Edition 16 | December 2022

Vital.

Employment & Immigration News

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Inside:

Tēnā koutou katoa

Welcome to the final edition for 2022 of Anderson Lloyd's Employment and Immigration Law Newsletter.

You may have noticed the name change to this newsletter, signalling an exciting addition to our workplace law offering – immigration expertise.

This month we are thrilled to announce Natasha (Tash) Rae, an experienced senior immigration lawyer, has joined the AL team to provide immigration services to our clients. Tash has written an article introducing herself and setting out what she can assist your business with. We also welcome Rebecca Laney, an Associate based in our Dunedin office. Rebecca is a technical, health and safety, and policy expert, and brings a depth of experience to this part of our practice. In other exciting people news, we are celebrating the promotion of three of our senior team members – Fi McMillan and Malcolm Couling to Special Counsel, and James Cowan to Senior Associate.

We have been busy with a number of the team presenting at seminars across the country, including the national NZLS Employment Law Conference. We are also proud to have been recognised in the Employment Law Firm category of the HRD Service Provider 2022 Awards.

With the end of 2022 fast approaching, we want to take this opportunity to say a huge "Thank You!" to all our clients, connections, colleagues, and referrers. We appreciate the relationships we have with you all, the work we get to do alongside you and your businesses, and the laughs and great work stories. Ultimately we are in the business of helping people with their people, and we wouldn't have that opportunity without you all.

We wish you a very happy and safe holiday season, and look forward to seeing you in the New Year.

Noho ora mai rā, stay well.

John and AJ

John Farrow
Partner

AJ Lodge
Partner

Introduction: Tash Rae

My name is Tash Rae and I have recently joined Anderson Lloyd as an Immigration Lawyer.

I was first exposed to the world of immigration about 12 years ago, when I was working as a mailroom temp for Immigration New Zealand (INZ). After law school I joined INZ as an Immigration Officer and spent my time processing temporary and residence applications in Christchurch. After a couple of years, I was lucky enough to transfer to Washington DC, where I continued processing temporary and residence visa applications at the New Zealand Embassy. At the time I did a Masters of International Security (Intelligence) to up-skill in the technical and risk side of immigration, which I found fascinating. My final role with INZ was in London, where I had the opportunity to work on the technical/risk side, and to manage a team of Immigration Officers.

Since leaving INZ I have focused on corporate immigration for large employers and multinational companies. This was initially for a global law firm, based in its London and Singapore offices. For the last five years I have been back in New Zealand, where I have continued to focus on corporate immigration for multi-national companies and large New Zealand employers. In addition to corporate immigration, I have a particular interest in assisting with partnership-based visa applications and tricky health or character issues.

It is becoming increasingly difficult for individuals and employers to navigate the ever-changing immigration rules. The Anderson Lloyd team would be happy to help make these immigration processes as straight-forward as possible. Our services include:

- health and character concerns
- mandatory employer accreditation
- partnership-based work and residence visa applications
- immigration audits and advice for employers on immigration compliance
- employer-based work and residence visa applications
- residence or deportation appeals to the Immigration and Protection Tribunal

We very much look forward to offering Anderson Lloyd's clients immigration advice.

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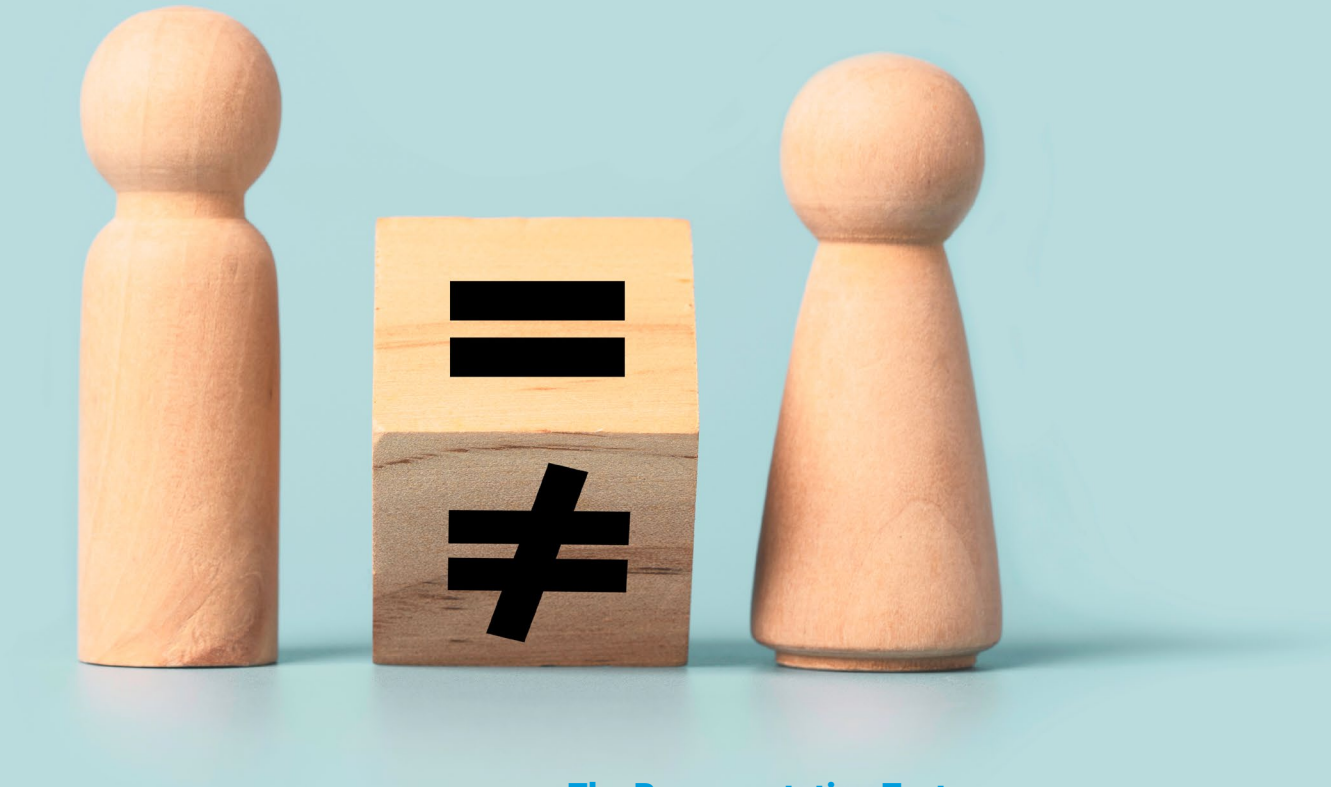
The Fair Pay Agreement Act – the highlights

How will it work?

