

Edition 18 | August 2023

# Vital.

Employment & Immigration News

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# Tēnā koutou katoa

## Kia ora and welcome to our latest Edition of Employment and Immigration News. There have been some interesting developments in the employment and immigration areas since our last Edition.

**With a demand for migrant workers in a number of industries, the Government has enacted new legislation, including a new Skilled Migrant category. Tash visits this topic in her article. The Government has also enacted legislation to provide a 12-month period for notifying personal grievances in relation to sexual harassment. Rebecca covers this in her article. Lucy discusses two new Private Members Bills which, if enacted, will have implications for employees' Parental Leave and KiwiSaver entitlements, and James provides a brief update on sectors which have been approved to initiate bargaining for Fair Pay Agreements. It is our view that the Fair Pay Agreement Act is going to create a lot of work for affected employers and Unions alike.**

Just when you may have thought Court decisions on vaccinations were a thing of the past, the Chief Judge has given a ruling which grapples with heightened Public Sector obligations and the importance of Tikanga when making decisions affecting employees. Jess covers this in her articles.

While unemployment remains low, we are now starting to see a number of employers commence restructuring assessments. William visits this in his article.

The second significant *Gloriavale* Decision has also just been released by the Chief Judge. The fact that she has found the Applicants to be employees is perhaps not surprising. However, the importance of the Decision, and the role the Employment Court has played in righting what most people would agree is a significant social wrong, is incredibly significant.

Following the Court Decision, the Education Review of Office is now investigating Gloriavale's school. The six successful women Applicants were found to have been primed for the job and taught from birth to submit to male leadership in all aspects of their lives. The Court found they were only provided an education to the extent it prepared them for life in the Sect. The Overseeing Shepherd accepted that children were not educated so that they were not equipped for the outside world and that part of the Leadership strategy was to ensure that children were kept separate from the outside world in order to keep them within the Community.

The case is certainly cause for reflection. The employment relationship does not exist in isolation and in Gloriavale's case, the exposure of the employment relationship also led to the exposure of a sexist, misogynist, oppressive culture that other Government Agencies, such as the Labour Inspectorate and the Ministry of Education, entirely failed to address. Watch our website for a summary of the case soon to follow.



AJ Lodge, Partner



John Farrow, Partner

# Unveiling Psychosocial Risks: Protecting Mental Well-being in the Workplace.



## In a ground breaking move, Australia has implemented new laws to address psychosocial risks in the workplace.

While the term “psychosocial risk” may evoke images of bullying and harassment, in reality it encompasses a broader spectrum of factors that can adversely affect employees’ mental health. Psychosocial risks extend to job demands, job insecurity, poor organisational justice, insufficient support, and lack of recognition or rewards.

### What are the obligations on workplaces in Australia?

We know long-term exposure to stress at work can detrimentally impact a worker’s mental health.

Australian workplaces must prevent employee burnout, or causing or contributing to mental illnesses such as anxiety, PTSD, and depression.

While well intentioned, these new laws are creating increased pressure on workplaces to identify, manage, eliminate or control and monitor. In determining the control measures to implement, the Australian laws require workplaces to consider all relevant matters including:

- the duration, frequency and severity of the exposure of workers and other persons to the psychosocial hazards.
- the design of the work, which includes exploring the job demands and tasks, understanding excessive time pressures, role conflict, scheduling, matching skills to the work, clarity of roles and responsibilities, lack of power, job control and autonomy in their work.
- the systems of work, including how work is managed, organised and supported.
- the design and layout, and environmental conditions, of the workplace, including the provision of:
  - safe means of entering and exiting the workplace.
  - facilities for the welfare of workers.
- workplace interactions or behaviours.

Detecting psychological deterioration can be more challenging than identifying physical harm. States throughout Australia have introduced Codes of Practice to assist workplaces and provide guidance.

This new focus in Australia marks a significant step towards prioritising employees’ mental well-being and addressing psychosocial hazards in the workplace.

### What does this mean for New Zealand?

At present, the Health and Safety at Work Act (HSWA) require persons conducting a business or undertaking (PCBUs) to manage hazards and associated risks. The primary duty of care includes reference to PCBU’s providing adequate facilities for the welfare of workers, as well as confirming that the definition of “health” includes both physical and mental. However, there are no specific provisions on psychosocial risks.

The current HSWA is based on Australian health and safety laws. History would suggest that if Australia has done it, it is at least likely to be considered here. That could be in the form of regulation in this area, or further guidance in the form of an approved Code of Practice.

We are already seeing a noticeable shift in New Zealand, with a growing focus on this issue. There has been continued pressure on WorkSafe to prosecute in this area, and WorkSafe has recently published a series of Essays on the topic. In the Courts, Coroner Mills has recently explored workplace stress while inquiring into the death of an Auckland employee who died by suicide.

