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Vital.

Employment & Immigration News

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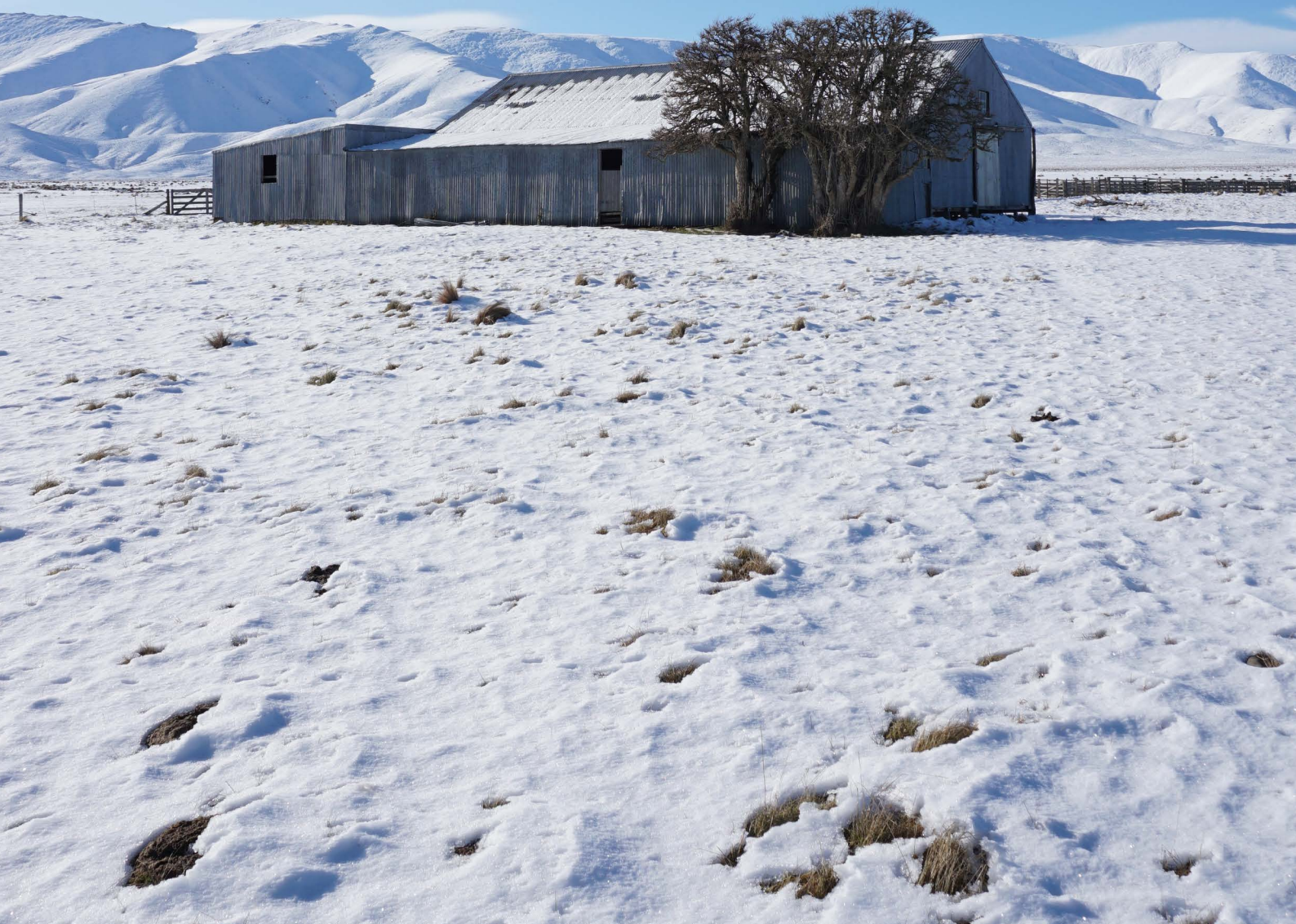


Welcome to Vital. our winter edition of the Employment and Immigration Newsletter

This newsletter is packed with reviews of significant cases, together with a summary of potential Holidays Act reform and recent Immigration changes

Initially the Coalition Government only changed the employment and immigration landscape by removing legislation such as the Fair Pay Agreements Act and the limitation on 90-day trials for businesses with 20 or less employees. However, recently the Government has signalled potential changes to contractor law and reform of the Holidays Act. Malcolm's article details the likely areas of reform.

The Coalition Government's Q3 Action Plan includes deciding, at a Cabinet level, on legislative amendments to clarify the employment status of contractors. This includes the Employment Relations Act to exclude independent contractors from the definition of 'employee' so that contractors who have explicitly signed up for a contracting arrangement cannot challenge their employment status in the Employment Court. It is proposed that contracts would have to meet certain minimum standards that protect workers' freedom to contract.

The Institute of Directors and WorkSafe have released a new resource – Health and Safety Governance: A Good Practice Guide. This is to help directors and other "officers" find ways to improve their own organisation's performance. Research by the Business Leaders Health and Safety Forum shows our health and safety performance continues to flatline when compared with Australia and the UK.

The Institute of Directors GM Governance Leadership Centre's, Guy Beatson, has stated:

> *"Courageous and honest conversations around the board table have the potential to improve our health and safety record more than further tinkering with regulations at a Government level."*

WorkSafe New Zealand Chair, Jennifer Kerr, has said that as Aotearoa New Zealand's primary work-health and safety regulator, WorkSafe is pleased to support this revised Guide which was developed by industry for industry.

The Good Practice Guide can be found here.

We hope that you find this edition of our newsletter informative and thought-provoking. Spring is just around the corner!

Ngā mihi

AJ Lodge, Partner

John Farrow, Partner

Court of Appeal set to clarify the approach to disputes over the interpretation, application or operation of employment agreements

The Court of Appeal grants leave to determine the scope of section 103(3) Employment Relations Act 2000

The Employment Relations Act 2000 (**Act**) differentiates between personal grievances – defined in section 103(1) and including unjustified dismissal and unjustifiable actions relating to one or more conditions of an employee's employment – and disputes that derive solely from the interpretation, application or operation of any provision of an employment agreement. The distinction between a grievance and a dispute is not always clear however, as illustrated in *Breen v Prime Resources Company Limited* [2024] NZCA 223.

Summary of the case

Mr Breen raised a personal grievance claim against his former employer, Prime Resources Company Limited (**Prime**), for failing to pay his salary for August and September 2021 during the COVID-19 lockdown.

Clause 4.2 of Mr Breen's employment agreement provided that Mr Breen would not be paid for *"the hour you are not working because of your personal matter or ACC etc"*. Clause 4.3 provided that Prime was entitled to make a ratable deduction from Mr Breen's remuneration for hours not worked in accordance with clause 4.2.

During the 2021 lockdown, Mr Breen advised Prime he would work from home. Prime did not pay Mr Breen's full salary for August or September 2021, claiming that Mr Breen had not been working full time during that lock down period. Mr Breen maintained that he had worked full time throughout the relevant period, and following meditation, Prime paid Mr Breen his outstanding pay for August and September (albeit late).

Mr Breen later bought a personal grievance claim in the Employment Relations Authority (**Authority**) claiming he had been unjustifiably disadvantaged as a result of the late salary payment. Prime argued that, under the terms of Mr Breen's employment agreement, it was not required to pay him for hours not worked. The Authority found there was no evidence that Mr Breen did not work fulltime during August and September, and it did not consider the "etc" reference in clause 4.2 covered the national lockdown, which was out of Mr Breen's control. The Authority upheld Mr Breen's claim and awarded him $2,000 compensation. Both Mr Breen and Prime appealed the decision.