An eligible Union can initiate bargaining if the proposed coverage area is clearly defined and it meets the Representation Test or the Public Interest test.



Coverage

There are two options:

- the industry or type of industry (for example, an FPA that would cover butchers and bakers in the supermarket and grocery industry); OR
- the occupation, including the work or type of work (for example, covering all commercial cleaners).

An industry-based agreement will apply to all employees employed in the occupation and industry covered by the Agreement. An occupation-based agreement will apply to all employees who are employed in the occupation covered by the Agreement.

The Representation Test

1,000 covered employees support initiating bargaining OR 10% of all covered employees support initiating bargaining. Employees do not need to be Union members to support bargaining.

The Public Interest Test

An alternative to the Representation Test. One or more of the following factors must apply:

- receive low pay for work;
- have little bargaining power in employment;
- have a lack of pay progression;
- are not adequately paid, taking into account working conditions (long or unsocial hours or contractual uncertainty);

Continued > .5

Union evidence for the Public Interest Test

- the coverage of the proposed Agreement includes a high proportion of migrant workers;
- systemic exploitation of migrant workers;
- most of the covered employees are employed on a temporary basis;
- there is a systemic failure to comply with minimum employment standards for the covered employees;
- a high proportion of the covered employees are employed by (small to medium-sized employers) (less than 20 employees);
- there are systemic health and safety issues for the covered employees.

Employer bargaining side

- one or more employer associations;
- an 'employer association' is essentially an incorporated society created specifically for bargaining for a Fair Pay Agreement. There has to be a demonstrable democratic, reasonable and lawful framework;
- must include at least one employer member within the coverage of the proposed agreement.

Employee bargaining side

Made up of the Union that initiated the bargaining and an unlimited number of eligible Unions.

Obligations on bargaining sides

Employer

- use best endeavors to represent the collective interests of all covered employers;
- provide regular updates about bargaining;
- provide all covered employers with an opportunity to provide feedback;
- consider all feedback received;
- use its best endeavors to ensure Maori employers are effectively represented.

Employee

- consider all feedback received;
- provide regular updates about the progress of the bargaining process;
- use best endeavors to ensure Maori employees are represented effectively.

Obligations on both bargaining sides

- agree an inter-party side agreement (setting out the details of how the bargaining side will make decisions).
- appoint a bargaining side lead advocate who will chair the bargaining parties and be the primary spokesperson.

Content

Compulsory

- date on which agreement comes into force;
- coverage of the agreement;
- normal hours required of each class of employee covered by the agreement;
- details of wages to be paid, including:
  - minimum base wage rates and when rates apply;
  - whether the minimum base wage rates include or exclude employer's contribution for superannuation;
  - the rates of payment for any overtime worked, and when they apply;
  - penalty rates and when the rates apply;
  - in relation to minimum base wage rates, overtime rates and penalty rates –
    - the specified amount by which they must be adjusted; or
    - the calculation that must be used to adjust them.
- governance arrangements that will apply;
- the process for each bargaining side;
- the date on which the agreement expires.

A fair pay agreement must apply for a period that is not less than three years but not more than five years.

Compulsory content for discussion

- Bargaining sides must discuss whether the proposed agreement will specify the following topics:

  a) the objectives of the proposed FPA

  b) health and safety requirements

  c) arrangements relating to training and development;

  d) arrangements relating to flexible working;

  e) leave entitlements;

  f) arrangements relating to any redundancy.

What agreements may include?

- anything that is not contrary to law or inconsistent with the Act;
- may include district variation for some provisions;
- may include differentiation for different classes of cover employees;
- no differentiation for size of employer businesses.

Good faith obligations applying to bargaining parties

- meet each other from time to time for the purpose of bargaining
- consider and respond to each proposal made by the other bargaining side
- continue to bargain even if a deadlock is reached.
- use best endeavors to agree terms in an orderly, timely and efficient manner
- not to undermine bargaining
- provide the other bargaining side with any information that:
  - the other side requests in accordance with section 92; and
  - is reasonably necessary to support or substantiate claims, or responses to claims.

Finalisation of agreement

- Employment Relations Authority must complete a compliance assessment of agreement
- no right of appeal from the Authority's decision
- once approved by the Authority, each covered employer must advise its covered employees that a ratification vote will be held, provide them with the agreement and a plain language summary;
- an agreement is ratified if more than half the votes are in favour of ratification.

What if the parties cannot reach agreement?

- a bargaining side can apply to the Employment Relation Authority (panel of three ERA members) for a determination to fix the terms of the proposed agreement;
- this option is only available after bargaining sides have exhausted all other reasonable alternatives, such as mediation and the ratification process has failed twice.
- the Employment Relations Authority has broad scope to fix terms (can fix mandatory terms, terms relating to the mandatory topics of discussion or any other terms that the parties have agreed to include);

Coverage overlap

- the Employment Relations Authority must review the terms of the proposed agreements which overlap and determine which agreement provides the better terms overall for the employees within the coverage of both agreements. Those terms will then apply.

Penalties and enforcement

- penalty for non-compliance with obligation when bargaining:
  - individual - $20,000 maximum
  - businesses - $40,000 maximum
- penalty for non-compliance with obligation when fair payment agreement in force:
  - individual – not exceeding $10,000
  - businesses – not exceeding $20,000

John Farrow
Partner

Redeployment – a key piece of the redundancy puzzle

As New Zealand continues to grapple with post-COVID economic uncertainty, we are seeing a steady flow of business restructures and resulting employee redundancies.

