Proposed Employment Law Changes and Case Law Updates

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Proposed Employment Law Changes

Recent announcements from the New Zealand Government indicate that we will be seeing potentially significant changes to New Zealand's employment law in 2025. Many of these proposed changes are being led by the Minister for Workplace Relations and Safety, Hon Brooke van Velden. The changes focus on personal grievances and remedies, exit discussions, pay transparency, and the reinstatement of pay deductions for partial strikes. Whilst these changes aim to enhance flexibility and choice in the workplace, they also raise concerns about balancing employers' rights with employee protections.

Employers will have the opportunity to submit feedback on these changes if and when the proposals become bills and go through the select committee process. If you would like assistance making a submission then please feel free to contact our team.

Personal Grievances: High-Income Threshold

The government has proposed amendments to the Employment Relations Act 2000 that would prevent anyone earning more than $180,000 a year from pursuing unjustified dismissal grievances. 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 Minister has stated that the income threshold would be based solely on an employee's "base salary," excluding other forms of remuneration such as benefits and incentives. Additionally, the Minister has indicated that this threshold would be reviewed annually and adjusted to align with increases in average earnings.

This approach is similar to current Australian legislation, where high-income thresholds have resulted in a more complex landscape for claims. A bill setting out the proposed change is set to be introduced in 2025.

Changes to employee remedies

The Minister has announced plans to amend the Employment Relations Act 2000 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, the Minister 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.

These changes could significantly impact the well-established process that the courts use to evaluate "contributory fault". Currently s.124 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 impending questions as to how this amendment will work in practice, we will have greater clarity once a bill is introduced in 2025.

Protected Exit Discussions

The Termination of Employment by Agreement Amendment Bill is a members' bill introduced by ACT MP Laura Trask which proposes to protect exit discussions initiated by an employer with an employee. Its stated purpose is to allow employers and employees to negotiate a termination without fear of constructive dismissal claims.

Employers would be able to make an offer to an employee to negotiate the termination of their employment and the offer of an exit settlement would not create grounds for a personal grievance claim.

This bill is based on similar legislation in the United Kingdom which enables employers to have protected conversations with employees about terminating the employment relationship. However, the UK law offers more safeguards for employees than what is proposed in the members' 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. The bill would make such discussions very much a "one way" proposition in favour of employers.

Whilst the bill has not yet passed its first reading, we expect it to be heavily scrutinized 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 s.103 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 progressing to the select committee stage. A link to how to make a submission can be found here.

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. Submissions on the bill are open until 20 January 2025, which is likely to be of interest to many unions and employers. A link to submissions can be found here.

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.

Case law updates

Homisan v Mackenzie District Council [2024] NZERA 514

Mr Homisan was dismissed by the Mackenzie District Council (MDC) for serious misconduct on the basis that he had breached the Code of Conduct and his obligation of loyalty to MDC, after a piece of paper was found on the wall board next to his open plan desk that included words he wrote "I still DON'T trust my CEO". Mr Homisan raised a grievance for unjustified dismissal.

The Authority assessed whether the employer's decisionmakers, the CEO and General Manager, had an ulterior motive in dismissing Mr Homisan. Mr Homisan had raised concerns about these individuals as they were senior to him at a prior employer, and his previous role was made redundant during a restructuring process. He had also raised issues about the CEO during the Covid-19 lockdown. However, the Authority rejected these concerns, finding that both the CEO and General Manager were implementing necessary cost-cutting during the restructuring and neither appeared to have an ulterior motive.

The Authority then considered relevant background history. Specifically, it noted MDC had commenced a disciplinary process with Mr Homisan in October 2022 relating to the use of a pool vehicle. The process was unresolved at the time he was dismissed, and Mr Homisan felt this formed part of the motivation to dismiss him. Despite noting the length of such a process and the stress this would have caused Mr Homisan, the Authority found there was no evidence that the vehicle use issue motivated the dismissal.

However, the Authority did find several problems with MDC's process in dismissing Mr Homisan.

On Friday 9 June 2023, Mr Homisan was invited to a meeting on Monday 12 June 2023 (the next working day) to provide feedback on whether his actions could constitute serious misconduct. The Authority found that the timeframe did not allow Mr Homisan to prepare or seek advice. Further, while MDC did take steps to provide him with the opportunity to explain his actions, he was not allowed an opportunity to comment on whether the matter was serious misconduct and whether the sanction could be summary dismissal. MDC also failed to put to Mr Homisan the three breaches of policy that they relied upon to dismiss him, at any time during the process.

