Vital.

Employment & Immigration News

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anderson lloyd.

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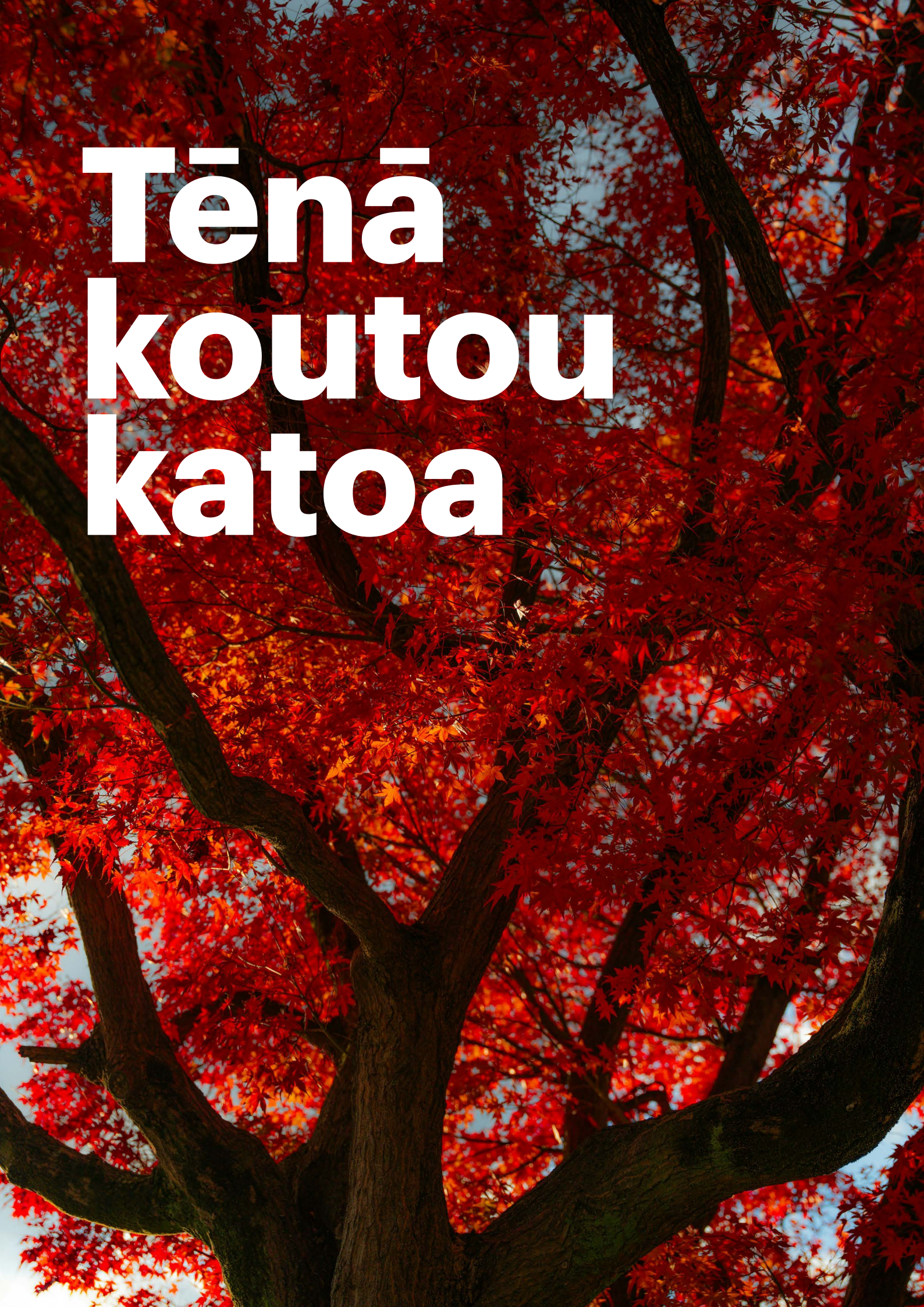

Tēnā
koutou
katoa

Welcome to our first Newsletter for 2025

This is packed with articles from the team. We have had a busy start to the year.

Things look set to get interesting with the coalition Government signaling a number of proposed changes to Employment Law. Kelly covers this in her article. Along with cost-cutting the Government has also initiated a number of other changes such as the imperative for public sector workers to return to the office. Sam covers this in his article.

In a tough economic environment a number of businesses have had to resort to restructuring and redundancies. Kelly covers this. Other trends we are experiencing are employee absence which is covered by Jess; and issues regarding workplace accommodation which is covered by Rebecca.

AJ looks at employment disputes in 2025, Jess covers key updates to Immigration Law and Lucy discusses an interesting case on employment standard breaches.

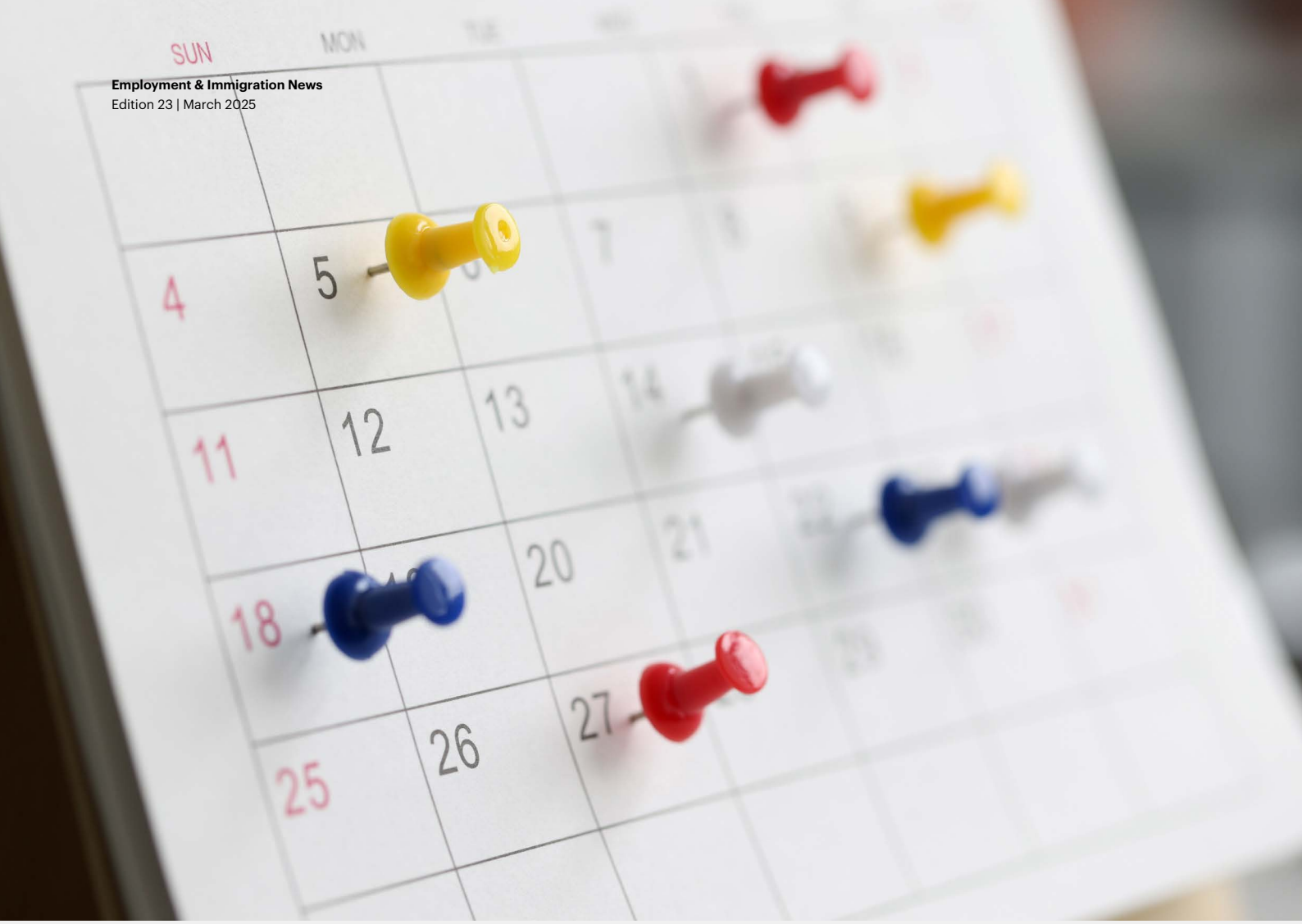
In addition to the legislation changes signaled by this Government, the recent appointments to the Employment Relations Authority will be seen as a positive for employers. These most recent appointments are of members with genuine business experience and we hope to see their decisions reflecting perhaps a better understanding of the challenges that employers face.