A key, but often overlooked, aspect of a lawful redundancy process is the consideration of redeployment – whether there are any other roles in the business that the employee could do, instead of losing their job.

The employer must consider whether there are any suitable redeployment options for an employee who has been made redundant. But what exactly does this look like, and how can employers avoid falling short?

The legal requirements

An employer who dismisses an employee, for any reason, must comply with the good faith obligations in section 4 of the Employment Relations Act 2000 (the Act), and should ensure the decision is one that a fair and reasonable employer could have made in all the circumstances.

More specifically, section 4(1A)(c) of the Act provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, the employer must provide to that employee access to information relevant to the continuation of the employee's employment, as well as an opportunity to comment on the information before any decision is made.

What this means in the context of redeployment

Where an employer has consulted on the proposed restructure and resulting redundancy, consideration of redeployment can often be an afterthought. However, consideration of redeployment is as crucial as being able to set out clearly the rationale for the restructure, and following a fair and genuine consultation process.

Considering redeployment means considering whether the displaced employee could fill an existing vacancy within the business, or a new position set to emerge as a result of the restructure. As a start, this will involve identifying those vacant positions, and then consulting with the employee as to whether any are suitable redeployment options.

Once redeployment options have been identified, the employee should be offered any role which they have the relevant skills and experience to perform, or which they could reasonably be trained to do.

The requirement to consider redeployment requires a robust approach. An employer will not adequately consider redeployment if they assess the employee's suitability for any alternative roles in isolation. Rather, the law requires the employer to consult with the employee before concluding whether a vacant role is suitable. This means properly engaging, providing sufficient information about the role(s) so the employee can provide feedback, and genuinely considering that feedback.

Recent guidance from the Employment Court

In the recent case of Gafiatullina v Propellerhead Ltd, the employer was heavily criticised for its failure to properly consult regarding redeployment, which largely contributed to a finding of unjustified dismissal.

Ms Gafiatullina was employed by a tech company, Propellerhead Limited, and held a number of different roles as part of her job. Propellerhead faced significant financial issues for a number of months before proposing to disestablish Ms Gafiatullina's main role and redistribute the rest of her roles to other workers.

Having been made redundant, Ms Gafiatullina raised a personal grievance alleging she was unjustifiably dismissed based on a procedurally unfair and substantively flawed restructure. Her claim made its way up to the Employment Court, which released its decision in late 2021.

The Court found Ms Gafiatullina was made redundant for genuine business reasons – i.e. the employer had a good reason for looking at whether it needed her role, and how it could do things more efficiently to save costs given its financial position.

However, Propellerhead's conduct fell short of what was expected of a fair and reasonable employer when it came to the process it followed around redeployment. During its restructuring process, Propellerhead led Ms Gafiatullina to believe there were no viable redeployment opportunities within the business, because it had already decided that she would not be suitable for any of the available roles.

The Court ultimately agreed with Propellerhead that it was reasonable for it to decide these opportunities were not suitable for Ms Gafiatullina. However, it said that the failure to discuss the opportunities with Ms Gafiatullina and seek feedback on that decision was procedurally unfair and a breach of Propellerhead's good faith obligations.

This recent decision makes clear to employers that it is not sufficient for the employer to say *"we have considered whether there are any suitable redeployment opportunities, and decided you are not suitable for any vacant roles"* – the standard one-liner we see in restructure proposals.

Rather, employers must genuinely consult with affected employees as to what the redeployment opportunities are, and whether the employee is suitable for any of those opportunities.

AJ Lodge
Partner

Young persons in the workplace

Are you considering employing young workers in your workplace?

A recent health and safety prosecution reminded us that New Zealand has several laws and restrictions regarding how and when young workers can work.

Health and safety restrictions

WorkSafe NZ v Ironhide Roofing Limited

A recent health and safety sentencing of *WorkSafe NZ v Ironhide Roofing Limited*[1] involved a 14-year-old worker injured on a construction site. The Ironhide team were in the process of replacing an old roof at the time of the incident. As the victim walked across the roof, he stepped on an old skylight and fell 8 metres.

Among other things, Ironhide was fined, for a breach of the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016 for employing a worker under the age of 15 to complete construction work. The mother of the victim expressly stated she was not aware of the restrictions on workers under 15 in the construction area or she would never have let him work.

The company was fined $25,000 (reduced from $300,000 due to its financial capacity to pay) and the young worker received $40,000 reparation.

What restrictions are in the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016?

The regulations specifically restrict younger workers' involvement in high risk workplaces. For example:

- a worker under 15 cannot be employed to do construction work, logging or tree-felling or the manufacture, use or generation of hazardous substances.
- a worker under 15 cannot be required to lift any weight or perform any task if doing so would likely be harmful to the worker's health.
- a worker under 15 cannot drive a tractor or ride in a tractor that is drawing an implement[2].
- a worker under 16 cannot work between 10pm and 6am.

Wider health and safety considerations

Employing young workers may require some reconsideration and review of the health and safety systems in the workplace. This will likely include reviewing risk assessments, the training framework, supervision requirements and how competency is assessed.

[1] *WorkSafe New Zealand v Ironhide Roofing Limited* [2022] NZDC 174232

[2] Note: an exception for agricultural work does apply.

Work is not to impact a young worker's education

The Education and Training Act 2020 limits the ability to employ a young person where it might impact their education. If you employ a person under 16, the hours of work must not be within school hours, or at times that interfere with the student doing school work.

The young worker can obtain a certificate of exemption to work during what would have been school hours. Failure to obtain the exemption can lead to a fine for both a parent and the employer.

Paying young workers

Employees between 16 and 19 can be paid less than the adult minimum wage if the starting out wage criteria apply. The starting out rate can be paid at 80% of the adult minimum wage and as of April 2022, this is currently $16.96. If you are using this rate, ensure this is detailed in the individual employment agreement.

Providing worker accommodation

There may be occasions where an employee is supplied with accommodation as part of their employment. This is called a service tenancy and the Residential Tenancies Act 1986 will apply.

