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Employment & Immigration News

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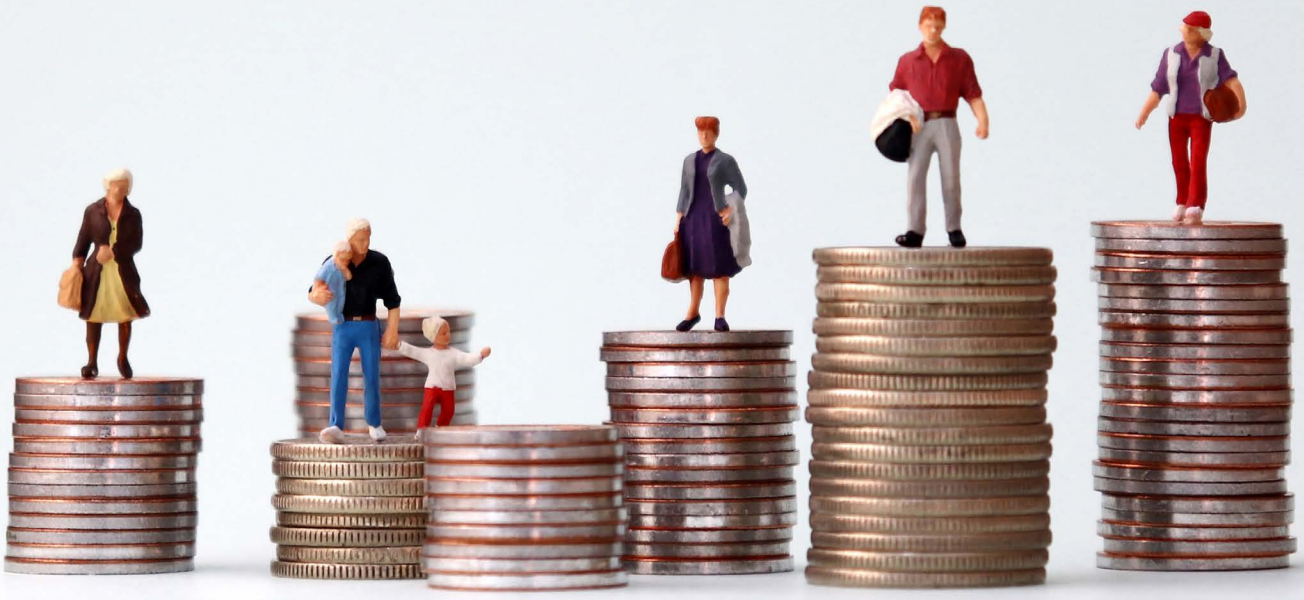
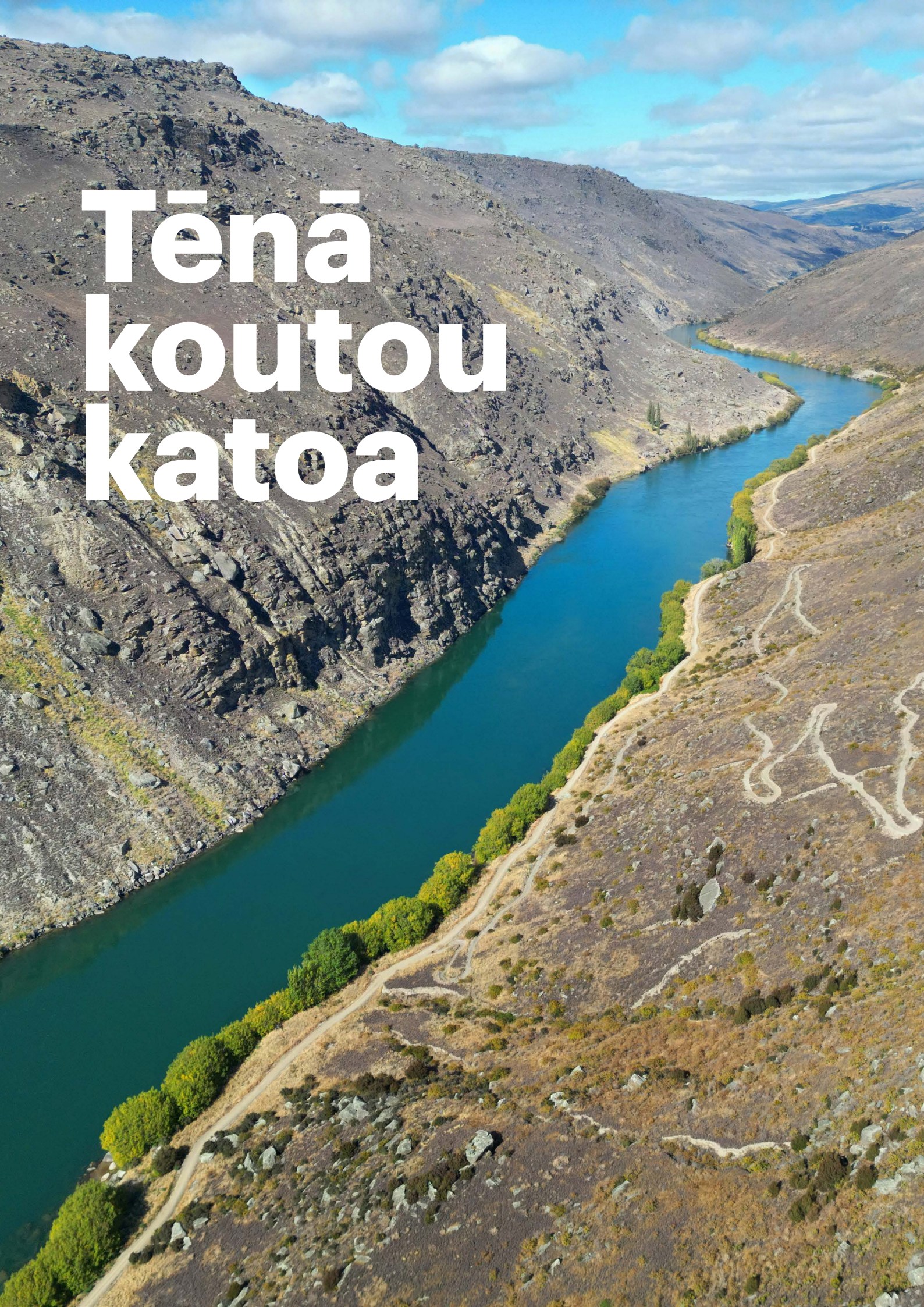


Inside:


Tēnā
koutou
katoa

Welcome to our first edition of the Employment and Immigration Newsletter for 2024.

The Government has just reached the end of its First 100 Day Plan with the major impact on employment law being the ability for all businesses (not only those with 20 or fewer employees) to use 90-day trial periods in their employment agreements. Please see the flowchart outlining how to lawfully implement trial period provisions on page 14.