The Authority also found that the investigators and decisionmakers were conflicted due to the prior involvement with Mr Homisan, and MDC should have taken further steps in considering the most appropriate decisionmaker and investigator. The Authority did not favour the CEO's argument that she was required by policy to undertake any dismissal. Instead, the Authority found that a sizeable public entity employer with comprehensive procedures would have the ability to delegate this function to someone else.

Overall, the Authority found that Mr Homisan was not provided a fair process, did not understand the reasons for dismissal, and that this was exacerbated by the CEO and General Manager being involved in the process and Mr Homisan's suspicions about their motivation.

Upon his dismissal, Mr Homisan was immediately escorted from the work premises. MDC said this was done to prevent Mr Homisan from upsetting others in the workplace. Whilst the Authority noted that Mr Homisan's loud vocalisation of his views as he left the building may have supported MDC's concerns, it considered this a reasonable reaction to such a sudden dismissal. The Authority found that Mr Homisan would have felt both humiliated on the day and professionally, having lost a senior public-facing job.

Mr Homisan received $8,000 compensation for humiliation and distress and 3 months for lost wages. However, the remedies were reduced by 15% as Mr Homisan had levelled highly personalised criticism at the CEO and General Manager during the process, and the Authority found that this behaviour was likely a contributory factor towards the grievance not being resolved in a more positive way. While it did not justify the flaws in procedure, it did result in a reduction in remedies.

Rasheed v Commissioner of Zayed College for Girls **[2024] NZERA 516**

Mrs Rasheed had been employed as the Principal of Zayed College for Girls (a state-integrated special character Islamic secondary school) since 2011. On 1 July 2024, Ms Rasheed was suspended from her position pending an investigation into matters raised in a letter of concern dated 19 June 2024. Ms Rasheed applied for interim reinstatement which would mean the suspension would be lifted.

In early 2023, a Commissioner was appointed in place of the school board. The Commissioner, Ms Myers, initiated an anonymous staff survey which recorded critical comments about Ms Rasheed's leadership and the health and safety of the work environment. Ms Rashed was placed on a personal assistance and guidance programme under the competency provisions of the collective agreement. The programme was concluded after reflections and changes Ms Rasheed had made to address matters raised.

On 29 April 2024, Ms Rasheed went on sabbatical leave and was due to return on 22 July. On 19 June, the acting principal Ms Shea wrote to Ms Myers setting out staff concerns which included critical remarks about Ms Rasheed's leadership. On 25 June, Ms Myers formally put the concerns to Ms Rasheed and proposed suspension. On 1 July 2024, Ms Rasheed received a letter from Ms Myers which advised her that she would be suspended during an independent investigation into the allegations.

The Authority found several of Ms Rasheed's claims that she had been unjustifiably disadvantaged by the process to be compelling. The Authority found that the Commissioner had failed to comply with key obligations under the collective agreement including that suspension can only occur if a disciplinary process has been initiated, and that the College was required to initiate informal discussions with Ms Rasheed to look at the early resolution of issues. It took issue with the broad nature of the concerns raised in the letter and the apparent lack of inquiry by the Commissioner to better understand the concerns raised by Ms Shea.

The Authority then considered whether there was an arguable case for permanent reinstatement, reiterating that where it is practicable and reasonable to do so, the Authority must provide for reinstatement as the primary remedy. The Commissioner argued that reinstatement was not practicable due to Ms Rasheed's leadership role, the complexities of her responsibilities, and concerns raised by third parties about her presence. However, the Authority found that Ms Rasheed maintained support from staff and the wider community and that she possessed the skills necessary for the role based on her qualifications and past performance.

Ultimately the Authority considered that Ms Rasheed had a legitimate case for permanent reinstatement, finding that while challenges existed, the relationship should not be deemed irreparable without further attempts to remedy it. The Authority found that this aligned with a general provision of the collective agreement about protecting the mana and dignity of the principal concerned.

The Authority considered that the balance of convenience weighed in favour of granting the interim order, finding that Ms Rasheed's return to the workplace would ameliorate the harm to her and the College community from her continued absence and stated that any potential adverse impact to third

parties could be understood and managed by the College. Further, Ms Rasheed showed willingness to return to work in a limited capacity and as co-principal.