A tenancy agreement entered with a person under 18, must state that the person is under 18 years of age. Because of their age, the tenancy agreement is not automatically enforceable. If an issue arises, the employer/landlord can apply to the Tenancy Tribunal for a review of the matter.

What this means for businesses and employers

While a reduced minimum wage may be appealing, it is important to understand the full limitations on young workers.

If you are considering hiring a young person and have any questions about what restrictions may apply to your workplace, contact our specialist Employment Team.

Rebecca Laney
Associate

The impact of mental health on a visa application – will someone who takes anti-anxiety/depression medication, or has counselling or EAP be able to get a New Zealand visa?

I frequently get asked whether mental health conditions will prevent a person from getting a New Zealand visa. This article explains the Immigration New Zealand (INZ) rules around this.

The health rules

Applicants must have an acceptable standard of health (**ASH**) to be approved a New Zealand visa. This is unless they are eligible to be considered for and have been granted a medical waiver.

The INZ health requirements are in place to protect public health and ensure that migrants do not impose excessive costs or demands on New Zealand's health or special education services. Importantly, a health condition shouldn't prevent an individual from doing what they were granted a visa for (e.g. to work).

There are different health rules for temporary and residence class visas. For residence, there is a (fairly long) list of conditions deemed to impose significant costs on New Zealand's health services - for example, cerebral palsy or cardiomyopathy. An individual with a relatively high probability of requiring health services of more than $81,000 over a five-year period or the course of a condition also won't meet residence health requirements.

Temporary health rules focus on whether there is a relatively high probability an individual will need publicly funded health services such as hospitalisation, expensive

medications or other high-cost care during their stay in New Zealand. In practice, the listed residence conditions often mean that an applicant will also not have an ASH for temporary entry, but this is not always the case.

To evidence good health, a General/Limited Medical and Chest X-Ray certificate are typically required for a stay of more than 12 months. Chest X-Rays may be required for a stay of more than six months if an applicant is from or has spent time in a country listed as having a high tuberculosis risk. For shorter stays, INZ rely on declarations in application forms to assess health.

It is irrelevant whether an applicant can pay for medical care or has private health insurance, unless applying for a temporary visa as seconded business personnel.

The rules applied to counselling and anxiety/depression medication

If medication for anxiety or depression is declared during a medical examination, it is likely that an INZ Medical Assessor will request further information. This would usually be a letter from a treating Doctor detailing the background, medication dosage and any history of inpatient or outpatient care.

Taking medication for anxiety or depression will not prevent an individual from securing a New Zealand work or residence visa most of the time. This is because many common anti-anxiety and depression medications are low-cost and readily available in New Zealand, with a General Practitioner prescription. This sort of medication and treatment is unlikely to impose significant costs or demands on New Zealand's health services. Exceptions would include where an individual has a major psychiatric illness or has required inpatient treatment or significant outpatient support.

Another question I frequently get asked is whether counselling or a few EAP sessions will impact an immigration health assessment. The answer to this question is case-specific and will depend on the frequency and duration of treatment. For example, regular and ongoing reviews by a psychiatrist may be considered significant support, but a few counselling sessions is unlikely to be an issue.

It would be highly unlikely for a mental health concern to prevent the partner or dependent child of a New Zealand citizen or resident from qualifying for a visa. While there are some (limited) exceptions, partners and dependent children of New Zealanders are usually automatically granted medical waivers. This is unless they have a particularly serious medical concern, such as a mental health condition that requires full-time care.

What if an individual doesn't meet the health requirements?

If an individual doesn't have an ASH they will need a medical waiver (if eligible). This is where INZ make a discretionary decision on whether to waive the good health requirements. When making this assessment an Immigration Officer will balance the degree to which an individual will impose costs or demands on New Zealand's health services with the potential contribution and any immediate family lawfully and permanently in the country.

Medical waivers are not usually available for temporary visa applications. They can be considered for most residence applications, provided an individual doesn't have an excluded condition (e.g, one that requires full-time care).

It's important to declare health issues

An applicant will usually be ineligible for a visa if, *in the course of applying for a visa has made any statement or provided any information, evidence or submission that was false, misleading or forged, or has withheld material information*. This would cover a situation where a medical condition was withheld during a medical examination or when completing the health section of a visa application form. For INZ to conclude that an applicant does not meet the good character requirements in this situation, they must determine that it was 'more likely than not' the medical condition was deliberately withheld.

If this conclusion is reached, the applicant will need a character waiver. This is where INZ make a discretionary decision on whether to waive the good character requirements, looking at the wider circumstances of the applicant. The relevant (listed) considerations differ between visa classes but these character waiver assessments are fairly similar in practice. An Immigration Officer will typically balance the character risk or significance of the withheld information against things like the benefit an applicant will bring to New Zealand and any strong family links.

Our advice

All medical concerns should be declared during health examinations and when completing the relevant section of a visa application form. A health condition may not disqualify an individual from getting a visa, but failing to declare it could result in a visa being declined on character grounds.

Occasional counselling sessions or taking medication for anxiety/depression is unlikely to prevent an individual from securing a New Zealand temporary or residence visa. This is unless they have a major psychiatric illness or require inpatient or significant outpatient support, in which case a medical waiver may be required (if eligible). We recommend individuals seek immigration (and medical) advice before making decisions about ongoing treatment.

Tash Rae
Senior Associate

Are your contractors actually employees?

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The recent landmark decision of the Employment Court found that four drivers for Uber were employees even though their employment contracts said that they were contractors.[1]

On 25 October 2022, the Employment Court delivered a landmark decision that four Uber drivers were employees. This decision is a timely reminder for employers and contractors to consider the real nature of their working relationships and, if necessary, make practical adjustments to that relationship.

The distinction between employees and contractors is important. An employee is entitled to benefits under the the Employment Relations Act 2000 (**Act**), such as sick leave and annual leave. After the court delivered their decision, the Uber drivers were entitled to receive approximately six years of backdated wage entitlements such as sick leave and annual leave.