We hope you find the team's articles interesting and informative.

Ngā mihi,

AJ Lodge, Partner

John Farrow, Partner



Quick reminder: what's on the horizon for employment law in 2025?

Between the coalition government, and individual members bills, there have been a number of employment related legislative changes proposed recently. Below is a quick reminder of what has been announced, and where you can find out more

Unjustified dismissal income threshold

The coalition government intends to introduce a Bill that would bar employees earning $180,000 (base salary) or more per annum from raising a personal grievance for unjustified dismissal.

The income threshold would apply to any new employment agreements once the Bill was passed, and existing employment agreements one year later. The transition period is to allow the parties to an employment agreement time to amend contracts if they wish. We expect this time would be utilised by the parties to negotiate bespoke dismissal provisions. There would also be the ability to opt back in to the unjustified dismissal framework.

The threshold would be updated annually based on upward (but not downward) changes in average earnings.

See our article here for more on this.

Restricted remedies for employees at fault

The Employment Relations Act (**the Act**) already allows employment institutions to make reductions to remedies where the employee contributes to their personal grievance, however in Hon Brooke van Velden's view, the reductions have become smaller, while awards to employees have been increasing.

The Minister is of the view that the employment institutions are not striking the right balance, and as a result, has proposed the following legislative amendments:

- An employee is not eligible for any remedies where their behaviour giving rise to the personal grievance amounted to serious misconduct.
- An employee is not eligible for permanent reinstatement or compensation where their behaviour giving rise to the personal grievance contributed to the issue.
- The Employment Relations Authority / Employment Court can reduce other remedies that are still available (such as lost wages) up to 100% where an employee has contributed to the situation which gave rise to the personal grievance.
- The Authority / Court must consider, in any personal grievance case, whether the employee's behaviour obstructed the employer's ability to comply with its obligations as a fair and reasonable employer.

See our article here for more on this.

Employee v Contractor gateway test

The Coalition Government has also proposed to introduce a 'gateway test' for businesses to distinguish between an employee and a contractor.

The proposed gateway test is:

a) A written agreement with the worker, specifying they are an independent contractor; and

b) The business does not restrict the worker from working for another business (including competitors); and

c) The business does not require the worker to be available to work on specific times of day or days, or for a minimum number of hours or the worker can sub-contract the worker; and

d) The business does not terminate the contract if the worker does not accept an additional task or engagement.

If all four criteria were met, the worker would be considered a contractor. If one or more factors were not met, then the existing text in the Act would apply.

See our article here for more on this.

Protected exit discussions

ACT MP Laura Trask's Members Bill was drawn from the ballot and introduced into Parliament. The Bill proposes to allow employers to make an offer to an employee for the purposes of negotiating the termination of their employment.

Currently, such a conversation could give rise to an unjustified constructive dismissal claim. However if the Bill was enacted, such an offer of an exit settlement would not create grounds for a personal grievance claim.

Pay secrecy

Labour MP Camilla Belich's Employment Relations (Employee Remuneration Disclosure) Amendment Bill was also drawn from the ballot. The Bill seeks to protect employees who discuss or disclose their remuneration, by introducing a personal grievance for if an employer engages in 'adverse conduct' for a 'remuneration disclosure reason'.

See our article here for more on this.

Theft by employer

The Crimes (Theft by Employer) Amendment Bill has now passed its third reading. It will come into force the day after it receives royal assent.

The Bill amends the Crimes Act 1961 to state that where an employer intentionally fails, "without reasonable excuse", to pay money owed to an employee, that constitutes theft. Once the Bill becomes law, an individual employer who commits wage theft could face either a fine of up to $5,000, or one year in prison, or both. The company which the employer works for could face a fine of up to $30,000.

The wording "without reasonable excuse" was introduced by New Zealand First's Casey Costello in an amendment paper, in an attempt to ensure situations such as payroll glitches, delayed time sheets, or cash-flow issues are not captured.

See our article here for more on this.

Kelly Thompson
Solicitor

Employment disputes in 2025 – delays, delays, and more delays

anderson lloyd.

The delays in our employment institutions continue to create headaches for employers and employees alike. This isn't good for anyone, and ultimately is a barrier to access to justice for all.

Employment disputes are dealt with through a number of mechanisms, largely governed by the Employment Relations Act 2000.

If a personal grievance cannot be resolved between the parties, the usual next step is mediation. Mediation is provided by the Ministry of Business Innovation and Employment (MBIE), and is a free service. Whilst in-person mediation used to be the only option, in the post-pandemic world Zoom mediations are now the norm. Mediations are normally set for half a day, or a full day if the employee is still employed.

Unhelpfully, the wait time for mediation is currently around 10 weeks. This is as a result of various factors within MBIE, and while internally MBIE is working hard to improve this delay, it is unlikely to improve drastically in the near future.

What does this mean? Well, this can be a significant problem where the employee is still employed, and the employment relationship continues to deteriorate during the wait for mediation. It also means both parties have an active dispute hanging over their heads, delaying the ability to move on. For the employer this might delay hiring a new employee; for the employee it might impact on their ability to find another role. I expect it is also putting employees who have genuine claims off raising issues in the first place. If they do, they need to be prepared for a long and drawn out process to resolve their dispute.

One option is private mediation. We have a number of private mediators we can recommend, and often use. This of course comes at a cost, which almost always is borne by the employer. However, that cost can be worth having the matter resolved in a timely manner.

An alternative option (and one that is always available throughout the life cycle of a grievance) is for the parties or their lawyers/representatives to negotiate a settlement between themselves. This is where having a good team of advisors is enormously valuable. Where settlement is appropriate, a lawyer who has the experience and relationships to negotiate a settlement quickly can save parties a great deal of time, money and effort.

