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Employment & Immigration News

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Kia ora and welcome to our final edition of Employment and Immigration News for 2023.

With the change of Government, we expect a number of changes to the employment and immigration landscape. National has signalled a repeal of the Fair Pay Agreements Act and a return of 90-day trials to all businesses, rather than those with 20 or less staff. In a strong labour market it's hard to see the exact rationale for broadening the use of 90-day trials, however they do provide a useful window for employers seeking to see if a new employee is the correct fit for their business.

For a summary of the proposed changes see the recent article by Kelly Thompson at www.al.nz/what-might-the-election-results-mean-for-employment-law/

In this edition, James and Kelly cover some recent health and safety District Court rulings, including Whakaari White Island. Jess covers the difficult interphase between personal and employment relationships. Rebecca looks at restrictions on the use of 90-day trial periods for accredited employers and the law on abandonment.

With long-overdue amendments to the Holidays Act still in abeyance, we thought it important as we approach Christmas to remind you of annual closedowns and other relevant obligations. Malcolm covers this in his article.

I take a look at the use of non-disparagement clauses in Records of Settlement and highlight some of the pitfalls associated with these and Lucy covers the difficult issue of mental health and fitness to work.

Will outlines what cautions should be taken when posting on social media.

James, Sam, Kelly and Lucy recently presented a webinar to clients on Practical Employment Law. If you missed this, recordings are available on request. Please email samuel.deavoll@al.nz if you would like access to this. We find this a useful way of communicating important issues and crucial employment law updates to our clients so watch this space for more offerings next year.

The full Employment Court recently heard a case involving name suppression. This involved 11 intervening parties, including the Privacy Commissioner. There has been some momentum in recent times in favour of employees in ERA and Court hearings having the benefit of name suppression. It will be interesting to see where the Court lands and whether legislative change is required.

We wish you all the very best for the festive season and look forward to catching up in the New Year - **John**.



AJ Lodge, Partner



John Farrow, Partner

Employees abandoning their employment



As a team, we have noticed an influx of employee abandonment scenarios for our clients. The below article explores the concept of abandonment and the process that should be followed.

Abandoning employment

Abandonment is a situation where an employee is absent from the workplace for a specified period without consent or notification and they have no intention to return to work. Most employment agreements contain an abandonment provision which references an absence of between 3 to 5 consecutive working days. It's important to note that abandonment doesn't equate to dismissal by the employer; instead, employment concludes through the operation of the abandonment clause.

Duty to make inquiries

During the period of unexplained absence, employers must continue to act in good faith. This includes making reasonable inquiries about the employee's whereabouts. This might include phoning, texting, emailing, or delivering a letter to their address. In some cases, it may be appropriate to contact the employee's emergency contact. This is not a situation where an employer can sit quietly and let the prescribed timeframe pass.

In *Murray v South Pacific Meats Limited*, the employer tried to call the employee's landline number despite being aware that she was out of the country. After not hearing from her, the employer deemed she had abandoned her employment and did not offer her any further work. The Employment Relations Authority determined this level of inquiry was inadequate and it was unreasonable for the employer to conclude she had abandoned her employment.

Considering the situation and context

In light of the unique nature of each abandonment situation, the specific circumstances must be considered before determining whether it is appropriate to pursue an abandonment pathway.

In *McMurdo v Davie Norris Boatbuilders Limited*, an employee left a voicemail for his employer in the aftermath of the Christchurch Earthquakes. The voicemail stated the employee was not going to be at work as he was helping his son relocate. The employer did not receive the voicemail and stated the employee had abandoned his employment. In such a crisis situation, it was deemed unreasonable to assume abandonment.

Process

Handling abandonment situations requires a fair and thorough process. At a minimum, the process must involve employers attempting to seek feedback from the employee concerning their absence and the possibility of abandonment. Simply assuming abandonment without giving the employee an opportunity to explain their conduct or absence can be deemed an unjustified dismissal.

The specific wording of the abandonment clause in the employment agreement may also play a crucial part. Some clauses contain additional requirements, such as determining whether the unauthorised absence was "without good cause". This will have an impact on the process to be followed.



Rebecca Laney
Associate



Mental health and fitness to work: Learnings from recent decisions of the Employment Relations Authority

Two recent decisions out of the Employment Relations Authority provide practical insight into how employers should navigate scenarios relating to an employee's mental health and their fitness to work.

