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Vital.

Employment & Immigration News

anderson lloyd.

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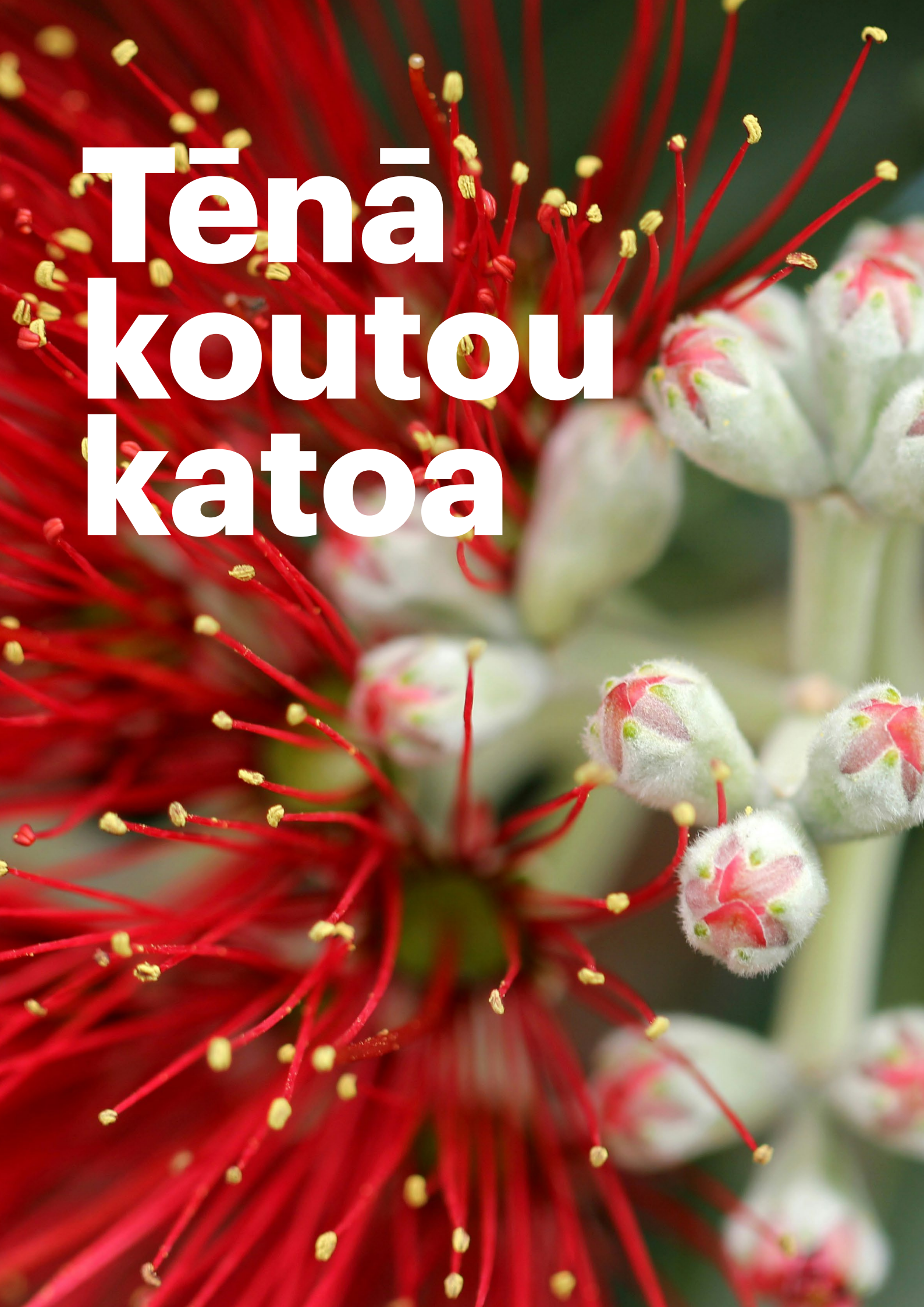

Tēnā
koutou
katoa

Welcome to the final edition of Vital. for 2024.

This year has seen a number of exciting and interesting developments in both employment and immigration law, and we anticipate this will continue into 2025 as the government ramps up changes in the workplace relations space.

We are likely to see a draft of the proposed changes to the Holidays Act, alongside potential changes to the personal grievance space, amendments to health and safety legislation, and a new test to distinguish between employees and contractors (and potentially resolve the longstanding Uber debate – are drivers employees or contractors?).

In this edition we have two alerts in the immigration space, we look at how to provide a mentally healthy workplace in 2024, we explore the proposed gateway test for determining whether an worker is an employee or contractor, and we discuss the limitation period for raising personal grievances. We also take a look at the changes to the rules around roadside drug testing, and explore contributory conduct and whether the changes signalled by the government are required.

As 2024 draws to a close, we wish you and your whanau a very happy holiday season. Stay safe, and we'll see you in 2025.

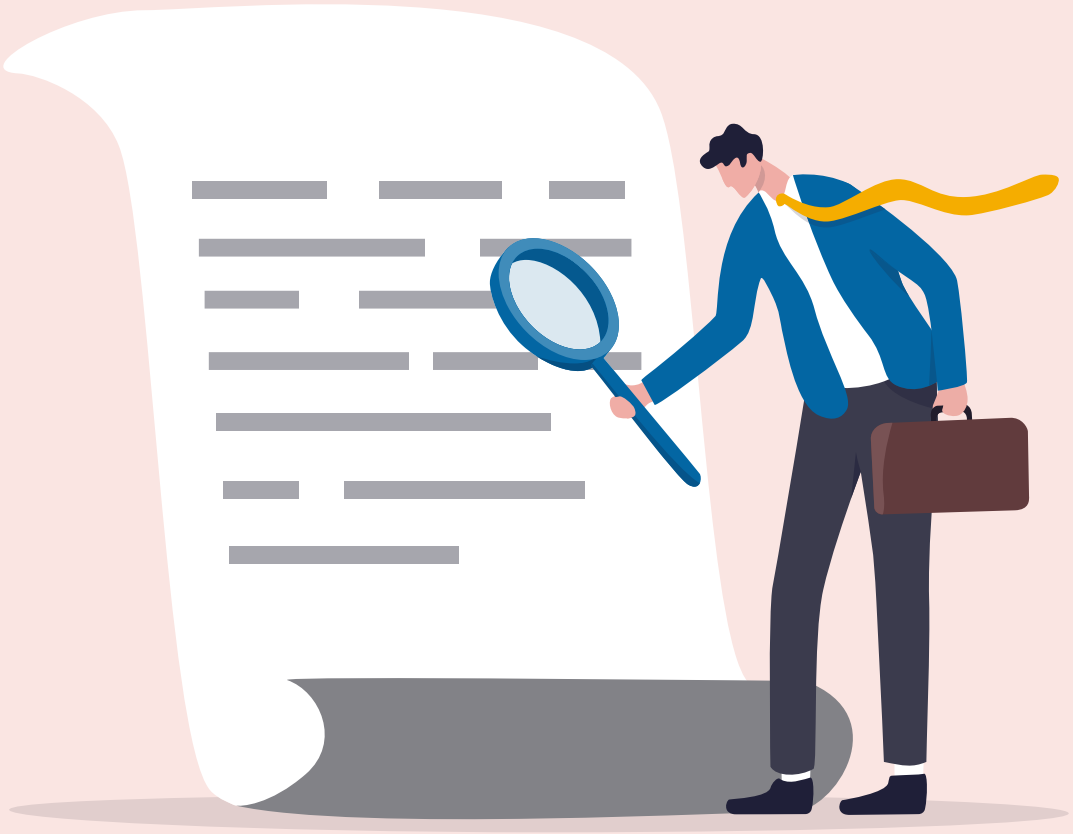
Ngā mihi

AJ Lodge, Partner

John Farrow, Partner

New gateway test to be introduced for determining whether a worker is a contractor or employee