If the grievance does not settle at mediation, usually the next step for an employee who wants to pursue their claim is an application to the Employment Relations Authority (Authority). If either party is unhappy with the decision of the Authority, or in some other narrow situations, the matter can be heard by the Employment Court. Taking a claim through either the Authority or Court is also a months-long, if not years-long, process, meaning ongoing financial cost, distraction cost, and unfortunately often a negative impact on the wellbeing of those involved.

The process for resolving employment disputes is intended to be low-cost, quick, and avoid the need for judicial intervention. However, at the moment, significant delays are undermining this process, resulting in additional costs and time, and fundamentally impacting on access to justice for those who often need it the most. Of course, prevention is better than cure, but if you find yourself on either side of an employment dispute, then take advice early, be pragmatic about the outcome, and choose your advisor wisely.

AJ Lodge, Partner

The Return to the Office: Can directing employees to return to the office when they have been working from home get you in to hot water?

The Public Service Commission recently reported the average number of work-from-home days for staff at the Ministry for Ethnic Communities is 2.2 per week, followed by 1.8 at Land Information NZ, 1.7 at Statistics NZ, 1.7 at the Inland Revenue Department and 1.6 at MBIE[1]

As technology has better enabled remote working, working from home has become part and parcel of many employment relationships. Flexible working arrangements have been acknowledged as an effective method for attracting and retaining employees across various demographics. It has also been shown to enhance employee engagement and productivity while improving overall wellbeing and happiness. However, many companies around New Zealand now want to encourage employees to return to the office to promote culture, build experience and skills, and foster better relationships in-person.

But, is it reasonable for an employer to direct employees to return to the office when they have been predominantly working from home? If so, how should employers go about this?

Working from home and flexible working arrangements are not guaranteed entitlements. However, Part 6AA of the Employment Relations Act 2000 has provided employees the right to request flexible working arrangements since 2008. Under Part 6AA, employers can only decline such requests if they cannot be accommodated for specific reasons, including a negative impact on quality, performance, or the ability to meet customer demand.[2] Furthermore, an ability to work from home is commonly featured as an agreed term in an employee's individual employment agreement, or is provided for within a policy, or simply has become an accepted common practice.

An employer must give consideration to these factors when considering how to direct an employee to return to work physically from the office.

In a recent case of *Martick v First Credit Union Inc*[3], the Employment Relations Authority (**ERA**) held that an employee (**Ms Martick**) had been unjustifiably disadvantaged due to a failure by her employer (**First Credit Union**) to consult when directing her to return to its Avondale office.

First Credit Union's letter of offer (which formed part of Ms Martick's employment agreement), specified that the place of work for the position was at the Avondale office. However, it was accepted practice during her employment that she undertook her duties from her home north of Auckland and attended the Avondale office infrequently to attend training or functions such as the work Christmas party.

Specifically, Ms Martick's employment agreement detailed the following express term in relation to her place of work:

> While the employee is initially assigned to a specific Branch, the employee agrees to work at any Branch as required by business conditions on a day-to-day basis is, subject to this requirement being reasonable in terms of travel distances.

Ms Martick's employment agreement also specified that her position may change in response to changing business needs at the discretion of the employer, and that the employer will consult with the employee prior to such change.

In early 2023, First Credit Union was struggling to recruit staff in its branches, leading to staff shortages and certain branches needing to close on certain business days. First Credit Union considered whether remote employees could be directed to work in its branches. First Credit Union reviewed Ms. Martick's employment agreement and decided she should work at the Avondale branch.

[1] Article in The New Zealand Herald regarding working from home data in the public service

[2] See article discussing working from home arrangements

[3] Martick v First Credit Union Inc [2024] NZERA 511

On 3 May 2023, First Credit Union informed Ms Martick that it had made the business decision that staff needed to be in the branches and directed her to perform her normal hours at the Avondale branch from the following Monday.

Ms Martick responded saying that she had been employed on a work from home basis from the outset of her employment and the place of work clause had never been exercised and was not applicable. She confirmed her preference was to continue to work from home because she was used to it and found it convenient.

On 10 May 2023, First Credit Union commenced a restructuring process proposing to disestablish Ms Martick's role due to its view that her role being based from home did not suit its business needs. On 2 June 2023, following consulting with Ms Martick and considering her feedback First Credit Union made the decision to disestablish her role. As part of this decision, she was offered the opportunity to be redeployed into similar roles based at either the Avondale or Whangarei offices.

On 6 June 2023, Ms Martick raised concerns that when she objected to the "relocation" the discussion had shifted to redundancy and this appeared to be in response to her objections rather than a genuine organisational need for redundancy. She also confirmed that she wished to remain home based in her current role. The next day First Credit Union confirmed that as Ms Martick had not accepted one of the redeployment options, her one month's notice would be paid out and her employment would end effective 6 July 2023.

Ms Martick raised a personal grievance claiming:

1. She had been unjustifiably disadvantaged by First Credit's Requiring her to work from the Avondale office when she has only ever worked from her home; and
2. She was unjustifiably dismissed for redundancy.

The ERA rejected the claim that Ms Martick was unjustifiably dismissed for redundancy. It considered that this decision was based on a genuine business need and that First Credit Union ran a fair process that adequately consulted with Ms Martick.

However, the ERA found Ms Martick was unjustifiably disadvantaged due to First Credit Union's failure to consult when she was directed to return to the office. In particular, it considered:

1. The employment agreement required reasonable travel distances to be a consideration in any requirement to work at a branch other than that to which the employee was initially assigned;
2. Ms Martick's consistent working from home was a feature of her employment and as such was a factor that should have been considered;
3. First Credit Union had enabled Ms Martick to work from home by providing her with the tools to perform her position remotely; and
4. First Credit Union was required under the employment agreement and under the duty of good faith to consult with Ms Martick making changes to her position.

The ERA held, given these known circumstances, Ms Martick had at least an acute interest in where she would perform her duties and therefore was entitled to be provided a reasonable opportunity to comment on working from the Avondale branch before a final decision was made. As this did not occur she was unjustifiably disadvantaged. She was awarded $12,000 under 123(1)(c)(i) of the Employment Relations Act 2000.

While not all employment agreements contain an express duty to consult or that travel distances will be a consideration when directing employees to return to the office, this case demonstrates that the circumstances of the entire employment relationship need to be adequately considered when making decisions about an employee's employment that will or is likely to, have an adverse effect on the continuation of employment.

In some circumstances, a unilateral decision to direct an employee to return to the office will be justified. However, it may often be the case that a failure to adequately consult an employee on a return to work can unfairly disadvantage that employee, particularly when working from home is or has become a fesssature of the employment relationship in the circumstances.

As employers continue to balance the needs of having employees physically in the office against the inclusion of flexible working arrangements, consideration needs to be given to how these decisions are fairly made.

Samuel Deavoll,
Senior Solicitor

Immigration Shake-Up:
Key Updates for Employers

A wave of immigration changes are rolling in throughout 2025, following the government's December 2024 announcements

Immigration Minister Erica Stanford has made the government's intentions clear:

"Our focus remains on attracting more higher-skilled workers while managing migration levels responsibly, so New Zealand has access to the skills we need to grow our economy."