Many workplaces in New Zealand offer Employee Assistance Programmes (EAP), resilience training, mindfulness workshops, or mediation sessions; however, these interventions do not address psychosocial risks at their root.

We encourage all workplaces to start reflecting on their environments, work design, and work systems, and make use of the learnings from across the ditch.

In an environment that is mentally unhealthy, we know turnover rates may rise, sick leave usage may soar, overtime hours may increase, and productivity may decline. This is all data we can analyse and use to help identify and monitor. As a starting point we recommend workplaces seek expert guidance, conduct risk assessments, utilise surveys, focus groups, and one-on-one discussions, invest in competent leaders, provide speak-up channels and awareness campaigns, and develop processes to ensure consistent and fair treatment of workers.



**Rebecca Laney**  
Associate

# Navigating redeployment in a restructure process.



**As businesses continue to grapple with the current economic uncertainty, we are consistently being asked to advise on a range of restructures and their resulting employment terminations. Amidst a threat of lower profits and rising costs, we are seeing many businesses responding by re-evaluating the size and structures of their workforces.**

Workforce restructures, whether large or small, run the risk of personal grievances and legal liabilities.

To minimise those risks, it is imperative businesses have a genuine and justifiable business reason for the changes they make, and run a fair process. This means presenting a proposal, providing all relevant information, consulting with employees, genuinely considering their feedback, considering any alternatives to redundancy, and making a final decision.

When it comes to alternatives to redundancy, one of the main considerations is redeployment. Can the employee who has had their position disestablished be redeployed elsewhere in the business?

When an employer turns its mind to redeployment, its obligations are many and varied. It is those obligations that are the focus of this article.

## Redeployment

If an employer pays mere lip-service to redeployment obligations, it can become a significant issue. The recent Employment Court case, *New Zealand Steel Limited v Haddad* [2023] NZEmpC 57, has underlined the risks if employers fail to adequately comply with their redeployment obligations. It has also clarified what those obligations are.

## Facts of the case

In the case, Mr Haddad was a Process Computing Manager whose position was disestablished and three new managerial roles created. Mr Haddad applied for all three positions, but declined to be interviewed as he considered NZ Steel should simply offer him one of the roles. He was also concerned that being interviewed would be futile and humiliating.

NZ Steel did not appoint Mr Haddad to any of the roles and said that in the absence of an interview, it was not able to determine his suitability. NZ Steel said further it was entitled to appoint the best person(s) for the job(s). Mr Haddad was terminated for redundancy.

## Redeployment takeaways

The Employment Court confirmed that even where there is no contractual requirement to consider redeployment, an employer has a number of specific redeployment obligations. In particular, an employer must:

- Consider whether to redeploy the employee;
- Consult with the employee about redeployment options; and
- In deciding whether to redeploy the employee, be active and constructive in maintaining the employment relationship in accordance with its good faith obligations.

This last requirement to be active and constructive in maintaining the employment relationship means that an employer cannot comply with its obligations simply by showing that it assessed the possibility of redeployment, it must be able to demonstrate the merits of its decision. In other words, a decision not to offer redeployment must be objectively reasonable. The Employment Relations Authority and Court are entitled to look at why the employee was not redeployed and determine that such a decision was not substantively justified or did not follow a fair process.

In Mr Haddad's case, his choice not to be interviewed for the three management positions was not fatal to his case. Mr Haddad had understandably perceived a dismissive attitude towards him and NZ Steel had enough information about him to properly assess whether he could take on any of those roles. Nevertheless, the Employment Court did consider that it would be wise for an employee to attend an interview in those circumstances, and put the employer to the test.

## Offering a role vs the opportunity to apply

One difficult redeployment issue is whether an employee whose position has been disestablished should be offered a vacant role or given the opportunity to apply for it.

The position that has developed through case law is that where the employee has the necessary skills and experience to perform the role, they should be offered the job. This is also the case where the employee will be able to perform the role after undertaking some additional training.

The opportunity to apply should only be used where it is unclear whether the employee has the necessary skills to perform the duties of the role. This will generally only arise where the vacancy is for a completely different role or one that is considerably more senior.

Where an employee is only provided with the opportunity to apply for a vacant role, the risk of a personal grievance is high. This is particularly so if the vacant role has some crossover with the role that is being disestablished, or the employee clearly has the skills to undertake some of the role's duties. Whether the employee applies and is unsuccessful, or chooses not to apply, there is likely to be significant risk involved in not offering them the position.

An employer's redeployment obligation also extends to roles that are considerably more junior and not as well remunerated. This is a well-established principle ever since Rittson-Thomas t/a Totara Hills Farm v Davidson [2013] NZEmpC 39 in which a disestablished Farm Manager successfully pursued a personal grievance for the failure to offer him a Junior Shephard role, despite him having turned down the opportunity to apply for that position.

