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New Zealand Employment Law Bulletin

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2021 NEW ZEALAND LAW AWARDS WINNER INSURANCE SPECIALIST LAW FIRM OF THE YEAR

Welcome to W+K's New Zealand Employment Law Bulletin

Issue 1, December 2022

W+K's wrap-up of recent employment law news for insurers, brokers and employers doing business in New Zealand.

We will continue to bring you further updates and new developments as they arise. If you would like to discuss any of the articles in this update, please contact our Employment Practices Liability team.

Headlines

+ Economic volatility and post-COVID restructuring
+ Protections for gig workers – an Uber story
+ Casual employees and unjustified dismissal
+ Holidays Act 2003 – annual leave + public holidays
+ Protected disclosures – whistling while they work
+ Fair Pay Agreements Act 2022 is in force

Economic volatility and post-COVID restructuring

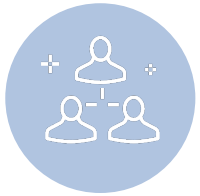
Businesses are currently facing serious financial pressures caused by inflation, rising interest rates, the aftermath of COVID-19 and international political disruption. Recession is predicted for 2023. Many are looking to restructuring to reduce costs and improve efficiency – often without taking advice.

Recent cases have re-emphasised that no matter how unprecedented the situation, businesses must still act in good faith, in a way that is both substantively justified and procedurally fair.

Fair process is a necessity

COVID lockdowns provided a genuine business reason for restructuring. But the Employment Relations Authority (ERA) and Employment Court have emphasised the importance of a fair process. Businesses have paid a high price for getting the process wrong, as exemplified in the following cases:

1) *Hunter v Metros Publishing Group (NZ) Ltd* – The employer was ordered to pay an employee $5,016 for lost wages and $18,000 for compensation for:
    a) failing to listen to, and engage with, the employee's feedback at the feedback meeting
    b) rushing the redundancy process, and
    c) asking the employee to provide feedback while she was on sick leave.
2) *Drivesure Ltd v McQuillan & Ors* – The employer was ordered to pay $8,000 compensation to each of three employees, plus $8,000 towards their legal costs (a total of $32,000) for unduly rushing the restructure process. This included holding a feedback meeting after the first COVID lockdown was announced (which also meant an employee's representative was unable to attend) and failing to consult on changes to the restructure proposal part way through the process.
3) *Ati & Ors v Unite Union* – This is an extreme case in which the employer was ordered to pay $20,000 compensation plus $1,000 penalty to each of 12 former employees, for an inadequate and insufficient consultation process and a breach of good faith. In particular, the employer did not provide the selection criteria to the employees so failed to give them an opportunity to comment on it.



Employers should seek advice before embarking on a restructure, particularly if redundancies are envisaged.

To justify a redundancy – along with having a genuine business reason – employers have to consider what information is appropriate, consultation requirements, whether a selection process is needed, and redeployment. As the recent cases make clear, even when times are tough, businesses cannot afford to take shortcuts.

Melissa Castelino (Associate), **Giulia Wiesmann** (Solicitor)

Protections for gig workers – an Uber story

Employees have access to a range of protections that contractors do not, including entitlement to the minimum wage, annual leave and paid sick leave. They also have the ability to raise a personal grievance.

Previously, the Employment Court had ruled that an Uber driver was not an employee[1]. But in *E Tū v Rasier Operations BV & Ors* [2022] NZEmpC 192, on very similar facts, the Chief Judge has ruled that Uber drivers can be employees. This ruling, if upheld on appeal, could have a profound impact on Uber's business model in New Zealand and affect other app-based service providers operating in the country's gig economy.

Uber has always argued that it is just a connector (it connects passengers with drivers for a service fee) and that drivers are self-employed contractors. Superficially, drivers could log on and off when they want and work for others without constraint. Uber says it has limited control, as drivers are not integrated into its business and are, in effect, in business on their own account.