Mr Breen appealed the quantum of the award to the Employment Court, and Prime appealed the entire decision. Prime raised, for the first time, that the Authority lacked jurisdiction to determine the matter, as Mr Breen's complaint was not a grievance as defined in s 103(1) of the Act. Rather, Prime's position was that the issue specifically concerned interpretation of the employment agreement, and as such should be dealt with under the dispute process at s 129 of the Act.

Section 103(3) of the Act provides that *an unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation… of any provision of the employment agreement*. Where a dispute arises about the interpretation, application or operation of an employment agreement, a party to that agreement cannot raise a personal grievance, but rather it is required to enter into dispute resolution pursuant to s 129 and Part 10 of the Act.

The Employment Court found that Mr Breen's claim was properly viewed as deriving solely from a disputed interpretation of the employment agreement. While Prime's actions may have been unjustified, they were based on a genuine interpretation of the employment agreement. As such, the issue derived from an issue of interpretation, and the dispute procedure of s 129 applied - no grievance based on a disadvantage had arisen.

The Employment Court accepted Prime's argument and set aside the Authority's award, requiring Mr Breen to pursue the dispute process under s 129 of the Act.

The Court of Appeal grants leave

Mr Breen applied for leave to appeal the Employment Court's decision, which was addressed by the Court of Appeal in the most recent case. Leave to appeal an Employment Court decision will only be granted where the question of law raised in the proposed appeal is a significant one that, by reason of its general or public importance, ought to be submitted to the Court of Appeal for decision.

Ultimately, the Court of Appeal found that there were seriously arguable questions of law which were significant, and that there is a need to clarify the approach to the proper construction and application of s 103(3). Accordingly, leave was granted for the Court of Appeal to consider whether the Employment Court erred in its construction and application of s 103(3) of the Act.

Is my employment issue a personal grievance or a dispute?

We look forward to the Court of Appeal's clarification of how to apply s 103(3). Until then however, we consider the following guidance may assist employers and employees when determining whether the issue at hand is a personal grievance claim, or whether it is a dispute that can be resolved in accordance with Part 10 of the Act.

The disputes procedure is intended to resolve genuine disputes about the employment agreement, such as an employee's rights or obligations under the contract, usually where the employment relationship is ongoing. The issue may address past conduct where a party to the agreement seeks redress, or it may be in respect of current or future intended conduct, where a declaration may be sought to determine the matter at hand. While the Authority does not have jurisdiction in respect of disputes, alternative statutory mechanisms are available, including mediation and arbitration.

Nearly all disadvantage claims involve a degree of dispute about the interpretation, application or operation of an employment agreement. Whether an employee is, for example, raising a claim in respect of unpaid wages or claiming an employer's failure to provide a safe workplace, these matters engage issues relating to the employee's employment agreement.

What will distinguish issues to be resolved by the dispute procedure under s 129 from personal grievances, will be when the claim derives **solely** from the interpretation, application or operation of the employment agreement. Where other matters are engaged that sit within the ambit of a personal grievance – being those listed in s 103(1) of the Act - the Authority will have jurisdiction to investigate that claim and make a determination.

Still unsure?

If you have any uncertainty as to whether your issue is a dispute or a personal grievance, our recommendation is to reach out to our employment team, and we can guide you in the right direction, or assist you to bring (or defend) a claim.

Rachel Symon,
Senior Solicitor

Can the fair and reasonable employers please E tū?

A warning to all "well-resourced" employers

The recent Employment Court judgment in *E tū Incorporated v Singh* [2024] NZEmpC 84 is a reminder that large and well-resourced employers will be held to a higher standard.

What also naturally follows is that smaller and less-well-resourced employers should be granted greater leniency particularly in their processes of investigating allegations against an employee. That has been recognised in numerous Employment Court judgments and Employment Relations Authority determinations—although perhaps not so consistently in the latter.

The facts

Mr Singh was employed as a union organiser. He was approached by a third-party employer (who he initially became friendly with) to assist with a meeting involving issues relating to that employer allegedly failing to pay wages and demanding an employee pay a premium for employment. Mr Singh attended the meeting and was asked to make a recommendation as to how the issues could be resolved. Mr Singh's role morphed into brokering a resolution between the employer and employee.

The individual who had approached Mr Singh for assistance later made serious complaints to E tū (as Mr Singh's employer) that Mr Singh had mentally and physically harassed her. The complainant threatened to go to the media about the concerns if E tū did not address them.

E tū's concerns were Mr Singh had been representing an employer and not an employee, and that he had acted unethically and compromised himself and E tū by acting in the roles of support person, mediator, and adjudicator all at the same time. E tū believed its credibility as a trade union was severely compromised by Mr Singh's actions, and that his actions had potentially caused reputational damage to E tū.

E tū commenced an investigation, suspended Mr Singh, and began a disciplinary process. Mr Singh was ultimately dismissed.

The suspension was rushed, because E tū's primary concern was its reputation, and it did not consider alternatives before confirming the suspension.

E tū's investigation into Mr Singh's workplace conduct failed to meet the required standard. It was limited to considering the communications and attachments provided by the complainant, and considering Mr Singh's responses. The court described these as being of "limited scope", observing E tū did not make any further inquiries, such as by verifying Mr Singh's movements, the authenticity of the messages, and interviewing others involved at the meeting to understand the role Mr Singh had played during it.

Those concerns (and the investigation conclusions) were put to Mr Singh at a disciplinary meeting. There were issues with how the meeting was run, including a lack of clarity as to who the E tū decision-maker was. Prior to adjourning the meeting, Mr Singh was advised that dismissal was proposed. There was no indication E tū had considered alternatives to dismissal. After the brief adjournment, Mr Singh was told his employment was terminated. A letter confirming the dismissal followed.

What is fair and reasonable, taking into account the resources available to the employer?

The *Singh* judgment articulated the question of resourcing as:

A further balance is reflected in s 103A [the statutory test of justification] in the requirement that the Authority/Court must (not may) have regard to the employer's resources in assessing the justification for what they did and how they did it. A well-resourced employer can be expected to do more; an owner/operator of a small business not so much. Resources may impact at each stage of the process – the nature and extent of the steps reasonably required of employer X as opposed to employer Y; and the scope of the options that may reasonably be available to employer X as opposed to Y in terms of (for example) disciplinary outcome. This is a key consideration which is often overlooked. As the Act makes clear, a one-size-fits-all approach is not the applicable framework for assessing justification.

(our emphasis)

Unsurprisingly, and accepted by E tū's representative, E tū was described as being well resourced, most particularly in respect of its knowledge and understanding of employment requirements, including around disciplinary processes. With that knowledge and understanding, E tū would be expected to both know what it needs to do to be a good employer, and to put it into action.

Outcome

The court concluded Mr Singh's suspension was unjustifiable (and he was unjustifiably disadvantaged because of it), and E tū's decision to dismiss Mr Singh was further unjustifiable (and he was unjustifiably dismissed).

The Employment Court confirmed trade unions are not immune from being bad employers, telling E tū to "e noho rā" by ordering the Union pay Mr Singh $25,000 in compensation, a sum equivalent to 12 months' lost remuneration, and a $11,500 contribution to legal costs.

Our thoughts

Recent cases reiterate large and otherwise well-resourced employers will (and should) be held to a higher standard than smaller employers. That reflects the reality that larger employers have the ability to do more, before taking action against or dismissing an employee.