## Redeployment obligations and unjustified dismissal

Failing to comply with redeployment obligations is a significant issue because it can completely undermine what may have started out as a genuine and substantively justified restructure. NZ Steel v Haddad has again confirmed that regardless of the rationale for the restructure, if the decision to not redeploy an employee was unjustified, or the redeployment process was not fair and reasonable, this will give rise to an unjustified dismissal claim. A decision not to offer redeployment is an inherent aspect of an employee's dismissal and can also indicate that the restructure itself was predetermined.

It is imperative that businesses don't just see redeployment as a tick box exercise tacked on the end of a restructure process. The Employment Court reaffirmed the position in Gafiatullina v Propellerhead Limited [2021] NZEmpC 146 that "an employer's assessment of suitability for redeployment is not to be conducted unilaterally outside of the restructure consultation". Rather, the proper consideration of redeployment is as an intrinsic part of any restructure process.

If redeployment is properly considered, consulted on and assessed, there will still be a number of situations where it is justifiable to not offer redeployment. However, in ensuring that a robust process has been undertaken around redeployment obligations, this will help provide comfort that a fair and reasonable decision has been made.



**William Fussey**  
Associate

# Immigration alert: Skilled Migrant Residence Update

## New Skilled Migrant Category

The Skilled Migrant Category (**SMC**) has been the main residence pathway in New Zealand for many years. In April 2020 Expressions of Interest (EOI) selections were suspended. The category reopened in November 2022 as an interim measure, while changes to this residence pathway were being consulted on.

In June 2023 a new SMC was announced. The objective of this category was to support economic growth by providing for the grant of residence visas to people who demonstrate that they can fill medium to long-term skill needs in New Zealand. Immigration New Zealand (**INZ**) has described this updated category as a faster route to residence for highly skilled individuals, with straightforward and complete applications set to be decided within two months.



This new category uses a simplified 6-point skills assessment, with no cap on the number of migrants that can be approved each year. It will be introduced on 9 October 2023, with final EOI selections under the existing category on 16 August 2023.

### What are the new eligibility criteria?

To qualify for residence under the new SMC an applicant must:

- 1 Be 55 years or younger at the time of application
- 2 Meet good health and character requirements
- 3 Have an acceptable level of English
- 4 Have skilled employment with an accredited employer. Employment will be considered skilled if sits at:
  - (a) ANZSCO level 1-3 with payment at median wage (\$29.66 hourly); or
  - (b) ANZSCO level 4-5 with payment at 1.5x median wage (\$44.49 hourly).
- 5 Claim six eligibility points. This can be made up of:
  - (a) Between three to six points for:
    - (i) Occupational registration; or
    - (ii) A recognised qualification; or
    - (iii) Meeting certain income thresholds.
  - (b) A further three points for skilled New Zealand work experience (one point per year).

### Who will benefit most from this category?

Individuals with PhD qualifications, occupational registration requiring six years of training or high-income earners (\$88.98+ hourly) will benefit the most from this policy change. These individuals will be able to secure six points, without needing to spend time working in New Zealand, in qualifying skilled employment.

To use an example, an individual with a recognised PhD and an offer for skilled employment with an accredited employer can apply for residence on 9 October 2023. If the application is complete and there are no unexpected eligibility issues (e.g. a character concern), the application could be approved within two months.

### SMC Interim Visa

An interim visa will be introduced to allow individuals to remain in New Zealand if an SMC application has been submitted but their temporary visa expires before a decision is made. SMC interim visas will be granted with the below conditions.

Visa category	Interim visa conditions
Visitor	Visitor
Student	Student (open) with the same work rights
Work (employer)	Same employer, occupation and location
Work (open)	Work (open)

These SMC interim visas will have multiple entry travel conditions and can be issued for up to 24 months. This is a positive update, which should largely avoid the need to renew temporary visas while waiting for an SMC application to be decided.

### Accredited Employer Work Visa update

Migrants with no skilled residence pathway will be limited to a five-year stay on an Accredited Employer Work Visa (AEWV). After five years, at least 12 months must be spent outside of New Zealand before a further AEWV can be applied for.

Five-year AEWVs will be granted from November 2023. Migrants holding three-year AEWVs will be able to apply for the balance, without an employer needing to submit a further job check application. This is provided the visa conditions (employer, location and occupation) remain the same.

### Our thoughts

We recommend migrants considering New Zealand residence have an eligibility assessment completed under both the current and proposed SMC categories. If the current SMC is the more favourable (or only) option, an EOI must be submitted before 15 August 2023.



**Tash Rae**  
Senior Associate

# Immigration alert: How to approach an immigration breach

## Background

To qualify (and maintain) employer accreditation, key people within an organisation must not have employed anyone who is ineligible to work under the Immigration Act 2009. Also, these key people must not have provided false or misleading information to Immigration New Zealand (INZ), or withheld anything material in previous dealings.