McKenzie v Tranzurban [2023] NZERA 303

This case involved an employee who had been off work for several months. Unhappy with how their employer had managed their absence, they reached out to their employer to let them know they were seriously struggling mentally. Within days, the employee contacted their employer again and said they wanted to return to work. Given the quick change of tune, the employer had concerns about the employee's ability to work, but struggled to get the employee to agree to an independent medical assessment to allay those concerns.

The decision is interesting in that the Authority agreed the employer's concerns were reasonable, but found the employer's suspension and dismissal of the employee was unjustified.

The facts:

John McKenzie began working as a bus driver for Tranzurban in June 2019. When the COVID pandemic struck, Mr McKenzie was unable to work as a result of several underlying health conditions. By September 2021, Mr McKenzie had been off work for four months.

It is unclear from the decision what occurred during those four months, but on 16 September 2021, Mr McKenzie emailed Tranzurban to say he had experienced a serious asthma attack and migraines, which had *“been brought on by excess stress anxiety and panic attacks from poor communication from Tranzurban and no individual solutions for support and lack of empathy.”* Three days later, Mr McKenzie sent a further email to Tranzurban telling them not to contact him under any circumstances.

However, several days later, Mr McKenzie’s union representative contacted Tranzurban to let them know Mr McKenzie wanted to return to work.

Tranzurban responded, saying it was *“concerned as to John’s ability to return to work due to the stress and anxiety he has raised in his email”*. Tranzurban added that, as a bus driver, Mr McKenzie’s role involved safety sensitive work that required him to be *“in the right frame of mind”* when at work. Accordingly, Tranzurban relied on the medical assessment clause in Mr McKenzie’s employment agreement, and requested that Mr McKenzie participate in a medical assessment based on a task analysis provided by Tranzurban’s Health and Safety Manager.

Mr McKenzie declined to participate in the assessment, and said he would provide a *“driving medical certificate”* instead. When Tranzurban repeated its request, Mr McKenzie again declined on the basis that the assessment was wide ranging and unreasonable. He then told Tranzurban he had now received the COVID vaccination and could return to work without participating in a medical assessment.

Still concerned as to Mr McKenzie’s mental health, Tranzurban did not accept that he was fit to return to work, and asked him to complete a *“Driving Medical Certificate”*, known as *“DL9”*. Included in the assessment would be an evaluation of any mental disorder that may impair Mr McKenzie’s ability to drive safely. Tranzurban further advised it was considering suspending Mr McKenzie for failing to comply with the medical assessment clause of his employment agreement. Mr McKenzie was invited to a suspension meeting to comment on the proposed suspension, and at that meeting it was agreed Mr McKenzie would participate in the DL9 assessment.

Mr McKenzie passed the assessment, but only sent pages one and four of the four-page assessment to Tranzurban. This raised alarm bells because the missing pages contained

the detail about mental disorders, which was the information most important to Tranzurban in determining Mr McKenzie’s fitness to work.

As a result, Tranzurban contacted the doctor about the missing pages, but the doctor did not provide them. The doctor said Tranzurban did not need the page on mental disorders, as all that was relevant to them as the employer was whether the assessment found Mr McKenzie fit to drive commercially, which it did.

Still unsatisfied, Tranzurban suspended Mr McKenzie and relied on his employment agreement to request that he attend a second medical assessment with an Occupational Physician. Mr McKenzie attended the assessment, and the report found he had no underlying health condition that might affect his ability to do his job. However, the report also noted that Mr McKenzie refused to answer any questions about feelings of stress or anxiety as raised with Tranzurban, which again was the information Tranzurban felt it needed to determine Mr McKenzie’s fitness to work.

At this point, Tranzurban *“gave up”* and dismissed Mr McKenzie under the medical assessment clause for being unable to satisfy whether he could safely return to work. Mr McKenzie then raised a personal grievance, claiming his suspension and dismissal were unjustified.

Employment Relations Authority:

The Authority found that while Tranzurban’s had *“valid concerns that Mr McKenzie posed a potential safety threat to himself, Tranzurban’s clientele and road using public generally”*, its process for addressing those concerns was *“misguided”* and became unjustified once Mr McKenzie informed Tranzurban he had passed the DL9 assessment. While it was frustrating that Mr McKenzie did not provide all four pages of the report, the fact remained that the parties had agreed Mr McKenzie could return to work if he passed the DL9 assessment.

Takeaway: The Authority’s decision in this case suggests that even if an employer continues to hold reasonable concerns about an employee’s mental wellbeing, and consequently the safety of others, the employer must accept the findings of the independent medical assessment regardless. In terms of what the employer can do with those findings will depend on what the employer and employee agree on prior to the medical assessment, and/or what the employment agreement says.

