New Zealand HR Compliance Navigator Report Q1 and Q2 2023

Key Updates on Relevant Employment and Workplace Legislative Changes and Major Case Law Developments in New Zealand

workforce SOFTWARE

HR ASSURED™
smarter workplace solutions

Contributing Author

Vaughan Granier

Vaughan Granier is an internationally experienced HR manager with a background in Employment Law. With over 30 years' experience in law and human resource management he has guided organisations through significant workplace change and ensured legal compliance in both the employment law and health and safety environments.

He has led human resources functions and safety at a senior level in South Africa, the Middle East, and Australia/New Zealand. He is an HR strategist and architect, having built numerous HR teams and functions from scratch and positioned executive teams for success through commercially aware and value-added solutions.

As a consultant, Vaughan emphasises practical, trustworthy advice to clients and guides clients to resolve challenges in effective, sustainable ways that ensure core business stability and productivity. He has a strong coaching and mentoring style and is very values driven. He understands the complexities of business leadership and prioritises simple, effective solutions for the business leader that minimise risk and maximise workplace resilience.

Vaughan spent many years in the international construction industry and understands and respects high risk, fast paced environments where margins are small, deadlines are tight, and the quality of people and workplace systems makes all the difference. He has worked in heavy manufacturing, electronics and retail, public health, and software and has also consulted widely on equal employment matters, discrimination and diversity, and skills development.

Qualifications: BA.LLB (South Africa); Dip. HR (UNISA), Certificate in Alternative Dispute Resolution (USBS)

Vaughan's Areas of Expertise

- Performance Management
- Employment Law Compliance
- Disciplinaries and Grievances
- Workplace Documentation
- Restructuring, Redundancy and Business Change
- Leadership Development, Including Succession Planning and Career Pathing
- Employee Engagement and Productivity
- Workplace Investigations
- Health and safety Leadership, Policy and Systems Development
- Safety Investigations
- Hris and payroll
- Recruitment, hiring and induction

Contents

Fair Pay Agreements Act 2022

Category:
New Legislation

Related legislation:
Employment Relations Act 2000

Summary: The Fair Pay Agreements Act has been brought into law with the stated aim of providing a framework for collective bargaining to improve working conditions through industry or occupation-wide minimum employment terms. Once a Fair Pay Agreement (FPA) has been agreed and/or ratified by the Employment Relations Authority (ERA), it is binding on all employees, whether or not they are union members, and all employers, whether or not they participated in the bargaining.

This legislation was introduced in December 2022 after significant public interest and widely varying opinions on its merit. Unions were strongly in support of the legislation, while businesses expressed concern about cost increases, administrative burden and business inflexibility.

The FPA regime essentially forces employers in either a sector of the economy or who employ workers in a particular occupation to engage in bargaining regarding the minimum working conditions for those employees. Those minimum working conditions include:

a. Minimum base rates of pay.
b. Standard hours during which base rates are paid.
c. Minimum rates for overtime work and penalty rates and when these apply.
d. Adjustments to these minimum base, overtime and penalty rates over the life of the agreement.
e. Training and development arrangements.
f. Leave entitlements.

For an FPA to be made, a union needs to first meet the representation test. That test requires that it be demonstrated that 1,000 employees, or alternatively 10% of employees who would be covered by the FPA, support the application to initiate bargaining.