The Workplace Relations and Safety Minister has signalled upcoming changes to the Employment Relations Act 2000.



On 15 September 2024 the Workplace Relations and Safety Minister (WRS Minister) said there would be upcoming changes to the Employment Relations Act 2000 (Act) to provide a new test to determine whether a worker was a contractor or employee.

Those upcoming changes would be to have a gateway test into the Act, which would be used by workers and businesses in determining whether a worker was an employee rather than contractor. If all factors in the gateway test were met, the worker would be considered a contractor.

Criteria in the gateway test

The criteria under the gateway test would be:

- a written agreement with a worker, specifying that they are an independent contractor;
- the business does not restrict the worker from working for another business (including competitors);
- the business does not require the worker to be available to work on specific times of the day or days, or for a minimum number of hours; OR the worker can sub-contract the work; and
- the business does not terminate the contract if the worker does not accept an additional task or engagement.

Business uncertainty

The WRS has commented that the current process for workers challenging their employment status through the courts can be costly for businesses and increase business uncertainty in general. The purpose of the upcoming changes would be to address and remedy those uncertainties.

Current law on the contractor and employee distinction

Recently, the law on determining whether a worker is a contractor employee has been tried before the Employment Court and Court of Appeal.

In 2022, Chief Judge Inglis of the Employment Court issued a decision that found four Uber drivers were in an employment relationship when carrying out work in driving for Uber – i.e. not a contractor (E TŪ INC v RASIER OPERATIONS BV LTD & ORS [2022] NZEmpC 192)

The Court of Appeal heard the appeal of that decision and in August 2024, concluded that the findings in the Employment Court's decision were correct (RASIER OPERATIONS BV v E TŪ INC [2024] NZCA 403).

These conclusions were reached with reference to the existing legal test for distinguishing employees from contractors, found in section 6 of the Act.

Current legal test under the Act

The legal tests that the Employment Relations Authority and Employment Court refer to in determining whether the true nature of the relationship is one of employment include:

- the intention test: the type of relationship the parties to the contract intended. This can normally be worked out from the wording in parties' written agreement (if there is one);
- the control vs independence test: the greater the control exercised over the worker's work content, hours, and methods, the more likely it is that a person is an employee;
- the integration test: this looks at whether the work performed by a person is fundamental to the employer's business; and
- the fundamental/economic reality test: this looks at whether the contractor is a person in business on their own account.

Next steps

The WRS Minister has said that these changes are expected to be reflected in an Employment Relations Amendment Bill introduced to Parliament in 2025.

- the public will have the opportunity to make submissions on that bill after it has been introduced to Parliament and passed its first reading. There will be significant interest from trade unions and business advocacy groups.

James Cowan, Senior Associate

Zoe Hollander, Senior Solicitor

Providing a mentally safe workplace in 2024

2024 has been a big year for the topic of mental health in the workplace, with several decisions out of the employment jurisdiction attracting media attention. We summarise some of those decisions and their significance in this article as a chance for employers to reflect on their obligations in this space.

Cronin-Lampe v The Board of Trustees of Melville High School

The Employment Court judgment

The Employment Court's ruling in *Cronin-Lampe v Board of Trustees of Melville High School* (No 2) [2023] NZEmpC 221 caught the eyes of many for the staggering $1.78 million awarded to the two plaintiffs: Mr and Mrs Cronin-Lampe, who were school guidance counsellors. The award stemmed from their employer, Melville High School (**the School**), failing to comply with its duty to provide them with a safe workplace.

The Cronin-Lampes were diagnosed with Post-Traumatic Stress Disorder in 2012, which the Employment Court accepted was as a result of their employment. In the preceding 15 years, the pair provided extensive guidance and counselling services to the School's community in relation to 32 student and community deaths – the majority by suicide. This work included visiting students and whanau offsite, officiating funerals, being contactable around the clock, and providing ongoing efforts in the School's long-term response to the volume of tragic events.

Shortly after their diagnosis, the Cronin-Lampe's were ruled medically unfit to work, and their employment ended for medical retirement. 12 years on, their claim that the School fell short of its duty to provide them with a safe workplace was successful.

In making that finding, one of the Employment Court's key concerns was that the School took no steps to implement a health and safety plan for identifying the hazards and risk to the pair's mental health as a result of the nature and volume of their work, and to that end, managing the reasonably foreseeable risk to the pair's mental health as a result of the nature and volume of their work during their tenure.

The School argued the Cronin-Lampes did not sufficiently "spell out" their concerns so as to put the School on notice of risk to their mental health. This argument carried little weight in the context of the School's pleadings that it had complied with its own health and safety duties. Rather, the Court reiterated the well-established principle that the School's knowledge of reasonably foreseeable harm to its employees is not only established based on what the employer actually knew (i.e., as a result of the employee telling them), but also what it ought to have reasonably known. The circumstances were enough in and of themselves to make it clear to the School that harm to the Cronin-Lampe's mental health could reasonably result in the absence of reasonable monitoring and management.

The appeal

In August 2024 the Ministry of Education (whom since the Employment Court's decision have taken control of School's affairs following its closure) successfully sought leave to appeal the Employment Court's judgment in respect of its findings as to remedies awarded; specifically in relation to the Cronin-Lampe's contribution to and mitigation of their loss arising from the harm caused during and after their employment (*Minister of Education v Cronin-Lampe [2024]* NZCA 382).

Pending the Court of Appeal's judgment, the Employment Court decision is still a decision worth nothing for what it says about employers' obligations in respect of providing employees with mentally safe workplace. It is not on the employee to "spell out" concern for their mental health as a result of their work where the employer ought to be aware of it in the circumstances anyway. There is no room for turning a blind eye.

