breach of the Human Rights Act.

Dismissal vs resignation – *James v Tauranga Birthing Centre* [2024] NZERA 101

A serious complaint was laid by a birthing mother about Ms James, an experienced nurse and midwife. Ms James' employer, Tauranga Birthing Centre, called her to a meeting to put the complaint to her. On reading the complaint, Ms James became visibly distressed and was crying.

During the meeting, Ms James was told that she was to be "stood down" from her duties, effective immediately. Ms James understood this to mean that she was not to return to work at the Birthing Centre, and that she had been fired. She thought her manager had used the words "stood down" as a kinder way of saying "you're fired".

On the other hand, Ms James' manager considered that Ms James had resigned during the meeting by stating that she did not feel safe working at the Birthing Centre, was not planning on returning, and had said "no, I'm leaving" or that she "wanted to go".

A follow-up email from the manager referred to Ms James' employment having been "suspended", and that Ms James had said she wished to "stand down". Ms James responded "thanks". The Birthing Centre then ceased contact with Ms James and paid out her final pay. Ms James never returned to work.

The key question for the Authority was whether Ms James had resigned or been dismissed.

The Authority helpfully noted that a dismissal occurs when the initiative for ending the employment comes from the employer. Ms James' understanding that her employment was at an end was due to the "imprecise wording" used by the manager at a meeting during which Ms James was in tears and physically shaking. In such circumstances, it was not accurate to say that she had resigned.

Further, the Authority noted that it is not sufficient for an employer to rely on an assumption that an employee had resigned when this had not been discussed further with that individual. Relying on a general comment from a visibly distressed employee to the effect that she "wanted to leave" was simply not enough. Ms James explained that what she wanted to leave was the distressing meeting rather than her employment, and the Authority considered that explanation to be entirely plausible.

Ms James believed that she had been sent away, and her employer acted in a way that supported that assumption. The initiative for ending the employment was found to have come from the Birthing Centre. Therefore, Ms James had been dismissed.

As the Birthing Centre's actions did not meet the fair and reasonable employer test, the dismissal was unjustified. Ms James was entitled to lost remuneration for the not quite two months until she found new work, and $17,000 compensation for hurt and humiliation.

Minimum wage for part time workers – *Mount Cook Airline Limited v E Tu Incorporated* [2024] NZCA 19

In *Mount Cook Airline Ltd v E Tu Inc*, the Court of Appeal has made it emphatically clear that that the fortnightly minimum wage rate that is set under the Minimum Wage Act 1983 is to be applied proportionately to part time employees who come within it.

Minimum wage rates are issued (generally annually) through Minimum Wage Orders. Since 2019, Orders have included a minimum fortnightly rate (currently $1,852 gross for adults following an increase in April of this year) for all employees who are not paid on a daily or weekly basis. Confusion as to how that minimum rate should be applied to part time salaried employees has, unfortunately, reigned supreme ever since.

Some (like E Tu) have claimed that compliance with the minimum fortnightly rate requires at least the full stated rate to be paid, including to those who work fewer than 80 hours per fortnight. Others (including Mt Cook Airline) have maintained that this rate should be applied to part timers based on whatever proportion of an 80-hour fortnight they happen to work – which might result in a payment of less than the stated fortnightly rate. This particular difference in view came to a head in respect of part time salaried flight attendants who worked ⅔ of their full-time colleagues' fortnightly working days (6 instead of 9) for ⅔ of their full-time colleagues' salary.

The case was heard by the Employment Court in 2022. The Court agreed with the Union that this group must receive at least the fortnightly figure set out in the relevant Minimum Wage Order. Mount Cook Airline was, however, successful in its subsequent appeal to the Court of Appeal. The Court of Appeal clarified that the fortnightly rate was very obviously based on an 80-hour work

fortnight, and consequently, where that particular rate is applicable to a part time salaried employee, it is to be proportionately reduced to reflect the higher of their actual hours worked, or actual contracted hours.

The decision also takes a stroll through the fascinating history of New Zealand's minimum wage legislation, including the interesting gem that the very first minimum rate for male workers covered by an award or industrial agreement was set based on the amount required in 1894 to *"maintain a wife and three children in a fair and reasonable standard comfort"*. That particular yardstick is very clearly no longer in use.

Reimbursement of immigration costs – *MGK Homes Ltd v Yoon* [2023] NZEmpC 217; *Dhala v FutureEd Australia New Zealand Pty Ltd* [2024] NZERA 38

In *MGK Homes Ltd v Yoon*, Ms Yoon was dismissed from her employment with MGK Homes Ltd and due to the dismissal, needed to apply for a new work visa for herself and a new student visa for her daughter. To assist with this, she sought the expertise of an immigration lawyer, which cost her $4,544.25. The Authority found the dismissal to have been unjustified, and awarded lost remuneration, $20,000 compensation for hurt and humiliation, and reimbursement of the cost of the immigration lawyer Ms Yoon had engaged.

The Court agreed that the dismissal was unjustified and upheld each of the remedies awarded. In relation to reimbursement of immigration legal costs, the Court found that this was money lost by Ms Yoon as a result of the grievance in that, if Ms Yoon had not been dismissed, she and her daughter would not have had to apply for new visas. The cost of the immigration lawyer was *"a direct and foreseeable consequence of"* the unjustified dismissal, and therefore recoverable as reimbursement of money lost by the employee as a result of the grievance.

Likewise, in *Dhala v FutureEd Australia New Zealand Pty Ltd*, the Authority had found that Mr Dhala had been unjustifiably dismissed from his employment with FutureEd Australia. The Authority subsequently considered Mr Dhala's claim for the recovery of fees he paid for employment and immigration law services and costs incurred prior to the Authority application.

The Authority considered that some, but not all, of Mr Dhala's immigration fees were related to FutureEd's breaches and therefore recoverable, and awarded him $7,000 towards immigration costs incurred. (There was evidence that some immigration costs were incurred following a failure by Immigration NZ, rather than as a result of FutureEd's breaches, and so were not recoverable from FutureEd.)

In addition, $1,500 was awarded in related legal costs incurred by the employee for employment law services following non-compliance by FutureEd with a record of settlement that the parties had entered into.

These cases serve as a reminder that costs corollary to an unjustified dismissal can be recovered and ought to be factored into an overall litigation risk assessment.

Employer or funder? – *Attorney-General v Fleming* and *Attorney-General v Humphreys* [2024] NZCA 92

These cases were heard and decided together by the Court of Appeal as both appeals concerned the basis on which the care of adult disabled people by family members has been funded since 2013.

Ms Fleming and Mr Humphrey both cared for their adult disabled children. They each brought proceedings seeking declarations that they were employees of the Ministry of Health in relation to the care they provide. The Employment Court held that both Ms Fleming and Mr Humphreys were employees of the Ministry. The Crown appealed both decisions; Ms Fleming cross-appealed.

"Homeworker" is defined in the Employment Relations Act as a person engaged, employed, or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwellinghouse; and includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser.

The Court of Appeal concluded that Ms Fleming was not a homeworker, and therefore not an employee of the Ministry of Health; and that Mr Humphreys was a homeworker and therefore an employee of the Ministry during the period of the Funded Family Care scheme (2013-2020) but not during the period of the Individualised Funding scheme (2020 onwards).

We look forward to further case law developments as 2024 progresses, and we will keep you updated.