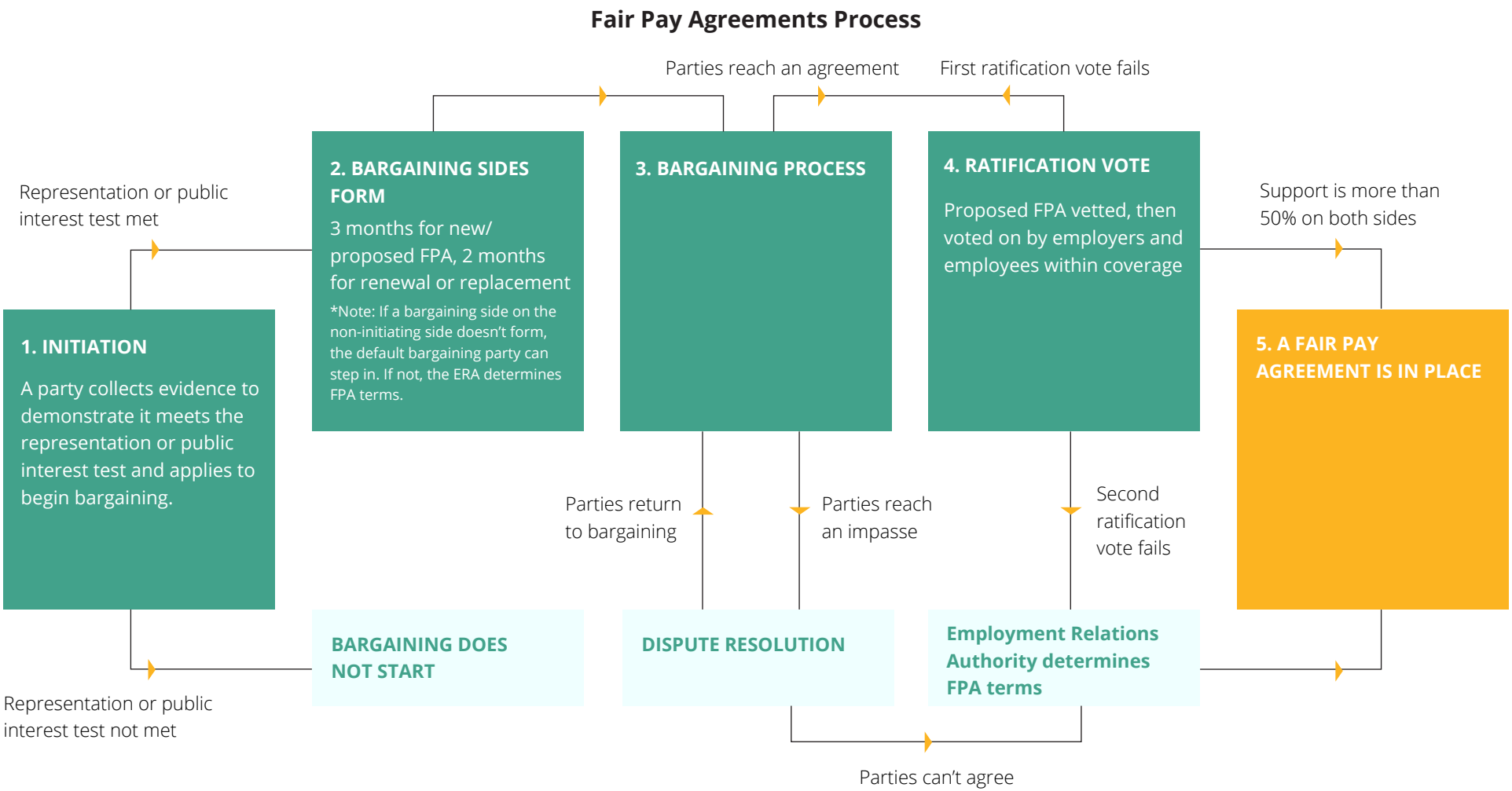
Once a union meets the representation requirements, it can lodge an application to be recognised as the legitimate representative of the employees in that sector, whether they are members or not. From there bargaining process can commence.

Employers must bargain via an Employers Bargaining Party, which must be a registered body with a constitution that authorises them to bargain on behalf of all the employers in that sector. When an application for a Fair Pay Agreement is lodged, and approved by Ministry of Business, Innovation and Employment (MBIE), employers have three months to form an Employer's Bargaining Party. In the absence of a registered Employer's Bargaining party, a further month is allowed for Business NZ to agree to be the default bargaining party, after which the union can apply for minimum employment conditions to be set by the ERA.

The bargaining process allows two opportunities for parties to come to a mutually agreeable outcome, which can be ratified by members and then signed into law by the ERA, failing which the ERA will determine the applicable minimum terms.

