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 <u>after</u> 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.

- 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.

- 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.

- 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 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

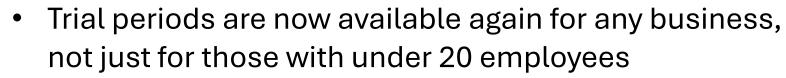
- Fair pay agreements
- Probably:
 - Protection for KiwiSaver members
 - Restraint of Trade
 - Wage theft

NOT YET...

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







- 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 <u>and</u> agreeing on terms
 - Employee can still raise PG for other issues