The Authority also stated that the overall justice supported Ms Rasheed, the investigation was at an early stage, and what substantive allegations Ms Rasheed may face are unknown. It found that the College had not properly initiated a disciplinary process or investigation as required under the collective agreement and was in breach of its obligations.

Ms Rasheed's application for interim reinstatement was therefore granted. The decision serves as a gentle reminder that the first port of call for an employer when considering taking adverse action, is to check the employment agreement. It is also an interesting example of reinstatement being granted in a situation where an employee had not been dismissed.

Ford v Henry Brown and Company Ltd **[2024] NZEmpC 181**

Mr Ford worked for Henry Brown and Co Ltd. He was summarily dismissed and pursued a personal grievance; the company made a claim against him. The Authority dismissed both parties' claims. Mr Ford then filed a challenge to the Authority's determination to the Employment Court.

Mr Ford had applied for a project management role at Henry Brown. Ms Muir, who was leading the recruitment process, gave evidence that she had asked Mr Ford why he had left his previous employment, and he advised that he had left his previous employment because of relationship issues with the area manager and health and safety concerns. Mr Ford disputed this, saying the interview questions instead focused on his fit for a small family-owned company.

Part of the issue related to the names of referees Mr Ford provided during recruitment with whom he had previously worked. Mr Ford provided a colleague as his reference rather than his manager. The colleague's response to the reference check was recorded on a form which included that Mr Ford had "*issues with the general manager*" and the health and safety of the company. Henry Brown proceeded with Mr Ford's appointment.

While the employment relationship started well, it was not long before issues arose. Mr Ford raised two personal grievances regarding the company's approach to health and safety and alleged bullying. The company was concerned with Mr Ford's behaviour, including with staff and clients, so they decided to contact the referee from his previous employer. Whilst the referee had left the organisation, when the previous employer was notified that they were ringing about Mr Ford, Henry Brown was told that he had been fired and that they would be better off without him.

After responding to the personal grievances the same day, the company wrote to Mr Ford advising that it had concerns that he had misrepresented himself when applying for the role. They stated that

he was in breach of his employment agreement by failing to advise that he had been dismissed from his previous employment, that termination was a possible outcome, and sought his response. After running a disciplinary process, Mr Ford was summarily dismissed.

Mr Ford then claimed he had been unjustifiably dismissed and disadvantaged. Central to the challenge was the correct interpretation of clause 16 of his employment agreement, which stated:

> *"Representations*
>
> *In appointing you we have relied on your representations as to your qualifications and experience. You confirm that those representations are true and correct and that you have disclosed everything, which if disclosed, may have been material to our decision to employ you. You also acknowledge that we may take disciplinary action against you, including dismissal, if your representations were misleading or incorrect."*

The Court held that Mr Ford was not obliged to proactively disclose everything potentially relevant to his appointment. Clause 16 referred to qualifications and experience, and the reasons for ending his previous employment fell into neither category. It found that the company failed to operate as a fair and reasonable employer and that a sum of $9,000 compensation for humiliation and distress and nine weeks lost wages was appropriate. Mr Ford did not seek reinstatement.

Many employment agreements include clauses stating that a failure to disclose relevant information may result in dismissal. This case indicates that a proactive approach is essential, and employers need to clearly ask candidates specific questions if there is specific information they are seeking (and make accurate records of the responses).

Liumaihetau v Pan Square Ltd [2024] NZERA 612

On 6 March 2023, Mr Liumaihetau was informally advised by his employer that there had been two allegations of sexual harassment made against him. On 9 March 2023, he was emailed a meeting request with an attached letter with two excerpts by the complainants.

The first complainant said Mr Liumaihetau called a staff member "sexy eyes", initiated unwanted physical contact, made comments about the complainant's appearance and asked questions about the complainant's virginity.

The allegations from the second staff member included claims Mr Liumaihetau had pushed up against her whilst cleaning plates, had made sexual comments, had touched her "ass" whilst physically moving past her including making comments about her body, and made a comment regarding an incident which had occurred some years before at a bar in Martinborough.

On 14 March 2023, Mr Liumaihetau attended a meeting to discuss the allegations. Regarding the first complainant, he denied grabbing anyone by the face and whilst accepting he used the phrase sexy eyes, he said this was at the end of a conversation when he was trying to get her out of the kitchen. In respect of the other complainant, Mr Liumaihetau denied the allegations.