The ERA's significant role in many stages of the Fair Pay Agreements process, may stretch their resources and slow down the finalisation of FPA's to some extent.

Fair Pay Agreements Act 2022



Source: Ministry of Business & Innovation (2021); the proposed Fair Pay Agreement System.

Fair Pay Agreements Act 2022

Learnings from the Australian Modern Awards System

a. Compliance will be more complex, likely requiring deeper management skills, to manage higher costs caused for certain hours worked and more sophisticated payroll systems.

b. There will be an increased cost associated with proactive compliance as more complex laws require more interpretation, scenario testing and advice.

c. Correctly capturing the FPA provisions within payroll rules at the outset is critical. Consequences of errors are exponential and arduous to resolve as errors compound over time and can only be unravelled by an exhaustive analysis of payroll and time records. Both the time component of investigating errors and remedying errors, as well as the financial cost of rectifying those compounded errors, can be significant.

d. There will be an ongoing need to manage payroll and management processes as it is likely that FPAs will vary over time.

e. HR Assured's sister company in Australia has significantly higher call rates than NZ around compliance issues as the time cost of compliance leads to the outsourcing of this specialised expertise to consultants.

f. Multiple Agreements might be valid in a single workplace (e.g. administration, management, engineering, warehousing) as the system grows. We know that in Australia, overlap between industries and between industries and occupations is a significant challenge.

Current Status

a. There are four industries/occupations where applications have been made. These are:
   i. Hospitality – including hotels, motels, cafes, restaurants, takeaway food businesses, casinos and movie theatres.
   ii. Supermarket and Grocery Store (general) – including supermarkets, bulk food retailing, grocery retailing and Asian groceries.
   iii. Security Guard/Officer.
   iv. Commercial Cleaner.

b. No employer Bargaining Parties have been registered for any of these proposed FPAs.

c. Hospitality is the most advanced, with the sample verification period closed in February 2023.

It appears likely that the above are being treated as test cases for the process, and that once these matters have sufficiently progressed, it is likely that further applications will be made. Early childhood education has been identified by the unions as a further target for a FPA application.

The time frame from a union's initial application (current applications are available here) would be around four to five months, but in reality this would be barely sufficient to establish a well-resourced, structured and mandated Employer Bargaining Party.

Screen Industry Workers Act 2022

Category:
New Legislation

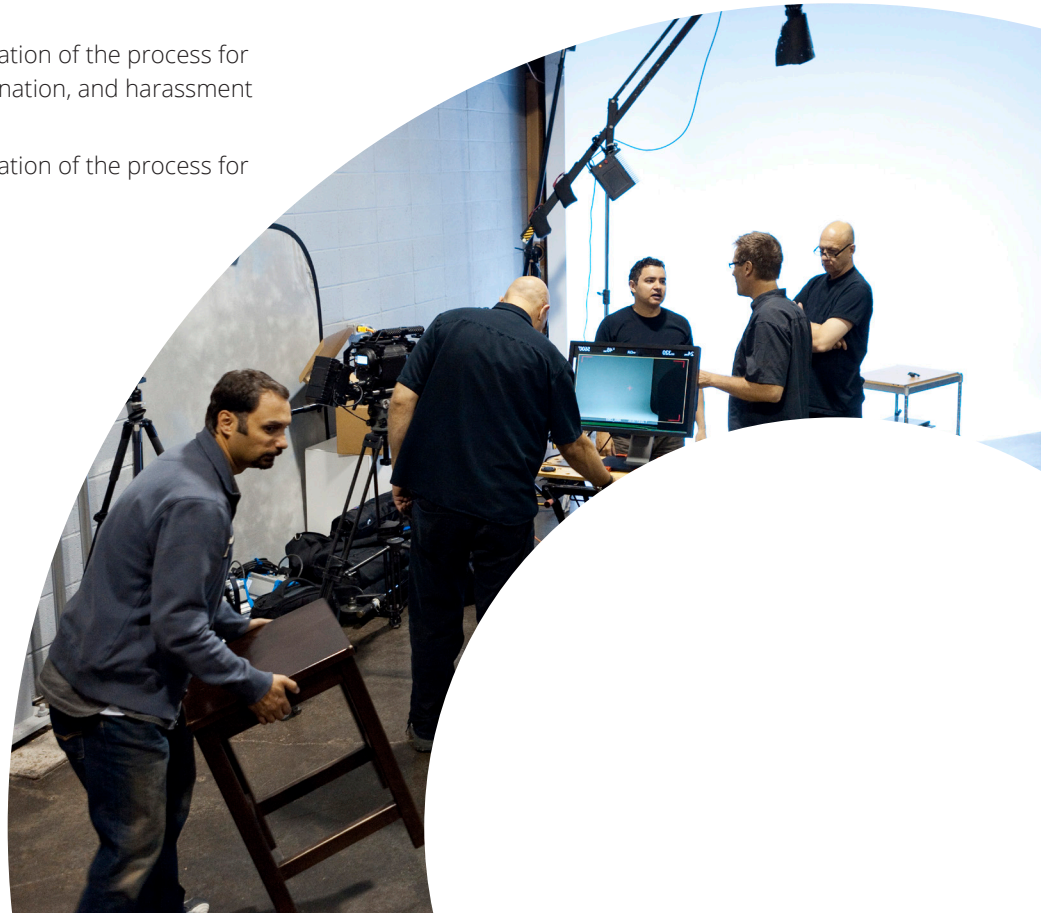
Related legislation:
Screen Industry Workers Act 2000