If an employer's key people have a history of non-compliance, including with a previous company, INZ needs to be satisfied that steps have been taken to avoid a similar incident happening again. When assessing whether there is a 'history of non-compliance' INZ will look at whether there have been two or more breaches, at any time.



## What this means for accredited employers

Employers are required to disclose previous immigration breaches in an accreditation application form. INZ also requires the disclosure of immigration breaches that happen during an accreditation period. This includes minor issues, for example when an employee:

- Works on an interim visa that has visitor conditions only.
- Moves to another office location without updating visa conditions.
- Works more than the 20 hours allowed for weekly on a student visa.

These disclosures must be made to INZ within 10 working days of becoming aware of them.

## What to do if there is an immigration breach

### 1. Correct the breach

When an immigration breach occurs, it should be quickly corrected. For example, if an individual has been working on an interim visitor visa, they should stop working until the substantive work visa is decided. If an employee has transferred to a different office but does not have location conditions allowing for this, they should return to the office listed on the eVisa, until a visa application is made to allow the transfer.

### 2. Take steps to ensure it doesn't happen again

Once the breach has been corrected, an employer should review its processes and take steps to prevent a similar incident in future. This could include:

- A 'right to work' check on all existing employees to show the breach was a one-off error. This involves checking that all employees have one of the below on file:
  - NZ passport or birth certificate.
  - NZ residence visa.
  - Australian passport or permanent residence visa.
  - A NZ visa with conditions allowing work for the company, in the occupation and location listed on the eVisa.
- Appoint an individual (or team) responsible for immigration compliance. This person should review visa conditions before an individual starts employment or changes are made to employment terms e.g. location or job title.

## Further compliance tips

We recommend the individual(s) responsible for immigration compliance put the below in place:

- Update job application forms to ask 'do you have the right to work in New Zealand?'
- Sight a work visa or other evidence before an individual starts employment. This will include checking the employer, occupation and location conditions.
- Sign up to VisaView and run all eVisas through this verification portal before an individual begins employment.
- Review changes to employment terms before they are approved e.g. location or hours.
- Track the expiration date of all work visas in an Outlook calendar or HR system.

## Summary

An accredited employer must disclose immigration breaches to INZ within 10 working days.

While one-off (minor) issues are unlikely to be a concern, the way these are disclosed and the actions taken to prevent a repeat incident are important. If a company doesn't address immigration compliance issues or make the required disclosures, it could impact on the ability to maintain or renew employer accreditation, which is now required to support most migrant workers for visas. Concerns that are not addressed or disclosed could be raised at accreditation renewal stage, or if a business is selected for an INZ compliance check.



**Tash Rae**  
Senior Associate

# Authority releases two vaccination determinations

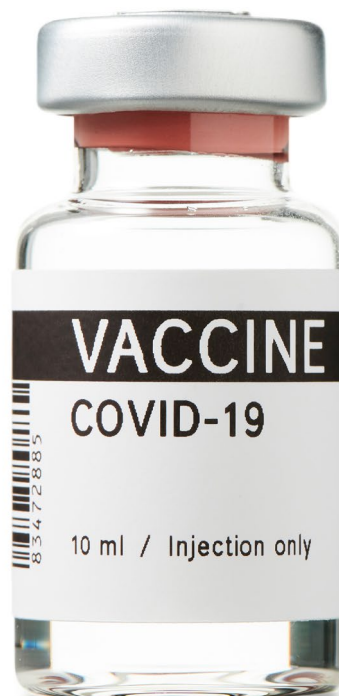
**The Employment Relations Authority and Employment Court have recently released decisions regarding unvaccinated employees, providing valuable insight into an employer’s legal obligations amidst the challenging landscape of the COVID-19 pandemic and vaccination requirements.**

## ***Thoms v Royal New Zealand Foundation of the Blind Incorporated<sup>1</sup>***

Sue Thoms, who is legally blind and has Multiple Sclerosis, had been employed by the Royal New Zealand Foundation of the Blind Incorporated (the Foundation) for 32 years, most recently as a Primary Service Provider (PSP). In her role, Ms Thoms provided needs assessment services to clients primarily working from home and occasionally visiting clients in person upon request.

### **Vaccinate mandate**

With the amendment of the COVID-19 Public Health Response (Vaccinations) Order in October 2021, Ms Thoms was classified as a care and support worker subject to vaccination requirements. The Foundation implemented a Vaccination Policy around the same time. Ms Thoms was reluctant to be vaccinated due to her MS, and had a letter from her doctor that she should not be vaccinated (but not a formal vaccination exemption issued by the Ministry of Health.) Ms Thoms was prepared to take Novavax if and when it became available in New Zealand. Ms Thoms proposed that she carry out her role remotely, at least temporarily for six months. Ms Thoms argued she



was unable to complete visual assessments anyway (for example, putting tactile bumps onto a stove) because of her own sight impairment. In that situation she usually enlisted a family member or a Rehabilitation Instructor to assist.