Wiles v The Vice-Chancellor of the University of Auckland

Wiles v Vice-Chancellor of the University of Auckland [2024] NZEmpC 123 also caught the eye of the public earlier this year given the involvement of high-profile employee, Siouxsie Wiles. Associate Professor Wiles was (and still is) an Associate Professor at the University of Auckland, working within the Faculty of Medical and Health Sciences. Her role involved research and teaching, and also public commentary in the media from time to time.

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Associate Professor Wiles became known to many through her public commentary during the COVID-19 pandemic. She was particularly good at simplifying complex scientific facts about the virus into information the general public could understand, and so she often appeared on the news, radio, and other media streams for that purpose.

Unfortunately, given conflicting ideas amongst the general public on how New Zealand could best respond to the pandemic, Associate Professor Wiles was subject to significant harassment both online and in person. This included threatening emails and social media messages; her phone number, email address, home address and photo of her home were all posted on a website opposed to the government's response, and she was harassed in person at the University campus.

Fearful for her physical safety and under an immense amount of stress, Associate Professor Wiles raised concerns with the University. She asked for a plan for responding her personal information being leaked online, as well as for managing ongoing harassment.

The University's response to Associate Professor Wiles, as well as other academics who were subject to the same sort of behaviour was to say stop engaging in public commentary about COVID-19. This was based on the University's position that if a hazard cannot be managed or limited, then the only option is to stop engaging in the hazard altogether.

Thinking that more could be done to manage the issue, Associate Professor Wiles raised both a personal grievance and a contractual claim alleging the University had breaches its health and safety obligations.

Associate Professor Wiles' claim led to the University engaging an external safety and security audit which produced a draft implementation plan for Associate Professor Wiles' feedback. Associate Professor Wiles gave feedback that an individual risk assessment was required for herself and each other affected member of staff on the basis of individual risk factors. For example, gender-based harassment towards female academic staff was a known risk at the University.

The University acted on Associate Professor Wiles' feedback and an individual risk assessment was carried out by KPMG. The implementation plan and external audit was finalised once that was to hand, and the University accepted all recommendations.

By that point Associate Professor Wiles' claims were before the Employment Court. While a positive outcome appeared to be achieved in terms of ensuring Associate Professor Wiles' mental and physical wellbeing, the Court criticised the road taken to get there. The Employment Court disagreed with the University's initial response that the best way to keep Associate Professor Wiles and other academics safe was to tell them to stop providing online commentary about COVID-19. The Court said that, while it accepted the University's intention was to reduce the risk of adverse consequences in doing so, this was an unreasonable instruction; there were alternative options available for mitigating the risk to Associate Professor Wiles' health and safety.

Further, the Employment Court noted that public commentary was part of Associate Professor Wile's job as an academic. The University therefore should have been putting in place a proper strategy to enable her and other staff to continue with that aspect of their role in the context of the pandemic.

The Court was also critical of the speed at which the University took steps to keep Associate Professor Wiles safe from ongoing harassment. It said that the University should have moved more quickly to put measures in place to protect and support Associate Professor Wiles, noting that the external audit was not commenced until mid-July 2021, despite Associate Professor Wiles first raising concerns with the University in March 2020.

Ultimately the Court accepted the University had made efforts to comply with its obligations to keep Associate Professor Wiles both mentally and physical safe at work, but those efforts fell short of the standard required. To that end, the decision illustrates the importance of employers acting in a timely manner when mental health concerns are raised by an employee.

The case is also notable for the importance of assessing risk to an employee's mental health on an individual specific level. An assessment for a group of staff at risk of mental health is unlikely to discharge the employer's obligations where different risk factors for different staff are at play. Employer's should be asking themselves: what individual risk factors exist for the individual employee (e.g., personal circumstances, gender, age, disability), and what steps should be taken to minimise or eliminate harm in light of those individual risk factors?

Perry v The Warehouse Group Limited

Perry v The Warehouse Group Limited [2023] NZERA is another notable decision to come out of the employment jurisdiction in the last year, as it squarely deals with the issue of employee burnout.

Stephen Perry began working for The Noel Leeming Group (NLG) in 2019 as an Education Specialist. In June 2020, NLG underwent a restructure where Mr Perry's role was not formally affected, but a consequence of the restructure was that after-sales support was removed. His workload, and by extension, his work-related stress, increased as a result.

Mr Perry first raised concerns about this during both his performance review and a separate team meeting in the second half of 2020.

TWG then merged with the Noel Leeming Group (NLG) and further additional tasks were added to Mr Perry's role without consultation. For example, he was now required to cross-sell warehouse stationary products to customers.

By that stage Mr Perry was experiencing severe medical symptoms relating to his stress, and in turn he raised concerns of burnout with this employer in mid-2021. He specifically told his employer he was "burnout out" and "broken by the workload", but Mr Perry's manager disagreed that Mr Perry's workload was excessive. In turn, the employer encouraged Mr Perry to access EAP support and offered him additional leave "off the books" to manage his symptoms.

Mr Perry later resigned in November 2021. In the same email, Mr Perry raised a personal grievance for constructive dismissal on the assertion that he had to resign as a result of mental burnout caused by his employer's actions.

The Employment Relations Authority considered that the third category of the constructive dismissal categories (in Auckland Shop Employees IUOW v Woolworths (NZ) Ltd CA150/84, 3 April 1985) was relevant – being a breach of a duty by an employer that causes an employee to resign.

The Authority said a breach under this category must be repudiatory as opposed to merely inconsiderate or causing unhappiness and there must be a causal link between it and the tendering of the resignation. The possibility of resignation in response should be foreseeable. The Authority said that Mr Perry had made it clear he was considering resigning.

While the employer had taken some steps to alleviate pressure such as allowing leave on pay "off the books", the Authority considered a fair and reasonable employer with the resources of a large employer would have taken more formal and proactive steps to understand Mr Perry's mental health situation. In other words, his employer had offered support, but had not addressed the underlying workload and stress issues.

This determination is a good example of an employer not doing enough to meet its obligations in relation to an employee's mental health and wellbeing where burnout concerns have been expressly raised. The determination is silent as to whether it was reasonable for the employer to disagree with Mr Perry that his workload was excessive. Instead, the Employment Relations Authority's criticism centred on the employer's failure to take steps to further explore Mr Perry's feelings stress and/or burnout with the assistance of medical advice. This is a key learning for employers with staff claiming stress or burnout which, at least from the employer's perspective, may be questionable.

Lucy Gallagher,
Solicitor

Immigration Alert:

Changes to partner work rights

Background

Currently, most partners of Accredited Employer Work Visa (AEWV) holders are granted conditional work visas, allowing work at median wage or higher for an accredited employer only. Exceptions are in place for partners of AEWV holders working in Green List roles, or earning at least double the median wage.