Summary: Under the Act, contractors working in the screen industry will be able to collectively bargain at occupational and enterprise levels.

The majority of the Act came into force on 30 December 2022.

The Act requires all contractor agreements for screen industry workers to include certain mandatory terms, including:

a. A term that requires both parties to comply with the Health and Safety at Work Act 1983 and the Human Rights Act 1993;
b. A plain language explanation of the process for raising bullying, discrimination, and harassment complaints; and
c. A plain language explanation of the process for resolving complaints.



Employment Relations (Extended time for Personal Grievance for Sexual Harassment) Amendment Bill

Category:
Amendment

Related legislation:
Employment Relations Act 2000

Summary: The time period during which a grievance or dispute of a sexual harassment nature will be increased from 90 days to 12 months.

Currently all disputes have a window of 90 days from the date of the alleged incident, for the submission or declaration of a dispute or a grievance. This includes any complaint relating to harassment of a sexual nature. The Human Rights Act 1993 provides a 12-month period for the submission of any grievance to a Human Rights infringement, and this amendment will bring the Employment Relations Act into line with the Human Rights Act 1993.

Holidays Act Review 2021

Category:
Amendment

Related legislation:
The Holidays Act 2003

Summary: On 23 February 2021, the Government released the Holidays Act Taskforce's Final Report dated October 2019 while announcing that the Government accepted all of all the Holidays Act Taskforce's 22 recommended changes. These changes are still to be prepared as a Bill to be introduced into Parliament, but it is expected that the passage of this Bill will be swift once this has been completed.

The key recommended changes are to:

a. Clarify what a week is for the employee when calculating annual holiday entitlements.
b. Implement a new test for an "otherwise working day".
c. Implement a new test for eligibility for family violence, sick and bereavement leave with a focus on agreed hours in the employment agreement.
d. Introduce a new concept of "Ordinary Leave Pay" to replace "Ordinary Weekly Pay" and "Relevant Daily Pay".
e. Amend the definition of "Gross Earnings" so that it reflects all cash-payments received, except direct reimbursement for costs incurred.
f. Define "intermittent or irregular" for the purposes of using pay-as-you-go holiday pay (at 8%).
g. Allow employees to take annual holidays in their first 12 months up to the pro-rated amount for which they would have been eligible.
h. Allow employees to access bereavement leave and family violence leave from their first day of employment.
i. Allow employees access to one day of sick leave from an employee's first day of employment with an additional day of sick leave added per month until their full five-day entitlement is reached (at month six).
j. Extend bereavement leave to include step-family, siblings-in-law, children-in-law, cultural family groups (e.g. Whangai relationships), aunts, uncles, nieces and nephews, and miscarriage.
k. Allow sick leave and family violence leave to be used in units of less than a day (with a minimum amount of a quarter a day).
l. Remove the "parental leave override" in the Parental Leave and Employment Protection Act 1987 so that employees will be entitled to be paid in full for their annual holidays after returning from parental leave.
m. Provide flexibility in businesses having closedown periods.
n. Update record-keeping requirements to reflect these changes.
o. Require employers to provide employees with payslips in every pay period.
p. Give employees, on the sale and transfer to a business, the choice whether to transfer all their leave entitlements or have them paid out and reset.