The corollary is that smaller and less well-resourced employers should not be held to the same standard. Too often personal grievances are notified in circumstances where a small employer has done its best in attempting to do the right thing. In other words, that small employer has done what a fair and reasonable employer could have done in the circumstances.

All employers need to turn their mind to what they (in their own circumstances) could (and should) do to act fairly and reasonably.

James Cowan,
Senior Associate

Casual employees can also raise unjustified dismissal claims

One of the main benefits of engaging staff on a casual basis is the ability to simply stop offering them future work without it constituting a 'dismissal'. There are, however, certain instances where a casual employee could be successful in raising an unjustified dismissal claim.

There is no legal definition of what constitutes 'casual employment', however it is generally accepted to be where there is a lack of an obligation on the employer to offer ongoing work, or for the employee to accept work when offered.

The factors to consider when determining whether or not the nature of the employment is casual or permanent include:

1. The number of hours worked each week.
2. Whether work is allocated in advance by a roster.
3. Whether there is a regular pattern of work.
4. Whether there is a mutual expectation of continuity of employment.
5. Whether the employer requires notice before an employee is absent or on leave.
6. Whether the employee works to consistent starting and finishing times.

Dismissing casual employees

Engaging an employee on a casual basis can be beneficial where employers just need someone on an 'ad hoc' basis, so they do not want to commit to having to offer a set amount of hours per week, or be bound to pay an employee for a guaranteed number of hours even if the work is not available. It follows that if the employer has no ongoing work available for the employee, they can simply choose not to offer any future work, and this will not be considered a 'dismissal'.

Where an employer actually dismisses a casual employee in the course of a casual engagement, however, that will constitute a dismissal, and could result in an unjustified dismissal grievance being pursued.

This was highlighted in a recent Employment Relations Authority decision. In that case, an employee was engaged on a casual basis with the employer. The employer had committed to an eight-week training period, and had said further korero and training would begin once the employee had returned from overseas.

After three weeks of training, the employer had concerns about the employee's behaviour and capability, so it terminated the employee's employment.

The employee raised a personal grievance for unjustified dismissal.

The employer argued that as the employee was engaged on a casual basis, it did not need to follow a process in terminating the employee's employment, but rather it could simply choose to offer no further engagements.

The Authority disagreed, and found that the employer had unjustifiably dismissed the employee, due to the failure to engage in any meaningful process.

The Authority stated that the employer's belief that it could end the employee's casual employment during a period of engagement, without any process was mistaken, and was fatal to the employer's ability to justify its decision to terminate the employee's employment.

The employee was awarded $20,000 compensation, and four weeks lost wages, (being for the hours that he was expected to perform work under the roster), plus holiday pay and interest on the four weeks.

Key takeaway

An employer is at liberty to offer as much or as little work to a genuine casual employee, and at any stage can choose not to offer any future shifts.

If, however, a casual employee is in the middle of an engagement (i.e. in the middle of an agreed period of shifts), general employment law obligations apply, including those in relation to terminating the employment relationship.

In such a situation, an employer needs to act as a fair and reasonable employer, and follow a proper process (as it would when dismissing any other employee). We would encourage any employer intending to terminate the employment of a casual employee to seek legal advice before doing so.

Kelly Thompson,
Solicitor

anderson lloyd.

Immigration Alert: Significant AEWV Changes

Update

On 7 April 2024 the government introduced a number of significant changes to the AEWV scheme. This alert provides a high-level overview of these changes.

Key Changes

ANZSCO Skill Level 4 and 5 restrictions

- Job vacancies for a role at ANZCO Skill Level 4 or 5 now need to be advertised on an acceptable platform for 21 days. The employer must also contact Work and Income to confirm whether suitable New Zealanders are available.
- AEWV applicants for a role at ANZSCO Skill Level 4 or 5 are now required to meet a minimum standard of English.
- The maximum length of stay for most AEWV holders in ANZSCO Level 4 or 5 roles is now 3 years. Current AEWV holders may no longer be able to extend their maximum continuous stay from 3 years to 5 years. New AEWV applicants will receive a 2-year visa, extendable by 1 year with a further Job Check.
- AEWV applicants with a role at ANZSCO Level 4 or 5 cannot support visas for their partner and/or dependent children. Family members wanting to travel with an AEWV holder will need to apply for a work, student, or visitor visa in their own right, provided they meet immigration requirements.

Skill level requirements

- Unless an AEWV applicant meets the Green List requirements or is paid at least twice the 2023 median wage, all new applicants must either:
  - Have 3 years or more of relevant work experience (supported by evidence, including references or certificates of service); or
  - Have a relevant qualification at Level 4 or higher on the New Zealand Qualifications and Credentials Framework (NZQCF).

Employer obligations and compliance

- All AEWVs will have a condition requiring at least 30 hours of work per week.
- Employers must inform INZ within 10 working days if an employee leaves their job.
- Before offering a job token to an AEWV applicant, the employer must take reasonable steps to ensure applicants have the skills and experience specified above and in the approved Job Check.
- Employers can now have their accreditation suspended while any suspected breach is investigated.