She estimated that face-to-face contact accounted for approximately 5% of her work, while the Foundation disputed this figure, claiming it was closer to 20%, which Ms Thoms challenged. A Rehabilitation Instructor confirmed he could assist with what Ms Thoms had proposed. The Foundation concluded home visits were crucial to the service delivery model so the role could not be performed remotely and filling the gaps using a Rehabilitation Instructor was not feasible. On that basis, the Foundation terminated Ms Thoms’ employment.

### **Determination**

The Employment Relations Authority (Authority) held Ms Thoms conducted the majority of her role remotely, and did so effectively, and that the Rehabilitation Instructor would only be required for a very small number of clients.

The Foundation never responded to Ms Thoms’ claims that their estimate of face-to-face contact of 20% was incorrect. The Foundation never addressed Ms Thoms’

<sup>1</sup> [2023] NZERA 254

challenge to their estimate of 20% face-to-face contact, nor provided any information regarding the considerations or costs involved in deeming remote work unfeasible. The Authority also criticised the Foundation for failing to discuss the option of seeking a formal exemption process with Ms Thoms.

The Authority acknowledged “*this was a difficult time when things were moving fast*”, but nevertheless concluded the Foundation failed to exhaust all reasonable alternatives to termination, as required by the Employment Relations Act 2000.

The Authority ordered Ms Thoms’ reinstatement even though her position had been filled, on the basis that given she had worked for the Foundation for over 32 years, there would be an option for her to return. The Authority also held that because the reason for her dismissal was due to “*unprecedented circumstances caused by a global pandemic*”, the employment relationship could be successfully re-established.

Ms Thoms was also awarded three months lost wages, and \$25,000 in compensation.

### **Mercer v North Beach Ltd<sup>2</sup>**

Ms Mercer was employed by North Beach Limited (North Beach) as an assistant manager in April 2020. In October 2021, North Beach issued a survey to staff regarding the level of risk they felt was present in the stores. The results of the survey confirmed that there was overwhelming support from staff for North Beach to increase its health and safety measures to mitigate the risk with COVID-19 in the community.

As a result, North Beach began consulting with staff about mandating COVID-19 vaccines for customer-facing roles. Ms Mercer responded that she would like to be vaccinated, but was hesitant to receive the Pfizer vaccine for health reasons. North Beach confirmed its decision to proceed with the proposal and that staff had until 15 November 2021 to received their first vaccine, and second by 15 December 2021. Ms Mercer sought information about potential redeployment options and North Beach indicated these would be limited and temporary roles. North Beach also discussed with Ms Mercer the possibility of seeking a formal exemption from the Ministry of Health, and whether Ms Mercer would consider the AstraZeneca vaccine.

Ms Mercer had spoken with her manager, Mr Prior, about AstraZeneca. Mr Prior confirmed Ms Mercer had until 26 November 2021 to decide. Ms Mercer responded this was not enough time for her to make a confident health

decision. Ms Mercer provided further feedback, which North Beach responded to at length. North Beach also confirmed casual roles were all that were available as redeployment options.

On 16 November 2021 Ms Mercer received a letter terminating her employment, and confirming the notice period would end on 23 November 2021 (on the basis that the date in which the email confirming the decision to implement the vaccination mandate was sent was the commencement of a four-week notice of resignation).

The Authority concluded Ms Mercer’s dismissal was substantively justified. At the time, the Delta variant of COVID-19 was in the community, and the mandatory vaccination policy was transparent and effective, and had the support of the majority of staff.

However, the Authority held Ms Mercer was not provided with the correct notice period. Ms Mercer gave evidence that she had a panic attack where she realised she only had a week of pay left. Despite it not being pleaded, the Authority found this amounted to a personal grievance and therefore awarded her four weeks wages and \$10,000 compensation. The Authority further held that a full-time stock controller role had been advertised externally but never presented to Ms Mercer as a redeployment option, although she was aware of it. North Beach said this role was not suitable as it required vaccination. Despite this, the Authority held a fair and reasonable employer could have had a more open and bilateral discussion about the role. The Authority estimated it would have taken a week for North Beach to conduct a fairer process, and accordingly awarded a further one week of wages to Ms Mercer.

Although the government mandate has now been removed, and most employers have removed their own mandates, we are continuing to see cases come through the Authority and Court. These rulings shed light on the complex considerations employers must navigate while balancing the safety and efficacy of their workforce with the rights and responsibilities of individual employees.