The Government has also signalled changes to Health & Safety legislation and we are currently waiting to see what that may look like. More emphasis on psycho-social hazards has been signalled and we include an interesting article on trust liability under the Health and Safety at Work Act.

Recently, the Chief Judge signalled an increase to the bands for compensation for injury to feeling, loss of dignity and humiliation. Moderate harm now falls into a band of $12,000 - $50,000 compensation, with significant harm exceeding $50,000 compensation. Some recent cases reflect extensive compensatory awards for grievances. The Cronin Lampe and Parker cases are discussed.

We also cover the current state of the law on resignations and employers' family violence obligations.

With increased immigrant worker numbers, Tash discusses the Visa renewal system in relation to the Accredited Employer Work Visa Scheme.

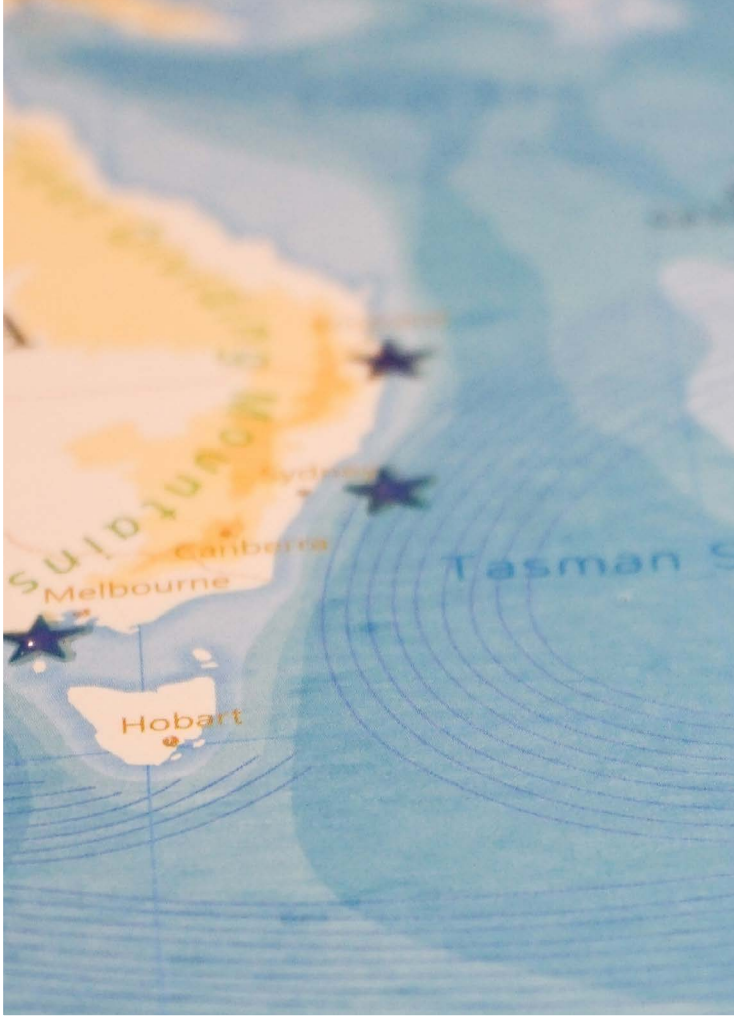
As always, if you require any advice on the matters we have written about in this Newsletter or any general employment / immigration advice, please don't hesitate to contact a member of our Team.

We wish you the best as we move through Autumn - **John.**

AJ Lodge, Partner

John Farrow, Partner

Accredited Employer Work Visa Scheme – renewals coming



In July 2022, the new Accredited Employer Work Visa (AEWV) scheme was introduced by Immigration New Zealand (INZ). This category replaced seven work visas and turned what used to be one application into three separate processes, with three different application fees.

The AEWV scheme requires employers to hold mandatory accreditation to support most migrants for a work visa. Accredited employer status is granted to employers that are genuinely operating, have a good history of compliance with immigration and employment law, and agree to complete various settlement support activities. The scheme has shifted a lot of work to employers, who are now responsible for driving the work visa process and covering much of the cost.

To allow INZ to process a high volume of applications quickly, initial accreditation applications required no supporting evidence and involved a company representative making declarations in a simple application form. While employers found the application process straight-forward, we have seen many quickly forget the commitments made when ticking through the form.

At the end of 2022, INZ announced that all employers who applied for accreditation before July 4 2023 would be automatically extended for a further 12 months. While this was a welcome relief for employers in terms of cost, time and administrative burden, it may have just delayed businesses becoming aware of potential compliance issues, which could impact on their long-term ability to support AEWVs.

In the next few months, many employers will be submitting accreditation renewal applications. These applications will need to include documentation to evidence compliance throughout the accreditation period. We expect this to be challenging for many employers, given the way the system was setup.

To prepare for an accreditation renewal application, we recommend employers complete an internal audit, to ensure the various post-accreditation obligations have been met and properly documented. This could include checking the below:

Settlement support activities

This is to be completed within one month of an AEWV holder starting employment.

Employment New Zealand modules

Paid time must be provided for the visa holder to complete all online employee modules here. This should be tracked, with completion certificates kept on file.

Community and work-related information

Information on the below must be provided to AEWV holders, for example in an induction document or welcome email:

- Accommodation and transport options
- Citizens Advice Bureau services
- Relevant community groups
- Access to healthcare
- Cost of living
- How to get an IRD number
- Job or industry hazards
- Industry training and qualification options

You need to track the start date of each AEWV holder and the date the above was completed.

Visa tracking

Track all employee AEWV expiration dates. We would suggest putting these in an HR system or outlook calendar (or both). Set the reminders for approximately 3 months from the AEWV expiration date.

Updating INZ

Updates to key persons, immigration/employment law compliance or business structure must be provided to INZ within 10 working days.

Employer modules

Everyone making recruitment decisions must complete Employment New Zealand's employer modules here, once every accreditation period. This includes HR, hiring managers and other employees making hiring decisions.

Recruitment costs

Costs for the below cannot be passed on to AEWV holders:

- Trade testing
- Branded uniforms
- Health and safety equipment
- Advertising or recruitment agency fees
- Compulsory training and induction costs
- Tools, where ownership is retained by the company
- Accreditation and job check fees (note that AEWV fees can be passed on)

No unlawful fees

Fees that would be unlawful in New Zealand cannot be charged to AEWV holders. This includes:

- Payment to secure a job
- Unlawful bonding agreements
- Unreasonable deductions from wages that have not been consented to in writing

Tracking hours worked

Your business should keep track of hours worked to ensure your migrant workers are being paid what was included in the IEA. This could include getting appropriate overtime (if applicable) and meeting income thresholds e.g. double the median wage.

Tash Rae
Senior Associate


Dear Boss
I Quit!

Is a resignation full and final?

Employee resignations – when can an employer rely on a resignation and are cooling off periods still recommended? An update.