The recommended changes are expected to be introduced into a Bill before Parliament in mid to late 2023.

Case Law: E tū Inc v Rasier Operations BV [2022] NZEmpC 192

Category:
Case Law: E tū Inc v Rasier Operations BV [2022] NZEmpC 192

Summary: The question in this matter was whether Uber drivers were "employees" of Uber under s6 of the Employment Relations Act 2000.

Four Uber drivers sought declarations of employment status from the Employment Court (Court) in relation to their work providing Uber rides and Uber Eats deliveries.

The Court found that the "real nature of the relationship" between Uber and the plaintiff drivers was one of employment for the following reasons:

a. Uber retained a significant level of control and subordination over the drivers. The drivers had no control over the setting of fares for trips, which was solely determined by the Uber App. Their performance was "encouraged" and strictly monitored through a rating and disciplinary system, with the potential for deactivation from the App.

b. The drivers had "little to no opportunity to improve their economic position through professional or entrepreneurial skill", so the ability to "grow their own business was virtually non-existent". They were not able to advertise for customers, nor were they able to increase profit by any means beyond working longer hours.

c. The degree "flexibility" and "choice" afforded to drivers in relation to their hours was largely illusory due to negative consequences for failing to maintain a high volume of rides and ratings.

d. Flexibility is a feature of most modern employment relationships (casual employees also have no obligation to accept work).

e. The drivers identified themselves as drivers for Uber, and part of the Uber business, when they logged onto the App and when picking up and delivering riders.

f. The drivers were provided with contracts on a take-it-or-leave-it basis with no realistic opportunity to negotiate the terms and conditions under which they were expected to work.

The Court noted that the declarations made in respect of the four drivers did not automatically extend to all Uber drivers as employment status is determined on a case-by-case basis having regard to the specific facts.

Enterprise Motor Group (New Lynn) Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment [2022] NZEmpC 194

Category:
Case Law: *Enterprise Motor Group (New Lynn) Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [2022] NZEmpC 194

Summary: At issue was whether the employer's method of calculating wages complied with the Minimum Wage Act 1983 and relevant orders (Minimum Wage Act).

The employees were salespeople who sold vehicles. They were paid an increasing rate of commission depending on how many vehicles they sold. The employees were paid a weekly advance payment which was deducted from their commission at the end of the month. The employees also earned bonuses and incentives.

The employer calculated wages by:

a. calculating the value of all commission, advances and bonus payments to the employee for each calendar month;
b. evenly apportioning those payments to the calendar weeks within each month;
c. assessing whether the employees received at least the minimum wage for each hour worked in each week (or later, fortnight); and
d. topping up the wages of any employee who did not receive at least the minimum wage for each hour worked in each week/fortnight.

After undertaking an investigation, the Labour Inspector found that the employer's method of calculating the wages did not comply with the Minimum Wage Act. The Labour Inspector considered the employer's use of an averaging method was impermissible. The Labour Inspector accordingly issued the employer with an improvement notice requiring it to identify all past and present employees who were impacted by the averaging method and review their time and wages records to identify the dates on which commissions and bonuses were earned. The employer was then to be required to calculate any shortfall occasioned by the alleged impermissible averaging approach.

The employer objected to the improvement notice in the Employment Relations Authority (ERA). Member Craig of the ERA removed the matter to the Employment Court for consideration without first investigating it.