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Mental health and fitness to work: Learnings from recent decisions of the Employment Relations Authority (Continued)

VXO v Northland District Health Board [2023] NZERA 97

This case involved a tricky situation that employers sometimes face in the context of a disciplinary process. The employer proposed to dismiss an employee for serious misconduct following an investigation, but the disciplinary process had to be adjourned because the employee claimed they were no longer fit to participate.

The Authority's decision is helpful in that it demonstrates how a preliminary decision to dismiss for serious misconduct can turn into a justified dismissal for medical incapacity.

The facts:

VXO was a Senior Medical Officer in a paediatric hospital unit. In April 2020, one of VXO's trainees made allegations of sexual harassment against him, and an investigation found that those allegations were substantiated. The Northland District Health Board (NDHB) informed VXO of its preliminary decision to dismiss him, and VXO was invited to provide his response.

However, three days later, VXO advised the DHB he'd been admitted to hospital due to stress induced cardiomyopathy. The disciplinary process was adjourned as a result and VXO was placed on sick leave.

Several months passed before the NDHB asked VXO to participate in an independent medical assessment. VXO agreed, and was examined by a cardiologist and psychiatrist. The psychiatrists report found that VXO had developed symptoms of a Major Depressive Episode, and that VXO would unlikely be fit to return to work "if his name is not cleared through the process of resolving the complaints".

At this stage, what had been a preliminary decision to dismiss on serious misconduct grounds turned into a preliminary decision to dismiss for medical incapacity. Not only was it clear that VXO would not return to work unless the disciplinary process went his way, but also VXO's extended absence was having a harmful effect on service delivery in the paediatric unit, and the cost of paying for expensive locums on top of VXO's sick leave was growing excessive.

As a result, the NDHB advised VXO of its preliminary decision to dismiss him on medical incapacity grounds. VXO provided his feedback via his lawyer, which reiterated the findings of the medical report. The NDHB upheld its preliminary decision and VXO was dismissed.

VXO then raised a personal grievance for unjustified dismissal.

Employment Relations Authority:

In the Authority, VXO's main argument was that the DHB should have carried out further enquiries as to VXO's expected date to return to work.

The Authority rejected this argument, and agreed with the DHB's rationale that it fairly switched to a dismissal for medical incapacity once it became clear VXO would not return to work to complete the disciplinary process without the DHB reversing its investigation finding. The key requirements for dismissing on incapacity grounds were met, and VXO's view on how the disciplinary process should conclude was unrealistic. Therefore, the DHB's decision to dismiss was a reasonable one.

Takeaway: The decision shows that an employer can pivot during a process where an employee becomes incapacitated, and in some cases that incapacity in those circumstances will warrant dismissal.



Lucy Gallagher
Law Clerk



Immigration Alert:

Removal of 90-day trial periods

From late October 2023 accredited employers now need to commit to not using 90-day trial periods for Accredited Employer Work Visa (AEWV) holders.

90-day trial periods

A 90-day trial period can be used by employers to determine whether a new employee is suitable for the role. An employer has the ability to dismiss the employee during the first 90 days and the employee is prohibited from raising a personal grievance in relation to that dismissal.

Under New Zealand employment laws, only employers with 19 or fewer employees can currently use a 90-trial period. Given the recent election results, we may see this extended to all employers regardless size.

How does the apply?

From 29 October 2023, employers cannot use a 90-day trial period when hiring people on an AEWV. This new commitment will be made by employers submitting Job Check or Accreditation applications.

Importantly, any Job Check under assessment when the change took effect may also be declined if it includes a trial period, regardless of submission date.

This new 90-day trial rule will not apply to:

- Already-approved Job Checks, and
- Migrants who already hold, or have applied for, an AEWV.

Our advice

If you regularly recruit workers under the AEWV scheme it may be helpful to have two sets of employment agreement templates: one for migrant workers and one for New Zealand citizens or residents.



Rebecca Laney
Associate

Holidays and annual closedowns – A new Government, but uncertainty remains.



At the time of writing the Country still does not have a new Government.

What we do know is that 5 long years after the initial review of the Holidays Act by the Taskforce we are no closer to seeing real change to the Holidays legislation. The National Party has signalled a new working group will be appointed to focus on an employers' ability to reduce compliance costs.

Any legislation that provides certainty for both employer and employees would be universally welcomed.