The employee and contractor distinction

Section 6 of the Act says the meaning of an employee is "any person of any age employed by an employer to any work for hire or reward under a contract of service." This must be determined according to the "real nature of the relationship" between the person and their employer. For that reason, the wording of "contractor" or "employee" in the employment contract can be irrelevant.

Before this decision, the Supreme Court[2] provided us with three primary factors to consider in deciding on the "real nature of the relationship" and, particularly, whether the person was an employee or contractor. These factors are:

- level of control exercised over a person;
- extent of integration of that person in the business;
- how fundamental the person is.

In this landmark decision, the court spent considerable time looking at the level of control that Uber exercised over its' drivers. By example, Uber exercised control over the drivers' work and the way in which it was conducted. It excluded drivers from engaging in any negotiation with their passengers. The contract between Uber and the passenger is finalised on the Uber App and, once it is finalised, Uber finds a driver. The drivers do not have control over their driving contracts. This was one of the features of the "real nature of the employment relationship" that led the court to conclude that the drivers operated under a high level of control.

What does this mean?

As we have seen, the employment court is willing to look beyond the wording of "contractor" or "employee" in an employment contract. The court will look at all the features of the working relationship to find its' "real nature" so that the court may make a decision that follows section 6 of the Act.

[1] *E tū Inc & Anor v Raiser Operations BV & Ors* [2022] NZEmpC 192.

[2] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372.

John Farrow
Partner

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Children's Act 2014 Safety Check obligations

Sometimes organisations need to onboard someone quickly to fill an unexpected gap. In the rush, it is important to remember the Children's Act 2014 requires government funded organisations to safety check all children's workers before they are employed or engaged. These checks have to be updated every three years.

A children's worker is a person who is paid to work in, or provide, a regulated service, and the work may, or does involve regular or overnight contact with a child or children, without their parent or guardian being present. The requirements do not apply to volunteers, unless they are working as part of an educational or vocational training course.

If your organisation is captured by the Act, you must complete a safety check that complies with the Act before employing or engaging someone as a children's worker.

The Act does set out two defences to the obligations, the defence of taking all reasonable steps or relating to short-term emergencies. Absent one of these applying however, failing to comply with the obligations may result in a fine not exceeding $10,000.

What does a safety check require?

For a new children's worker, the organisation must:

- verify their identity;
- obtain a police vet;
- gather information about their work history for the previous 5 years;
- obtain the name of any professional organisation or authority they are a member of or hold a current license, registration or practising certificate for;
- contact at least 1 referee;
- interview them; and
- conduct a risk assessment to determine whether the person does or would pose a risk to the safety of children, and to what extent.

The checks must be periodically carried out again within 3 years after the date of the latest safety check. However, these periodic checks do not require the organisation to collect work history, contact a referee or interview the person.

If the person is regularly vetted (at least every three years) as a requirement of a membership with a professional organisation, or for a license or registration, the organisation is not required to carry out the police vet.

Core worker convicted of specified offence

Children's workers are further classified as either 'core workers' or 'non-core workers'. Core workers are those who are either the only children's worker present with, or someone who has primary responsibility for, or authority over, a child/ children.

Organisations captured by the Act are prohibited from employing or engaging, or continuing to employ or engage someone as a core worker if they have been convicted of a specified offence (unless they hold an exemption). The Act lists the specified offences, most of which involve child victims, or are of a sexual or violent nature. The Criminal Records (Clean Slate) Act 2004 does not apply to safety checks of core workers.

The Act sets out a specific process for suspending and terminating a worker where the organisation believes they have been convicted of a specified offence.

Kelly Thompson
Solicitor

Holidays and annual close downs – In a year of uncertainty

With the countdown to Christmas holidays well and truly underway and with so many employers wondering whether they will have sufficient staff available to work over the summer period it is timely to provide employers with certainty around their legal obligations to ensure their existing employees are paid correctly when rostered over the holiday period.

What is an annual closedown?

A closedown is a period where businesses can close down (either in whole or in part) for a set period. The closedown period usually includes the Christmas and New Year period and will usually be for at least two weeks.

Can all employers closedown?

Yes, provided the annual close down has become a tradition (custom and practice) or it is provided for in an employment agreement.

What do I need to do in order to closedown?

You must give employees at least 14 days' notice. That notice should be in writing, to avoid later arguments. An email or letter is fine.

Can I operate more than one closedown?

No, you can only have one closedown per year. You cannot close at Christmas and then again over the Easter break. You can by agreement, with your employees, have another period where the business does not operate, but it will not be an official closedown.

Can an employee refuse to take their annual leave over a close down?

Some employees may feel aggrieved at being forced to take annual leave at times when they would prefer not to, but if it is provided for in an agreement, or is custom and practice, then an employer can direct an employee to take annual leave by giving 14 days' notice in writing.

What do I pay an employee?

This is often a question that employers grapple with the most. The answer depends on the nature of the employment and whether the employee is permanent, part-time or casual, whether the employee has worked for more than 12 months and if there is sufficient annual leave available. It also depends on whether the public holidays that fall during the close down period would normally be working days for the employees. Each situation is different and there is no one size fits all approach.

If an employee does not have sufficient leave, then they must be paid 8% of their total gross earnings at the start of the closedown (less any leave taken remainder in advance). An employer and an employee must discuss and negotiate whether the closedown period will be taken as unpaid leave or as annual leave in advance. Good faith applies, but there is no obligation on an employer to grant leave in advance. In some cases, it may be a risk to do so if the employee reflects over the closedown and does not come back to work. The employer will have overpaid the employee and will be faced with the prospect of not being able to recover the overpayment or spend a disproportionate amount to recover.

This year Christmas Day and New Year's day fall on a Sunday with Boxing Day and 2 January fall on the Monday. In this situation Christmas Day and New Year's day are Tuesdayised and transferred to the next available weekday, Tuesday, while Boxing Day and 2 January remain observed on the day they fall, Monday.

For part-time employee who work, for example, Wednesday to Saturday then this year they will have no entitlements to a paid public holiday. That is because they do not normally work on the calendar date of the holiday and Tuesdayisation of Christmas Day means the public holiday falls on a day that is normally a day off for them.