**Jessica Higgins**  
Associate

<sup>2</sup> [2023] NZERA 301

# Employment Court overturns vaccination decision, comments on tikanga and heightened public sector obligations

**The Employment Court’s long-awaited decision of *GF v Customs*<sup>1</sup> has found that Customs unjustifiability dismissed an unvaccinated Port worker, reversing the Employment Relation’s Authority 2021 finding. The case has also provided interesting insight into the incorporation of tikanga in the employment relationship, and what the Court described as the “heightened obligations” of public sector employers.**

## Vaccination issues

GF was an Assistant Customs Officers Maritime Border (ACOM) at a South Island Port. GF did not want to be vaccinated and Customs ultimately terminated their employment. GF pursued a claim in the Employment Relations Authority, which was dismissed. GF appealed the decision to the Employment Court.

Customs terminated GF’s employment on the basis that there were health and safety reasons requiring them to be vaccinated, and that their role was also covered by the Government Vaccination Order (Order), which was passed into law the day GF was terminated.

Initially, in early 2021, Customs took steps to “educate, expect and support” its workers to be vaccinated, but did not require vaccination. In mid-February 2021, Auckland was placed in Alert Level 3. Staff were informed that Customs now expected all staff to be vaccinated, to ensure border resilience, but employees could still “opt out”.

GF did not attend Custom’s Q and A sessions and did not read most of the information Customs sent out about vaccinations. They considered it irrelevant because they had already decided not to be vaccinated.

The Authority described this as GF “studiously” avoiding engagement. The Court took a different view, and found that GF felt isolated from the process, that they were upset by the messaging Customs adopted (including by lauding employees who had been vaccinated as having taken steps to protect their communities) and that Customs failed to adequately and appropriately communicate with GF.

By March 2021, Customs conducted a risk assessment and formed the view that all staff interacting with people who were arriving in New Zealand should be vaccinated. GF realised, for the first time, that their job was in jeopardy on 26 March 2021 when they read a newspaper article titled: “Unvaccinated border workers to be barred from frontline roles.” At that point GF instructed an advocate, who wrote to Customs seeking to engage in discussion and requesting information.

<sup>1</sup> *GF v Comptroller of Customs NZEmpC 101 [2023]*

Meanwhile, the Prime Minister announced that front line border workers had to be vaccinated by 12 April. GF's advocate asked Customs repeatedly for an urgent reply. No substantive response was provided until three weeks later, at which point Customs proposed to terminate GF's employment.

The Court criticised Customs for providing a generic letter (rather than an individualised one) to GF that did not explain why Customs formed the view that the work GF did needed to be performed by a vaccinated worker. The letter also did not provide the information sought by GF's advocate.

The parties met on 29 April. Customs confirmed its assessment that it required GF's role to be vaccinated, that GF was an "affected person" under the Order, and that there were no internal redeployment opportunities. As such, the next step would be to look to external redeployment options with other public sector agencies, and if there were none, Customs would consider a stand down and then termination. Customs sought feedback during the meeting about the termination, stand down and redeployment, but not on its assessment or whether GF was actually covered by the Order. GF declined to participate further in the meeting and their employment was terminated the next day.

The Court concluded GF was unjustifiably dismissed and suffered unjustifiable disadvantage. It held Customs failed to follow a fair and reasonable process, failed to adequately engage with GF, and that its decision was predetermined. GF was awarded \$25,000 in compensation and three months' lost earnings. The Chief Judge also revisited the banding approach for compensation and adjusted these to reflect inflation. The new bands are: \$0-\$12,000 for band 1 (low), \$12,000-\$50,000 for band 2 (middle) and \$50,000 upwards for band 3 (high).

## Tikanga

GF argued Customs failed to comply with tikanga/tikanga values it had voluntarily imported into its employment relationships with staff. Te Hunga Rōia Māori (The Māori Law Society) was given leave to appear as an intervenor.

The Court accepted Te Hunga Rōia Māori's submission that although the Employment Relations Act does not expressly incorporate tikanga/tikanga values, the statutory framework for employment relationships does not preclude their incorporation. The Court referred to the Supreme Court's comment in the Ellis decision that tikanga has been, and will continue to be, recognised in the development of the common law of Aotearoa/New Zealand

in cases where it is relevant and held tikanga was relevant here, given that Customs incorporated tikanga into its employment relationship with its employees through numerous employment documents.

The Court accepted, at a minimum, Customs was obliged to acknowledge and consider tikanga/tikanga values that it itself had introduced into the employment relationship. Having gone on the front foot and incorporated tikanga into the employment relationship, it then failed to comply. Although GF was not Māori, it was not only relevant to Māori staff because tikanga was incorporated generally.

Having committed to tikanga/tikanga values in its employment relationships, the Court recommended that Customs take steps to engage pūkenga to ensure that it has in place capacity and capability to meet its obligations.

## Heightened good employer requirements for the public sector

The Court also found that Customs did not meet the heightened good employer obligations imposed on it under section 73 of the Public Service Act.