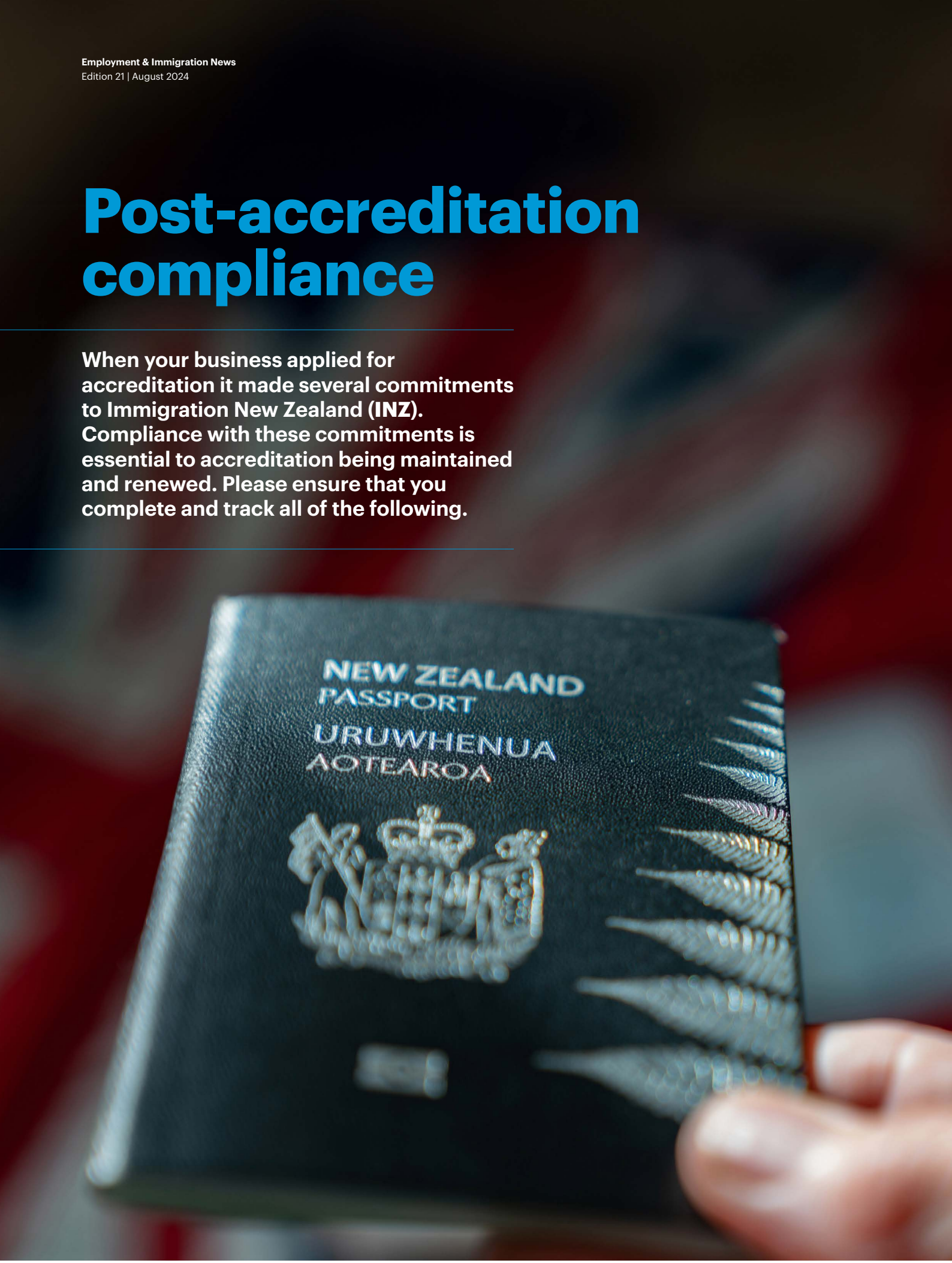
Our thoughts

These rules are complex and fact-dependent, with several exceptions in place. We recommend seeking advice in relation to these changes, particularly if you currently employ or are looking to employee AEWV holders in ANZSCO Level 4 or 5 positions.

Tash Rae,
Senior Associate

Post-accreditation compliance

When your business applied for accreditation it made several commitments to Immigration New Zealand (INZ). Compliance with these commitments is essential to accreditation being maintained and renewed. Please ensure that you complete and track all of the following.



Guaranteed hours

All AEWV holders must be offered at least 30 hours work each week.

Updating INZ

The below must be communicated to INZ within 10 working days:

- Updates to key persons, immigration/employment law compliance or business structure; and/or
- When an AEWV holder leaves their job.

Checking skills

Before offering a job token to an AEWV applicant, the employer must take reasonable steps to ensure applicants have the skills and experience specified in the approved Job Check.

Employers must also check applicants meet INZ's minimum skill-level requirements. Unless they qualify under Green List or are paid at least twice the 2023 median wage, all new applicants must either:

- Have 3 or more years of relevant work experience; or
- Have a relevant qualification at Level 4 or higher on the New Zealand Qualifications Framework.

Note: Bachelor level+ qualifications do not require a New Zealand Qualifications Assessment

Settlement support activities

The below 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; and
- Industry training and qualification options.

Employers should track the start date of each AEWV holder and the date the above was completed.

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; or
- Accreditation and job check fees. 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; or
- Unreasonable deductions from wages that have not been consented to in writing.

Keep track of hours worked

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

Visa tracking

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

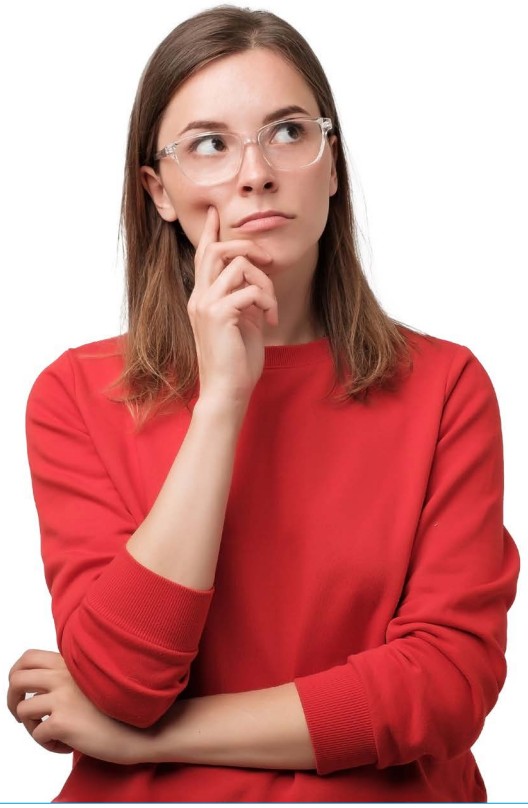
Compliance checks

INZ will check up to 15% of accredited employers to ensure these post-accreditation requirements are being met.

Consequences of non-compliance

Employers can now have their accreditation suspended while any suspected breach is investigated. To avoid concerns, we recommend having one person or team responsible for tracking compliance with all of the above.

Tash Rae
Senior Associate



Considering hiring someone new? A reminder of the risks and safeguards when offering new employment

Offering new employment can be a risky business. Sometimes an employer backs out of discussions with a prospective employee without realising their words or actions have already given rise to an offer of employment. In other circumstances, an employer might intend make an offer of employment, but later want to withdraw the offer following unsatisfactory results from pre-employment checks.

So what can employers do to ensure early conversations don't amount to a job offer, and to ensure they can withdraw an offer if pre-employment checks don't go to plan?

Where an employer is discussing possible employment during the recruitment stage, or is wanting to make an offer of employment prior to receipt of satisfactory pre-employment checks, steps should be taken to avoid making an offer capable of acceptance. Once an offer capable of acceptance is made by the employer and accepted by the prospective hire, the prospective hire is considered "a person intending to work" and thus meets the Employment Relations Act 2000's definition of "employee". Once an "employee", the individual has the right to challenge the withdrawal of the offer by raising a personal grievance for unjustified dismissal.

How to avoid making an offer of employment capable of acceptance

Generally, contract law principles require sufficiently specific terms to be included in a contractual offer for it to be capable of acceptance. In the employment context, this includes anything that could fundamentally impact an individual's decision to accept the offer, such as the duties associated with the role, remuneration, hours, location, and start date.

Based on contract law principles alone, it could be argued that a loose conversation about a possible job opportunity falls short of being an offer capable of acceptance. However, case law provides that a person may still receive an offer capable of acceptance with or without knowledge of all, or any, of the specific terms of the offer. In one judgment concerning whether employees had an arguable case that they were "persons intending to work", the Employment Court made a distinction between the formation of an employment relationship and the formation/articulation of the terms of that relationship. There, the Court found that an

offer of employment, with key terms to be negotiated and the job description finalised, was still an offer of employment capable of acceptance in light of the employers' conduct at the time the offer was made, and after. In another judgment, the Employment Court found that "I will be needing you in a few weeks' time when things get busy" was an offer of employment capable of acceptance by an individual who had performed seasonal work for the employer in the past.

The bar for acceptance of an offer is also relatively low. Acceptance does not require a formal "I accept" statement, but rather can be inferred from the individual's words or conduct. Unless the offer specifically requires acceptance to be indicated in writing, a verbal "I would love the job" will likely be enough to be lawful acceptance. Once the person's acceptance is conveyed, the employment relationship is in effect.

Key takeaway

Ultimately, employers should beware that their words or conduct may amount to an offer capable of acceptance, even if most or all of the terms of employment are still to be figured out. Employers can safeguard against the risk of any verbal communications being misconstrued by either sticking to written communications that make it clear no offer has been made, or alternatively following up verbal communications with a written confirmation to confirm what was said. This saved an employer in the Employment Relations Authority recently, where the applicant failed to prove they had accepted a verbal offer of employment due to the employer having text messages with the applicant which showed he was still progressing through the application process.