If the public holiday falls on a day that the employee would otherwise work, and they are required to work then they are entitled to be paid time and a half based on their relevant daily pay or the average daily pay for the hours that they work, and also receive an alternative day in lieu of taking the holiday.

If the public holiday falls on a day that the employee does not normally work, and they agree to work, then they are entitled to be paid time and a half based on their relevant daily pay or average daily pay, but they do not receive an alternative paid holiday.

If the public holiday is a day that the employee would otherwise work, but does not work on that day, then they are to be paid either their relevant daily or average daily pay depending on which calculation is used by the employer.

Casual employees' entitlements are even more complex.

To determine if an entitlement to a public holiday exists that will involve an analysis of the casual employee's pattern of work. If a casual employee regularly works a Sunday then they can reasonably expect to be paid for Christmas and New Year's Day.

If the work is more sporadic, then there may still be an opportunity to receive payment for a public holiday if the employee's pattern of work identifies that they regularly work one of those days. For example, if a casual employee worked 4 out of the past 6 Sundays leading up to Christmas then that gives a strong indication that Christmas Day can be treated as a pubic holiday for that employee.

Other factors need to be taken into account to determine what is an "otherwise working day" for employees so it always best to seek advice.

What happens if the employee is sick or suffers a bereavement during the closedown?

If the day on which the employee is sick, or suffers a bereavement, is a day that the employee would otherwise have been working (but for the annual closedown) then they are entitled to be paid sick or bereavement leave rather than using up their annual leave.

This is contrasted with the situation where an employee is on annual leave outside a closedown period and becomes sick. In those circumstances, there is no mandatory obligation on the employer to allow the employee sick leave, although a fair and reasonable employer acting in good faith might grant sick leave subject to satisfactory evidence being provided.

Can an employer grant some employees annual leave over the Christmas / New Year period, but not others?

Yes, an employer is not required to grant time off to every employee who wants annual leave. Employers need to be able to resource and operate their business as they see fit.

Can an employer go back on their decision to grant annual leave?

Sometimes employers have a change of heart, which happens when they realise that they have insufficient cover over a busy period or an unexpected event occurs. Once annual leave is approved, it cannot be unilaterally withdrawn. Employees may have made plans for their annual leave. If an employer wants to withdraw leave then they can only do so in good faith and after having discussed and agreed with the employee. An employee is entitled to decline and an employer may need to incentivise an employee to delay their leave. For that, reason employers should be very careful about making sure they have sufficient cover over any busy period.

Similarly, an employee who has been granted annual leave does not have the automatic right to cancel their approved annual leave. Employers will often have brought in extra staff to cover an employee's planned absence so the cancelation of leave requires commuciation and agreement.

Can I make my employees work overtime?

If you have guaranteed hours included in an employee's employment agreement then only salaried employees can be required to work outside those hours.

For waged employees any additional overtime must be agreed, unless the employment agreement contains an availability provision and compensation to the employee for making themselves available to work outside their guaranteed hours.

In the absence of an availability provision, then an employee's free to agree or decline any requests to carry out overtime.

My employee has resigned and their last day is Christmas Eve, 24 December? Do I still have to pay them for the Christmas and New Year public holidays?

That depends on whether or not the employee has untaken annual leave. If the employee's annual leave entitlement, when added to their last day of employment, takes them through Christmas Day, Boxing Day and into the New Year then the employee must also be paid for the four public holidays.

An employee wants to cash-up some of their annual leave so they can really enjoy themselves over the holiday period. What are the obligations?

An employee can only request that one week of their statutory annual leave entitlement to be 'cashed-up. If an employer pays out more than one week's statutory annual leave then the employee's entitlement remains, which means the employee will receives more 'annual leave' than they are entitled to. For example, if an employee has four weeks' annual leave then they are only entitled to cash-up one of those weeks. If the employer allows them to cash-up two weeks then they will still have three weeks annual leave remaining but would have also received the equivalent payment for two weeks, giving them a total 'entitlement' to five weeks.

For employees who receive more than 4 weeks annual leave an employee and an employer may agree arrangements to cash up the additional 5th week. This would need to be at the employee's request and documented. An employer might do this if the employee had a large outstanding leave liability. The preferred course of action would of course be to agree with the employee that they take an extended period of annual leave over the holidays rather than cashing up too much of the leave entitlement.

Malcolm Couling
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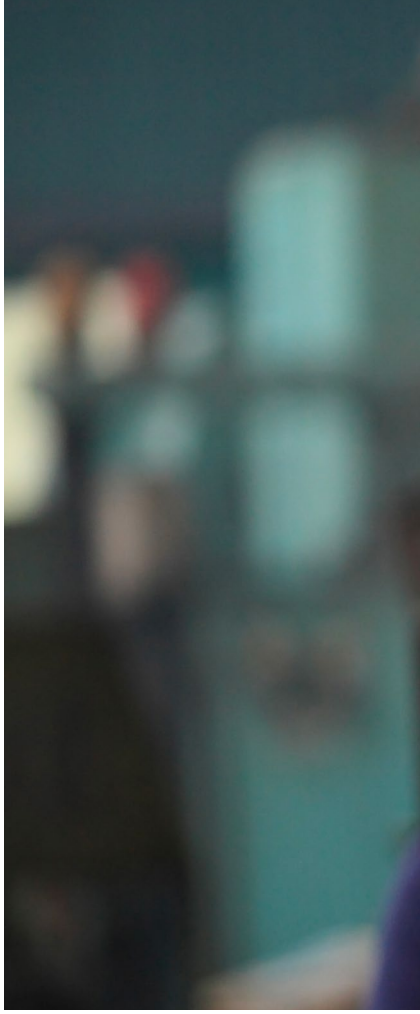

Employing Migrant Workers: The "Accredited Employer Work Visa" Explained

On 4 July 2022, the new Accredited Employer Work Visa (AEWV) came into effect.

Th AEWV process encourages Kiwi businesses to train, upskill, and hire Kiwi workers before considering hiring migrant workers. The process also ensures businesses meet immigration and employment standards and prevents them from exploiting any migrants they do hire.