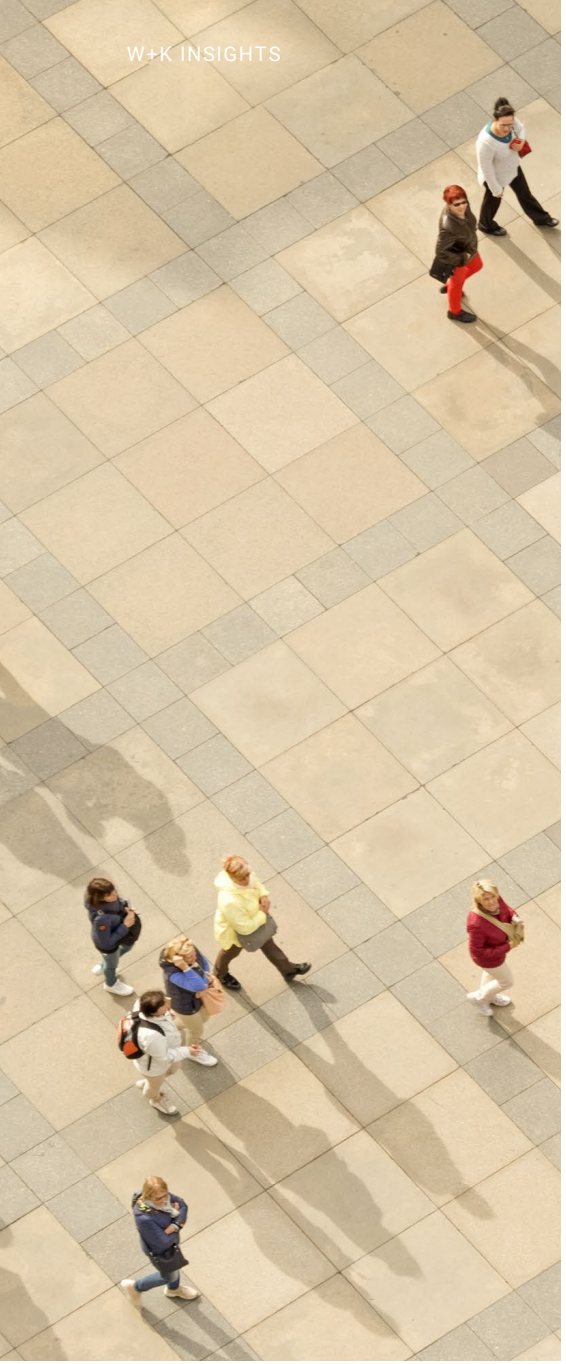
The Court looked in detail at the way Uber operated. Whilst, on the face of it, drivers could log on and off when they wanted, Uber controlled the fares that could be charged and deployed a number of 'carrots and sticks'. These included different statuses, depending on how often a driver logged on, that attracted different privileges. In reality, this meant Uber exerted a significant amount of control over the drivers. The Court did recognise that there was no 'mutuality of obligation', which is the requirement to offer work and the requirement to accept work. It did not, however, consider this to be determinative that the drivers were not employees. The Court pointed out that casual employees also do not have mutuality of obligation but are still employees. Additionally, passengers identified drivers as "Uber drivers". Ultimately, the Court found that the only entity that was running a business or undertaking was Uber – not the drivers.

Although the Court did emphasise that this ruling does not affect all Uber drivers, as the Court does not (yet) have that power, Uber will almost certainly have to reconsider its business model if its appeals are unsuccessful.

More broadly, businesses will need to continue to look at how they engage staff, and the terms on which they engage them, as more and more workers challenge their status. Insurance policies will often exclude employment disputes liability for contractors claiming to be employees and will not cover minimum entitlements, so a ruling that a contractor is an employee could have significant consequences for a business.

Murray Grant (Special Counsel)

[1] *Arachchige v Rasier New Zealand Ltd & Anor* [2020] NZEmpC 230



Casual employees and unjustified dismissal

In *Dewar v The Wellington Free Ambulance Service*[2], the ERA recently clarified obligations to casual staff.

Ms Dewar worked for the Wellington Free Ambulance (WFA) as an ambulance officer. She resigned from her full-time position in 2019 to become a casual staff member in order to focus on her new business. She continued working 42 hours a week until she was later involved in a car accident. She did not resume working for WFA for quite some time after the accident, but WFA paid her ACC payments. After being cleared for work, Ms Dewar, of her own volition, picked up minimal shifts with WFA and primarily focused on working on her business. In June 2020, WFA informed Ms Dewar that there was little casual work available. Ms Dewar expressed interest in picking up more shifts, but they were not approved.