On 15 March 2023, Mr Liumaihetau attended a further meeting. During this meeting, he was given a letter. The letter stated Pan Square had considered the serious nature of the allegations raised and the effect his behaviour had on the trust and confidence they had in him. During this meeting Panhead also gave Mr Liumaihetau the option of resigning.

A final meeting was held on 21 March 2023. Mr Liumaihetau attended the meeting, provided his response and then resigned, as he felt he had no other option. A company director (one of the decision makers) accepted this as the case, namely, they were giving Mr Liumaihetau a chance to limit the damage to him by allowing him to resign rather than dismissing him.

However, the Authority found that the investigation was flawed, and a fair and reasonable employer could not have reached a conclusion of serious misconduct.

The Authority noted that Mr Liumaihetau's responses to the allegations differed significantly from what the complainants alleged, yet those responses were not put back to the complainants for comment. It also noted that because it was unclear who was making the decisions and who investigated the allegations, Mr Liumaihetau did not have access to the decisionmakers, who could not have had all relevant information before them, which meant any decision made to dismiss was likely to be flawed.

The Authority also noted that one director accepted in her written evidence that she did not see the allegations as reaching the level for instant dismissal, meaning that there needed to be further consideration before a finding of serious misconduct could be made.

Overall, the court found Mr Liumahetau had been unjustifiably dismissed and an award of $18,000 compensation for humiliation and distress was appropriate. This amount was reduced by 15% given Mr Liumahetau's admissions regarding his conduct.

Fredricsen v Air New Zealand Ltd [2024] NZEmpC 198

Captains Fredricsen and Lawrence raised unjustified disadvantage grievances, claiming that they had been treated differently to other pilots in similar circumstances.

Both pilots were members of the NZ Air Line Pilots Association, with their terms and conditions of employment set out in a collective agreement. During the Covid-19, pandemic aircrew members were

required by the Covid-19 Public Health Response (Vaccinations) Order 2021 to be vaccinated with the Pfizer vaccine, and later, with the Janssen vaccine available in the US.

By manipulation of rosters and use of familiarisation flights, Air NZ facilitated the travel of several pilots to the US to receive the Janssen vaccine. However, when the two captains requested familiarisation flights, Air NZ refused, even though another pilot with a similar lack of experience on a similar type of aircraft had been included.

The pilots claimed this unjustifiably disadvantaged them, as it forced Captain Fredricsen to take leave, including leave without pay, or be dismissed, and Captain Lawrence's transfer to the B787 aircraft was delayed which resulted in him receiving lower pay. Air NZ submitted it was not obliged to facilitate their flights to the US, and it was not unreasonable in the circumstances.

The Court said there was no general principle preventing employers from preferring one employee over another, as long as there was no unlawful discrimination involved. However, the employer's duty of good faith would normally require them to act consistently towards employees.

The collective agreement covering Air NZ pilots meant the two individuals had a reasonable expectation that they would be treated consistently with any other pilot. Such an expectation formed part of the conditions of their employment and if Air NZ had treated them consistently, they would have been able to obtain the Janssen vaccine.

First, the Court considered whether there was in fact a disparity in treatment. The Court found that there was, as another pilot (Captain Lawson) had been rostered on to a familiarisation flight to facilitate him receiving the vaccine in the US, yet Captains Fredricsen and Lawrence were denied the same opportunity despite being employed in the same position as Captain Lawson.

The Court initially found that Air NZ had an "*adequate explanation*" for treating Captain Lawson differently, as the two Captains were not scheduled to begin training to fly the B787 aircraft and therefore did not have the same operational reason as Captain Lawson for being rostered on the familiarisation flights on this aircraft. However, the Court stated that arranging a familiarisation flight to the US for Captain Lawson who had a similar lack of experience with a particular type of aircraft, meant Air NZ's argument "*collapsed*" and it was found to not have adequately explained the disparity in treatment between them.

The Court then considered whether the action causing disadvantage was justified, notwithstanding the disparity for which there was no adequate explanation. It found that Air NZ's refusal of familiarisation flights for the two captains was justified in the circumstances as they could not lawfully facilitate the Captains onto a B787 Aircraft and because suitable medical treatment was available in NZ with the Pfizer Vaccine.