Read on to learn how your business can become an accredited employer.

Employer Accreditation

There are three key requirements for becoming an accredited employer. The employer must:

1. Be a viable, genuinely operating business:

To prove the employer has a "genuinely operating business'" they must meet one of the following financial requirements:

- have not made a loss (before depreciation and tax) over the last 24 months;
- have a positive cashflow for each of the last 6 months;
- have sufficient capital and/ or external investment to ensure business is ongoing and viable; or
- have a credible, minimum 2-year plan to ensure ongoing and viable business.

There are extra requirements for if the employer is a franchisee or plans on placing workers with a controlling third party.

2. Complete settlement support activities:

The employer must then provide information about the local community, Citizens Advice Bureau services, and employee work-related matters to AEWV employees. This includes providing information on: accommodation options, transportation costs, the cost of living; how to access healthcare services, Citizens Advice Bureau services and relevant community groups; obtaining an IRD number; industry training; and information on specific job or industry hazards. Employers must also provide the worker with sufficient time during paid work hours to complete Employment New Zealand's online modules, within one month of employment.

3. Be compliant with immigration, employment and business standards:

To be considered "compliant with standards", the employer must not be on the Labour Inspectorate's non-compliant list or subject to a stand-down, and must have a limited history of immigration non-compliance. In practice, an employer will need to have a history of two or more instances of immigration non-compliance for there to be a potential issue in becoming accredited. It is not uncommon for employers (even great ones) to have one or two instances of technical non-compliance – an example would be promoting a worker to a different job title and not updating their visa to reflect this.

There are further standards which require each individual who makes recruitment decisions within the employer organisation to complete Employment New Zealand's online employer modules once within every accreditation period.

The employer must also pay all recruitment costs in and outside New Zealand and not pass these on to the migrant. This includes paying any legal and government application fees for the accreditation and job check steps.

Obtaining an AEWV for Incoming Migrant Workers

Once an accredited employer, further requirements must be met before the employer can offer employment to a migrant worker on an AEWV.

1. The Job Check

When looking to fill a certain role, the employer will need to advertise for suitable Kiwi workers for at least two weeks before considering migrant workers (the exception to this is where the role pays at least twice the median wage, or is on the Green List). In practice, this is where a lot of employers get stuck. It is crucial for an employer to ensure they comply with this advertising requirement before seeking out migrant workers.

The employer must also apply for a 'job check' before offering work to a migrant. This involves:

- confirmation that the job is at least 30 hours a week;
- confirmation that the minimum pay rate for the job is equal to the median wage (unless the job falls under a sector agreement);
- labour market testing (unless the pay rate is double the median wage, or the role is on the Green List and the migrant meets the job's requirements); and
- confirmation that the employment agreement meets acceptable standards. Employers should seek legal advice to ensure their employment agreements are compliant before making an accreditation application to avoid falling short of its requirements.

2. The Migrant Check

The employer will need to show that the migrant worker has adequate qualifications and experience for the role, and meets health and character requirements. This check is particularly important when it comes to jobs on the Green List. Although a job may be on the Green List, the employer cannot avoid the requirement to advertise for Kiwi workers where the migrant worker does not have adequate qualifications and experience for the job.

In most cases, where the application is approved, the migrant will be granted a 3-year AEWV to work under the employer. The exception to this is where the migrant is to be paid below the median wage and is able to obtain an AEWV based on an income exemption.

Lucy Gallagher,
Law Clerk

Hours of work and availability provisions continue to cause tensions.

How do you dictate your employee's hours of work and do they require compensation for remaining available for overtime?

Hours of work clauses come in all shapes and sizes, because the labour needs of employers varies so significantly. When it comes to working hours, some employers can easily identify, manage and agree on employees' hours upfront; while others require maximum flexibility and struggle to create compliant hours of work clauses.

The current legislative framework does not easily translate for those employers needing more labour flexibility. In this article we take a look at two recent cases on this point.

Reciprocity at work

Background

In 2016 laws relating to hours of work clauses were drastically changed. Since that time, the idea of reciprocity is fundamental to any hours of work arrangement. For example,

- if any employer can only guarantee 20 hours per week, the employee only needs to make themselves available for 20 hours a week.
- if the employer guarantees 50 hours per week, the employee must be paid for 50 hours, even if the employer does not need the employee for 50 hours that week.
- if the employer cannot guarantee any hours, then all hours will be by agreement week to week, and the employee is free to refuse any hours they don't wish to work.

This can create headaches for some employers, particularly where work is impacted by seasonal fluctuations, weather, or is generally unpredictable.

Overtime - requested versus required?

Most employers also need to contemplate the potential for overtime or extra work. There are two categories of extra hours:

- where extra hours can be requested but the employee is not obliged to accept the work, or
- where extra hours can be required and an employee has no choice but to either stay late or return to work when asked.

Being "required" to work extra hours is an example of what is now known as an "availability provision". An availability provision is a provision that requires an employee to keep themselves available to work hours outside their usual hours, but with no guarantee that there will be extra hours required.

These clauses are commonplace in salaried employment agreements – they often say something like *"Your usual hours of work will be 40 hours per week, however we may require you to work additional hours, and your salary compensates you fully for all hours worked."*

However, if an employer includes an availability provision in a waged employment agreement, there are strict requirements. One requirement is the inclusion and payment of "availability compensation".

Availability compensation is compensation purely for remaining available in case additional work arises. It should not be confused with an overtime payment. The compensation is payable regardless of whether the extra work eventuates or not. The Employment Relations Act 2000 sets out a number of factors to be considered when deciding what reasonable compensation might look like in each situation.

What remedies can be sought

Two recent cases have shed more light on this area. Both cases involved non-compliant availability provisions and established that the employees were disadvantaged in their employment.

Employment Court – Mr Stewart

Mr Stewart worked in a small service department of a meat works. His employment agreement stated he was required to work extra if needed. He was paid for any extra hours worked but he did not receive any availability compensation for remaining available to his employer.