The Act requires, among things, that public service employers must operate an employment policy containing provisions for the recognition of the aims and aspirations of Māori, the employment requirements of Māori and the need for greater involvement of Māori in the public service. The Court held it was seriously arguable that the obligations imposed on public sector employers are broad, extending to requiring public service organisations to understand and act consistently with tikanga/tikanga values relevant to their role as a good (public service) employer. The Court drew a link between the obligations under the Public Sector Act and the fact that Customs had incorporated tikanga/tikanga values into the employment relations framework, and that the extent to which its commitment to tikanga has been met, is relevant to assessing whether it has complied with its good employer obligations.



**Jessica Higgins**  
Associate

# Timeframe for raising sexual harassment grievance extended.

**New laws provide employees with an extended timeframe of 12 months to raise a personal grievance claim in cases of sexual harassment.**



## The Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Bill has now come into force.

The new law introduces two significant updates to the existing Employment Relations Act 2000.

- An employee will have 12 months to raise a personal grievance in respect of a sexual harassment claim. All other personal grievances remain restricted by the current 90-day window. This change will apply to both current and new employees.
- All employment agreements must include a resolution of employment relationship problem clause, which is already mandatory. This clause will now need updated to refer to the two different timeframes for raising a personal grievance, 12 months for sexual harassment, and 90 days for all other grievances. This change will apply to all new employment agreements entered into.

### Background

One of the objectives of our legislative framework is to ensure personal grievances are dealt with expeditiously. For that reason, there is a time limit on raising personal grievances.

This 12-month legislative change was foreshadowed in 2020 when Ministry of Business, Innovation and Employment published an issues paper seeking feedback and submissions on New Zealand's current system for dealing with bullying and harassment. The paper found only 14 cases in the Employment Relations Authority between 2015 and 2019 dealing with sexual harassment and none in the Employment Court. It specifically noted this did not seem to reflect the known prevalence of sexual harassment.

A number of factors seem to have contributed to the decision to extend the time period for raising the grievance to 12 months. These included:

- cultural norms of shame and fear that can hold victims back;
- power imbalance;
- embarrassment;
- minor matters may build over time;
- upset and trauma preventing people from reporting;
- fear of retaliation;
- victim blaming;
- to allow time for people to come to terms with what had happened and obtain necessary support to come forward.

### Implications for new employees

Have your employment agreement templates reviewed and updated immediately. Ensure the resolution of employment relationship problem clause refers to the two timeframes, 12 months for a sexual harassment grievance and 90 days for all other claims. If clauses are not updated, an employee will have strong grounds to apply for leave to raise a personal grievance for a sexual harassment claim beyond the new 12 months' timeframe.

### Implications for current employees

While it is best practice to extend these updates to current employee agreements to ensure consistency, it is not immediately necessary.

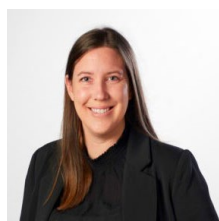
Proposing changes to current employment agreements which alter existing terms and conditions (rather than purely additional statutory entitlements) will depend on the extent of the proposed changes:

- For minor updates to a single clause, a letter of variation would likely be the simplest option. This can be signed by the parties and attached to the current employment agreement.
- If the updates are more extensive, a new employment agreement could be offered. It is also timely to review any workplace policies that may also reference personal grievances to ensure this new timeframe is reflected.

### Wider implications

Businesses have an obligation to provide safe and healthy work environments free from sexual harassment. If an employee makes a claim of sexual harassment, then the employer needs to investigate. This may be more difficult if the events occurred some time ago.

An alternative pathway open to employees is through the Human Rights Review Tribunal (**HRRT**) under the Human Rights Act 1993. The timeframe for raising a complaint is also 12 months from the incident of sexual harassment but the results of compensatory awards in the HRRT have in some instances been significantly higher.



**Rebecca Laney**  
Associate

# Fair Pay Agreement Dashboard.

**Fair Pay Agreements (FPA) are sector-wide agreements which set minimum entitlements for all employees within the FPA's scope. The Fair Pay Agreements Act 2022 came into force on 1 December 2022. The coverage of a Fair Pay Agreement can be based on a type of work (an occupation) or can reference an industry.**

The Ministry of Business, Innovation & Employment has created an online dashboard which provides an overview of all applications to initiate bargaining for an FPA. The dashboard can be accessed at:

[www.mbie.govt.nz/business-andemployment](http://www.mbie.govt.nz/business-andemployment)

As at 5 July 2023 there have been 7 applications to initiate bargaining for an FPA. These are:

### In bargaining

- Interurban, rural and urban bus transport – bus drivers, coach drivers, and cleaners