With Christmas not far off and with so many employers struggling to have enough staff available to work, it is timely to provide employers with some certainty around their compliance obligations so that employees are paid correctly when working over the holiday period.



Q: 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.

Q: Can all employers closedown?

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

Q: 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.

Q: 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 a statutory closedown.

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

Some employees may not want 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. The in-writing part is critical.

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Holidays and annual closedowns – A new Government, but uncertainty remains. (Continued)

Q: 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 unique and there is never a 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 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 Monday with Boxing Day and 2 January falling on the Tuesday. This is great news for employers because without the public holidays falling on a weekend, the concepts of Mondayisation and Tuesdayisation do not come into play, which makes compliance significantly easier. The public holidays are observed on the day they actually fall.

For part-time employees who work, for example, Wednesday to Sunday 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.

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 Monday, which can often be the case, 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 Tuesdays leading up to Christmas then that gives a strong indication that Boxing Day and the 2nd of January 2024 can be treated as a public holiday for that employee.

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

Q: 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.

Q: 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.

Q: 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 cancellation of leave requires communication and agreement.

Q: 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 is free to agree or decline any requests to carry out overtime.

Q: 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 undertaken 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.

Q: 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?

Watch this space.

At present an employee can only request that one week of their statutory annual leave entitlement to be 'cashed-up'. There is no obligation to agree, but National are proposing that an employee will be able to cash up their 4th week, no questions asked, and the personal grievance rights will not apply. We are unlikely to see this legislative change in 2023, but it is on the horizon.

The key is to only allow the 4th week 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 receive more 'annual leave' than they are entitled to. For example, if an employee has four weeks' annual leave and 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
Special Counsel



Non-disparagement – what does it actually mean?

For those of you familiar with confidential Records of Settlement, a mutual non-disparagement clause is common. MBIE’s template Settlement Agreement includes it as a matter of course.

However, employers and employees alike should carefully consider both the advantages and disadvantages of including such a clause.

The meaning of ‘disparaging’

The Employment Court’s Decision in *Lumsden v Sky City Management Limited* set out the definition of ‘disparagement’ contained in the Shorter Oxford Dictionary. “Disparage – to:

- (i) *bring discredit or reproach upon; to dishonor, lower in esteem;*
- (ii) *degrade, lower in position or dignity; cast down in spirit; and*
- (iii) *speak of or treat slighly or critically; vilify; undervalue, depreciate.”*

The Court noted that this definition of ‘disparage’ did not require the disparaging comments to be fabricated or untruthful. A genuinely held belief may still be disparaging. A remark may still be disparaging even if it is believed to be factually correct or truthful.

Negative remarks consist of remarks about the other party that are *harmful, damaging, detrimental, belligerent, acrimonious, antagonistic, or which attack or criticise*. A ‘disparaging’ remark is also likely to be a ‘negative’ remark.

As you will appreciate from the above reference, the definition of disparaging is extremely wide and can capture fair comment or fair responses to questions asked or enquiries made.

Consideration

Both employers and employees may pause to consider whether the advantages of such a clause outweigh the risk of breach. Section 149 of the Employment Relations Act 2000 provides that *a person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority.*

A review of some recent cases highlights the risk inherent in including a non-disparaging clause in a Record of Settlement.

In *Levchenko-Scott v Presbyterian Support Central Charitable Trust* the Authority found that Presbyterian Support Central Charitable Trust (**PSC**) breached the terms of a Record of Settlement.

The Record of Settlement detailed that PSC would provide Mr Levchenko-Scott (**LS**) a reference on letterhead with agreed wording. The Record of Settlement further provided that *if contacted by a third party, PSC will restrict its comments to those which are consistent with the text of the reference.*

LS moved to Australia following mediation and sought work there. He received three provisional offers of employment, each of which was withdrawn after the prospective employers had reference-checked him.

LS' evidence was that when prospective employers asked PSC referees whether they would employ him again, they answered 'no'. When asked why not, they referred to his failure to align with the organisation's values.

PSC submitted that answering questions from prospective employers honestly and factually as to whether it would employ LS cannot amount to disparagement.

The Authority rejected that submission and found that PSC was bound by the settlement agreement to provide LS a written reference containing an agreed text and to restrict its comments to those which were consistent with that text if contacted by a third party.