Update

From 2 December 2024, more partners of migrant workers will receive open work visas. This will include:

- partners of AEWV holders working in an ANZSCO Level 1-3 role earning at least $25.29 an hour.
- partners of AEWV holders earning at least $25.29 an hour if they were already supporting a partner for a work visa on 26 June 2024.
- partners of AEWV holders working in an ANZSCO Level 4-5 role:
  - earning at least NZD$47.41 an hour; or
  - earning at least NZD$31.61 an hour in a Green List role, having met the Green List requirements for the role; or
  - earning at least NZD$25.29 an hour, having met the requirements of a role in the Transport or Care Sector Agreements (or the wage specified in the sector agreement; whichever is higher).
- partners of Essential Skills Work Visa holders earning at least $25.39 per hour.

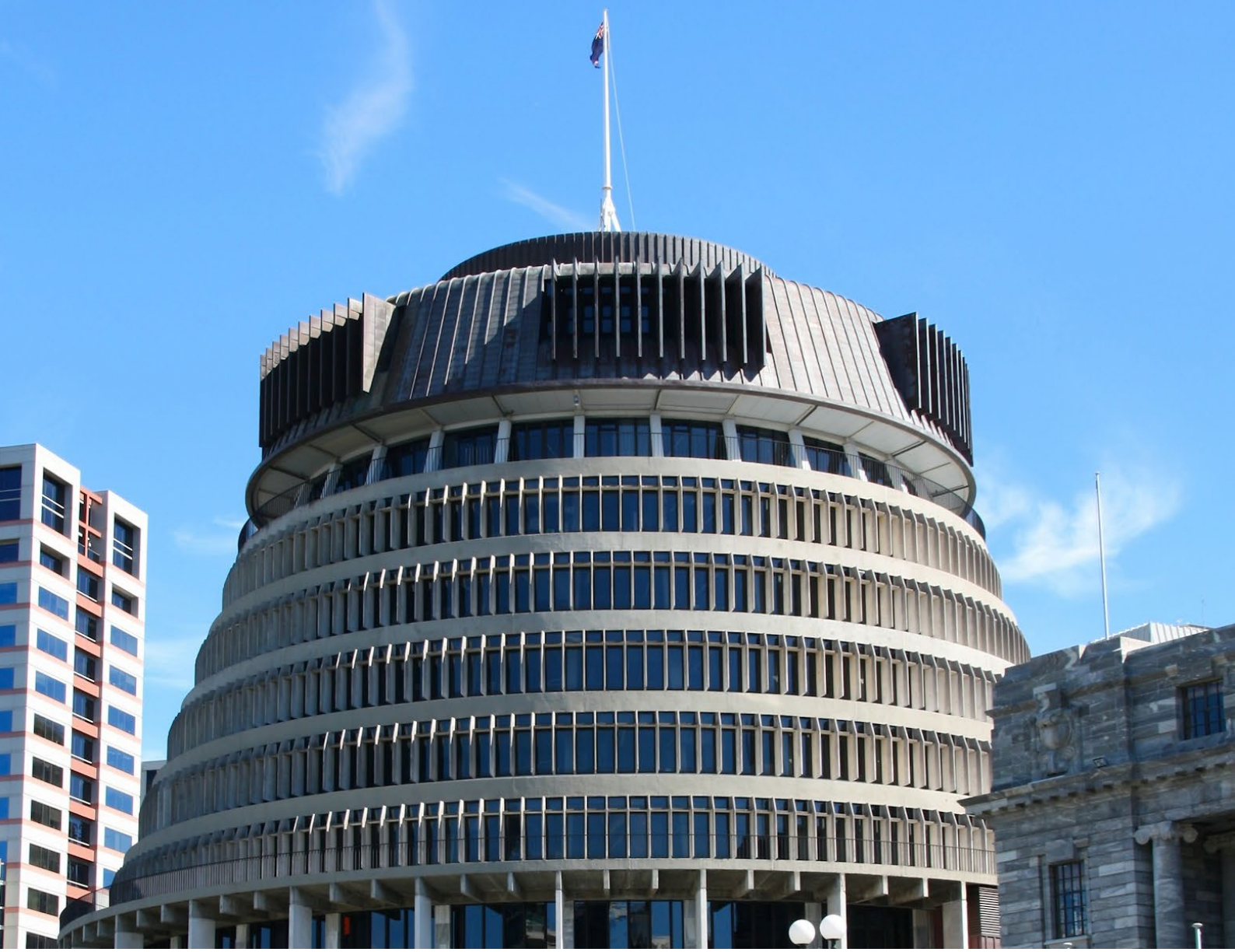
Eligible partners on conditional work visas will be able to vary these to open work rights.

Our thoughts

Many partners of migrant workers have found it difficult to find employment that meets the current median wage and accredited employer requirements. Removing these restrictions is a welcome update and will help New Zealand attract the skilled workers that it needs.

Tash Rae,
Senior Associate

Contributory conduct in 2024 – change signalled by Government, but is it needed?



In November 2023, the newly elected government outlined the priorities for its thee-year Parliamentary term in two coalition agreements – one between the National Party and the New Zealand First Party, and another between the National Party and the ACT Party.

While both agreements set out a number of policies aimed at improving workplace relations, the National-ACT agreement in particular made several policy commitments intended to simplify the resolution of employment disputes – at least for employers.

Relevant to this article in is National and ACT's commitment to "consider simplifying personal grievances and in particular removing the eligibility for remedies if the employee is at fault".

In March 2024, Hon Brooke van Velden, Minister for Workplace Relations and Safety, expanded on motivation behind the policy. She claimed that the current legal framework encourages employees to raise a grievance "even where their behaviour has contributed to the employment relations problem." She added that "vexatious employees … can impose significant legal costs on businesses and impact their reputation."

Many practitioners reading this may be casting their minds back to their own encounters with vexatious employees. It is true that vexatious claims can be devasting to businesses, both from a financial and reputational perspective. However, not all employees who have contributed in some way to their predicament are vexatious, and nor are all employers in the same predicament squeaky clean.

Almost a year into the government's electoral term, we are yet to see any movement in relation to this particular policy. At this stage we can therefore only speculate as to how the policy would operate in practice, including how being "at fault" would be the determined, and what would occur where both parties played some part on the breakdown of the relationship (which is often the case).

In any event, we would posit that such a law change is not required given the law in this space is relatively settled and clear, and already allows the employment institutions to reduce, to nothing if appropriate, remedies payable to an employee for contributory conduct. There is the statutory ability in s 124 of the Employment Relations Act (ERA) to reduce remedies for contribution, and the scope of that power has been examined by Court on a number of occasions.

The current approach as set out in Xtreme Dining t/a Think Steel v Dewar [2016] NZEmpC 136

In Xtreme Dining t/a Think Steel v Dewar [2016] NZEmpC 136, a full bench of the Employment Court cemented the Authority and Court's power to "extinguish" remedies payable to an employee, where the circumstances justify it.

The Court confirmed that it and the Authority have the ability to make no award for remedies under s 123, despite the existence of a personal grievance, where the employee's conduct is "so egregious" so as to warrant such a decision in accordance with equity and good conscience.