The Court held the clause in his agreement was non-compliant because it required him to stay available, but it did not provide any availability compensation. The Court held Mr Stewart was disadvantaged.

The employer argued Mr Stewart could have turned down the extra work since he was aware the clause in his agreement was non-compliant. The Court stated in reality Mr Stewart could not decline the overtime, this would have placed undue stress on his small team of co-workers.

In terms of how much the availability compensation should have been, we have little guidance in this space to date. The Courts are somewhat restricted as they are not allowed to set or fix terms and conditions in employment agreements.

Mr Stewart, therefore, raised a claim of quantum meruit (being what one has earned, or a reasonable value of services). These claims are relatively rare in the employment jurisdiction and seek to recover the reasonable value of or reasonable remuneration for services performed. The Court held that it is entitled and will hear such a claim.

In this case Court has sent the parties away to attempt to resolve the issues in the first instance. If the parties cannot agree, it may come back before the Court.

Employment Relations Authority – Mr Lye

Mr Lye was a Stevedore who claimed his employment agreement required him to be available 24/7 without any payment of reasonable compensation. His work arrangements included being informed the day prior whether he was working or not the next day.

As a consequence, Mr Lye was unable to make commitments in his personal life including care arrangements for his son, or committing to attending school activities.

The Authority accepted that the non-compliant provision disadvantaged Mr Lye.

When it turned to remedies, a calculation was made and backdated to 2020, based on 50% of Mr Lye's wage for the hours he was required to be available. The authority awarded him $22,500 for his loss of benefit and inability to enjoy commitments in his personal life. The authority further awarded Mr Lye $15,000 in compensation for humiliation, loss of dignity and injury to feelings.

Summary

If an employer requires its employees to be available outside of their usual hours of work then careful consideration needs to be given to the hours of work and availability provisions in the employment agreement.

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"Cooling off" periods are warming up

A recent decision from the Employment Court decision presents a new approach to "cooling off periods."

Traditionally, and in order to minimise the risk of a personal grievance of unjustified dismissal, the prudent employer would allow an employee who had resigned "in the heat of the moment" with an opportunity to cool off and reconsider. In many instances this will still be the safe and sensible approach, especially if the employee is one the employer would like to retain.

But employees can no longer automatically rely on an employer's failure to provide them with a cooling off period in order to support a subsequent claim that they have been unjustifiably dismissed. Chief Judge Inglis in the Employment Court has reviewed recent cooling off cases, and made, by way of guiding principles, four observations;[1]

- Resignation is a unilateral act. Once the employee notifies their resignation (in whatever form) it is not open to the employer to claim that the resignation has no effect
- An employee is not required to justify their decision to resign, or to establish they had thought it through
- The key issue is whether, on an objective assessment, the employee had resigned. If they had resigned then there was no legal obligation for the employer to hold off on recognising the resignation, and failing to recognise the resignation could not turn the resignation into a dismissal
- Any concerns about whether a resignation arose from an employer's misconduct or breach could be addressed via the case law relating to constructive dismissal.

These principles have been applied in subsequent cases, including the March 2022 *Urban Décor Limited* decision[2]. In that case, the Employment Relations Authority had accepted that the two employees were unjustifiably dismissed, placing significant weight on the employer's failure to provide a cooling off period before sending out the dismissal letters. The employer challenged the decision to the Employment Court, and given some rather fortuitous timing was able to rely on the new authority from the Chief Judge.

The Court found that as the employees had both quit their jobs before leaving the work place during work hours there was no ability for the employer to reject their resignations and to declare the employment relationship ongoing. Nor was there any ability for the employer to dismiss the employee (even if the employer purported to do so by letter) as the relationship had already ended. The test is an objective test, even if the employer does not understand the employee to have resigned at the time.

As with any employment matter it is going to be important for employers to consider all of the relevant circumstances at the time. An employer who would actually prefer to retain the employee, or who thinks there might be risk of a constructive dismissal claim, might consider offering the employee an opportunity to reconsider. But in the face of a plain resignation, even in the heat of the moment, there is no longer the same obligation to automatically offer a cooling off period.

Nor is there any requirement to "accept" an employee's resignation before it takes effect. An employer can "acknowledge" the resignation in writing, in order to keep the records straight, but is not entitled to reject it. From that perspective cooling off requirements have warmed up.

[1] Mikes Transport Warehouse Ltd v Vermuelen [2021] NZEmpC 197
[2] Urban Décor Limited v Mingxia Yu [2022] NZEmpC 56.

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Our Employment and Immigration Team

Anderson Lloyd has a strong team of specialist employment and immigration lawyers acting for some of the country's largest employers, as well as SMEs and employees covering the full spectrum of employment issues and disputes.

In addition to alternative dispute resolution options such as mediation, our lawyers regularly appear in the Employment Relations Authority and the Employment Court. We have also represented clients before the Court of Appeal and the Immigration and Protection Tribunal.

Within our employment and immigration team we have a specialist investigation practice. Our independent investigators can conduct workplace investigations, independent investigations and inquiries.

Our employment and immigration law expertise includes:

- drafting and reviewing employment agreements
- collective bargaining
- redundancy
- disciplinary procedures
- representation in mediation and court appearances
- restraints of trade and protection of confidential information
- employment implications of business sales and purchases
- development of employment policies
- personal grievances and disputes
- advising clients in relation to payroll requirements
- compliance advice
- obligations of employers, workplace occupiers and the operators of activities
- health and safety plans, guidelines and statutory requirements
- health and safety investigations and prosecutions
- assisting employers with recruiting and retaining staff from overseas
- accredited employer applications
- assisting employers and employees with visa applications
- partnership-based work and residence visa applications
- immigration audits and advice for employers on immigration compliance
- employer-based work and residence visa applications
- residence or deportation appeals to the Immigration and Protection Tribunal

We are recognised by top global legal directories for our labour and employment law expertise, including the 2020 Asia Pacific legal 500 directory and Best Lawyers in New Zealand. Anderson Lloyd has also been recognised as a 5-Star New Zealand Employment Law Firm by the Human Resources Director publication.

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