The Authority found that when PSC informed prospective employers it would not re-employ LS and explained that the reason was his non-alignment to, or fit with, its values, *PSC stepped well-outside the agreed text of the reference.*

In *Byrne v New Zealand Transport Agency* the Employment Court concluded that the word 'disparage' or 'disparagement' is capable of broad effect. Any statement having a negative meaning could be disparaging in a general sense. That is, a disparaging statement can be expressly stated or implied.

In that case the Court found that it was plain from the context of the Record of Settlement that the disparagement clause related to the employment circumstances which had existed up to the point of resignation. As a consequence,

that clause should not be construed broadly. It did not preclude either party from making any disparaging remark about the other in any circumstances.

It was argued that potentially disparaging comments which did not relate to matters arising out of the employment relationship could not be caught by the clause in question. The Court agreed.

The clause provided an assurance that the employment-related issues that had been left unresolved would not be raised by either the employer or the employee with a third party to the detriment of the other party.

The Court found that the facts relating to the reaching of settlement, and the discussions leading up to it, were confidential and this included related issues that were not investigated. Neither party could refer to these circumstances either explicitly or implicitly without breaching the non-disparagement clause.

In *Te Manawa o Tūhoi Trust v McDonnell* the Authority was required to determine whether Te Manawa o Tūhoi Trust (**TMOT**) breached the Record of Settlement by making disparaging comments to the Police about Ms McDonnell.

In this case the employment agreement contained a clause requiring the return of property upon termination of the employment relationship. TMOT made a complaint to the Police on the understanding that the employment relationship had ceased and the return of property clause had become operative. It was only following attempts to engage with Ms McDonnell and have its property returned, which she absolutely refused to do, that the complaint was made to the Police.

The Authority found that to the extent that TMOT was making a report to the Police based on its reasonable belief that Ms McDonnell was improperly retaining its property in breach of both the Record of Settlement and her employment agreement, it cannot be held to have made disparaging comments about her actions to the Police.



John Farrow
Partner

Navigating the Intersection of Personal and Professional Relationships



The legalities of the employment relationship are tricky at the best of times. When the employee and employer are family or in a personal relationship, things can get even trickier.

It is relatively common in New Zealand for someone to have their kids or partner help out with the family business. It is also common for one partner to receive a salary from the business as a way of providing income, which can also have tax advantages, even though there may not be an intention for the person to be employed by the business.

Is there an employment relationship where a family member or spouse is helping out? It depends on the true nature of the relationship. Despite it being a relatively common arrangement, there is surprising little case law on the topic. The Court in *Dillon v Tullycrine Ltd* has held it shouldn't jump to assume an employment relationship exists where there is a personal connection, if that was not intended and doesn't reflect the true basis upon which the exchange between parties occurred.

In that case, Chris Dillon and his wife, their son and their daughter-in-law purchased a block of land to run an agricultural business on. Dillon performed work on the land, including caring for the horses and other farm work, and made a claim for wages, arguing he was an employee. The Court found the arrangement between the parties was always based on their familial relationship. Dillon and his wife were approaching the end of their working lives with little in the way of assets or income and the business was seen as a way in which all the family would contribute and benefit. Dillon had expectations his son and daughter-in-law would support him and his wife when they retired and was hoped the business would be successful to everyone's benefit. Dillon was not an employee.

That decision can be compared to the Employment Relations Authority determination in *McKay v Wanaka Pharmacy Limited*.

Nicole McKay and Aaron Heath were together for 13 years and operated the Wanaka Pharmacy Ltd and Wanaka Sun (2003) Ltd. McKay undertook various roles and responsibilities for the two companies and was paid a salary, until she separated from Heath in 2018. She reported to work one day and was told someone else had taken over her role. That same day she received a letter from Heath's lawyer confirming she no longer worked for the Wanaka Sun or the Wanaka Pharmacy. McKay filed in the Employment Relations Authority, claiming she was an employee. Heath said McKay was not an employee because of their matrimonial relationship, that her salary was introduced for income splitting tax purposes and there was never an intention to

create an employment relationship. Heath claimed the work McKay undertook was flexible and of her own volition.

The Authority concluded the work McKay undertook over the years was not of a minimal nature and/or without value to the companies. Whilst she had a degree of freedom in when and how she undertook some of her responsibilities it was not to the extent that there was no control or supervision at all. The integration and fundamental tests favoured a relationship of employment. The real nature and true basis of the relationship between Ms McKay and Wanaka Pharmacy and Wanaka Sun was employment under a contract of service. McKay was unjustifiably dismissed, and entitled to pay for holidays which she said she never took.