Background

In 2015, the Authority found Mr Dewar had been unjustifiably dismissed after his employer, Xtreme Dining, failed to run a full and fair investigation prior to dismissal, and unreasonably concluded Mr Dewar had engaged in serious misconduct. Mr Dewar was awarded lost wages and compensation for hurt and humiliation. The Authority then reduced Mr Dewar's awarded for compensation from $12,000 to $10,000, in recognition of his contributory conduct.

In 2017, Xtreme Dining brought a non-de novo challenge in the Court in relation to the remedies awarded by the Authority. One of several arguments Xtreme Dining advanced was that the Authority did not go far enough in reducing Mr Dewar's award for contribution.

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The general approach to s 124

In considering this argument, the Court took the opportunity to clarify the general application and effect of s 124 ERA. Section 124 empowers the Authority and Court to reduce any remedy it awards where the employee contributed to the situation which gave rise to their personal grievance:

> ***124 Remedy reduced if contributing behaviour by employee***
>
> *Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,–*
>
> *(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*
>
> *(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

The Court noted that consideration of s 124 does not come into play until:

1. a personal grievance is established, and, if so;
2. applicable remedies are fixed under s 123.

Fixing of remedies comes first, and then consideration of contribution; not the other way around.

The Court then turned to consider s 124 itself, which requires the Authority or Court to consider the extent to which the employee's actions contributed to the situation that gave raise to the personal grievance, and, if required, reduce the remedies accordingly.

The Court emphasised the importance of proportionality in this exercise. An employee may be at fault, but such fault may not be so significant so as to justify their dismissal or disadvantage. The employee's conduct must be "culpable" or "blameworthy", and causally connected with the situation that gave rise to their grievance.

Complete extinction for contributory conduct?

The Court then embarked on an analysis of whether s 124 gave the ability to reduce remedies by 100%, or effectively extinguish remedies.

With reference to previous case law out of New Zealand and the United Kingdom, the Court concluded it could not have been Parliament's intention for s 124 to require the fixing of remedies, if that could then be followed by a decision that those remedies should not be awarded at all.

The Court found the more logical way to deal with such egregious contributory conduct by an employee is to not fix any remedies under s 123 in the first place. In making this finding the Court endorsed dicta from Wilmshurst v McGuire (t/a California Sun & Beauty Studio) [1999] 2 ERNZ 128 (EmpC):

> … If the employee has behaved in a way that is strongly causative of the situation that gave rise to the personal grievance, and that behaviour was reprehensible in a way that is relevant to the employment relationship and was known to the employer before dismissing the employee, so that it can be said that but for the employees bad behaviour the employer probably would not have considered dismissing the employee, then the Tribunal may be justified in awarding no compensation for injury to the employees feelings or reputation or for humiliation.

Further, the Court found that the equity and good conscious jurisdiction, drawn from s 189 ERA, enables the Authority or Court to conclude, where the employee's conduct is so "egregious" or "outrageous" so as to justify no award, that no remedy should be awarded under s 123, despite the employee having established a personal grievance. The Court noted that such an exercise would be rare, albeit within the Court and Authority's ambit of powers.

Cases following *Xtreme Dining*

The clarification provided by Xtreme Dining has set a precedent for the Court and Authority to decline to award remedies in cases where the employee's relevant conduct is egregious.

Shaw v Bay of Plenty District Health Board [2022] NZEmpC 10, [2022] ERNZ 74 is a recent example out of the Court which identifies the circumstances as falling with the "rare category" created by Xtreme Dining. The case involved a health professional dismissed for breaching patient privacy. The Court found that her dismissal was justified, but moved to consider whether the employee was entitled to remedies in the event its conclusion was incorrect. The employee had collected and retained patient records for several years and ultimately used them for her own purposes. The Court categorised this misconduct as so significant as to disentitle her to remedies.

The Authority has also made use of Xtreme Dining in awarding no remedies for an established grievance. In Smith v Electrical Training Co Ltd [2019] NZERA 420, the Authority found defects in the employer's dismissal of an electrical apprentice for failing to adhere to wiring standards. Among other failings, the Authority found the employer failed to conduct a full investigation into the allegations, and found the employee's behaviour had amounted to serious misconduct, despite his behaviour falling within the lesser threshold of misconduct in the company policy. However, in light of the employee's knowledge of the potential consequences for not following wiring standards (including causing a fire within an apartment building), and the employer's previous attempts to resolve performance issues, the Authority found it would be "unconscionable for the Authority to reward [the employee's behaviour"]. Referring to Xtreme Dining, no remedies were awarded.

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The current approach vs possible reform

Without further detail on the government's intention to consider removing personal grievance remedies for employees "at fault", it is not clear what the Government is looking to achieve that is not already achievable using the current approach established in Xtreme Dining.

Perhaps there is a view that removal of remedies should occur in more cases than the current approach elicits. In light of other employment law reform undertaken by the current government to date (including the reintroduction of trial periods for all employees), and other proposed reform (including the inability for employees earning over a certain income to raise a personal grievance), perhaps it is unlikely that legislative change here would require the same high standard of "egregious" or "outrageous" conduct for the removal of remedies eligibility.

The government may instead consider a standard of proportionality, where the removal of remedies eligibility occurs if the employee's misconduct is proportionate to the employer's unjustified actions. However, determining whether the employer and employees' actions are proportionate could be a difficult task for the Authority or Court to embark on in light of the inherent inequality in power with the employment relationship – a disparity that the operative section of the ERA expressly acknowledges and works to keep in check. The removal of remedies eligibility as a result of any misconduct on the employee's part, regardless of its severity or its proportionality to the employer's actions, is another approach which would appear to be in conflict with the ERA's objective.

We will wait to see what proposed legislative change looks like, and, if the bar is to be shifted, how far that shift will be.

This article has also been published in LexisNexis' Employment Law Bulletin, Issue 5 of 2024.

AJ Lodge,
Partner

Lucy Gallagher,
Solicitor

Immigration Alert:

Job Change applications following a business sale or restructure

Current rules

When a business is sold or restructured, Accredited Employer Work Visa (AEWV) holders cannot keep working if their employer changes as a result of that process. Instead, a Job Change must first be submitted, and to request a Job Change, employers often need to re-advertise the role and submit a Job Check.

To make things more complicated, the new employer must also be accredited before either the Job Check or Job Change applications can be submitted. This can cause significant delays, leaving new employers short-staffed and migrant workers with gaps in their employment.

Update

From 6 November 2024, most AEWV holders will be able to go through a simplified process if their employer changes due to a business sale or restructure. A Job Change will still be required; however, a Job Check will only be required if the worker's location or occupation also changes. Applicants will need to submit information explaining why a Job Change is required, like a letter from the new employer explaining that a business sale or restructure has occurred.

To streamline the process, INZ will be able to decide the Job Change before the new employer's accreditation application is decided. This is provided the new employer has applied for accreditation.