Offering employment subject to the results of any pre-employment checks

It's common practice for employers to make an offer of employment subject to obtaining any relevant pre-employment checks (e.g., references, criminal record vetting, visa confirmation or qualification assessments). In the event the results from those checks are unsatisfactory, the employer's ability to withdraw the offer of employment hinges on whether the offer was made conditional upon the checks being satisfactory. If so, the offer of employment is not capable of full acceptance until the condition is fulfilled, and thus the employer can withdraw it without consequence if it isn't.

A recent judgment from the Employment Court is a helpful illustration of how to successfully implement a conditional offer of employment. There, the applicant first received a verbal offer of employment, at which time they were advised a pre-employment check would take place. After the verbal offer, the applicant received the individual employment agreement and an offer letter that advised "this offer is conditional upon satisfactory pre-employment checks specific to the role we're offering you". At that stage, the applicant disclosed his criminal history which would appear on his criminal record to be received by the employer. The employer waited to receive the criminal record before taking any further steps. Following receipt of the criminal record, the employer found the results to be unsatisfactory, and withdrew the offer in writing.

The employee contested the withdrawal in the Employment Relations Authority, and then Employment Court, arguing he was "a person intending to work" and thus entitled to raise a personal grievance for unjustified dismissal. However, the Employment Court rejected that the applicant had attained "employee" status as "a person intending to work", on the basis that the conditional offer was clearly set out and explained to the applicant at the time the offer was made.

Key takeaway

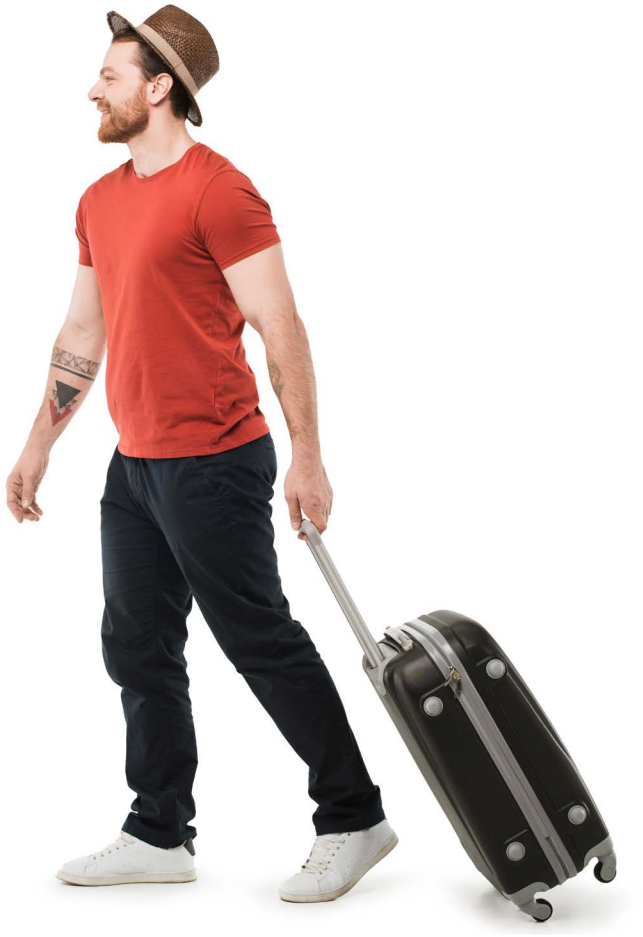
Conditional employment offers are an effective way for employers to securing new talent without fully committing to employing them until any necessary background checks can be made, provided the condition is clearly communicated to the individual receiving the offer.

A conditional offer should be made in writing, otherwise the employers risks the individual claiming there were unaware of the condition, or not provided with a reasonable opportunity to obtain independent advice. Best practice would be to state the condition in a separate cover letter amongst other key terms, however, the Employment Relations Authority has previously found that stating the condition in the individual employment agreement itself is sufficient. It would also be sensible to reiterate the condition verbally to the person to avoid any surprises.

The wording of the condition itself should make clear that the offer is conditional upon satisfactory results from any relevant pre-employment check, and that if satisfactory results aren't received, the employer is entitled to withdraw the offer.

Lucy Gallagher,
Solicitor

Holidays Act Reform



For what seems like an eternity we have been waiting for an overhaul of the Holidays legislation. Employers and Employees want legislation that is easily applied, understood and not at all complex. But the Holidays Act has been a political football since 2011 with no one looking like breaking the deadlock.

The previous Government had set about reviewing the Holidays Act 2003, which was no longer fit for purpose and simply did not recognise the modern way the labour force worked. A Taskforce made 22 recommendations, jointly agreed by Business leaders and Unions. It was anticipated that the new legislation would come into force in early 2023. That never happened, an election did, and now the new Government has set about the unenviable task of trying to implement a set of rules that is both clear and transparent.

The Minister for Workplace Relations and Safety Brooke van Velden says, "Although the previous Government spent many years working on a solution, the advice I have received from officials has led me to the conclusion that there are further opportunities to improve the simplicity and workability of the legislation. In some areas the previous Government's decisions would end up increasing complexity and compliance costs. As a consequence, we now have a commitment to make changes that increase certainty and reduce complexity.

Targeted consultation with the Ministry of Business, Innovation and Employment (MBIE) and key stakeholders is scheduled for September 2024 to consult on a draft Bill with the optimistic hope that by December 2024 we will have a Bill ready for the legislative process. Those timelines seem unrealistic, but we are heading in the right direction. The question is; will the proposed changes bring about sensible and achievable legislation? From what I have read, I have considerable doubt, but until we see draft legislation and consultation has occurred we will not know for certain.

In the meantime, this article sets out some of the key proposals, as they currently stand.

Annual Leave Entitlements

Employees will accrue their four-week annual leave entitlement continuously during employment rather than becoming entitled to annual leave after 12 months' 'continuous employment'. Annual leave is expected to be a weeks-based accrual system accruing at a rate of not less than 0.0768 weeks per week of employment. That already sounds confusing, but it is meant to provide certainty and we are told it will by including a new methodology for determining a week.

There will also be a new 'greater of three' methodology for calculating annual leave payments: Ordinary Weekly Leave Pay (which does not include variable components of pay), quarterly (13 – weeks) and annual average weekly earnings.

Pay as you Go (8%) – Objective criteria will be established in determining eligibility for using pay-as-you-go along with a clear framework for reviewing its use during employment. Pay as you Go will conceivably be allowed for longer periods than the current 12 months.

The requirement to pay annual leave in advance during closedown periods will be removed, but there will be greater transparency around how employees are notified about any closedown periods and they will have access to their accrued annual leave.

FBAPS leave

One of the many criticisms about the current legislation is that we are talking not just about holidays, but also family violence leave, bereavement, alternative, public holidays and sick leave (FBAPS) as well. Some of the key changes in this area include:

- Only one calculation is going to be required, which will comprise four parts: a base rate for wages or salary, plus fixed allowances, plus an average of productivity or incentive payments received, plus the cash value of board and lodgings. That sounds difficult to reconcile;
- Eligible employees will have access to FBS leave entitlements from the first day of their employment;
- For employees eligible for sick leave after 6 months - two days will be available on day one, a further four days after three months, and a further four days after six months;
- The eligibility criteria, we are informed, will be clearer;
- There will be an ability to take part days of FBS leave – proportionate to the time that would have been worked;
- Pro-rating sick leave, proportional to hours of work. This means, for example, that employees who only work 25 hours a week could be entitled to 6.25 sick days a year, while full-time employees will continue to receive the full 10 days; and
- Bereavement leave was not considered inclusive of varied family arrangements or cultural practices so the proposal is to extend the current 3 days.