The moral of the story is that if you wish to work alongside family members or a spouse, it is first important to ascertain if there is an employment relationship. Wanaka Pharmacy is an important reminder that if a family member or spouse is an employee, they will have the same rights as any other employee. It also means that if things go pear shaped in the personal relationship, the employing party cannot simply terminate the employment relationship, however difficult it will be to not let one relationship interfere with the other.



Jessica Higgins
Associate

WorkSafe's brother bother

Recent health and safety prosecutions have kept it in the family. Two health and safety cases involving prosecuting individuals have resulted in vastly different outcomes. In this case round-up we outline the family business affairs that have recently been the subject of WorkSafe's attention.

The Buttle brothers¹

Andrew, James, and Peter Buttle are the directors of Whakaari Management Limited, the entity which manages Whakaari White Island. The Buttles were charged under section 44 of the Health and Safety at Work Act 2015 with failing to exercise necessary due diligence in relation to health and safety matters. The charges alleged the directors of WML should have ensured WML obtained quantitative risk assessments and expert advice.

The Buttles successfully applied to have the charges against them dismissed. The application to dismiss the charges was made following WorkSafe closing its case. The application was made on the basis that a court could not reasonably convict on the evidence WorkSafe had presented.

The court concluded it could not reasonably convict on the evidence presented, even when WorkSafe's evidence was taken at its highest.

The Judge commented to determine whether a director had met their due diligence, the Judge would need to ask:

- a) *what were the relevant circumstances, including those of WML and those of the particular director, including the nature of the responsibilities undertaken by that director; and*
- b) *given those circumstances, did that director exercise the care, diligence, and skill that a reasonable officer would exercise?*

The court determined WorkSafe had failed to present evidence about the directors' individual actions and responsibilities. WorkSafe had presented its case more generally referring to what the *Buttles* collectively did or did not do. In order for charges to ever be possible against individual directors, there needed to be evidence as to what those individual directors did or did not do, or were required to do, in terms of due diligence.

WorkSafe had not given evidence of *what happened behind the boardroom door*. WorkSafe had not sought board or management meeting minutes relating to internal decision making. There was no evidence about the directors' individual responsibilities, such as whether the board had agreed that one director would be specifically responsible for looking into whether and what expert advice WML should take.

Each of the charges against the Buttles were dismissed.

Our thoughts

The case provides some insight into what sort of evidence will be required when bringing charges for breach of an officer's due diligence duty, particularly where the officer charged is just one of a number of board members. Directors should also be aware of the liability they may face where their individual responsibilities include specific oversight of health and safety-related matters, such as where the board has agreed that individual director will oversee health and safety governance or management.

The Sullivan brothers²

On another brotherly note, William and Steven Sullivan were recently sentenced to prison for their conduct during a WorkSafe investigation into a workplace health and safety incident.

WorkSafe investigated a workplace incident at Aimex Limited where an employee was overcome with brake cleaner fumes and passed out. As a result, the employee suffered a hypoxic brain injury and continues to suffer the effects.

Five days prior to the incident, another employee had carried out the exact same task, but managed to escape from the enclosed boat hull when they began to feel

¹ *WorkSafe New Zealand v Buttle* [2023] NZDC 18939.

² *R v Sullivan* [2023] NZDC 15433; *R v Sullivan* [2023] NZDC 15041; *Sullivan v R* [2023] NZHC 2251; *Sullivan v R* [2023] NZHC 2453.



lightheaded. The employee had made a note of the incident on their timesheet, and completed an incident report for William Sullivan (the Health and Safety Officer). Despite William recording on the incident report that the potential consequences of the incident were “significant”, Aimex took no steps to remedy the situation.

WorkSafe was informed of the first incident during the investigation, and requested the incident report on numerous occasions. Aimex denied it existed, stating it had reviewed its records and could not locate the incident report. William similarly denied any knowledge of the incident or the existence of an incident report.

Steven Sullivan (Managing Director) had also become aware of the first incident, and the incident report. Nevertheless, he maintained that he had found no record of the incident ever occurring.

This meant WorkSafe was unable to clearly establish the earlier incident had occurred, or that Aimex was aware of it.

Aimex pleaded guilty to charges under the Health and Safety at Work Act 2015, however at sentencing again rejected the proposition that a previous similar incident had been reported to it in a manner that could reasonably have been followed up on. This resulted in Aimex receiving discounts to its sentence as it was essentially treated as a first offender with a clean prior record.