Any transferring AEWV holders will count towards the new employer's quota of five AEWV holders for standard accreditation. If this will result in an employer exceeding this quota, they will need to upgrade to high-volume accreditation before the Job Change is submitted.

Our thoughts

The current process following a business sale or restructure has caused significant delay and inconvenience for both employers and migrant workers. This update is a positive change that makes sense, given in most cases the impacted migrants will continue to work in the same role and location.

Tash Rae,
Senior Associate

Can employment claims be raised outside the 90-day limitation period for a personal grievance?

Generally, employees have a 90-day limitation to raise a personal grievance claim. But can employers breathe a sigh of relief once the 90 days have passed?

Personal grievances are the primary vehicle under New Zealand legislation for employees to raise claims about the decisions or conduct of their employer.

Section 114 of the Employment Relations Act 2000 (**the Act**) provides that employees have a 90-day limitation period to raise a personal grievance with their employer. In 2023, this was expanded to 12 months for sexual harassment personal grievance claims.

If an employee raises a personal grievance claim after the employee notification period has expired, their claim is considered 'out of time'. In that situation, an employee only has grounds to continue their claim if the employer consents to it or if the Employment Relations Authority grants leave on the basis of one of the exceptional circumstances listed under section 115 of the Act.

Exceptional circumstances include where the employer has been so affected or traumatised as to be unable to have properly considered raising the grievance within the employee notification period, where the employee made reasonable arrangements for a representative to raise a grievance in the appropriate time but the representative failed to do so, and where the employment agreement does not contain an explanation regarding the resolution of employment relationship problems[1].

[1] For further discussion regarding these exceptional circumstances, please refer to this article

How is the employee notification period calculated?

Under section 114(7) of the Act, the employee notification period begins on the date on which the alleged action amounting to the personal grievance occurred or came to the notice of the employee (whichever is later).

This is a straightforward calculation when the alleged action amounting to a personal grievance is one definable act, for example:

- A decision to terminate employment;
- A single action that disadvantages the employee's employment (e.g. suspending without cause or consultation); or
- A single act of harassment or discrimination.

In these circumstances, it will usually be clear when the alleged conduct occurred, and therefore whether or not it is within the employee notification period.

However, employment relationship problems are often not as granular as an issue arising from a single definable act. Instead, conduct that could give rise to a personal grievance may cumulate throughout the employment relationship, sometimes crystallising at a specific point and triggering a personal grievance claim.

In a constructive dismissal claim where an employee resigns because of the employer's alleged treatment, whilst there may be one specific event which is 'the straw that breaks the camel's back', the claim could involve conduct dating back well before the employee notification period. For example, alleged bullying or mistreatment over a period of years.

In circumstances like these, it can be tricky to determine what conduct falls within the scope of a personal grievance claim. However, providing that a personal grievance has been raised within the employee notification period for the most recent conduct, this does not preclude earlier incidents being taken into account as well.

In *Premier Events Group Ltd v Beattie (No 3)* [2], the Employment Court held, in relation to an unjustified disadvantage grievance, that the Authority or Court can hear evidence of events that occurred outside the 90-day period, as long as these were connected to events within the 90-day period. The earlier events could help establish a course of conduct as the basis for the grievance, and is often referred to as a continuous cause of action.

In a recent ERA determination, the ERA stated: "*I accept that in cases of bullying, there may well be a series of actions giving rise to the grievance. However at least one such instance must occur within the relevant timeframe. Although events outside the 90 day timeframe may inform a consideration of the merits of a grievance raised within time, they cannot establish a grievance in their own right.*" [3]

In considering if a continuous cause of action extends to events that occur outside the 90-day period, the earlier events must be properly evaluated to determine if they are connected to the continuous cause of action. Specifically, the Court has said that "*it is a question of fact and degree whether separate acts are so close in time and quality as to be properly described as constituting a continuous cause of action.*" [4]

In other words, consideration must be given to the length of time between separate actions and the degree to which those actions are connected to the ultimate personal grievance.

What about other types of claims?

Personal grievance claims are not the only types of claims an employee can raise, and where the employment relationship problem is not a personal grievance, employees have six years to take their claims.

This means that the following (non-exhaustive) claims all have a six-year limitation period:

- Non-payment or incorrect payment of employee wages;
- Issues around how entitlements under the Holidays Act 2003 are calculated;
- Breach of good faith or other common law duty such as the duty of fidelity;
- Breach of the employee's employment agreement, including any implied terms of the agreement.

Claims like breach of good faith and breach of employment agreement will sometimes be used by employees to 'get around' the 90-day personal grievance limitation period.

This is especially so because it may be relatively straight forward to conceptualise any personal grievance claim as a breach of good faith or breach of the employment agreement. In particular, good faith requirements like being "active and constructive in establishing and maintaining a productive employment relationship" (section 4(1A)(b) of the Act) are very broad, allowing almost any claim to be raised in that way.

Conclusion

Whilst the 90-day / one-year notification periods for a personal grievance raise a useful jurisdictional bar for employee claims, there are various ways in which conduct that occurs outside of those periods can still result in arguable claims against the employer. As an employer, it is not a simple matter of waiting 90-days and then thinking you are out of the woods.