The changes in place and soon to be implemented are:

Market Rate Instead of Median Wage
March 2025

One of the more significant changes is that accredited employers will no longer need to pay the median wage for Accredited Employer Work Visa (AEWV) holders — market rate will apply instead, which will be role-specific. This makes sense, as the median wage requirement often forced employers to pay well above market rates and, in some cases, more than what New Zealand citizens or residents earned in the same role.

It's not clear at this stage whether the change will apply beyond AEWV holders.

Market rate is what a New Zealand citizen or resident would expect if they were working in a similar role, at the same level. INZ use different sources to figure this out, for example the salary data on careers.govt.nz and seek.co.nz.

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Employment Modules No Longer Required
January 2025

Migrant workers and 'Key People' (those involved in recruitment) no longer need to complete employment modules from Employment New Zealand. Instead, Immigration New Zealand will provide resources outlining employment rights and obligations.

Labour Hire Domestic Workforce Threshold Lowered
January 2025

For certain construction roles, the required percentage of New Zealand workers in a labour hire firm has dropped from 35% to 15%, making it easier to recruit migrant workers.

Lower Experience Requirement for Some AEWV Applicants
March 2025

Applicants for ANZSCO Skill Level 4 and 5 roles will now need two years of relevant experience instead of three. While this is a step in the right direction, two years is still a reasonably lengthy period of experience required for some lower-skilled roles.

Less Paperwork for Job Checks (March 2025). Employers no longer need to provide evidence of WINZ engagement or list vacancies for 21 days. Instead, a simple declaration confirming the role was advertised and suitable candidates interviewed will be enough.

Longer Visa Duration for Lower-Skilled Workers
March 2025

New AEWV applicants in ANZSCO Skill Level 4 and 5 roles will get three-year visas instead of the current two-year visa plus a one-year extension. This will result in less paperwork, time, and cost for employers.

Higher Income Threshold for Supporting Dependent Children
March 2025

AEWV holders will need to earn at least NZ$55,844 (up from $44,322.76) to support dependent children on visas. This increase is based on inflation (it hasn't been updated since 2019.)

Interim Work Rights for Visa Applicants
April 2025

Work visa holders applying for an AEWV will now have interim work rights, as will student visa holders applying for an AEWV (during term time). This will reduce disruptions for workers and employers during the application process.

New Seasonal Work Visa Pathways
November 2025

The current seasonal work pathways will be replaced with:

- A three-year multiple-entry visa for experienced workers
- A seven-month single-entry visa for lowerskilled workers

Details are still emerging, and we expect to have more information closer to the time.

Streamlined Job Check Process
Mid-2025

A revised Job Check process will be introduced to reduce processing times for low-risk employers. We're still waiting on further details, but this should be a positive step.

Remote Work Allowed for Visitor Visa Holders

Visitors can now work remotely for an overseas employer while in New Zealand, provided their primary purpose is to visit (e.g. for sightseeing or visiting family).

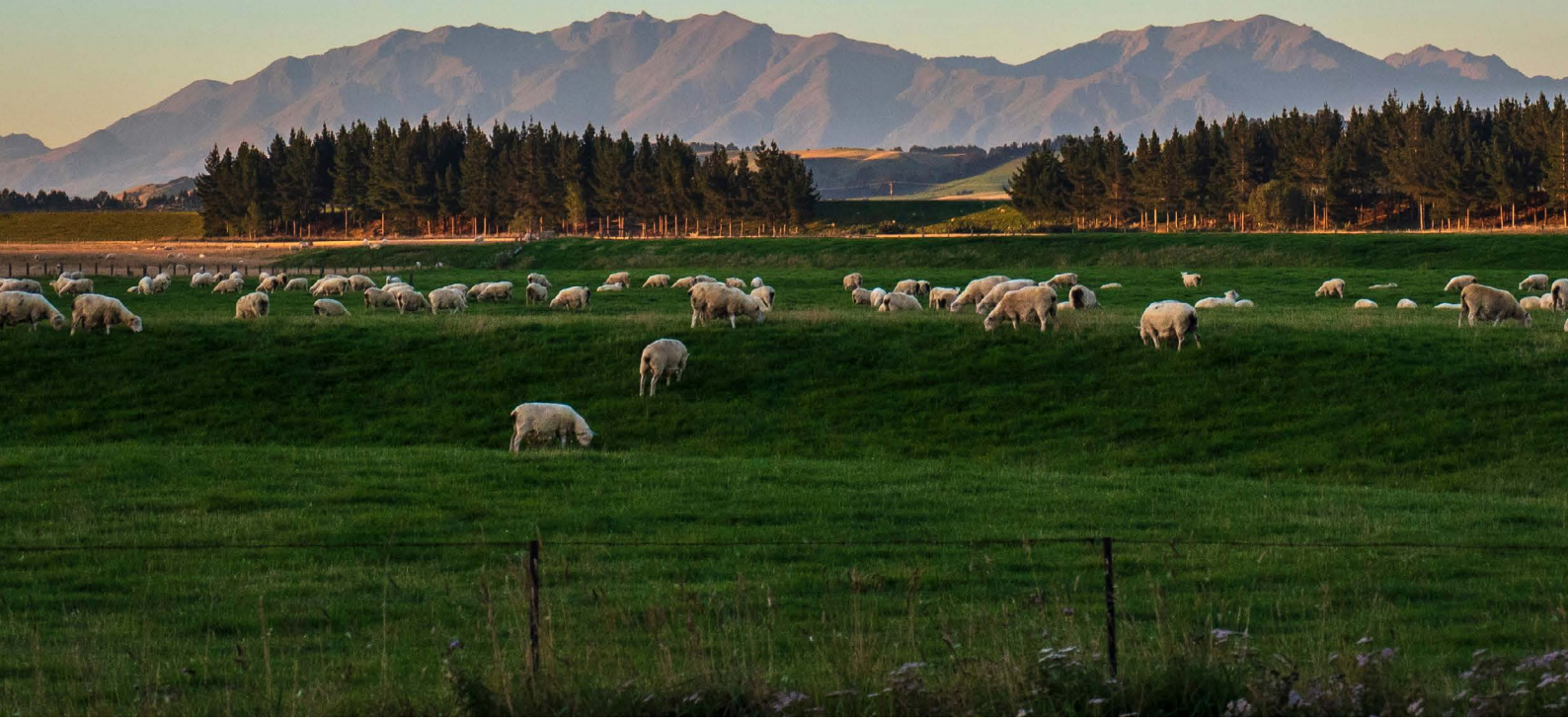
This aligns with the global rise in "digital nomad" visas, but New Zealand's version is fairly limited—work is only allowed for up to six months (multiple entry) or nine months (single entry) and the primary purpose of the visit cannot be to work in New Zealand.

What This Means for Employers

These updates are mostly a welcome change for employers and migrant workers. With many of these changes taking effect in the coming months, now is the time for employers to review their hiring plans and ensure they're ready to take advantage of the new settings.

Jessica Higgins,
Associate

South Island farmer ordered to pay $30,000 for breaches of employment standards



A reminder of the importance of good employee record keeping

In New Zealand, all employers must meet certain employment standards as governed by the Employment Relations Act (**ERA**). These standards include the right for employees to be paid at least minimum wage under s 6 of the Minimum Wage Act 1983, and to be correctly paid all holiday pay under Part 2 of the Holidays Act.