Gross Earnings

There will be a new definition of gross earnings to provide clarity around which payment types to include. This is important because gross earnings is a fundamental concept in the calculation of leave.

End of Employment Payments

We are going to have only one payment calculation for annual leave when employment ends, rather than the current two. Although no details have been provided of what the calculation may look like.

Sale and transfer of business

Vulnerable employees aside, leave entitlements and the payment/transfer of those will be negotiated between incoming and outgoing employer.

Currently employees are meant to be paid out when a business is sold or there is a transfer, but practically in the majority of situations employees just agree to transfer their leave entitlements as part of any sale or transfer of any business. Going forward employees will be able to agree to transfer their entitlements to a new purchaser.

New Employment Protection clause requires:

- Whether or not employment will be treated as continuous for the purpose of determining the employee's service-related entitlement;
- Whether or not the new employer will recognise all or part of the employee's annual and alternative holiday entitlements not taken or exchanged for payment before the date of transfer (instead of the outgoing employer paying them out in accordance with the Act);
- Whether or not the new employer will recognise all or part of an employee's family violence, bereavement and sick (FBS) leave entitlements not taken or exchanged for payment before the date of transfer; and
- Whether or not, where recognition of annual leave and alternative holiday and FBS leave entitlements is negotiated, an employee will be provided a choice in the matter or it will be automatic if they choose to transfer their employment.

Information about pay and leave entitlements

Currently, there is no requirement for employers to directly inform employees about how their pay and leave has been calculated. There will be a requirement for a "pay statement" in each pay period to provide greater transparency about leave and pay for all employees. For example, how annual leave or FBAPS leave was arrived at.

Returning from parental leave

Currently when an employee returns from parental leave their annual leave is based on their average weekly earnings over the previous 52 weeks. The new payment method removes this 'override' provision so employees returning from parental leave will be paid according to the normal rules for annual leave.

Cashing up leave

An employee will, after the completion of the first 12 months of employment, be able to request to exchange up to one week of accrued annual leave entitlement for payment in each subsequent 12-month period.

Summary

What we know about the current proposed changes only reinforces how much uncertainty still needs to be resolved if we are going to get an Act that is truly modern and reflective of the way we work. Time will tell if the legislation can be made workable.

Malcolm Couling,
Special Counsel

Potential law reform – should gender be a protected ground under the Human Rights Act?

We are increasingly being asked to advise on issues involving the crossover of employment law and human rights or anti-discrimination laws. One question we get is whether gender, or gender identity, is a prohibited ground of discrimination in the Human Rights Act 1993 (HRA), and thus whether an employee discriminated against because of their gender can bring a discrimination claim pursuant to the HRA.

The New Zealand Law Commission has recently published an Issues Paper – Ia Tangata – a review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people who have an innate variation of sex characteristics – which deals with this particular point and a number of other related issues. The Issues Paper calls for feedback on proposed reform to New Zealand's anti-discrimination laws intended to better protect people who are transgender, non-binary, or have an innate variation of sex characteristics.

One of the recommendations in the Issues Paper is that the HRA is amended to explicitly protect people from discrimination that is linked to the fact that they are transgender, non-binary, or have an innate variation of sex characteristics. The Issues Paper explores how this could be achieved, including whether additions to the list of prohibited grounds of discrimination in the HRA should be made to specifically include that being transgender or non-binary or having an innate variation of sex characteristics is covered. The Issues Paper also explores whether any exceptions in relation to employment should apply.

What does the law currently say?

While gender is not a prohibited ground of discrimination in the HRA, sex is. The HRA does not define sex, so to ascertain whether sex includes gender for the purposes of the HRA, we look to guidance from the Human Rights Commission and case law, and a 2006 opinion from the Acting Solicitor General – Crown Law Office.

Acting Solicitor General – Crown Law Office opinion

In 2005, the question arose as to whether sex as a prohibited ground of discrimination also prohibits discrimination on the basis of gender. This was in the context of a private member's bill which sought to add "gender identity" as a prohibited ground of discrimination to the HRA.

During the review stage of the bill, the Attorney-General sought the opinion of the Crown Law Office as to whether prohibition of discrimination on the grounds of gender identity is already provided for in the HRA through the prohibition of discrimination on the grounds of sex.

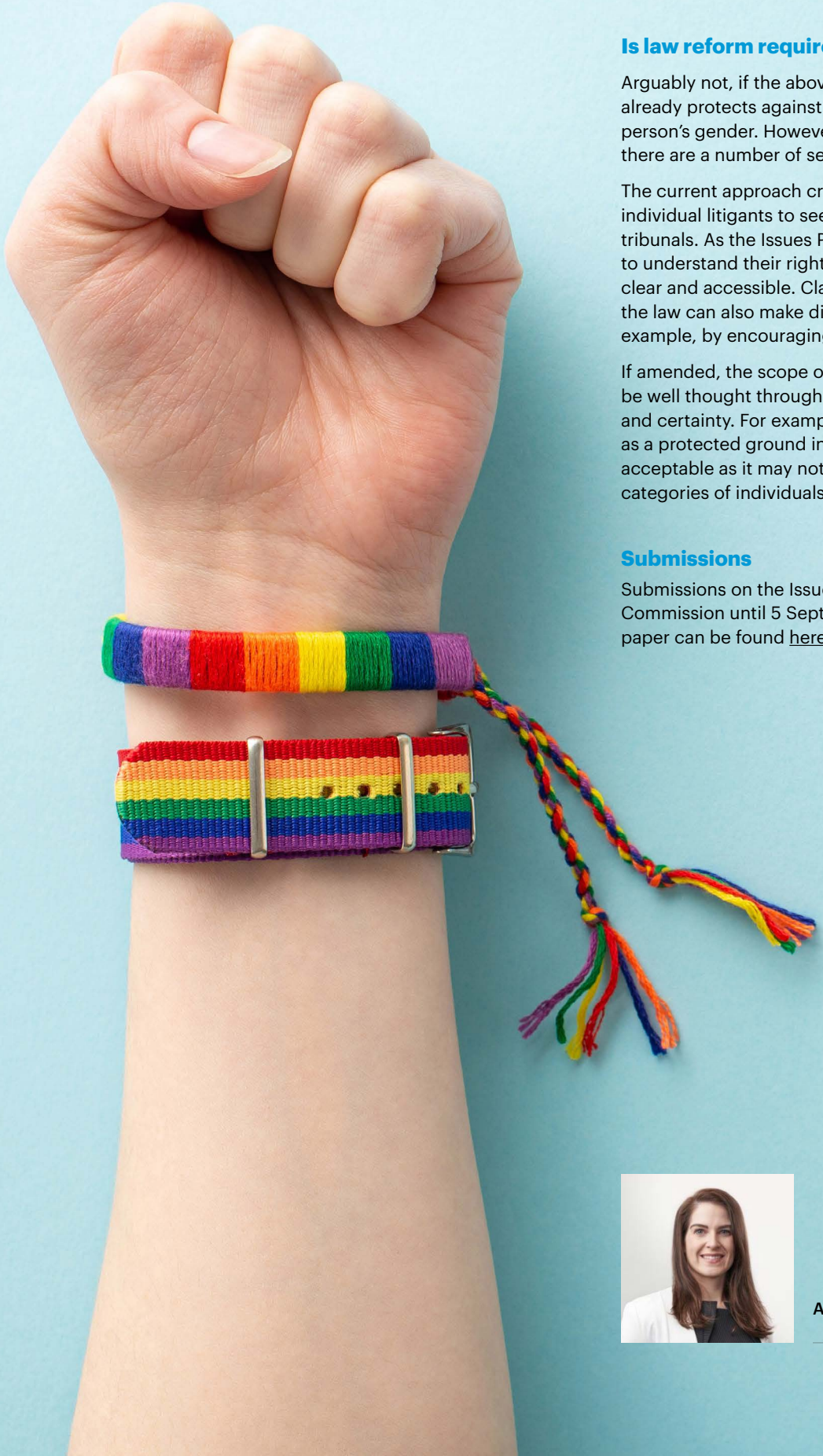
The Crown Law Office said yes – the opinion of the Acting Solicitor General was that sex as a prohibited ground of discrimination includes gender, and therefore no amendment to the HRA to include "gender identity" was necessary.