William Fussey, Associate

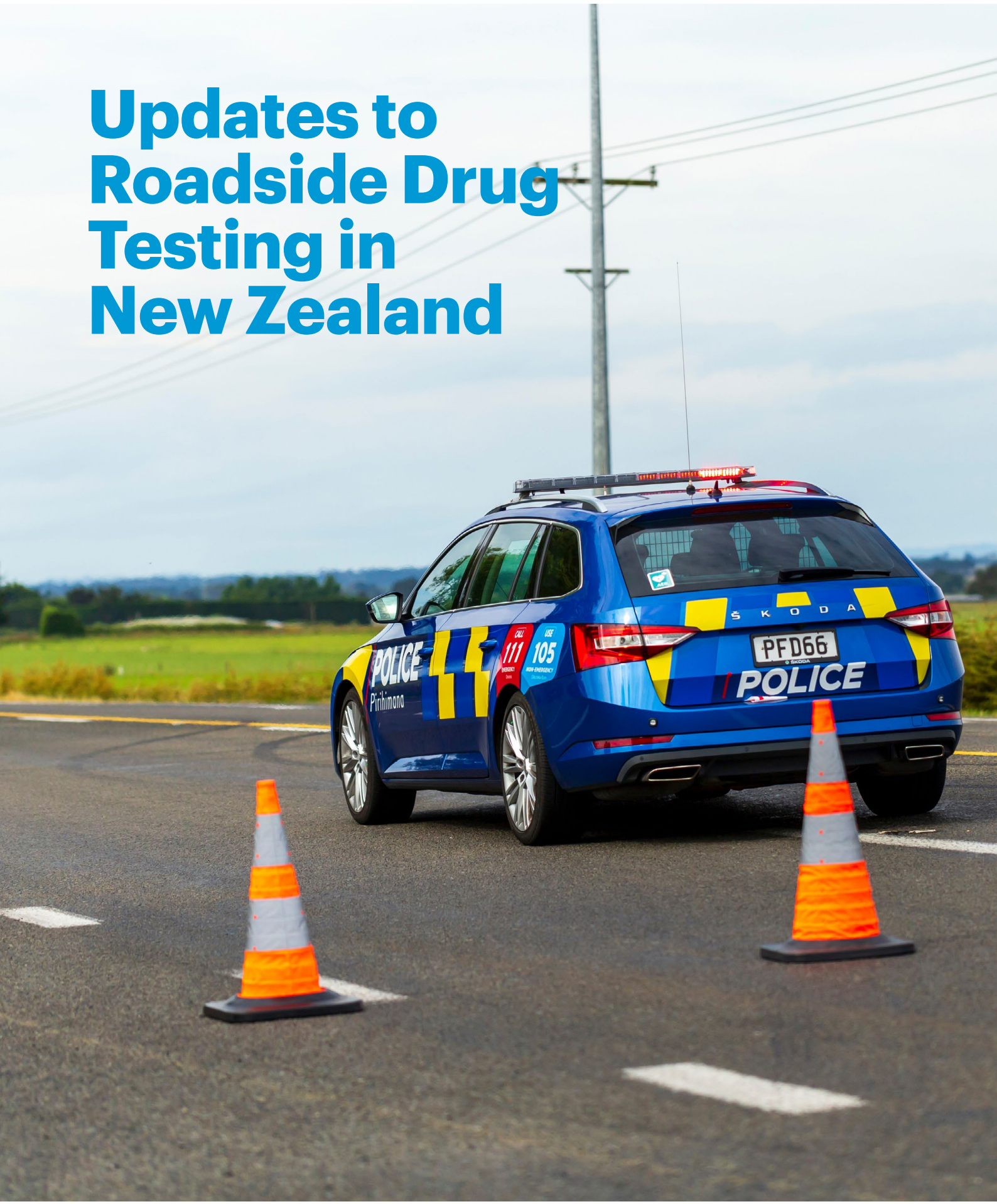
Samuel Deavoll, Senior Solicitor

[2] Premier Events Group Ltd v Beattie (No 3) [2012] NZEmpC 79, [2012] ERNZ 257.

[3] Rookes v Tillmans Fine Furniture Ltd [2024] NZERA 504.

[4] Waugh v Commissioner of Police [2003] 1 ERNZ 236 at [97].

Updates to Roadside Drug Testing in New Zealand



In 2022 the Land Transport (Drug Driving) Amendment Act 2022 was introduced to contemplate roadside oral fluid testing for substances including a new list of prescription medications. At the time, the amendment could not be implemented due to a number of practical considerations including the lack of devices that could test to the level required by the legislation.

This new updates would amend the Land Transport Act 1998 to resolve issues with the current oral fluid testing regime and allow its implementation for example by changing the criteria for the testing device. The Minister of Police will need to be satisfied with the accuracy of the device but will no longer need to be satisfied that an approved device will only return a positive result if it detects the presence of a qualifying drug.

Obligations around impairment

Ensuring that the risk of impairment is managed is a critical aspect of health and safety obligations under New Zealand's Health and Safety at Work Act 2015.

It's well known that prescription medication can cause side effects, for example, drowsiness, fatigue, reduced cognition, and reduced reaction times. The types of prescription medication that are listed in the Bill include codeine, diazepam, lorazepam, oxycodone, tramadol, and triazolam.

The risk of impairment would be greater in some industries, including industries where employees drive or operate machinery. Failure to take appropriate steps in managing drug impairment could expose employers to legal liability in the event of an accident.

Considerations for employers

Clear communication and education are key in this area. We recommend employers take steps to educate or refresh employees on the following:

- The impact of drug or medication use on workplace safety.
- The new roadside drug testing regime and what it means for them as employees.
- Company policies regarding drug use, testing, and how a positive test result (including a roadside testing drug test) could affect their employment.
- The importance of disclosing any prescribed medications that could risk impacting the safety at work including driving.

Our advice is to act on the recommendation from medical professionals and seek to understand the risks a prescription medication might pose to an employee. Employers are entitled to request medical information so far as it relates to the employee's work.

If an employer identifies that impairment could be a risk for employees at work, it could request that any employees taking prescription medication attend their medical professionals and seek to understand if the medication they are taking creates a risk of impairment or side effects that may impact the workplace. If the medical professional indicates there is potential impairment risk then the employer could reasonably request the employee disclose those details.

Employers must carefully navigate privacy issues when dealing with drug testing results or personal medical information. Take the opportunity now to review your privacy protocols and ensure personal information is handled sensitively and stored securely.

Conclusion

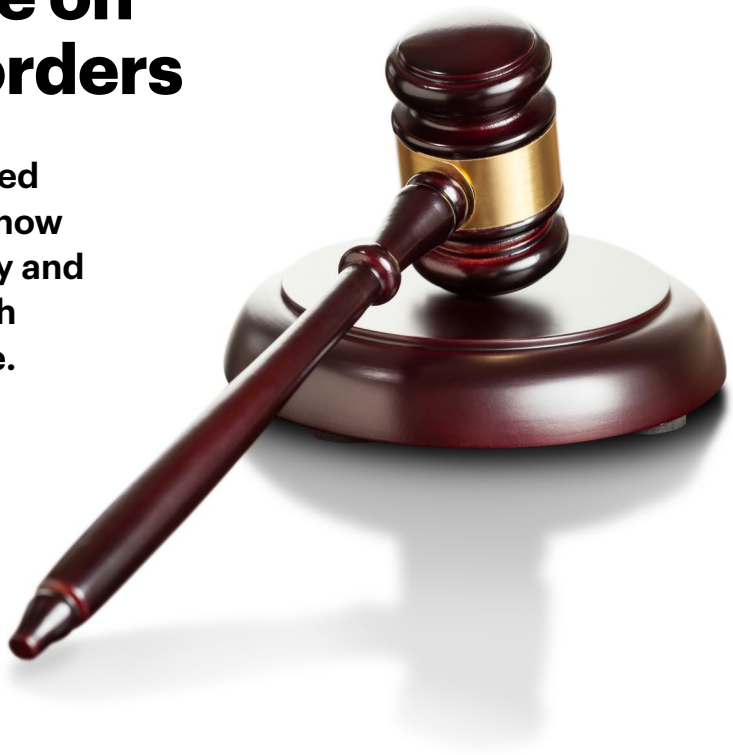
The current changes are contentious. The New Zealand Law Society Te Kāhui Ture o Aotearoa have publicly shared its submissions stating the Bill should not proceed because, among other things, it is inconsistent with the Bill of Rights Act 1990.

Regardless of whether these changes go ahead, it is a reminder to all employers regarding the risk of impairment. We encourage employers to be proactive in considering and addressing these risks and setting clear expectations for employees around information sharing.