Resignations are part and parcel of employment, and often occur without an issue. However, an employer can be left in a precarious situation when an employee announces "*I quit*" in the heat of the moment, where it appears the employee may not intend for their words to be taken literally.

The historic position was that a fair and reasonable employer would provide the employee who had resigned "in the heat of the moment" an opportunity to cool off and reconsider, and that this would mitigate the risk of a personal grievance of unjustified (constructive) dismissal.

However, the 2022 cases of *Urban Décor Ltd v Yu*[1] *and Mikes Transport Warehouse Ltd and Modern Transport Engineers Ltd v Vermuelen*[2] suggested that instead a clear resignation was immediately effective, and employees could not simply rely on their employer's failure to provide them with a cooling off period to support a claim that they had been unjustifiably dismissed.

In the Mikes Transport Warehouse case, Chief Judge Inglis provided the following guiding principles in relation to resignations:

1. Resignation is a unilateral act. It is not open to an employer to assert that the relationship remains on foot and the resignation is of no effect.
2. An employee is not required to justify their decision to resign or for the decision to be well thought through.
3. The key issue is whether, on an objective assessment of the circumstances, the employee resigned.
4. A resignation given in clear and unequivocal terms is more likely to satisfy an objective assessment than words of resignation expressed in an equivocal manner or which are plainly not meant to be taken seriously.
5. If a resignation is effective, it cannot then become a dismissal as the employment relationship ends when the resignation is given by the employee.
6. If there are concerns the resignation arose from misconduct by the employer, this is a separate issue that can be addressed by referring to case law relating to constructive dismissals.

Since 2022, the objective assessment of an employee's resignation has been applied by the Employment Relations Authority to determine if an employee has resigned. The Employment Authority summaries the current position:

> ***"The emphasis has moved away from consideration of whether an employer has given a cooling off period to an objective consideration of whether the employee has resigned. The employer can rely on that as a resignation rather than having to go back and ask if they are really sure. However, in some cases a cooling off period may still be required where words are spoken in anger or frustration. An employer is still subject to the duty of good faith which requires the employer to be active and constructive in maintaining the employment relationship.[3]"***

Therefore, the key consideration for employers when deciding if a "cooling off" period is necessary is whether the specific words said by the employee when resigning, and the surrounding circumstances in conjunction with those words, was it made in the heat of the moment or was it meant to be taken seriously.

Employers need to consider the circumstances and should not assume a "cooling off" period is unnecessary. If a resignation is ambiguous or in the heat of the moment, a reasonable and fair employer should objectively consider the full context of the resignation as providing an opportunity to reconsider (and retract the resignation) in a "cooling off" period may minimise the risk of a constructive dismissal claim.

[1] Urban Décor Ltd v Yu [2022] NZEmpc 56.

[2] Mikes Transport Warehouse Ltd and Modern Transport Engineers Ltd v Vermuelen [2021] NZEmpC 197.

[3] CSJ v JRL [2023] NZERA 282

Samuel Deavoll
Senior Solicitor

Employment Court orders High School to pay two former employees $1.79 million

The recent decision of *Cronin-Lampe v Melville High School* highlights employers' obligations in respect of employees' mental health, and particularly those who have inherently stressful or emotional jobs. The $1.79m award sends a big warning to employers about the potential consequences of failing to meet the required standards.

Background

Mr and Mrs Cronin-Lampe (**the Cronin-Lampes**) were employed by Melville High School (**MHS**) as guidance counsellors from the late 1990s until 2011.

Throughout their employment, the Cronin-Lampes provided extensive counselling services in the context of a wide range of traumatic circumstances including student suicides, fatal crashes, terminal illness and murder. During the 15 or 16 years of their employment, there were approximately 32 deaths. The Cronin-Lampes were actively involved in these tragedies, both in the immediate aftermath and usually in relation to ongoing issues.

In 2012, the Cronin-Lampes were diagnosed with post-traumatic stress disorder.

The Cronin-Lampes raised various claims against MHS in relation to the significant mental harm they suffered.

Contractual causes of action

The Cronin-Lampes raised three contractual causes of action for: breach of terms implied by common law, breach of terms implied by the Health and Safety in Employment Act 1992 (as it then was), and breaches of implied and express terms derived from the Secondary Teachers' Collective Agreement.

The Cronin-Lampes essentially alleged that MHS failed to meet its health and safety obligations, and failed to manage workload and workplace conditions adequately.

MHS argued that it met the applicable duties, and to the extent it did not, it said the consequences of the alleged failures were not reasonably foreseeable.

After considering the evidence, Judge Corkill found that by 1999-2000 MHS was sufficiently on notice that there was a foreseeable risk of harm to the Cronin-Lampes' health and safety. MHS knew the Cronin-Lampes had been required to deal with a significant degree of trauma including suicide, and it was known that their workload increased, but this did not lead to any proactive steps being taken, as required by the legislation, to systematically and effectively identify the stress created.

Judge Corkill ultimately found that MHS breached express and implied contractual health and safety duties it owed to the Cronin-Lampes. Both Mr and Mrs Cronin-Lampe suffered mental harm in the form of PTSD as a result of those breaches. Their injuries were caused by the established breaches of contract. It was foreseeable that the Cronin-Lampes suffered harm of the kind which occurred if the employer did not take all practicable steps to eliminate, isolate, or minimise and monitor the hazards of their occupation.

Personal grievances

Judge Corkill said that the contractual breaches also constituted unjustified conduct.

The Cronin-Lampes also raised four further relationship problems that the Court said were better dealt with as personal grievances. These included allegations that MHS failed to provide time off and cover during absences, a bullying issue, an issue with "BJ" and a status issue.

Judge Corkill said the traumatic incidents, with the allied need to provide services to those affected by those events, could be expected to have raised a red flag as to the steps a fair and reasonable employer could be expected to have taken to rectify the absence of relevant health and safety measures.

Judge Corkill concluded that the actions of MHS, and how it acted, were not steps which a fair and reasonable employer could have taken in all the circumstances. The personal grievances were also established.

Affirmative defence

MHS tried to argue that the statutory bar of the Accident Compensation Act precluded Mrs Cronin-Lampe from seeking damages because she had cover for mental injury. However, Judge Corkill was not satisfied the criteria in s 21B was made out, and therefore the defence in s 317 did not apply.

Remedies

As the Cronin-Lampes made out both their contractual claims and personal grievance claims, Judge Corkill was required to consider the availability of both damages and remedies, acknowledging that there could not be a double recovery for overlapping claims.

Judge Corkill firstly considered the appropriate common law award for non-economic loss for past, present and ongoing mental harm. Judge Corkill set Mr and Mrs Cronin-Lampes appropriate awards at $97,500 and $130,000 respectively.

Judge Corkill then went on to consider whether a different award would be justified under s 123(1)(c)(i) of the Employment Relations Act, and found the appropriate level of compensation was $85,000 for Mrs Cronin-Lampe, and $63,750 for Mr Cronin-Lampe.