The facts in the matter were not in dispute and the Court needed only to consider the lawfulness of the employer's averaging method.

The employer argued that the Act permitted it to apply a wage calculation taking into account bonuses and commissions across a whole month, provided that in each week or fortnight the employee was paid at least the minimum wage for each hour worked. The Inspector argued that the employees' income needed to be assessed based only on the commission and bonus payments earned in each particular week or fortnight.

The Court found the employer's method of calculation did comply with the Minimum Wage Act. The Court held the method did not attempt to off-set an underpayment in one week (or fortnight) against earnings in another period and therefore differed to impermissible averaging. It found that the method did not deprive the employees of at least the minimum rate of pay for each hour worked. The Court also found the method was more consistent with the variable nature of the industry, including that sales in the industry often happen over a period of time. The Court amended the improvement notice in a manner consistent with the averaging approach.

Baillie v Chief Executive of Oranga Tamariki – Ministry for Children [2022] NZEmpC 223

Category:
Case Law: *Baillie v Chief Executive of Oranga Tamariki – Ministry for Children* [2022] NZEmpC 223

Summary: Employment Court – Personal grievance – Serious misconduct – Unjustified dismissal – Remedies

At issue was:

- Whether the employee was unjustifiably dismissed for serious misconduct.
- If so, what remedies should be awarded.

The employee worked as a residential youth worker at a secure residence for children and young persons.

The employee was identified on CCTV appearing to have an altercation with a resident in a room. The CCTV recorded the incident without sound. The shift leader on duty at the time witnessed part of the incident.

The resident was on a call with his girlfriend and was heard by the employee and their shift leader using what they considered to be aggressive and abusive language towards the girlfriend. The employee and shift leader entered the room shortly after and the employee advised the resident that their language and behaviour was unacceptable and needed to stop. The two then left the room and the resident threw the phone speaker he was using. The two re-entered the room and a discussion took place between the employee and the resident in which the employee advised of the consequences of the behaviour, including that his phone call would be terminated, and the resident threatened to "smash" the employee. The employee asked the shift leader to terminate the call and the shift leader left the room. The employee attempted to pick up the phone speaker and the resident kicked him.

The CCTV then captured an image of the employee "briefly closing his hand and slightly pulling his arm back" (the hand image). The employer suspended the employee after reviewing the CCTV footage. The employer raised six allegations of potential serious misconduct and invited the employee to a disciplinary meeting. The employer concluded the employee had "formed a fist and was preparing to punch the young person". The employee had denied this. The employer summarily dismissed the employee after finding most of the allegations were substantiated.

The employee raised a personal grievance for unjustified dismissal. The Employment Relations Authority (Authority) dismissed the claim. The employee challenged the determination in the Employment Court (Court).

The Court found the employee was unjustifiably dismissed. The Court took into account that:

a. The employer relied "almost exclusively" on the CCTV footage and drew inferences from it without adequately taking into account its deficiencies.
b. There was no basis for the employer to prefer its own interpretation of the CCTV footage over the employee's explanations and the shift leader's evidence.
c. The employer never interviewed the young person concerned during the investigation.

Baillie v Chief Executive of Oranga Tamariki – Ministry for Children [2022] NZEmpC 223

d. The employer rejected the employee's explanations as "untruthful" when they were considered "plausible" (see para 58). The hand image, which appeared briefly on CCTV footage, only "lasted less than one second". The employer had not fairly assessed the employee's explanation that it was a reflex (see para 66).

e. The employee was justified in restraining the young person according to the relevant regulations.

The Court held that the employee was unjustifiably dismissed because the employer's decision to summarily dismiss the employee, viewed objectively, was not what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. The financial loss and harm the employee suffered, which "flowed entirely from the employer's decision of dismissal", were "significant. The Court ordered that the employee be reinstated to his former position or one no less advantageous to him, that he be paid lost remuneration between the date of dismissal and the judgment and that he be paid $30,000 in compensation for humiliation, loss of dignity and injury to feelings under section 123(1)(c) of the Act.