Rebecca Laney,
Associate

Balancing privacy and open justice: Full Employment Court provides guidance on non-publication orders

A full Employment Court has released a judgment providing guidance on how the Employment Relations Authority and Employment Court should approach non-publication orders in the future.



The case arose from a challenge to an Employment Relations Authority (**Authority)** decision where the Authority had made various orders in favour of the plaintiff, but had declined to make an order for non-publication over the plaintiff's name. The plaintiff challenged the non-publication aspect of the determination.

While the challenge was directed to a narrow point, the Employment Court (Court) considered it was a good opportunity to review the Authority and Court approaches to non-publication in general. A full Court was convened to hear the challenge, and leave was granted to numerous interested organisations to appear and be heard.

Spoiler alert – the full Court unanimously agreed to overturn the Authority determination and granted the application for non-publication. However, whilst the judges all agreed on the overall result, Chief Judge Inglis preferred a different approach to considering non-publication matters than the Majority (made up of Judge Corkill, Judge Holden and Judge King).

Current approach to non-publication

At the time this case was heard, the Erceg v Erceg and Crimson Consulting Ltd v Berry approaches to non-publication were often being applied to applications for non-publication.

In Erceg, the Supreme Court reinforced the fundamental importance of open justice and concluded that "the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule,... the standard is a high one."

Crimson then considered the application of Erceg in the Employment Court. On the issue of principle, the Court considered an applicant must show "specific adverse consequences which would justify a departure from the fundamental rule." The Court described that as a high standard and stated that a case-specific balancing of competing factors was required. However, the Court noted that the position may be different at the interim stage.

Judgment of the Majority

The Majority concluded that the general rule of open justice (as expressed in Erceg), applies in the employment jurisdiction.

The Majority's preferred approach to non-publication orders is:

1. Open justice is of fundamental importance. It may be departed from, but only to the extent necessary to serve the ends of justice.
2. In most cases, there must first be reason to believe that the specific adverse consequences could reasonably be expected to occur.
3. The necessary evaluation will focus on evidence available. Inferences may be required, but they must be reasonable inferences that may be taken from the evidence, based on the specific circumstances of the case, when considered in context.
4. The Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case. This is a weighing exercise. Equity and good conscience may play a part. Consideration of tikanga will, where appropriate, be woven through that weighing exercise.
5. Neither the Authority nor the Court needs to wait for an application for a non-publication order; they may raise the issue themselves.
6. The same general approach ought to apply at an interim stage as applies at a permanent stage, but the weighing of particular factors may differ at different stages.

The Majority said that one circumstance in the employment jurisdiction where the broader public interest may weigh more heavily in favour of non-publication is where employees go to the Authority or Court seeking minimum entitlements.

The Majority further noted that where enforcement proceedings are brought for a breach of a s 149 settlement agreement that contains a confidentiality clause (as was the case in Spiga), that confidentiality clause will necessarily be a significant factor in the application of the Erceg test. This will be especially the case where enforcement proceedings relate to enforcing the confidentiality clause itself.

The Majority then set out examples of factors that may be relevant in the weighing exercise:

1. Circumstances of the case.
2. Interests of the person or entity applying for a non-publication order, the other party or parties to the litigation, and any third party.
3. Public interest, including the rights of media.
4. Any further issues of equity and good conscience.
5. Tikanga and its principles, values, or concepts.

The Majority also noted that one option which perhaps should be used more often is that of anonymising the names of participants in the proceedings.

Judgment of Chief Judge Inglis

Chief Judge Inglis suggested that the approach generally adopted to applications for non-publication in the employment jurisdiction should be recalibrated. The Chief Judge would prefer to remove the presumption against non-publication, and for the Authority and Court to make an order where they consider it appropriate to do so.

The Chief Judge's view was that, in considering an application, it would be appropriate to assess what is at stake and what the interests of justice require, viewed through the lens of the objectives of the legislation – listing equity and good conscience as the ultimate touch-stone.

While the Chief Judge had differing views on the 'right' approach, the majority's approach will be applied in future cases.

Applying the Majority's approach

We are now starting to see the Authority and Court apply the Majority's approach to subsequent cases.

Interestingly, in M v Q, Judge Corkill anonymised the names and identifying details of parties to a judgment that was issued seven years prior. Judge Corkill also made a non-publication order in respect of personal medical information from the employee's evidence.

Chief Judge Inglis has applied the Majority's approach in FDE v UWV. The applicant had struggled to find alternative employment, and considered prospective employers had been googling their name. Chief Judge Inglis said that equity and good conscience was "particularly engaged" and that it would "... offend the Court's conscience for the applicant to be penalised into the future for exercising a right they were perfectly entitled to exercise..."

While the Majority in Spiga essentially kept the status quo, with some employment specific flare added, we do expect to see the number of non-publication applications, and perhaps, those granted, to increase.

Kelly Thompson,
Solicitor

Holidays – all I want for Christmas is a new Act!

Changes to the Holidays Act have been long overdue given how unworkable the existing legislation is. Targeted consultation on a draft bill began in September, but exactly where that has landed is anyone's guess.

What we currently know is that the requirement to pay annual leave in advance during closedown periods is likely to 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 on a pro-rata basis in advance of their entitlement.

That said, with the countdown to the Christmas period on we are still left wondering when and if there will be some new law any time soon. While we remain optimistic that any new legislation will reflect the modern working environment, it is important for employers to understand what their existing obligations are over the festive period.

In this article some of the more commonly asked questions are answered.

What is Annual Closedown?

A period where businesses can close down (either in whole or in part) for a set amount of time. A closedown period usually includes and runs through Christmas and New Year and is often for at least two weeks.

Can all employers' closedown?

Absolutely, provided the annual close down has become a tradition (custom and practice) or it is provided for in your employment agreements.

What do I need to do in order to have a closedown?

You must give employees at least 14 days' notice. That notice should be in writing and an email or letter will meet the requirements.

Can I operate more than one closedown?

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

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

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

What do I pay an employee?

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

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

For permanent employees who work a 5-day week, Monday to Friday, then with the way the holidays fall there is no Mondayisation of holidays this year

For part-time employees who work, for example, Wednesday to Saturday then they will have an entitlement to Christmas Day, Boxing Day as well as New Year's Day and the 2nd of January as paid public holidays.

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

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

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

Casual employees' entitlements are even more complex. To determine if an entitlement to a public holiday exists that will involve an analysis of the casual employee's pattern of work. If a casual employee regularly works a Wednesday then they can reasonably expect to be paid for Christmas and New Year's Day. If the work is more sporadic then there may still be an opportunity to receive payment for a public holiday if the employee's pattern of work establishes that they regularly work one of those days. For example, if a casual employee worked some Wednesdays leading up to Christmas then that may well be sufficient. Other factors need to be considered to determine a casual employee's entitlements so it always best to seek advice.

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

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

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

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

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

Can I make my employees work overtime?

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

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

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

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

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

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

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

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

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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.

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