The Cronin-Lampes were entitled to the higher of the two remedies.

Judge Corkill awarded further remedies in relation to the Cronin-Lampes' rental property. The Cronin-Lampes gave evidence that they came under significant financial stress, so their rental property was sold below its capital value. Judge Corkill found that but for the income challenges the Cronin-Lampes faced, the property would have been retained and available for subsequent sale and utilisation of proceeds. Judge Corkill said that viewed objectively, a serious breach of contract which affected the Cronin-Lampes' ability to work and thus service indebtedness, was reasonably foreseeable, and awarded damages for lost capital gain, loss of rental income and interest on both.

The Cronin-Lampes were further entitled to lost income, lost superannuation, and costs for psychologist sessions.

Contributory conduct

Judge Corkill did accept that the Cronin-Lampes could have referred to their health issues with greater specificity in 2011, during the periods when they were affected by their escalating PTSD conditions. The Court said there was an obligation to disclose the impacts of the circumstances to MHS, whether directly or via the PPTA. This did not happen. Judge Corkill said that such a step may well have led to the provision of professional assistance earlier than was obtained. Accordingly, remedies were reduced by 5% for contributory behaviour.

Collectively, and after the 5% reduction for contribution, the remedies totalled just short of $1.8m.

Key takeaways

While this case will undoubtedly cause concern for employers given the significant financial award, the facts are important. The Cronin-Lampes had suffered significant mental harm over a sustained period of time, and this was reflected in the remedies.

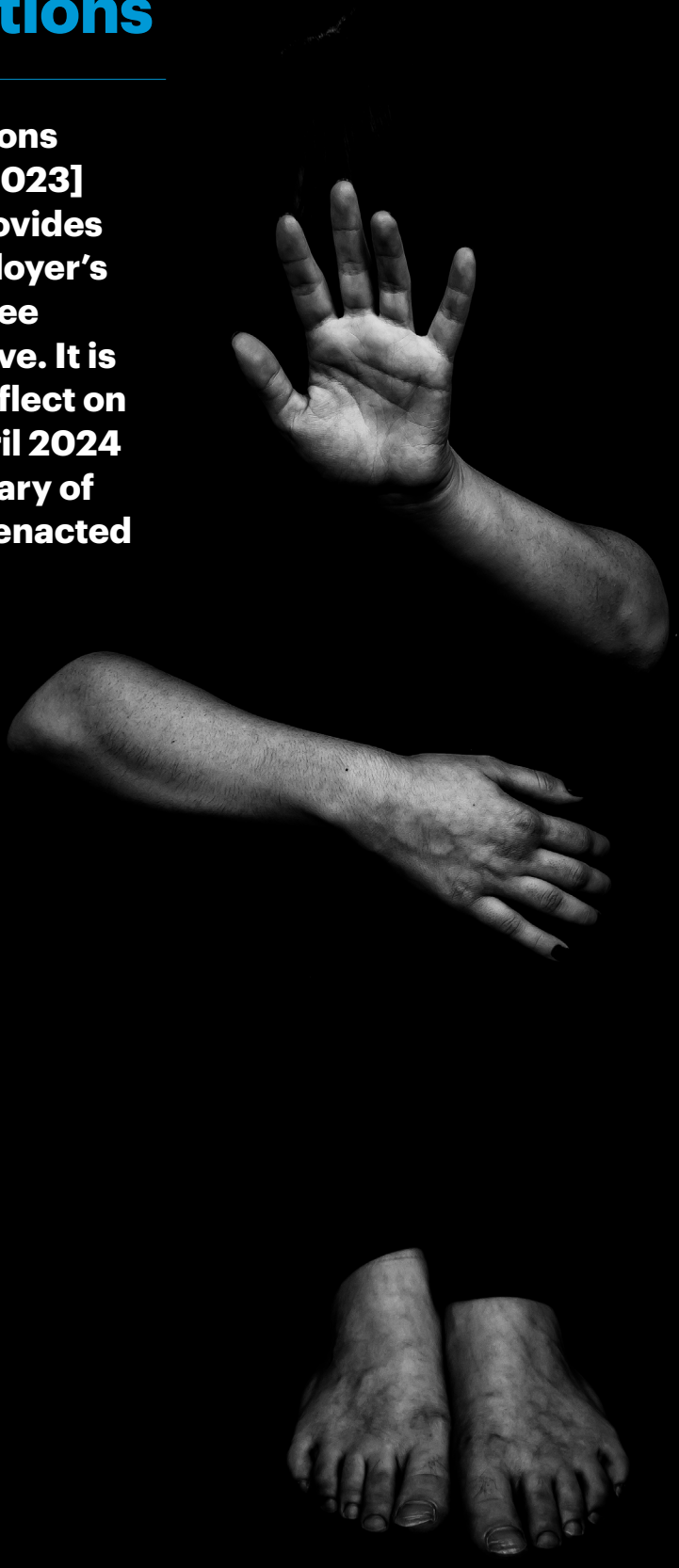
It does however highlight the obligation on an employer to be proactive in relation to employee's health and safety, including mental health. It is not just about what you know, but also what you ought to know.

If there is (or should be) a level of awareness, employers are required to take appropriate steps to remove or minimise potential hazards. What this looks like will be fact-specific, but this case tells us that the Court will award significant remedies where an employer fails to meet the required standard.

Kelly Thompson
Solicitor

Employers' family violence obligations

A recent Employment Relations Authority case, *RDJ v SGF* [2023] NZERA 462, clarifies and provides a useful reminder of an employer's obligations when an employee requests family violence leave. It is also an opportune time to reflect on those obligations, with 1 April 2024 being the five-year anniversary of family violence leave being enacted into New Zealand law.



The Domestic Violence – Victims' Protection Act 2018 provides an ability for employees who are affected by family violence to take up to ten days paid family violence leave each year, and to request a short-term flexible working arrangement of up to two months, such as a change to their duties, work location, or start and finish times.

The short-term flexible working arrangement request can be refused on specified grounds such as an inability to re-organise work among existing staff, a burden of additional costs, or a detrimental effect on ability to meet customer demand. However, providing the employee has been employed by the same employer continuously for at least six months, there are no grounds to refuse family violence leave unless the employer has requested proof and the employee has been unable to provide it.

This raises the question: what constitutes proof? Proof is not defined in the legislation and is partly the subject of RDJ v SGF [2023] NZERA 462. In that case, a couple (RDJ and ZEL) co-owned a business, SGF, for several years. After their relationship ended, RDJ cut financial ties with the business, however, he subsequently agreed to return to work as an employee while ZEL recovered from a mental health breakdown. Further down the track, RDJ resigned and sought family violence leave until the end of his notice period.