Case Law: Price v Pinevale Farms Ltd [2023] NZERA 45

Category:
Case Law: *Price v Pinevale Farms Ltd [2023]* NZERA 45

Summary: Employment Relations Authority – Personal grievance – Constructive dismissal – Breach of minimum standards

At issue was whether the employer constructively dismissed the employee by breaching the terms of her employment to such an extent that it was reasonably foreseeable she would resign.

The employee worked on a dairy farm performing milking and general farm work. The employee began as a relief milker with an agreed amount of pay per milking. She quickly began milking ten times a week. After approximately two months, the employee moved into accommodation on the farm and worked additional hours on general farm tasks. The parties never signed an employment agreement. The parties had different expectations of the role and conditions of employment. Without an agreement to refer to, the relationship between the employee and employer became fraught over time. The employee was not always paid correctly or on time.

The employee resigned, stating in her resignation letter that she was resigning because (see para 32):

a. Despite several requests, the employer had failed to provide an employment agreement.
b. The employee was not provided with regular days off.
c. Her roster was changed without her agreement.
d. The employer did not increase her pay in line with extra hours worked.
e. The employer did not pay the minimum standards for public holidays or provide holidays.
f. The employer treated her badly in recent times, including avoidance of communication.

The employee left the resignation letter for the employer to find, but the parties did not discuss her resignation during her notice period.

The Authority found the employer had constructively dismissed the employee by serious breaches of the terms of her employment. The Authority noted the employer had disregarded its legal obligations and there was a bargaining imbalance between the parties. The Authority ordered the employer pay the employee:

a. $20,000 in compensation under section 123(1)(c) of the Act;
b. $25,000 in unpaid wages under section 123(1)(b) of the Act;
c. Unpaid wages for the notice period worked of $800;
d. Unpaid Holiday Pay in the amount of $8,287.13;
e. Payment for work performed on public holidays in the amount of $2,160;
f. Interest on the sums set out at two to five above.

Henry v South Waikato Achievement Trust [2023] NZEmpC 20

Category:
Henry v South Waikato Achievement Trust [2023] NZEmpC 20

Summary: Employment Court – De novo challenge – Personal grievance – Unjustified dismissal – Serious misconduct – Procedural and substantive fairness

At issue in this case was whether the employer unjustifiably dismissed the employee for serious misconduct.

The employee was employed as second-in-charge in a community residential facility for disabled persons. The employee filed a complaint to her manager about alleged abuse of a client by a support worker. The employee had not witnessed the alleged abuse but relied on statements from another support worker. Information in the complaint was from around six months earlier, but the support worker had not reported it at the time.

The employer carried out an investigation and decided there was not sufficient evidence to support the complaint. The employer was concerned:

a. that the employee had an improper motive in bringing the complaint (as she had complained about the same support worker previously; the employer considered the employee's actions could be retaliatory);
b. that the employee had improperly questioned the person in care as part of the reporting of the alleged incident; and
c. that the employee had not reported the incident earlier, contrary to the employer's complaints process.

Based on its concerns, the employer started an investigation into the employee. The six matters that were the subject of the investigation were:

a. the employee was aware of the incident around the time it had allegedly taken place.
b. the employee did not report the incident at the time.
c. in relation to the reporting of the incident, at issue was whether a support worker had approached the employee to lodge a complaint or whether the employee had asked her to complain.
d. the incident was reported shortly after a separate complaint made by the employee against the employee alleged to have abused the client was unsuccessful.
e. the employee spoke to the client about the alleged abuse which was considered inappropriate.
f. a separate issue related to her involvement in the slamming of a vehicle door.

Henry v South Waikato Achievement Trust [2023] NZEmpC 20

The employer undertook a comprehensive investigation which was carried out by a member of the Trust's board. The employee was given the opportunity to respond to the allegations in writing. The investigation resulted in findings that the employee had engaged in serious misconduct, and she was ultimately dismissed for this reason.

The employee took a claim to the Authority for unjustified dismissal and for unjustified disadvantage in relation to the suspension. The employee was unsuccessful in the Authority.