The director of a company will also be personally liable for breaches of employment standards along with the company under s 142 of the ERA. It is the director of a company that is required to keep a record of wages and time sheets, and they must be able to provide these at any time under s 130 of the ERA.

A recent case example

Labour Inspector v H and S Chisholm Farms Ltd [2025] NZERA 8 is a recent example of an employer falling short of these standards, and paying the price as a result. The Authority first considered the number of breaches and the maximum penalties available. The Authority then looked at how severe the breaches were and whether any factors either aggravated or mitigated the severity. Finally, the authority made adjustments based on the director's ability to pay.

In the Employment Relations Authority, H & S Chisholm Farms Limited (**the Company**) was fined $20,000. The Company's owner, Hugh Roderick Chisholm (**Mr Chisholm**), was fined $10,000 for breaches of employment standards. There were 34 breaches in total, including failing to pay minimum wage, not providing holiday entitlements, failure to properly pay for public holidays, and failure to pay sick leave. Additionally, Mr Chisholm failed to keep adequate records of the payments and deducted wages from employees without consent.

Breaches

Ultimately, Mr Chisholm was found to have made significant record-keeping failures. His process was paper-based, involving either incomplete or inconsistent records. The effect was that arrears calculations could not be certain. In addition to incorrectly paying employees, failure to keep accurate records meant that Mr Chisholm hindered the Labour Inspectors ability to enforce employment standards.

Additionally, Mr Chisholm had faced intervention by the Labour Inspector on two previous occasions, reflecting a repeating nature of the breaches, despite claims by Mr Chisholm that the breaches were unintentional.

Mitigating factors

The Company had been operating at a loss of the past few years, with projected losses for 2024. Despite this, Mr Chisholm argued that the underpayment was not intentional and there were not major breaches. He argued that this was not a case of an employer trying to systematically breach employee standards, and that the Company did not take advantage of vulnerable employees.

The Authority may take factors such as payments already made or personal circumstances into account in deciding the penalty. Mr Chisholm sought a reduction for wages already paid to the employees as well as personal circumstances with health issues. The Authority found that payments already made would not have a significant impact on the fine because the time to make those payments was 15 months ago, and even health issues did not justify such a departure in time.

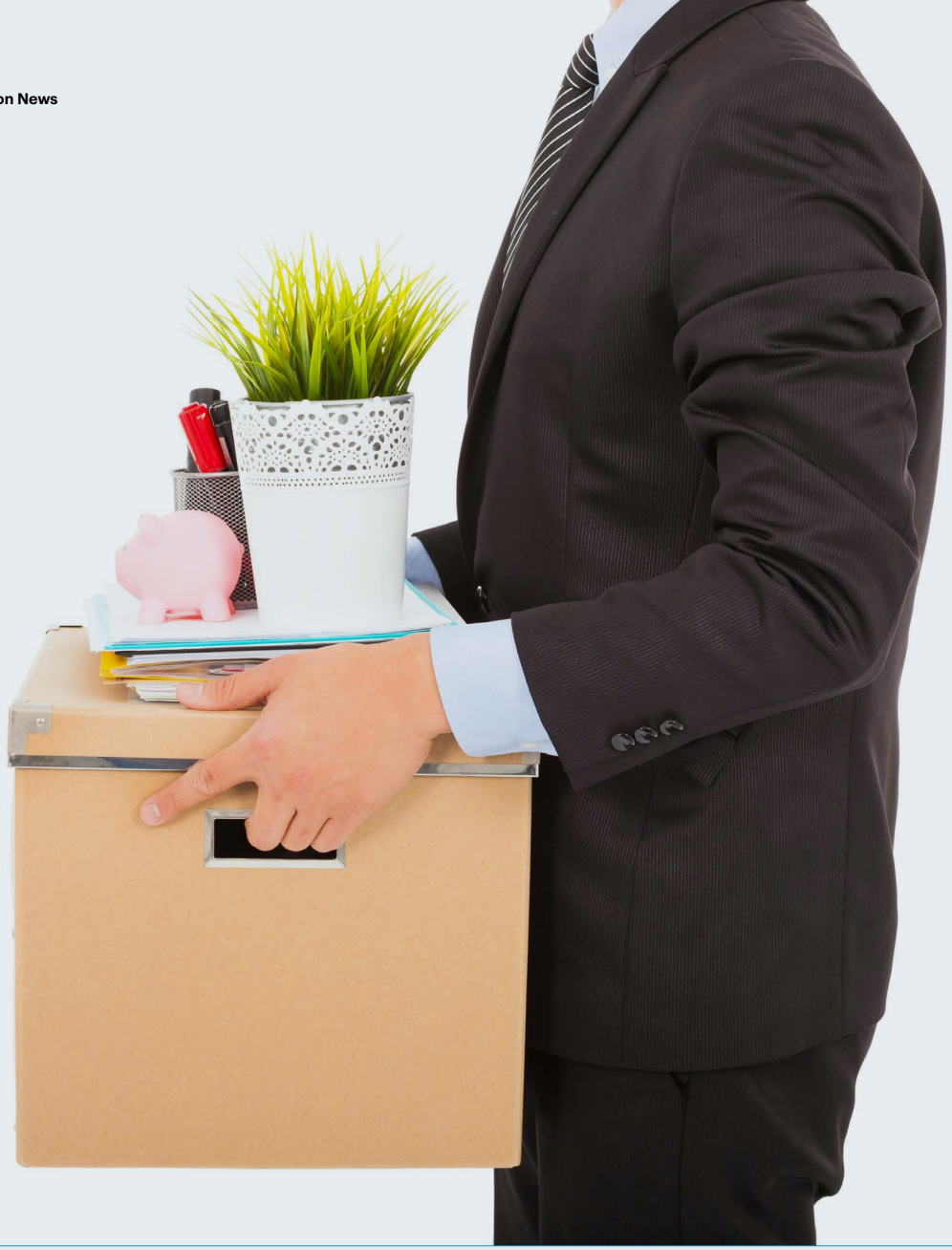
In an attempt to mitigate the amount of the fine, Mr Chisholm also distinguished his circumstances from other cases in which there was an inability for the employer to establish mitigating factors or cases where the violations were found to be ongoing and deliberate. Mr Chisholm raised the point that in materially similar cases, the offending was either similar or higher, while the fine was lower.

Finally, Mr Chisholm argued that although he was involved in the employment standard breach, he and the farm are 'one in them same' due to being both the owner and director. Therefore, by fining both himself and the business, he was being double counted. Although the Authority accepted that there was a need to avoid a double count, the penalty against Mr Chisholm was still considered appropriate in order to enforce his liability as a person involved in breaches of employment standards.

Conclusion

This case is a timely reminder of the importance of employers ensuring that they are meeting their obligations to their employees, and furthermore, ensuring that they are keeping accurate records in case any issues may arise. While many cases may involve unintentional oversight resulting in breaches of employment standards, this will not extinguish an employer's liability. Directors must ensure that they are meeting their obligation to meet employment standards as they are liable alongside the company.

Lucy Gallagher,
Solicitor



Genuine restructure or hidden agenda?

Commercial reasons behind a redundancy are a matter for the employer's judgement, but a recent Employment Relations Authority determination highlights that the genuineness behind a restructure can still be scrutinised

The employer's decision to make an employee redundant was found to constitute an unjustified dismissal for being motivated, (at least in part), by matters other than genuine commercial considerations - concerns around an employee's performance and conduct.