SGF requested proof that RDJ qualified for family violence leave, and RDJ provided copies of abusive text messages from ZEL, such as "hope you die"; a photo of a bite mark on his new partner's arm that had been inflicted by ZEL; and described ZEL physically attacking both him and his new partner. Despite this, SGF rejected RDJ's request for family violence leave on the basis of a lack of proof. Moreover, ZEL had her own strongly felt and expressed views that it was RDJ who was the perpetrator of family violence, and not her.

The Employment Relations Authority determined that the details provided by RDJ did constitute proof of family violence and said that whilst the statute does not establish what level of proof is required, "learned commentaries suggest it is set at a low bar". Furthermore, the Authority noted that Parliament had specifically rejected prescribing a range of acceptable documents to prove family violence and instead indicated that "any proof" would be sufficient. It is possible that even an employee's self-declaration of family violence could constitute acceptable proof.

The Authority also pointed out that in a situation where two employees from the same family allege family violence against each other, the employer cannot be expected to conduct an extensive enquiry into the respective merits of each employee's claim. In such a situation, both employees would likely meet the standard of proof required, and therefore be entitled to family violence leave.

It is also worth remembering what the definition of a person affected by family violence is: a person against whom any other person is inflicting, or has inflicted, family violence. This means that even in a situation where an employee suffered family violence 20-plus years before the commencement of their employment, they are considered to be a person affected by family violence and therefore able to access family violence leave. The definition further extends to a person who lives with a child who is impacted by family violence.

The Domestic Violence – Victims Protection Act 2018 also introduced a new personal grievance: that the employee has been treated adversely on the basis that he or she is a person affected by family violence.

Employers should also be conscious of Privacy Act 2020 issues, by being careful not to disclose any family violence issues to other employees, and considering how family violence leave is coded by payroll to minimise any such risk of disclosure.

In RDJ v SGF [2023] NZERA 462 the employee was awarded payment for the two weeks' family violence leave that had been declined and $7,000 non-taxable compensation both in relation to the unfair treatment of his leave application and a separate issue regarding his being served a trespass order for personal purposes during a work-related meeting.

RDJ v SGF [2023] NZERA 462 serves as a helpful reminder that employers should think carefully before declining family violence leave given the low bar for what constitutes proof. In addition, employers should not treat employees affected by family violence in an adverse way, instead providing them as much support as they can to help them resolve their issues and continue a productive employment relationship.

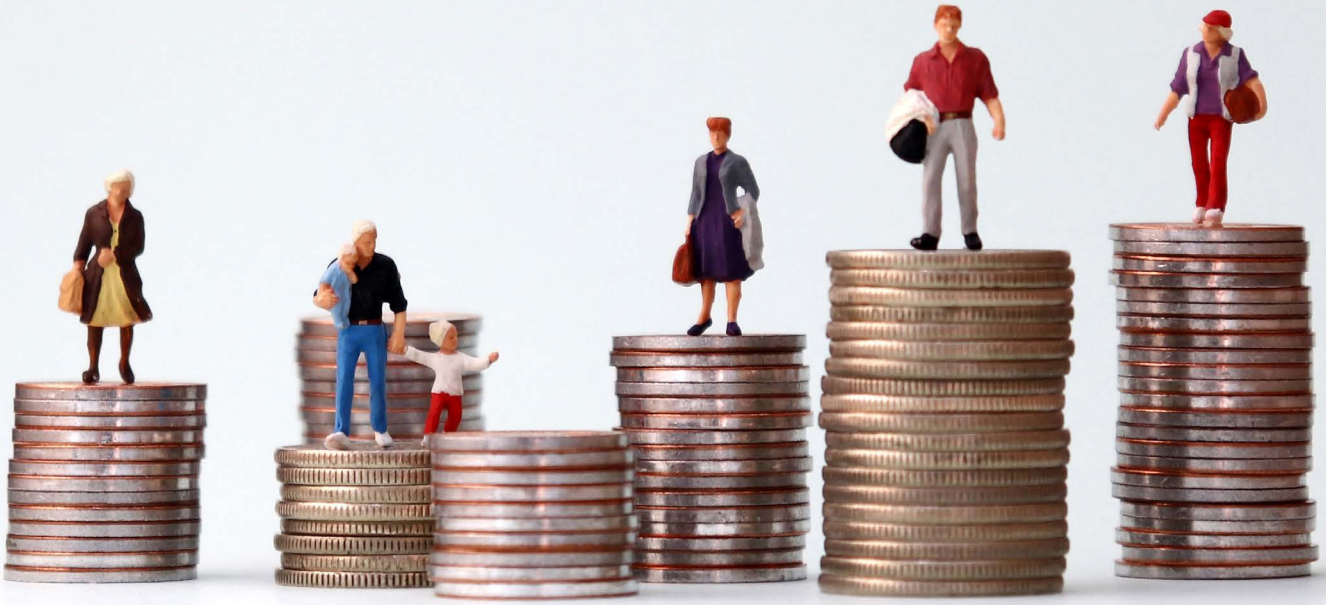
William Fussey
Associate

Clarification on Minimum Wage Rates for Part-time, Salaried Employees in New Zealand

The Court of Appeal has issued a judgment articulating how the minimum wage rates apply to a part-time, salaried employee. *Mount Cook Airline Limited v E Tū Incorporated* [2024][1] overturns a previous Employment Court ruling on how the minimum wage rates should be applied.

Mount Cook Airline Limited is an airline based in Christchurch. It has a mixture of employee types including full-time and part-time cabin crew. The part-time cabin crew work 6 days per fortnight and the full-time cabin crew work 9 days per fortnight. The salary is paid on a pro-rata basis meaning the part-time cabin crew receive two-thirds of the salary of the full-time cabin crew.

The union, E Tū, on behalf of the part-time cabin crew, raised a minimum wage claim. It argued that the part-time salaries breached the minimum wage rates set out in the Minimum Wage Order.



Minimum wage statutory scheme

There are four categories of minimum wage rates for adult workers in New Zealand. The four categories and the current 2024 rates are as follows:

1. for a worker paid by the hour or by piecework, $22.70 per hour;
2. for a worker paid by the day, $181 per day and $22.70 for each hour exceeding 8 hours worked on a day;
3. for a worker paid by the week, $908 per week, and $22.70 per hour for any hours exceeding 40 worked in a week;
4. in all other cases, $1816 per fortnight and $22.70 per hour for each hour exceeding 80 hours worked in a fortnight.

It is well settled in New Zealand that a salary cannot be used to offset busy periods of the year, with quieter periods. That is because the above wage rate categories make it clear that the maximum length of time you could analyse the pay versus hours worked for minimum wage compliance, is a fortnight. If you pay employees monthly, you must still comply with the fourth category which is to ensure that the minimum fortnightly wage rate has to be paid each fortnight in respect of the hours worked in that same period.

Court of Appeal analysis

E tū claimed that the part-time, salaried employees were receiving less than $1,600 per fortnight, and therefore this was a breach of the minimum wage rate for the fortnightly pay category.