The employee challenged the Authority's determination in the Court. The employee sought remedies for a personal grievance and reinstatement.

The Court found the suspension was unjustified because the employer "did not adequately disclose to [the employee] the reasons for it and there was no proper basis for reaching that decision".

The Court also found the decision to dismiss for serious misconduct, viewed objectively, was not one that was open to a fair and reasonable employer in all the circumstances. In reaching that conclusion, the Court considered:

a. The Chief Executive, to whom the employer directly reported, also did not follow the employer's complaint process, making his expectations about complying with it "potentially confusing".
b. The employer treated the employee differently from how it treated the support worker who also did not report the alleged assault at the time, in that the employer did not take any action against the support worker.
c. The employer "drew a long bow" in deciding the employee's complaint was retaliatory, including because that complaint did result in a sanction for the relevant employee.
d. The employer did not interview all employees and could not explain how it selected those who it did interview.
e. The person conducting the investigation did not interview employees but rather relied on transcripts of earlier interviews conducted by a different investigator.
f. The interview transcripts dealt with broad issues rather than the specific matters that were the subject of this investigation.
g. The investigator seemed to give little weight to positive comments about the employee in the interview transcripts, nor did they give weight to statements which raised questions about the employee who was alleged to have engaged in the abuse.

The employee sought reinstatement to her former position, lost remuneration, $40,000 as compensation under s123(1)(c) of the Act and special damages for legal expenses incurred.

The Court determined that reinstatement was not appropriate, in particular having regard to the fact that the employee's role had been disestablished and that there was a significant and probably insurmountable difficulty to re-establishing an ongoing employment relationship. The Court awarded:

a. lost remuneration of $52, 636.72;
b. special damages of $8,060.48; and
c. compensation pursuant to s123(1)(c) of the Act of $35,000.

About HR Assured

HR Assured has been helping businesses with workplace compliance for over 30 years. No matter what employment issue you're facing, they've seen it before and helped their clients resolve them.

From outsourcing your HR case management so your business can instantly scale your team to unlimited and untimed workplace advice around the clock, the team at HR Assured can tailor a solution that meets your business's needs, seamlessly integrating with any standing HR functions.

So, why HR Assured?

a. You can access their our pool of talented workplace relations specialists to seek advice 24 hours a day, seven days a week, 365 days a year.
b. Specialised case management services where HR Assured acts as an extension of your internal HR team.
c. They'll arm you with hundreds of documents, customisable templates, employee agreements, workflows, workplace policies and procedures—all accessible anytime, anywhere at the click of a button.
d. They'll set you up with HRA Cloud—a dynamic cloud-based information and management system. You'll enjoy paperless control over all your employee records from recruitment to retirement. Fast, secure and easy to use, you can update information anywhere, from any device.
e. HR Assured assists in arranging cover that is made available to HR Assured's clients in the unlikely event that you receive a work-related claim. Subject to the terms and conditions of the policies, if faced with a claim, you will be insured with a no-excess insurance policy. The Insurer will handle your claim and if the matter escalates, specialist lawyers will take over, handle the matter for you, and represent you.
f. A complete health and safety (H&S) management system.

HR Assured provides advice and support for businesses across many industries and ones just like yours. Read about how they've helped their clients here.

If you'd like to know more about HR Assured and what this industry-leading HR & WHS solution can do for your business, email horton@hrassured.co.nz or phone 0800 003 825.

About WorkForce Software

WorkForce Software is the first global provider of workforce management solutions with integrated employee experience capabilities. The company's WorkForce Suite adapts to each organisation's needs—no matter how unique their pay rules, labour regulations and schedules—while delivering a breakthrough employee experience at the time and place work happens.

Enterprise-grade and future-ready, WorkForce Software is helping some of the world's most innovative organisations optimise their workforce, protect against compliance risks and increase employee engagement to unlock new potential for resiliency and optimal performance. Whether your employees are deskless or office workers, unionised, full-time, part-time, or seasonal, WorkForce Software makes managing your global workforce easy, less costly and more rewarding for everyone.

Learn more about WorkForce Software at www.wfsaustralia.com