Facts

ADO was employed by the Joan Fernie Charitable Trust Board (JFCT) as a Fencer General.

ADO allegedly had a disagreement with the Chairperson of the JFCT Board of Trustees in October 2023. ADO claimed that after the argument, the Chairperson told ADO they would no longer be doing stock work.

Two days later, JFCT advised ADO of a proposed restructure, which if it went ahead, would involve the appointment of a Livestock Manager, and as a result, ADO's position would become surplus to requirements.

ADO was informed that there were no redeployment opportunities or vacancies, and that it would likely go through a recruitment process to fill the newly created Livestock Manager position.

ADO met with JFCT and provided feedback on the proposal. ADO said they were advised that they did not meet the requirements, or have the qualifications, for the Livestock Manager role, and that they would not be successful in that position.

JFCT ultimately confirmed the restructure, and gave ADO notice of termination on the grounds of redundancy.

ADO then raised a personal grievance of unjustified dismissal, and sought, amongst other things, immediate reinstatement to his role, or as an alternative, redeployment to the Livestock Manager role.

Employment Relations Authority

The Employment Relations Authority (**the Authority**) ultimately concluded that ADO had been unjustifiably dismissed from their employment.

In coming to that conclusion, the Authority stated that some of the correspondence JFCT had sent to ADO suggested the redundancy was not genuine. JFCT had sent a letter to ADO raising various issues, such as:

- allegations that ADO had anger management issues and would lose control and become verbally abusive;
- an allegation that ADO had presented an invoice to the JFCT's accountant for repair of a trailer portrayed as belonging to the JFCT but that was in fact ADO's personal trailer;
- that ADO did not have the requisite skills to take on the managers role; and
- that ADO's physical condition limited the manner in which they could perform work.

The Authority noted that while the commercial reasons underlying redundancy are a matter for the employer's judgement, it did not accept that the allegations of misconduct were irrelevant to the decision to proceed with issuing the restructuring proposal, nor were they irrelevant to the decision to implement the proposal or to dismiss ADO. The Authority noted that there was little evidence of the commercial basis for the proposal being discussed amongst the Board of Trustees.

ADO had also claimed that the work they were performing was unknown to JFCT, and that a fair and reasonable employer could not have disestablished their role where its understanding of the role was incorrect. The Authority accepted that submission, and stated it was not satisfied that ADO's role was in reality surplus to the needs of the business. This assessment would have required an understanding of what ADO's role actually entailed, and the Authority considered there was at best, a lack of understanding as to ADO's role, or at worst, that JFCT had purposefully sought to artificially limit the scope of ADO's role to exclude tasks and duties.

The Authority further accepted ADO's submission that with sufficient time and training, they likely could have performed the Livestock Manager role. The Authority therefore found that ADO's claim that JFCT had conflated the restructure with redeployment, and that it dismissed ADO prior to considering all options short of dismissal was made out.

The Authority held that the dismissal was both substantially and procedurally unjustified.

Remedies

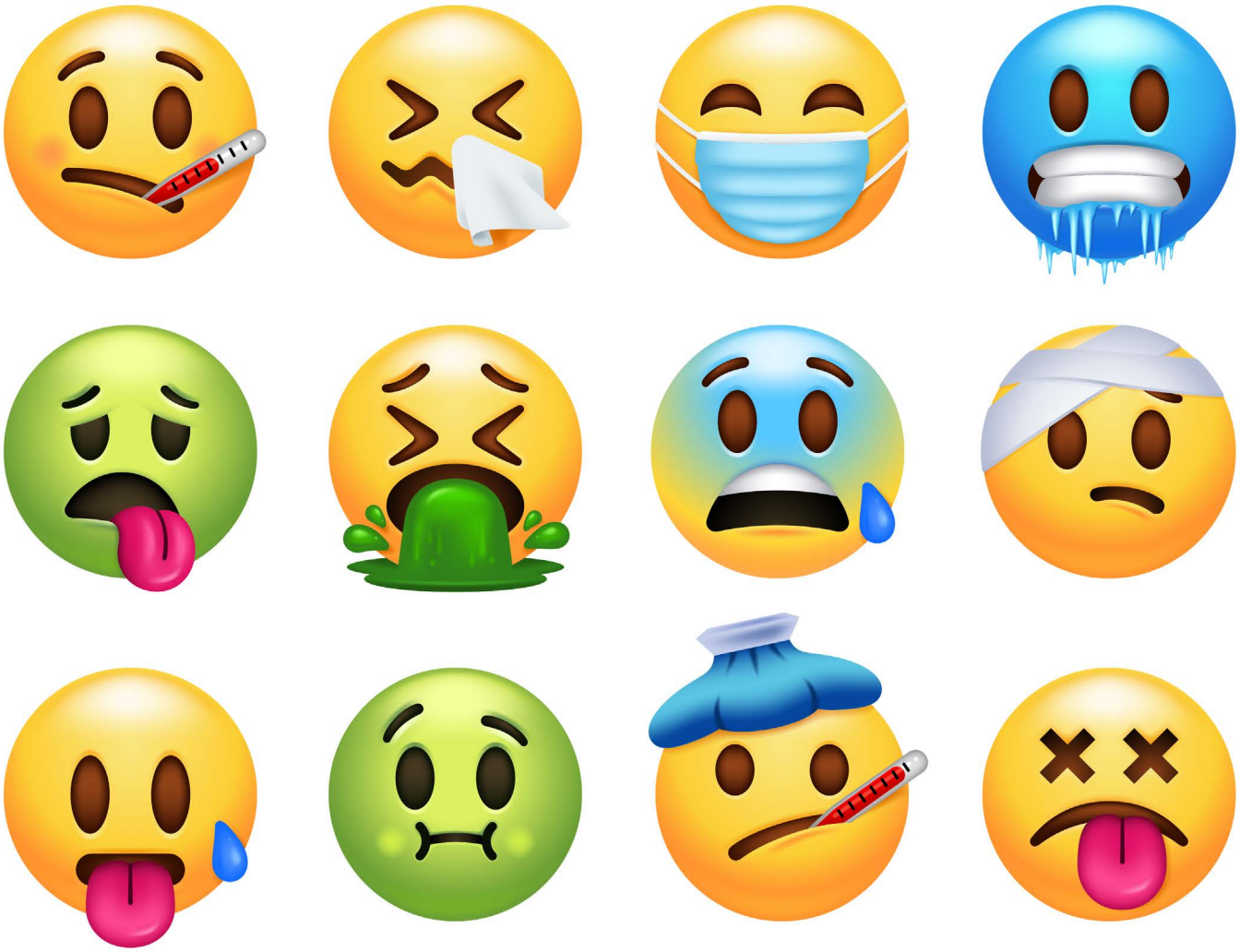
ADO had applied for permanent reinstatement, however this was not granted on the basis that the employment relationship had irretrievably broken down, and reinstatement would be impracticable.

ADO was awarded $30,000 as compensation, and $8,055.19 as lost wages for the unjustified dismissal personal grievance.

ADO had also raised an unjustified disadvantage personal grievance, alleging JFCT treated them unfairly in relation to unsubstantiated allegations, and a subsequent unjustified investigation and findings. This was also upheld and ADO was awarded another $15,000 compensation.