After sentencing, a newly appointed Chief Operating Officer discovered the cover-up and made a protected disclosure statement. Police executed a search warrant at the former General Manager’s home address and located a copy of the first incident report.

The Sullivans were charged with crimes under the Crimes Act 1961: William for making a false statement, and Steven for perverting the course of justice.

William was initially sentenced to nine months’ imprisonment in the District Court, but successfully appealed the sentence to the High Court by establishing it was “manifestly excessive”. A sentence of home detention is the likely outcome once a suitable proposed address is put before the court.

The District Court sentenced Steven to 20 months’ imprisonment. Steven’s appeal of his prison sentence was dismissed by the High Court.

Whilst the charges against the Sullivans were brought under the Crimes Act, individuals can also be sentenced to prison for breaches of the Health and Safety at Work Act 2015 where they have been reckless as to the risk to an individual of death or serious injury/illness.

Our thoughts

The Sullivans’ cases illustrate where attempting to mislead a WorkSafe investigation may land you. Officers/directors of companies and other entities need to be aware of their health and safety obligations and the potential for personal liability.



James Cowan
Senior Associate

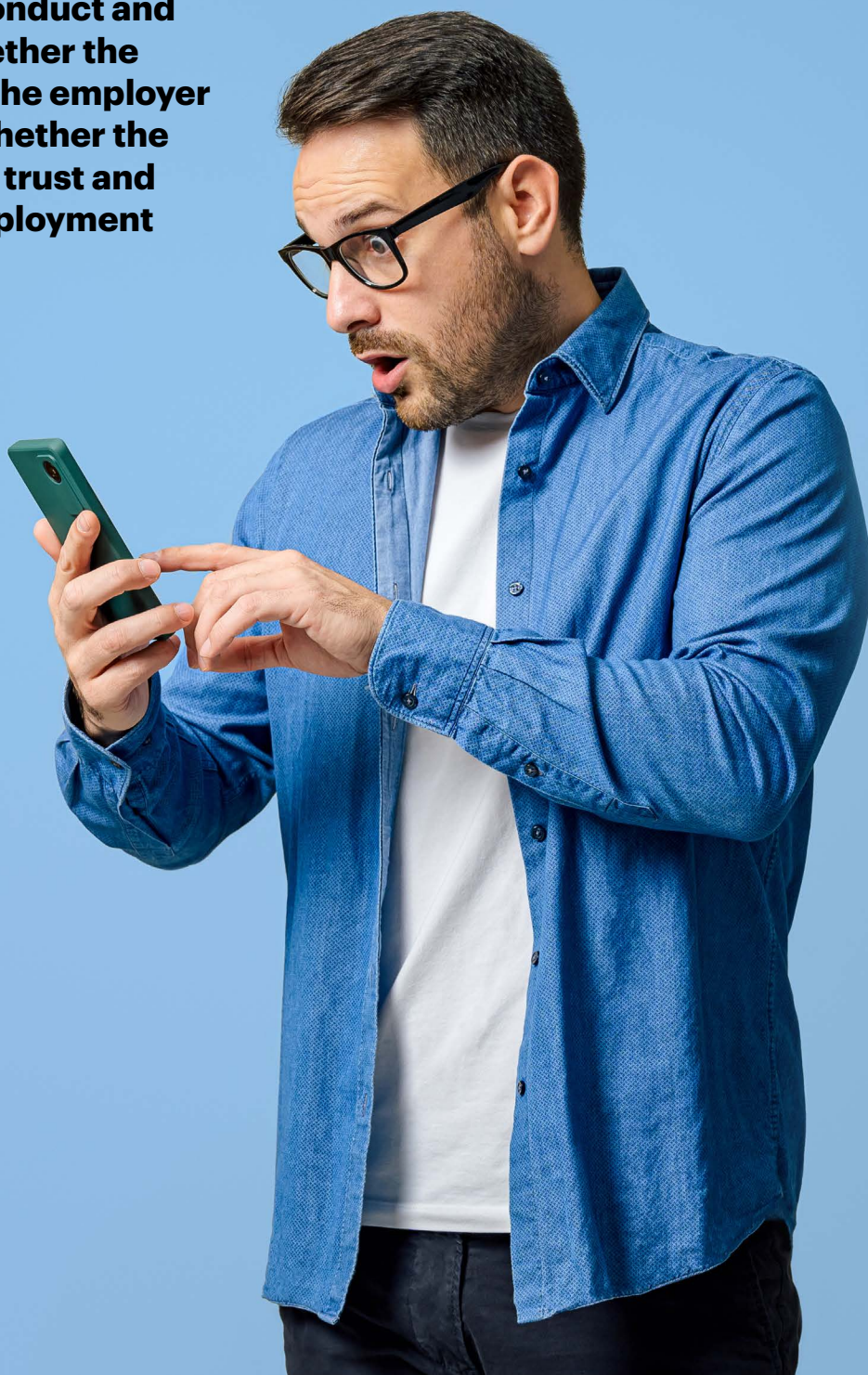


Kelly Thompson
Solicitor

Beware of Social Media Posts

In a previous newsletter, we discussed situations where an employee can justifiably be disciplined for behaviour outside of work. Specifically, the employer must determine whether a link exists between the conduct and the employment, whether the conduct could bring the employer into disrepute, and whether the conduct destroys the trust and confidence in the employment relationship.

When it comes to social media, a recent Employment Court case sheds further light on what an employee can and cannot do.



Turner v Te Whatu Ora [2023] NZEmpC 158

Ms Turner was a registered palliative care nurse at an aged care facility. She was dismissed in April 2021 as a result of her Facebook posts which, broadly, contained anti-vaccination and anti-Muslim content. The Court said they were not considered or balanced discussions and involved strongly worded, and often derogatory, statements or allegations against individuals and groups.

Such posts were considered contrary to the employer's interests. In particular, the posts were made at a time when her employer was very actively and openly involved in work to support and deliver the Government's vaccination programme and there were genuine fears about COVID-19 again entering the community. Residential care facilities were seen as particularly vulnerable.

Furthermore, Ms Turner was a respected medical professional, whose views could have influenced fellow employees and other people with whom she interacted. This included those who worked in the sector of the community in which Ms Turner worked, caring for vulnerable elderly people and others with significant health issues.

In respect of Ms Turner's comments regarding Muslims, these ran counter to both the employer's and the Nursing Council's code of conduct. In particular, the Nursing Council's code of conduct principles include respecting the dignity and individuality of health consumers, respecting the cultural needs and values of health customers, and maintaining public trust and confidence in the nursing profession. The code stipulates that registered nurses are not to impose their political, religious and cultural beliefs on consumers.

