

Employment Disputes

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Agenda

- Key obligations for employers
- Golden Rules
- Resolution pathways
- Recent cases
- Legislation changes



#1 Obligation – Good Faith (s4 ERA 2000)

(1) The parties to an employment relationship...

- (a) must deal with each other in good faith; and
- (b) ...must not, whether directly or indirectly, do anything—
 - (i) to mislead or deceive each other; or
 - (ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith...

- (a) is wider in scope than the implied mutual obligations of trust and confidence; and
- (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
- (c) ... requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
 - (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
 - (ii) an opportunity to comment on the information to their employer before the decision is made.



Test of justification (s 103A)

(2) The test is whether the employer's actions, and how the employer acted, were **what a fair and reasonable employer could have done in all the circumstances at the time** the dismissal or action occurred.

(3) ... the Authority or the court must consider—

- (a) whether... the employer sufficiently investigated the allegations against the employee;
- (b) whether the employer raised the concerns that the employer had with the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns; and
- (d) whether the employer genuinely considered the employee's explanation (if any) ...
before dismissing or taking action against the employee

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable solely because of defects in the process followed by the employer if the defects were—

- (a) minor; and
- (b) did not result in the employee being treated unfairly.



Golden Rules

- Seek advice early
- Ask for (and consider) feedback
- Provide relevant information
- Have an open mind
- Good processes take time



Pathways to dispute resolution

- **Informal resolution**
 - Take advice
 - Have a backup plan
- **MBIE Early Resolution process**
 - More suited for entitlement disputes
 - Cannot be used if PG in play



Pathways to dispute resolution

- **Mediation**
 - Free with MBIE
 - Aimed at settlement
- **Employment Relations Authority**
 - Formal investigative process
 - Decisions are public



CASE: Pact Group v Sheridan

- Ms Sheridan was dismissed and raised a PG.
- IEA contained the standard wording “Two weeks written notice shall be given”. The dismissal letter said that the two-week notice period started that day.
- The Employment Court held that that “two weeks” meant a period of 14 full, clear consecutive days.
- The day notice was given did not count.

Key takeaway: unless IEA is very clear, treat notice periods as starting the day **after** notice is given to the employee.



CASE: *O'Brien v C3 Limited*

- Safety sensitive workplace – Auckland Port.
- Mr O'Brien (stevedore) gave invalid urine sample.
- C3 suspended and then dismissed for serious misconduct.
- Mr O'Brien sought interim reinstatement
- Employment Court ordered **partial** reinstatement (only to the payroll) due to C3's health and safety concerns.

Key takeaways:

- Partial reinstatement is a risk when terminating an employee.
- Money paid during this time may be recoverable from employee.



CASE: *Kwon v Tranquility and Health Spa Limited*

- Ms Kwon's childcare situation changed. Ms Kwon told THS and agreed to keep them informed.
- Ms Kwon said she *may have to* resign, and THS took the view that she **had** resigned and said there would be "no turning back from that".
- Ms Kwon raised a PG for unjustified dismissal.
- ERA held: where an employee raises the possibility that they *may* have to end their employment, this was not a resignation, but being active and communicative. THS was responsible for clarifying Ms Kwon's intentions.
- **Key takeaways:**
 - Don't assume anything
 - Ensure any resignation is unequivocal



CASE: *GF v Comptroller of the New Zealand Customs Service*

- GF did not want to be vaccinated.
- Customs had assessed GF's role as requiring vaccination and proposed to terminate his employment.
- Customs sought feedback from GF on redeployment **only**.
- Employment Court held:
 - Customs should have spoken with GF about whether their work did require vaccination.
 - Customs moved too quickly through the process.
 - Customs failed to comply with tikanga values.

Key takeaways:

- Consult, consult, consult
- Comply with the values you hold your employees to



CASE: *Ling v Super Cuisine*

- Mr Ling was paid \$13/hr. He resigned after his manager insulted him and alleged that he was constructively dismissed.
- The Employment Court found that the breach of the obligation to pay at least the minimum wage caused Mr Ling to resign
- It was reasonably foreseeable that Super Cuisine's failure to comply with its obligations would cause Mr Ling to resign.

Key takeaways:

- An employer who is ignorant of, and unknowingly breaches, its legal obligations will find little sympathy.
- An employee can be constructively dismissed without understanding the precise nature of an employer's breach of duty.



CASE: *Turner v Te Whatu Ora – Health Care NZ*

- Ms Turner was a registered nurse.
- She posted on her personal Facebook account expressing concerns about the Covid-19 vaccine and Muslim immigration into NZ.
- TWO received complaints about these posts and (after investigating) dismissed Ms Turner for serious misconduct.
- She raised a PG for unjustified dismissal and discrimination.
- The Employment Court upheld her dismissal: TWO's Code of Conduct and social media policy were clear, and the statements had the potential to undermine the public's trust and confidence in TWO.

Key takeaway: an employer can take disciplinary action in relation to an employee's conduct outside of work, if the conduct has a detrimental impact on the employment relationship.



FOCUS: Whakaari & H&S Obligations

- Criminal prosecutions for the Whakaari tragedy have concluded, with significant fines and reparations ordered.
- **Key takeaways:**
 - Key duties under HSWA
 - Employment duties
 - Practical management:
 - Health and Safety policy
 - Emergency plan/procedure
 - Accident/incident register
 - Hazard/risk register



Legislation Changes

IN

- Trial periods
- Minimum wage increase
- Migrant protection
- Sexual harassment PGs – 12-month limitation

OUT

- Fair pay agreements
- Probably:
 - Protection for KiwiSaver members
 - Restraint of Trade
 - Wage theft

NOT YET...

- Health and safety reforms
- Limiting independent contractor status claims
- PG regime reforms
- Shared parental leave



SPOTLIGHT: Trial Periods



- Trial periods are now available again for any business, not just for those with under 20 employees
- If you are seeking to rely on a trial period clause, seek advice (for the clause and the dismissal)
- Employee cannot bring a PG for unjustified dismissal if trial period clause is valid and notice period complies
- **Trial period key points:**
 - Only for brand new employees
 - Must be agreed on **before** starting work and agreeing on terms
 - Employee can still raise PG for other issues





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