However, despite this, the Court found Air NZ did not comply with its good faith obligations. Air NZ was found to have not adequately engaged with the captains in explaining why they were treated disparately to Mr Lawson when declining their request for familiarisation. This undermined the employment relationship by undermining Fredricsen and Lawrence's confidence that they would be treated fairly. It was not conduct that a fair and reasonable employer could have adopted in the circumstances, and they had been unjustifiably disadvantaged.

The Court considered $8,000 each was appropriate as compensation for humiliation, indignity and injury to feelings, noting that the conduct was not deliberate, serious or sustained, or intended to undermine the employment relationship. It stated that while Air NZ had breached its statutory duty of good faith, it was not a breach to which s 4A of the Employment Relations Act 2000 applied and Fredricsen and Lawrence did not seek penalties for breaches of good faith.

Whaanga v Ngāti Rehua Ngātiwai Ki Aotea Trust [2024] NZERA 593

In this decision the Authority had to decide whether Mr Whaanga was an employee of the Ngāti Rehua Ngātiwai ki Aotea Trust, and if so, was he unjustifiably dismissed.

The Authority reached the view that the relationship formed between the parties was an employment relationship, albeit not recorded in documentary form.

In making this finding, the Authority was then unequivocal in its view that the termination of Mr Whaanga's employment was unjustified, and that he was therefore entitled to lost wages and compensation, as the dismissal had humiliated him in front of his hapū and iwi, and because he was dismissed hastily, he was not given the opportunity to defend himself or restore his mana.

Interestingly, however, the compensation award was reduced by 10% for contributory conduct due to Mr Whaanga's poor behaviour which also *"negatively affected the mana of the Trust".*

Understandably tikanga Māori was a pertinent factor in this case, but the decision joins the growing case law on how tikanga Māori can apply during disciplinary processes and subsequent litigation. Whether tikanga Māori is a relevant factor in any decision is heavily contextual, however the decision serves as another example that tikanga Māori-based arguments can form a basis for a claim and/or a defence in the employment jurisdiction.

PXW v QLZ [2024] NZERA 599

The applicant (PXW) was employed by the employer (QLZ) on a fixed-term employment agreement crewing onboard one of its "passenger vessels" in a "*safety-sensitive role*". Just after the employment

started the applicant failed a ‘pre-employment’ drug test. The test showed the presence of cannabis above the screening test limit.

PXW provided medical information from two doctors as evidence that the cannabis was taken medicinally for a medical condition she suffered from. This included an opinion from the doctor who felt that PXW would not be impaired when performing the role. However, when PXW failed a second drug test she was dismissed. Despite being dismissed, PXW remained on full pay until the end of her fixed term. PXW argued that the dismissal was unfair because the medicinal cannabis was prescribed for a disability, and the employer had discriminated against her for this disability.

PXW had raised her personal grievances outside the required 90-day period and therefore applied for leave to pursue them out of time because of exceptional circumstances. PXW argued that she took reasonable steps to raise the grievance through an advocate, but the agent failed to do so. She also raised other contextual factors as to why she failed to raise the claim in time, including family violence, issues that happened during her employment, and because of the disability she suffered from.

As PXW also sought non-publication, the Authority first assessed whether this should be granted. Overall, the Authority found that it is likely that PXW would suffer adverse consequences if her name was publicised. The Authority said that the applicant was young, and her medical information and need for prescribed medicinal cannabis may expose her to adverse comments on social media. The Authority also had concerns around the discrete geographical area the role was based in, and the easily identifiable nature of the job in the circumstances. However, the Authority stated the main reason for granting non-publication was because PXW had been the victim of serious family violence where the perpetrator was criminally convicted, making the context complicated and risky.

The Authority then moved on to assess whether leave should be granted for PXW to raise the grievances out of the 90-day timeframe. This involved a two-step analysis of whether the delay was due to “exceptional circumstance” and if so, is it “just to do so” to grant leave.

The Authority found that there were exceptional circumstances that prevented PXW from raising her grievance within the time frame. The exceptional circumstances were the advocate's neglect in raising the grievance in time. PXW provided evidence that she had messaged the advocate on either side of the 90 days, but in the advocate’s own words, they had “*dropped the ball*” and failed to raise it.

However, despite finding exceptional circumstances caused the delay, the Authority did not find it just to grant leave to bring the grievances out of time.