Kelly Thompson
Solicitor

Dealing with employee absences



Employee absenteeism is a common yet often complex issue that employers have to navigate. While employees have a right to take time off when unwell, employers are entitled to balance that against the need to effectively manage operations

The legislation

Employees are entitled to 10 days of paid sick leave per year after six months continuous employment. Employees can use sick leave in cases of personal illness or injury, as well as to care for a partner or dependent who is unwell.

These are the minimum statutory entitlements which may be enhanced by the employment agreement.

Once sick leave is exhausted an unwell employee will either need to take annual leave (with the employer's agreement) or unpaid leave.

In some cases, employers may request a medical certificate to verify the validity of an employee's sick leave.

If an employee is absent for three consecutive days or more, they can be required to provide a medical certificate. The employee is generally responsible for the cost of obtaining this certificate. If an employee is absent for fewer than three days, an employer may request a medical certificate only if the employer agrees to cover the cost.

Different types of absenteeism

Abandonment

If an employee is absent from work without explanation and there is no indication they intend to return, they may have abandoned their employment. The employment agreement may specify the number of days absence that will amount to abandonment.

Abandonment is termination at the employee's initiative – it is not a dismissal.

Before concluding someone has abandoned their employment the employer should attempt all methods of contact. A single phone call won't be sufficient.

If the employee is uncontactable then they should be warned if they don't make contact within a certain frame their employment will be regarded has having ended due to their abandonment. If the employee does turn up, this is not abandonment and should be treated as a misconduct issue for unauthorised leave.

Non-genuine sick leave

Employees have a duty to be honest with their employer. In some case "throwing a sickie" will amount to misconduct or serious misconduct, and potentially justify termination.

In Taiapa v Te Runanga o Turanganui, the employee was found to have been dishonest about his sick leave after posting on social media about attending an event while claiming to be unwell. The court ruled that the employer was justified in questioning the genuineness of the sick leave, and dismissing the employee.

Genuine sick leave

Some employees may take sick leave intermittently, leading to frequent but short absences. While these absences may be genuine, they can be very disruptive, particularly as the absences may be unpredictable and leave the employer scrambling to find cover at the last minute.

If there's no question about the genuineness of the absence this falls into a "no fault" situation and we would not recommend it is treated as a misconduct issue. It is important for an employer to understand the reasons for the absences. If they are all related to a single medical issue it may be necessary to treat the matter as one of medical incapacity (more on this below). If the absences are for a whole variety of different reasons it may be more appropriate to approach the issue as one of performance: in this situation the employee is unable to uphold their end of the bargain and perform their contractual hours of work. In some circumstances this may ultimately justify a termination.

Sustained long term sick leave

An employee may be absent for an extended period due to illness or injury, which may be covered by ACC. The employer is not bound to hold that employee's job open indefinitely.

So when can an employer "fairly cry halt"?

The employee should be given a reasonable time to recover from their illness or injury. This period will vary depending on the circumstances and the nature of the position held. In particular, what will be critical is whether the position can be easily covered. If the absence is for a set period, it may be that a larger organisation can quite easily cover with casual or fixed term staff. However, in our experience, more often the employee's absence will be simply covered by the rest of their team picking up the slack, which puts pressure on them and is not sustainable long term.

Once a reasonable time has passed the employer may wish to commence a medical incapacity process. This involves a fair enquiry. The first step is obtaining medical information to understand the diagnosis and prognosis and whether the employee is able to return to work, in what capacity, and in what timeframe.

If the medical information indicates a return to work is unlikely in the near future, that may justify a termination if the role cannot be kept open for them. As with any termination, the possibility of dismissal should be put to the employee to comment on before it is confirmed. The employer is also obliged to consider alternatives to dismissal. This may include consideration of whether the employee is fit to perform fewer hours or other tasks and whether the employer can reasonably accommodate this. Employers are not required to agree with an ACC return to work plan, if it doesn't fit their needs.

It's not essential to have a contractual medical incapacity clause in order to terminate, but if there is a clause, it should be followed.

What if the employee won't provide the medical information?

An employee can't be compelled to provide private medical information but there is arguably a good faith duty to do so. If the employee refuses to co-operate then the employer can make a decision based on the information it has available, even if that is limited.

Summary

Managing employee absenteeism can be challenging. By understanding entitlements, addressing concerns early, and following proper processes, employers can take action to address absenteeism while ensuring legal compliance.

Jessica Higgins,
Associate

Workplace accommodation disputes: a reminder to employers and landlords

Providing accommodation to employees often means an employer assumes a dual role as both employer and landlord. Because accommodation is tied to the employment, this can create additional legal complexities

Service tenancies are governed by the Residential Tenancies Act 1986 (RTA). Below are recent examples highlighting common mistakes and legal considerations we're encountering.

Healthy homes standards apply

(*Guinee v Cable Bay Wine Limited* [2024])

Ms Guinee was employed as the General Manager at Cable Bay Wines. She was also provided with accommodation at a reduced rent as part of her employment. Her employer was also her landlord. The Tenancy Tribunal (Tribunal) confirmed this arrangement was a service tenancy under the RTA.

The Tribunal accepted that the landlord did not provide an insurance, insulation or Healthy Homes statements to the tenant. These statements are legally required under the RTA. The Tribunal also accepted there were a number of other breaches including the failure to comply with the ventilation standard by not having an extraction fan in the kitchen, failing to maintain the heat pump, kitchen floor and bathroom vanity and issues with draught due to a large cat flap that could not close.

The landlord was ordered to pay the tenant $1,450.

Tenant liable for poor behaviour from guests

(*Cookson v Guest* [2023])