The Court of Appeal reviewed the minimum wage scheme and stated there were two competing interpretations:

1. The "minimum rate of wages" of $1,600 per fortnight is a fixed minimum sum that an employee who is not paid by the hour, day, or week must receive, regardless of hours worked during that same period; or
2. The "minimum rate of wages" of $1,600 per fortnight is a rate of wages and not a fixed amount. It is a rate based on a full-time 80-hour fortnight and therefore it should be pro-rated to reflect actual hours worked for part-time employees.

The Court of Appeal stated both interpretations are potentially open but it preferred the second, pro rata approach, for the following reasons:

- The Court concluded the concept of "rate" implies a proportional relationship between two things, in this case, time worked and compensation.
- The Court stated the Act envisages a single hourly rate, i.e., the four mimimum wage rate categories are all different ways of expressing the same minimum hourly rate across different time periods.
- The pro rata approach aligns with the overarching goal of minimum wage legislation to ensure fair compensation for all workers, irrespective of their employment status. To apply interpretation one would lead to part-time, salaried employees receiving more for each hour worked, compared to their full-time colleagues.

[1] Mount Cook Airline Limited v E Tū Incorporated [2024] NZCA 19

[2] $1,600 was the applicable fortnightly minimum wage rate at the time of the claim. The same category today, is $1816 per fortnight.

Rebecca Laney
Associate

Can I terminate an employee under a trial period?

Is the employee on an Accredited Employer Work Visa (AEWV) or covered by an employment agreement that prohibits use of a trial period?

No

Has the employee worked for you before?

No

Is there a valid trial period provision in the employment agreement? Does the provision include the following:

- The length of the trial period (no longer than 90 days)?
- The length of the notice period in the event of termination?
- That if the employee is dismissed, the employee cannot bring a personal grievance claim or other legal proceedings relating to their dismissal?

Yes

If the trial period provision does not include this information, the provision is invalid, and cannot be relied on in terminating the employee's employment.

No

If the employee has previously been employed by the same entity, the employee cannot be employed subject to a trial period.

Yes

If the employee is an AEWV holder, or covered by an employment agreement prohibiting use of a trial period, they cannot be employed subject to a trial period.

Yes

anderson lloyd.

Yes

At the time the employment agreement was entered into:

- Was the employee aware of the trial period prior to starting work?
- Did the employee have reasonable opportunity to seek independent advice before signing?
- Did the employee sign their employment agreement before they started work?

No

If the trial period provision does not include this information, the provision is invalid, and cannot be relied on in terminating the employee's employment.

Yes

Can you give notice of termination within the trial period timeframe?

Notice of termination must be given within the trial period timeframe, but employment can end after the trial period has ended.

No

If the trial period provision does not include this information, the provision is invalid, and cannot be relied on in terminating the employee's employment.

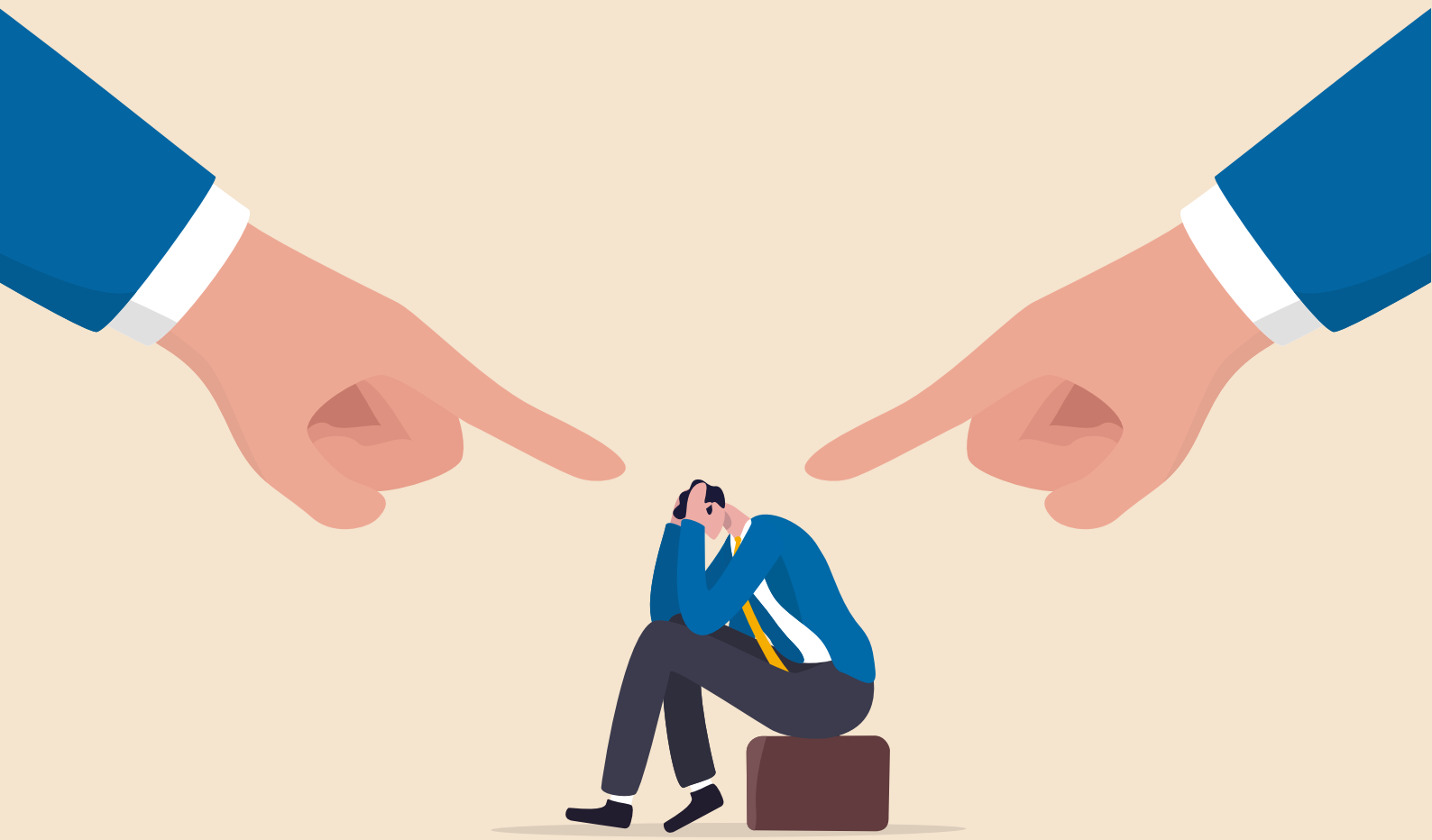
You can proceed with terminating the employee's employment under the trial period provision.

Before doing so, be sure you:

- Check what the employee's notice period is in their employment agreement.
- Consider whether the employee may receive payment in lieu of notice.