But her Facebook was private and only accessible to Facebook friends?

Although Ms Turner's Facebook posts were only accessible to her approximately 86 Facebook friends, the Court considered that social media posts undertaken in the employee's free time, and containing personal opinions, are not automatically protected from employment consequences. Sharing such opinions with 86 Facebook friends is significant enough to mean the comments made were not truly private, particularly given that some of those friends were her colleagues. The Court also noted that even if she had sent the material to only a few other employees or professional contacts, disciplinary action would have been open to the employer.

Importantly, Ms Turner's employer had a Code of Conduct and social media policy which was clear both about its expectations, and the consequences for failing to adhere to those expectations. Its expectations included not undertaking actions that could cause damage to the employer's reputation, or which might cause it to be linked to derogatory, racist, or other offensive comments. The employer was entitled to rely on such policies.

Ms Turner was, or should have been, aware from the Code of Conduct and social media policy, that Facebook posts, even to a closed group, could be the subject of an employment investigation and potential disciplinary action.

What about freedom of expression pursuant to the Bill of Rights Act 1990

Ms Turner argued that she had rights to freedom of thought, conscience and religion, and to freedom of expression, under sections 13 and 14 of the Bill of Rights Act 1990.

The Bill of Rights Act applies to acts done by the legislative, executive or judicial branches of the Government, or any person or body in the performance of any public function, power or duty. It therefore applies to some of Te Whatu Ora's actions. However, the Employment Court's view was that the Bill of Rights Act does not apply to employment decisions, even if made by public entities or entities operating in the public sector that happen to perform a public function. According to the Court, employment does not involve the performance of any public function, power or duty and is therefore more properly governed by the principles of general private law.

The Court then went on to say that even if the Bill of Rights Act had applied, rights are subject to such reasonable limits as can be demonstrably justified in a free and democratic society. As such, it cannot protect everything an employee might say, particularly if such comments are contrary to the interests and actions of the employer.

Conclusion

It is clear from this case that social media posts by employees in their private capacity, even to a relatively small number of people, can provide a link to their employment if those posts are clearly contrary to the interests or values of their employer. An employee's social media posts also have the potential to bring their employer into disrepute and to destroy the trust and confidence in the employment relationship. Where this occurs, justified dismissals can result.



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