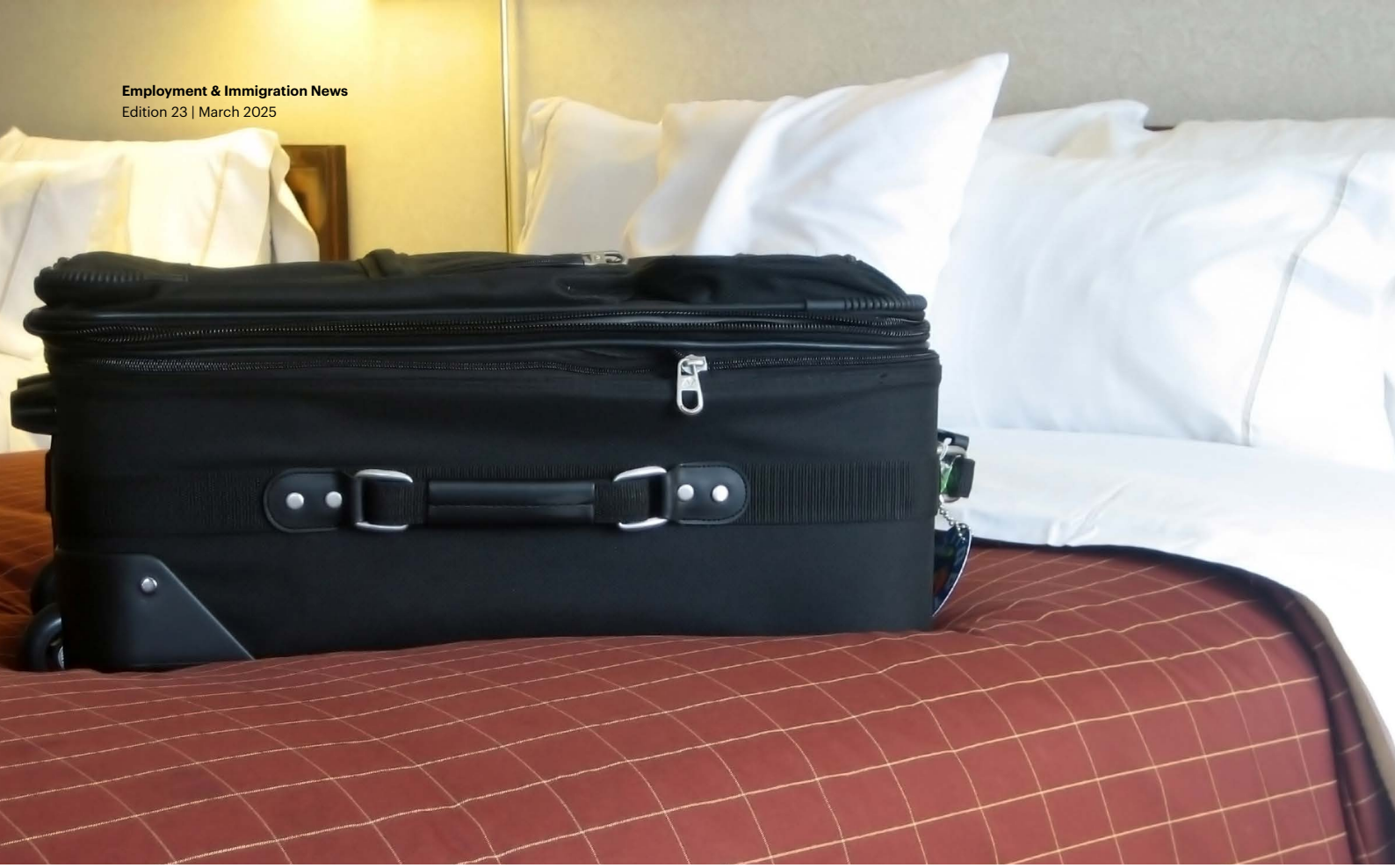
Ms Guest was an employee at Mr Cookson's farm. She entered into a service tenancy for a tiny house situated on the farm.

The landlord applied to the Tribunal seeking unpaid rent from Ms Guest. Ms Guest experienced poor health in the latter stages of the tenancy due to complications with her pregnancy and she spent a period of time away from work and the property. The Tribunal stated a tenant's obligation to pay rent continues to the termination date of the tenancy, irrespective of whether the tenant is living in the property. Ms Guest was ordered to pay the outstanding rent arrears of $1,540.

In addition to the unpaid rent, there was extensive damage to the property. In any claim for damage, the landlord must establish that the damage occurred during the period of the tenancy and that the damage is beyond fair wear and tear. The tenant is legally liable for damage that is caused by themselves or by anyone who is at the premises with their consent.

The Tribunal accepted there had been intentional damage to the tiny home likely caused by the tenant's ex-partner. The damage included stab marks in the kitchen bench, damage to an electrical fitting, and the UV filter ripped off its bracket. There was also a missing fridge/freezer, fire extinguisher, registration plate and security lights.

In total, Ms Guest was required to pay $4,303.43 to the landlord/employer.



14-days' notice to terminate

(*[Tenant] v Apex on Fenton* [2024])

The tenant was employed by Apex on Fenton, a motel. He was provided accommodation on-site as he was undertaking duties for the motel operation but was not required to pay rent. This was found to be a service tenancy, despite a written agreement referring to the arrangement as a "flat/house – sharing agreement".

It is not clear the specific details but the tenant's employment was summarily terminated. The employer wrote to the tenant setting out "Your actions have significantly harmed the reputation of Apex Motel. Therefore, we have no choice but to terminate your contract with our company. We request you vacate the premises within one day from now..."

The termination of the tenancy was deemed unlawful. The RTA sets out that a landlord may terminate a service tenancy by giving at least 14 days' notice. The Tribunal stated that there was no provision to justify an immediate eviction and awarded the tenant compensation of $500.

Even if the agreement contemplated a lesser notice and both parties signed it, the RTA is clear; any clause that is inconsistent with the RTA will have no effect.

When can the Employment Relations Authority and Employment Court get involved?

An employee, Mr Wilson, recently attempted to raise concerns about his accommodations in the Employment Relations Authority. Mr Wilson had a service tenancy arrangement and he stated that his accommodation was not compliant with the healthy home standards. He claimed he was unjustifiably disadvantaged by being charged rent. The issues included a leaking roof, mould, holes in the garage wall and rotten window frames.

The Authority confirmed it does not have jurisdiction over these matters and that this fell within the Tenancy Tribunal's jurisdiction. It stated the relevant relationship was between landlord and tenant.

Where an employment dispute arises, if it involves a service tenancy, parties will need to keenly analyse the different elements and ensure they are raised in the correct jurisdiction. We envisage some elements might overlap and create complex scenarios, for example, a dispute over a deduction from the employee's pay that relates to the accommodation.

There are accommodation types where the RTA does not apply. In these circumstances, the employment jurisdiction would be the appropriate avenue to hear the full claim.

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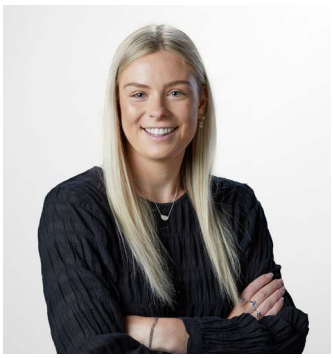

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Anderson Lloyd has a strong team of specialist employment and immigration lawyers acting for some of the country's largest employers, as well as SMEs and employees covering the full spectrum of employment issues and disputes.

In addition to alternative dispute resolution options such as mediation, our lawyers regularly appear in the Employment Relations Authority and the Employment Court. We have also represented clients before the Court of Appeal and the Immigration and Protection Tribunal.

Within our employment and immigration team we have a specialist investigation practice. Our independent investigators can conduct workplace investigations, independent investigations and inquiries.

Our employment and immigration law expertise includes:

- drafting and reviewing employment agreements
- collective bargaining
- redundancy
- disciplinary procedures
- representation in mediation and court appearances
- restraints of trade and protection of confidential information
- employment implications of business sales and purchases
- development of employment policies
- personal grievances and disputes
- advising clients in relation to payroll requirements
- compliance advice
- obligations of employers, workplace occupiers and the operators of activities
- health and safety plans, guidelines and statutory requirements
- health and safety investigations and prosecutions
- assisting employers with recruiting and retaining staff from overseas
- accredited employer applications
- assisting employers and employees with visa applications
- partnership-based work and residence visa applications
- immigration audits and advice for employers on immigration compliance
- employer-based work and residence visa applications
- residence or deportation appeals to the Immigration and Protection Tribunal

We are recognised by top global legal directories for our labour and employment law expertise, including being recommended in The Legal 500 Asia Pacific 2023 edition. Anderson Lloyd has also been recognised as a 5-Star New Zealand Employment Law Firm by the Human Resources Director publication.

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