Lucy Gallagher,
Solicitor

Employer pays the price for extensive bullying and abusive behaviour towards employee



The Employment Relations Authority has awarded $100,000 to an employee in the recent case Parker v Magnum Hire Limited & Field, illustrating that the Authority is prepared to make significant awards against employers who do not provide their employees with a safe workplace.

Background

Mr Parker alleged that during his 12 years as the General Manager of Magnum Hire Limited (Magnum) the director, Mr Liam Field, bullied and psychologically abused him, ultimately leading to his constructive dismissal in 2021.

Mr Parker's claims against Magnum

Mr Parker alleged the following:

- As a result of Mr Field's bullying, Magnum:
  - failed to provide him with a safe workplace, causing an unjustified disadvantage to his employment;
  - forced Mr Parker to resign, and therefore constructively dismissing him;
  - breached its implied contractual duty to take all reasonable care to maintain a safe workplace; and
  - breached the Wages Protection Act 1983 (WPA) and the Holidays Act 2003 (HA) by failing to pay Mr Parker's bonuses or accompanying holiday pay, or to provide him with his time and wage records.
- Mr Parker sought a global penalty against Magnum for various breaches of the WPA, HA and Employment Relations Act 2000 (Act).
- Mr Parker also claimed that Mr Field is a "person involved in breaches of employment standards" and sought leave to recover money from Mr Field personally to the extent that Magnum would be unable to pay any monies owing.

Bullying and harassment, leading to constructive dismissal

Multiple ex-employees of Magnum provided evidence of the toxic culture at Magnum, and how Mr Field was verbally abusive towards not only Mr Parker, but a number of employees.

Mr Parker provided examples of Mr Field's alleged bullying, including:

a) excessive and unprovoked personal criticism and verbal abuse;

b) threatening Mr Parker's job security, overtly and impliedly;

c) publicly humiliating him and calling him incompetent;

d) deliberately continuing or escalating abusive behavior when Mr Parker showed signs of vulnerability or asked him to stop; and

e) engaging in manipulating and psychologically abusive behaviours, such as deploying false flattery and false reassurances.

As an example of the severity of the bullying, on one occasion following a clash with Mr Field, Mr Parker was driven to hospital as he believed he was having a heart attack (that turned out to be a panic attack). Mr Parker described another confrontation with Mr Field that occurred after Mr Parker had undergone urgent surgery, where it was alleged Mr Field verbally attacked Mr Parker, threatening his job security and blaming him for the company's profit losses. Mr Parker gave evidence that he found the call so traumatic it caused him to have a panic attack, which ruptured the surgical incisions in his lower abdomen and required medical attention.

Despite attending mediation, the parties were unable to resolve matters. Magnum's counsel proposed to carry out an investigation into Mr Parker's bullying claims itself (rather than engaging an independent party). In response, Mr Parker resigned, effective immediately, and raised a personal grievance for constructive dismissal.

Continued >

Bullying claim out of time?

A personal grievance must be raised within 90 days of the instance giving rise to the grievance occurring. Despite not being raised by Magnum's counsel, the Authority highlighted that Mr Parker's bullying claims may have been bought out of time, and sought the party's views on this.

The Authority ultimately found that Magnum had impliedly consented to Mr Parker's claims being raised out of time. Magnum had substantively responded to Mr Parker's bullying personal grievance in its pleadings and evidence, presented a defence to the bullying claims at the Authority's investigation meeting, and despite raising limitation issues in respect of Mr Parker's other claims, never raised any issue about the bullying grievance being out of time.

The Authority's findings

It is important to note that bullying itself does not always give rise to a personal grievance on its own, but rather it may be the basis for an unjustified action causing disadvantage grievance based on the employer's failure to provide a safe workplace.

While the Authority acknowledged the evidence provided in support of Magnum, it highlighted that many of the witnesses were current employees of Magnum, and their loyalty to both Magnum and Mr Field came through in their evidence. The Authority found that Mr Field had engaged in bullying behaviours towards Mr Parker. The evidence overwhelmingly supported that Mr Field's actions were unreasonable and harmed Mr Parker. In a workplace where unreasonable behaviour was seen as "normal", there was no formal support for workers, no bullying or harassment policy and no formal or informal process to deal with complaints, the Authority found Mr Field ought to have reasonably foreseen that Mr Parker would experience the behaviour as bullying.

Accordingly, the Authority found that Mr Parker was bullied at work, and Magnum did not do anything to protect Mr Parker from this foreseeable harm. Ultimately, Magnum failed to provide Mr Parker with a safe workplace.

Remedies

The Authority was presented with evidence that as a result of Mr Field's bullying and work-related stress, Mr Parker was depressed and his mental and physical wellbeing had considerably deteriorated. The Authority accepted that Mr Parker had suffered significant harm, and made an award of $50,000 compensation.

Mr Parker's evidence of the effect of being constructively dismissed on his mental health, self-esteem and self-worth was compelling, leading to the development of depression, anxiety and post-traumatic stress symptoms akin to PTSD. Mr Parker suffers flashbacks to Mr Field's abusive behaviour, and evidence from Mr Parker's clinical psychologist detailed that Mr Parker had recurrent suicidal thoughts. Taking this evidence in account, and that Magnum's defence had further compounded the hurt and humiliation Mr Parker has suffered, a further award of $50,000 compensation was made.

Further awards were made in favour of Mr Parker in respect of an unjustified suspension, lost wages and a penalty for breach of the WPA.

The Authority also considered it appropriate to make recommendations under section 123(1)(ca) of the Employment Relations Act 2000, requiring Magnum to implement a clear Bullying and Harassment Policy and Code of Conduct, and to establish a clear avenue for the resolution of complaints and investigations of bullying and harassment.

Concluding thoughts

The awards made in this case are near the upper end of the revised compensation bands discussed by the Chief Judge in GF v Comptroller of the New Zealand Customs Service. This is interesting that Mr Parker was only awarded $50,000 compensation, given that the highest compensation band (reflecting high-level loss or damage) is awards over $50,000. In light of the significant harm that the Authority found Mr Parker had suffered due to Magnum's conduct, it is unclear what further harm an employee must have suffered before an award would be granted in the highest compensation band.

Also interesting is that the Authority made two compensation awards for matters that arose from the same factual circumstances and, arguably, had the same impact.

This case also serves as a reminder for employees to ensure that a personal grievance claim is brought within the 90 day timeframe, and for employers, to challenge claims immediately where they are brought out of time.

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Trust liability under the Health and Safety at Work Act 2015

Businesses need to be aware of both independent and collective trustee liability under the Health and Safety at Work Act 2015.

It is a widely known and accepted legal principle that a trust is not a legal entity, but rather a legal relationship between the trustees and the trust property, which is held and controlled on behalf of the beneficiaries. Therefore, at least in civil litigation, liability accrues to the trustees individually.