Human Rights Commission

The Human Rights Commission's approach is consistent with the Crown Law Office's opinion. It accepts complaints linked to discrimination based on gender identity, because such discrimination amounts to discrimination based on "sex" as referred to in the HRA. The HRC does, however, consider that this needs to be clearer.

Supreme Court guidance

Further, while whether sex as a prohibited ground of discrimination includes gender has not yet been directly tested by the courts, the Supreme Court has referred to sex and gender interchangeably when listing the grounds of discrimination prevented under the HRA (Air New Zealand Ltd v McAlister [2009] NZSC 78, [2010] 1 NZLR 153 at [43]).



Is law reform required?

Arguably not, if the above position is correct that the HRA already protects against discrimination on the basis of a person's gender. However, as the Issues Paper points out, there are a number of sensible reasons for reform.

The current approach creates uncertainty, requiring individual litigants to seek guidance from the courts or tribunals. As the Issues Paper notes, "People are more likely to understand their rights and obligations when the law is clear and accessible. Clarity, certainty and accessibility of the law can also make dispute resolution more efficient, for example, by encouraging early settlement."

If amended, the scope of the protections being afforded can be well thought through and defined, again to provide clarity and certainty. For example, a simple addition of "gender" as a protected ground in s 21 HRA may not be desirable or acceptable as it may not be specific enough to include all categories of individuals it is designed to protect.

Submissions

Submissions on the Issues Paper can be made to the Law Commission until 5 September 2024. A full copy of the paper can be found here.

AJ Lodge, Partner

Employment Relations Authority found pregnant employee's resignation to be a constructive dismissal

An employee who resigned after 'repeatedly putting her employer on notice of her need for some flexibility, and the medical issues she was facing in relation to her pregnancy,' has recently been awarded $20,000 for a successful constructive dismissal claim

Facts

Ms Caldeira was employed by LCNZ Ponsonby Pty Limited, (which trades as Laser Clinic Ponsonby) (**LCNZ**), as a part-time beauty therapist.

Ms Caldeira's employment agreement provided that her hours of work would be set by a roster, notified to her at least 14 days in advance. It stated she would be provided with an average of 15 hours per week.

A few weeks into working for LCNZ, Ms Caldeira found out she was pregnant. She advised LCNZ.

When another staff member resigned, Ms Caldeira asked if she could pick up one of the resigning employee's shifts. She was given an extra shift on Mondays. From then on, she worked three days a week on Sunday, Monday and Wednesday. Her usual hours went from about 15 hours a week to about 24 hours.

A few months later, Ms Caldeira raised concerns that she had not been treated fairly or equally to her colleagues, especially compared to a therapist who was also pregnant at the time. She said that the issues were impacting her health and wellbeing.

Ms Caldeira said that her pregnancy was high risk for herself and her baby, and that she had mental health issues. She stated that although she was not being paid for days she was sick (as she was not yet entitled to sick leave), she was questioned or shamed about being sick, or given cold and sharp treatment. She said she was made to feel uncomfortable and guilty for feeling unwell.

Ms Caldeira said she had asked if she could start her shift at 10am, referring to the traffic in the morning, and that her morning sickness was worse in the morning, but she received a negative response.

Ms Caldeira met with management to discuss her concerns, however she was not satisfied her issues had been addressed.

The following month, Ms Caldeira text her manager to inform her that she did not sleep, and would get to work at 10am. A text exchange followed whereby the manager expressed their dissatisfaction with Ms Caldeira's message, that she was required to be at work, and reminding her of her employment agreement. Ms Caldeira forwarded a letter from her midwife which stated that the midwife supported her to take some time off work as she was feeling unwell.

The next day, Ms Caldeira found out she was no longer rostered to work Mondays. She saw this as punishment for the incident the day before, and raised her concerns with management.

Ms Caldeira and her partner attended a meeting with management. During the meeting, Ms Caldeira's partner read out a statement on Ms Caldeira's behalf. This stated the sudden decrease in hours felt like a punishment, and that Ms Caldeira's sickness was genuine. It outlined how pregnancy had been hard on her for certain stated medical reasons, and because she had consistent morning sickness and nausea. It referred to Ms Caldeira's previous request for a bit of flexibility and the option of starting at 10am. It outlined that she feared an unworkable environment was being created which may force her to quit.

That night, Ms Caldeira applied for a job at another LCNZ clinic.

The following day, Ms Caldeira verbally resigned. She followed the verbal resignation up with an email the following day stating that the situation and unfair treatment had forced her to resign, and the reason was that she requested flexibility to start shifts at 10am due to issues with her pregnancy, and that if that had been arranged, she would not have lost days of work and would feel able to attend.

Employment Relations Authority

Ms Caldeira claimed that she had been constructively dismissed.

One recognised category of constructive dismissal is where the resignation is caused by the employer's breach of duties owed to that worker. The resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee that a worker would resign rather than put up with such breaches. The Authority commented that it appeared Ms Caldeira considered this category applied to her situation.

The Authority commented that although Ms Caldeira had not yet become entitled to paid sick leave, as a pregnant female employee, she was entitled to take up to 10 days' unpaid special leave for reasons connected with her pregnancy under the Parental Leave and Employment Protection Act 1987 (**PLEPA**).

There was no evidence that LCNZ considered its obligations under PLEPA. The Authority stated that special leave could have potentially been taken in half days, or even smaller segments for things such as doctors' appointments, illness related to the pregnancy, or even tiredness. Ms Caldeira had not framed her texts as constituting a request for special leave, however the Authority stated that as an employer, LCNZ ought reasonably to have been aware of her entitlements and facilitated special leave.

LCNZ submitted that care should be taken in interpreting the text messages between the manager and Ms Caldeira, as English was neither of their first languages. The Authority accepted that, however stated that even allowing for it, objectively, how the manager responded was not the actions of a fair and reasonable employer.

The Authority did not consider the parties had reached agreement that Ms Caldeira's hours would permanently increase to include Mondays. However, that LCNZ should have, in good faith, first consulted with Ms Caldeira before making the significant roster change it did. The Authority found it was more likely than not that the change was informed by the manager's concerns of Ms Caldeira's habit of being "perpetually late".

The Authority also commented that LCNZ did not give the 14 days' notice of the roster change as required by the employment agreement.