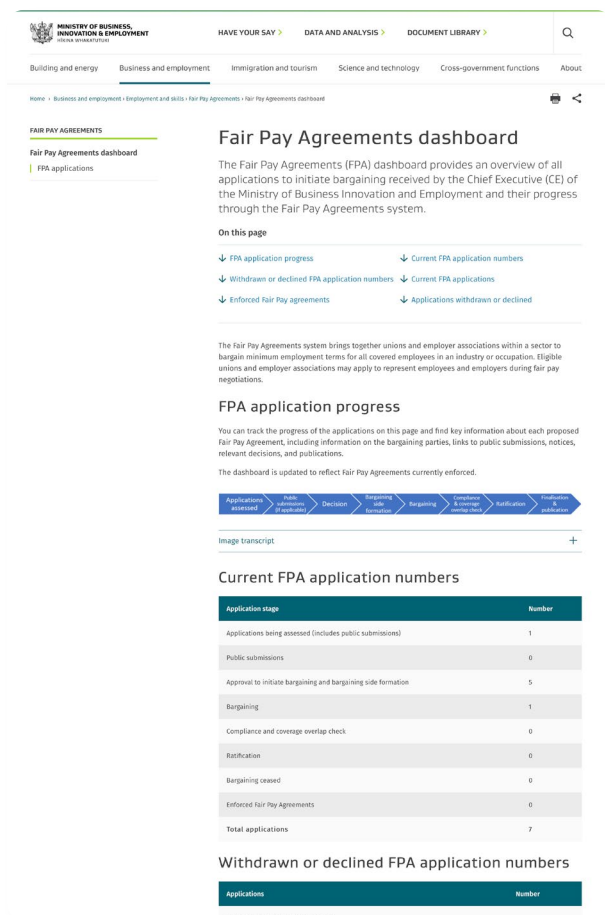
### Approved to initiate bargaining

- Hospitality related – general
- Security officers and guards
- Commercial cleaners
- Early childhood education – general

### Applications being assessed

- Supermarket and grocery store workers
- Waterside workers

If those FPAs are negotiated, approved and ratified, employers who employ workers in those roles (or industry, if applicable) will be bound by the minimum entitlements and terms of the relevant FPA.



**James Cowan**  
Senior Associate

# Two Bills introduced to enhance existing employee entitlements.

**On Parliament's agenda are two new Private Member's Bills which, if enacted into law, will have implications for employees' parental leave and KiwiSaver entitlements.**

## Parental Leave and Employment Protection (Shared Leave) Amendment Bill

The Parental Leave and Employment Protection (Shared Leave) Amendment Bill was plucked from the Ballot in December 2022. Put forward by National Party Deputy Leader Nicola Willis, the Bill aims to 'modernise and enhance' the current parental leave system.

Under the current law, a primary carer can transfer part or all of their parental leave to their spouse or partner, but the leave cannot be taken together.<sup>1</sup> The Bill aims to change this by allowing parents to split their leave and take it at the same time, provided that the total paid parental leave taken by the couple does not exceed the maximum leave provided for a single primary carer.

Willis says the flexibility of the Bill would enable new parents to design leave arrangements that best suit their individual circumstances, and allow them the chance to bond as a family unit. The explanatory note states that the Bill offers this new flexibility without increasing the operating costs of providing paid parental leave.

Despite being introduced to Parliament over six months ago, the Bill is yet to have its first reading. However, Willis has said the Bill will be passed into law should the National party succeed in the upcoming election.

## Employment Relations (Protection for KiwiSaver Members) Amendment Bill

The Employment Relations (Protection for KiwiSaver Members) Amendment Bill was introduced to the House last month. The Bill aims to address an existing loophole in KiwiSaver contribution practices that effectively allows employers to circumvent paying their compulsory contribution.

The introduction of the Bill is timely in light of Consumer New Zealand's recent call for change in this area. In April of last year, the organisation drew attention to employers taking advantage of the "total remuneration clause" that is sometimes included in individual employment agreements. The clause allows the employer to deduct the employer's compulsory contribution to the employee's KiwiSaver fund from the employee's pay packet, rather than paying the contribution in addition to the employee's pay packet.

This practice has long been a subject of contention. While some employers argue it is a means of ensuring equal benefits for all employees, regardless of their participation in the KiwiSaver scheme, the alternative view is that total remuneration clauses result in employees effectively paying their KiwiSaver contributions twice – once for themselves, and once for their employer.

The Bill seeks to eliminate this loophole. It establishes a clear obligation for employers to contribute a minimum of 3% of a worker's pay if the employee is signed up and making their own contributions to KiwiSaver. Importantly, the Bill removes the option for employees to agree for the employer's contribution to come out of their remuneration package, ensuring that the employer bears the responsibility for this contribution.

This Bill is also awaiting its first reading in the House. It will be interesting to see whether it is considered prior to the election, as the Labour and National parties have had conflicting views on the practice in the past. In 2007, the Labour government prohibited total remuneration clauses, but the 2008 National government re-introduced them.

<sup>1</sup> Section 71E, Parental Leave and Employment Protection Act 1987.



**Lucy Gallagher**  
Law Clerk

# 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 being recommended in The Legal 500 Asia Pacific 2023 edition. 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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