However, a recent High Court ruling has considered the liability of a trust under the Health and Safety Work Act 2015 (**HSWA**) for the first time, with implications for trusts and trustees throughout New Zealand. In *WorkSafe New Zealand v RH & Jury Trust and others*[1] the High Court determined that the trustees collectively amount to a "body of persons... unincorporate" and therefore a trust entity falls within the definition of "person", and subsequently a "Person Conducting a Business or Undertaking" (**PCBU**), for the purpose of being charged under the HSWA.

District Court decision – trust not a 'person'

WorkSafe charged RH & Jury Trust and alternatively its trustees (who carried out farming operations) for its failure to comply with the HSWA that led to the tragic death of a young boy on its dairy farm. The Trust disputed it was a "person" and able to be charged under the HSWA.

The District Court found the Trust was not a "person", because it would be contrary to common law principles and equity to collectively charge trustees for liability.

High Court appeal

When overturning the District Court decision, the High Court considered the orthodox position that a trust is not a separate legal entity. However, it found that specific legislation could displace that orthodox principle. It therefore went on to determine the position in light of the HSWA's scheme, text and purpose.

As a matter of policy, the Court noted it would likely be an inconsistent and "perverse outcome" if a PCBU could include a body of persons carrying out business with an informal internal structure where there was no legal entity in existence, yet if those same people were trustees, they would collectively no longer be a trustee but instead be three separate PCBUs.

The Court noted that although the HSWA was silent on the inclusion of trusts, the definition of "person" included a "body of persons.... unincorporate" and that a wide definition of PBCU was needed to give effect to the HSWA's purposes. It distinguished the position in New South Wales, which has found that a trust cannot be prosecuted under equivalent legislation, as it did not include the same definition of "person". The High Court considered that if there is a case of structural fault it will be the trustees' collective actions that are responsible, so criminal liability is appropriately apportioned jointly. It is important to bear in mind that while the Court found a trust ultimately meets the definition of "person", that was because it was a "body of persons.... unincorporate."

Finally, the Court found that s 29 of the HWSA does not prohibit an indemnity for the trustees from trust assets under the trust deed as that indemnity did not amount to an "insurance policy" or "contract of insurance" and a trust was not a "person" giving an indemnity under s 29. This broad interpretation could have wider implications for the scope of s 29, but the Court noted that if s 29 was intended to override a fundamental trust principle it would be worded more broadly.

While the Court was cautious, bearing in mind the importance of conceptual consistency in trust law, its decision is ultimately one which could have wider implications on trust law, trust structures and arrangements. It is important to note that the Court was careful to emphasize that a trustee will not always be indemnified from trust assets if fined under the HSWA. It will depend on the specific facts, the trust deed and general trust law. The Trusts Act 2019 provides limitations on the indemnity of trustees, prohibiting indemnities for any breach of trust arising from a trustee's dishonesty, wilful misconduct or gross negligence.

This decision will be relevant to all trustees operating trusts that carry out operations with potential HSWA implications. Trustees should be aware of their obligations under the HSWA and their indemnity position.

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[1] [2023] NZHC 3871.

Workplace law under a new government – 100 days in, what's on the horizon?

The first 100 days for the new government has recently ticked over, so let's take a look at what changes have been made, and what changes are in the pipeline.

Changes to date

The government has already delivered on two of their election promises. The first being to wind back the Fair Pay Agreements framework and legislation, and the second to extend the availability of 90-day trial periods.

While no Fair Pay Agreements had been finalised prior to the framework being abolished, there were a number in progress. These have effectively been binned. In addition, government resources had been allocated to manage the negotiation and set up of these agreements, for example within the Employment Relations Authority. This additional resource is no longer required, and we wait to see whether that will result in a freeing up of resource, or perhaps downsizing of those departments.

The extension of the 90-day trial periods for all employers removes the requirement for an employer to have 19 or fewer employees to be able to utilise a trial period. Now employers of any size can make use of the 90-day trial period, provided they meet the requirements. For further information on this point see our article on page 14.

What's on the horizon?

With those two priorities ticked off, the government appears to have a long list of other changes in the pipeline that will impact on employers and employees alike. The Minister of Workplace Relations and Safety, the Honourable Brooke van Velden, spoke to the Auckland Business Chamber on 12 March 2024 and outlined her government's priorities moving forward.

The first was that the government wants to progress changes to the Holidays Act that have been toyed with for some four or five years now. The Minister acknowledged that the Holidays Act has struggled to keep up with modern working arrangements, and is unnecessarily complex. This reform has been underway for a number of years already, with the Holidays Act taskforce established in 2018 – perhaps an indicator of just how complex the framework is. While the Minister didn't appear to be suggesting a restart of the review process, she signaled that progress would need to be made more quickly than it had been to date, and noted that any changes to the Health and Safety Act needed to be workable and "a material improvement on the status quo".

The Minister said that reforming the health and safety law and regulations is another priority for the government. This is an interesting proposal, and seems born out of some frustration amongst the business community that the current health and safety laws and regulations are too complex, impractical and don't recognise or relate to the reality of running a business. A full review is suggested as to whether or not the health and safety legislation we currently have is fit for purpose. The Minister said the government intends to commence this review with public consultation, which will apparently be released in the coming months.

The third priority that the Minister spoke about is reviewing parts of the Employment Relations Act. As the fundamental piece of legislation regulating the labour market and the relationships between individual employees and employers, any changes to the Employment Relations Act are important.

Included in this proposed review is a review of the current position regarding contractors. The Minister said it is a priority of the coalition to better protect choice and freedom to contract for workers and businesses. This is undoubtedly aimed at the recent line of cases coming from the Employment Court which re-examine the landscape around the line between contractors and employees. The Minister noted that most contractors are happy being in a contracting relationship. This is perhaps oversimplifying the position, given the inherent vulnerabilities which have arisen as a result of the gig economy and the change in the way we work and in New Zealand. As at the date of writing this article the Court of Appeal is hearing the challenge in the Uber case, so watch this space.

The Minister also spoke about making changes to simplify the personal grievance process. She noted that the process of pursuing a personal grievance claim can be slow, costly, and incentivise employees to pursue grievances even where their behaviour has contributed to the employment relationship problem. This is true, in that the current mechanisms for dealing with personal grievances can be slow, costly, and both parties can certainly be incentivised to behave poorly and for improper purpose during that process. The Minister has asked officials for advice on how to simplify personal grievances, including exploring setting an income threshold above which a personal grievance could not be pursued, and to remove the eligibility for remedies if the employee is at fault.

Finally, the Minister spoke about improving the effectiveness, efficiency and responsiveness of frontline services for the system she is responsible for. This is welcome news to users of the system, including those of us who navigate it regularly alongside our clients. Improving effectiveness, efficiency and responsiveness whilst also cutting costs is an ambitious goal, and it is not clear yet what changes are being considered, but we wait with interest to understand more.

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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
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- representation in mediation and court appearances
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- 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

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