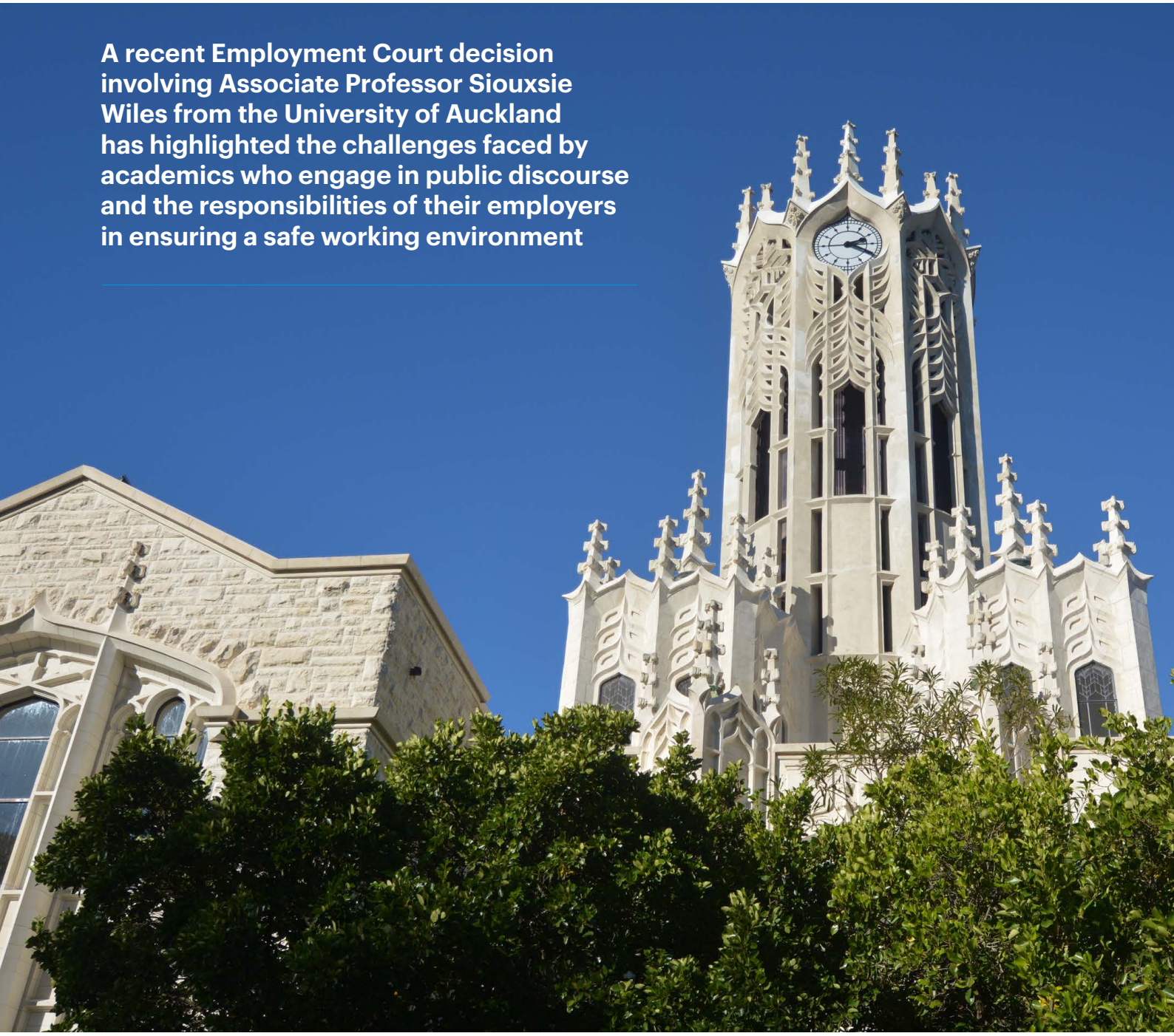
The Authority was satisfied that LCNZ's breaches were sufficiently serious to make it reasonably foreseeable that Ms Caldeira may resign. Ms Caldeira repeatedly put LCNZ on notice of her need for some flexibility and the medical issues she was facing in relation to her pregnancy. Ms Caldeira's experiences with management demonstrated that nothing was likely to change. The Authority said that Ms Caldeira's unmet requests for understanding and flexibility for pregnancy-related reasons fell on deaf ears, and she was suddenly met by an abrupt reduction in days of work.

The Authority held that Ms Caldeira's resignation was an unjustified constructive dismissal. She was awarded $20,000 compensation.

Kelly Thompson,
Solicitor

Siouxsie Wiles case highlights employer's health and safety obligations

A recent Employment Court decision involving Associate Professor Siouxsie Wiles from the University of Auckland has highlighted the challenges faced by academics who engage in public discourse and the responsibilities of their employers in ensuring a safe working environment



As the COVID-19 pandemic arrived in New Zealand, a small number of academic experts became well known in the media. Siouxsie Wiles was perhaps one of the most prominent. Wiles provided a significant amount of commentary and expert advice on the COVID-19 pandemic for mainstream media platforms.

However, this visibility also subjected Wiles to severe harassment, via email, social media and in person. She was also "doxed", with her personal information being posted on an anti-government website. These threats escalated significantly during key pandemic events, such as vaccine rollouts and lockdowns.

Wiles regularly reported the harassment to the University. In June 2021, the University advised Wiles and the other academics that they should consider pulling back from COVID-19 commentary and that providing such commentary did not form part of their jobs. In July 2021, the University arranged for an external provider to undertake a security and safety audit. It wasn't until October 2023 that the all recommendations in the report had been actioned. Wiles was supportive of the recommendations of the report, but was concerned about the speed of implementation and the fact that there was no individual risk assessment for staff experiencing harassment.

Alongside the health and safety issues Wiles was raising, the University had its own concerns about the wide range of activities Wiles was carrying out in her private capacity including as a "celebrity speaker" engaged through a talent agency.

Legal issues

Wiles raised a number of claims against the University. Wiles argued that the University failed to provide a safe working environment, thereby breaching its health and safety obligations. She also argued that the University did not engage in constructive dialogue regarding her safety, violating its statutory duty of good faith. Wiles also asserted that the University's suggestion for her to minimise public commentary infringed upon her academic freedom. Lastly, she believed the University's actions hindered her ability to fulfil responsibilities to Māori, breaching Te Tiriti obligations and resulting in disadvantage.

The Court's decision

The Employment Court acknowledged the difficult context in which the University and its staff were operating and that it was under pressure. However, it found the University's response to the harassment insufficient and too slow.

The Court noted that abuse of academics is not new and the risk was well recognised. Despite that, the University did not have a well-developed strategy for dealing with that risk. While it was reasonable for the University to have consulted with Wiles over steps that she might wish the University to take, the onus was on it to obtain the right advice and put in place a plan proactively. The Court concluded that the University failed to provide adequate protection and support, breaching its health and safety obligations. While it did make some efforts, these were ultimately insufficient and reactionary. Simply telling Wiles and her colleagues they should stop providing commentary on the pandemic was not reasonable.

The Court also found that the University breached its statutory duties of good faith and its contractual obligations to act as a good employer. The Court held the focus on Wiles' alleged outside activities was misplaced and the correspondence from the University was aggressive and unreasonable, exacerbating Wiles' distress rather than alleviating it.

However, the Court did not find substantial evidence that the University's actions impeded academic freedom or that Wiles' claims regarding Te Tiriti were made out.

Compensation and remedies

The Court declared that the University breached its contractual obligations to protect Wiles' health and safety and its statutory duties of good faith. It awarded general damages of $20,000 to Wiles for the unjustifiable disadvantage and general damages for breach of contract. The Court did not impose additional penalties, as it found the University's actions were not deliberate or intended to undermine the employment relationship. The Court noted Wiles was still undertaking her work and there was no medical evidence of any serious or ongoing health consequences. That limited any damages or compensation due.

Implications for employers

This decision highlights the importance of proactive and adequate measures to protect employees from psychosocial health and safety risks, including harassment by members of the public. Employers must ensure robust health and safety protocols are in place and maintain constructive engagement with employees where these risks are at play.

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