PXW argued she had failed to organise filing the grievance because she was incapacitated by her mental health issues which were caused by trauma related to the family violence. However, the Authority pointed towards evidence that suggested the contrary, as PXW had formally challenged the police about matters of disclosure of information regarding family violence matters and had communicated articulately with a lawyer to reopen an ACC-sensitive claim. The Authority found that without clear medical evidence to show that the applicant was paralysed by these issues, she should have taken steps to find a more reliable advocate.

PXW also stated she had failed to meet the 90-day deadline because she was sexually harassed in the workplace. However, the Authority was not satisfied that this was a factor that it could consider as the legal test set a high threshold, and the issues experienced by PXW needed to be linked to the grievance. Further, it was found the matter was resolved successfully by PXW and could not be considered as a reason she was impaired.

PXW also argued it was just to grant leave because it was a significantly important case for her and others interested in the disability sector who rely on medicinal cannabis. However, the Authority said that, if the employer had followed its own procedure of conducting a drug test before hiring PXW, PXW would not have been employed in the first place.

Finally, PXW argued that the screening test for drugs was unfair. However, the Authority quickly dismissed this argument as it is well established that an employee can test for drugs rather than test for impairment in the context of safety-sensitive work.

So, despite finding that there were exceptional circumstances which caused PXW not to raise her grievance within the 90-day timeframe, the Authority did not consider it just to grant leave. The Authority also noted that because the employee stayed in employment and was paid for the whole of the fixed-term agreement, this would affect what remedies she could receive. Overall, the Authority consider that it was not just to grant leave for the grievances to be heard out of time.

Maritime New Zealand v Gibson [2024] NZDC 27975

In a landmark judgment, Tony Gibson, the former CEO of Ports of Auckland Limited (POAL), was found guilty of offences under the Health and Safety at Work Act 2015 (HSWA) for failing to undertake adequate due diligence as an "officer" of POAL to ensure that it complied with its health and safety obligations. The prosecution followed the 2020 death of a stevedore who had been loading containers on a ship berthed at the port. He was killed when a shipping container fell from a crane.

The case is significant as it is the first time that an officer of a large New Zealand company has been prosecuted for an alleged breach of their due diligence duties under s.44 of the HSWA. Importantly

for employers, the Court's decision has summarised principles which it considered relevant to the assessment of an officer's exercise of due diligence. These principles included that:

- A breach by the PCBU does not necessarily mean that officers have failed to exercise due diligence. Similarly, failure to exercise due diligence is a strict liability offence, which means that an officer can be found in breach even without acting intentionally or recklessly.
- The evaluation of whether due diligence has been exercised must be based on the specific facts and circumstances of each case. Relevant factors include, but are not limited to, the nature of the PCBU's business and the responsibilities held.
- In large organisations, officers are not required to be directly involved in day-to-day operations. However, they cannot merely rely on others within the organisation. Officers must ensure they personally acquire and maintain enough knowledge to reasonably assure themselves that the PCBU is meeting its duties under the HSWA.
- While industry standards, guidelines, and comparators are relevant to the Court's evaluation, they are not definitive. If an officer relies on such guidance and that guidance subsequently turns out to be insufficient in meeting the requirements of the HSWA, the officer could still be deemed to be in breach.

In particular, officers must:

- Ensure that individuals assigned to health and safety duties possess the necessary skills and experience to effectively perform their roles.
- Obtain and maintain adequate knowledge of the PCBU's operations and the actual work being carried out "on the shop floor".
- Ensure that effective and robust systemic processes are in place to ensure the PCBU complies with its health and safety duties. This is especially important in large organisations where such processes are critical.
- Ensure efficient reporting lines and systems that enable the flow of essential health and safety information to officers and other individuals responsible for governance and supervision. This is also a key requirement for large organisations.
- Proactively monitor, verify and interrogate the information they receive.
- Engage in, or arrange for, an effective process of monitoring, reviewing, and auditing the PCBU's systems, processes, and work practices to ensure they are effective and being followed.

Mr Gibson is awaiting sentencing in 2025. It is not clear yet if he will appeal the findings against him.

All officers should carefully consider this decision and what it means for them and their organisation. It sets important guidance on what officers need to do fulfil their due diligence obligations. Please contact us if you would like to discuss how this.

All the best for the holiday season from the team at Dundas Street. We look forward to working with you again in 2025.