Ms Dewar's employment with WFA was terminated in October 2020. Ms Dewar claimed she was unjustifiably dismissed. WFA argued that because Ms Dewar was a casual employee, there was no obligation to provide her with work, nor for her to receive it. As the end of an assignment was the end of the relationship[3], and as there was no obligation to provide further work, there could not be an unjustified dismissal.

The Employment Relations Authority agreed. It found that Ms Dewar was a casual employee and that WFA was not obliged to offer her any particular type or amount of work, and that Ms Dewar had not been unjustifiably dismissed in these circumstances.

This case helpfully restates the relationship between an employer and a casual employee. An employer is not obligated to provide a casual employee with any minimum or guaranteed amount of work. Whilst an employer could be liable for dismissing a casual employee during an assignment, if the employer decides to end the relationship at the end of an assignment or shift, it cannot have a liability for unjustified dismissal.

Casey Williams (Solicitor)

> Whilst an employer could be liable for dismissing a casual employee during an assignment, if the employer decides to end the relationship at the end of an assignment or shift, it cannot have a liability for unjustified dismissal.

[2] 2022-NZERA-506

[3] *Applying Drake Personnel (New Zealand) Ltd v Taylor* [1996] 1 ERNZ 342

Holidays Act 2003 – employers cannot require employees to take annual leave without first attempting to agree

The case of *E Tū & Ors v Carter Holt Harvey LVL Ltd* concerned whether Carter Holt Harvey LVL (CHH) could require its employees to use their annual leave during the 2020 Level 4 lockdown.

CHH advised its employees that they would need to take eight days annual leave, as part of its measures to ensure they were paid during the lockdown, despite being unable to work. CHH believed that this was consistent with s 19 Holidays Act 2003 (Act), which provides that an employer may require an employee to take annual leave if the employer and employee are unable to reach an agreement. CHH argued that this provision applies where the employer does not have the means or capacity to reach an agreement, as in extraordinary circumstances like the COVID lockdown.

The Employment Court did not accept CHH's arguments. It considered that before the employer could direct an employee to take leave, the Act required the employer and employee to try to agree when the leave would be taken. 'Agreement' is a higher standard than 'consultation'. Consultation only requires proposing an arrangement and allowing and considering feedback before making a decision.

However, attempting to come to an agreement requires employers to be active and constructive. Because CHH had not even attempted to engage with employees to reach an agreement, it could not require the employees to use their annual leave.

The employees also argued, without success, that annual leave could not be used for the lockdowns because the Act provides that annual leave is for 'rest and recreation'. The Court rejected this argument. Employers do not have to ascertain what employees will be doing during a period of annual holidays and assess whether that, in fact, constitutes rest and recreation. It would be quite an onerous undertaking if an employer had to discern whether an employee was using their annual leave for rest and recreation in every case.

While this decision will have no impact on annual leave taken over business closedown periods (as this is provided for in the Holidays Act), it will have a significant impact for employers who require employees with large, accrued leave balances to use their leave.

Kathleen Best (Solicitor)

Holidays Act 2003 – public holidays – employer impacts

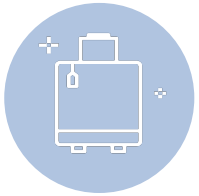
While employers are required to seek agreement with employees regarding annual leave, two months ago, the government decided to impose a one-off public holiday to commemorate the passing of Queen Elizabeth II. While many New Zealanders embraced the long weekend that this created (whether royalists or not), it did cause issues for businesses.

Queen Elizabeth II Memorial Day required the normal public holiday entitlements under the Holidays Act to be observed. It provided a timely reminder of what those requirements are where the public holiday falls on a day that would otherwise be a working day, specifically:

1) employees have a day off with pay, or
2) employees required to work are paid time and a half for the hours worked and an alternative day of leave.

The 'without warning' decision to add the public holiday to the calendar left businesses with only two weeks to consider the implications of reduction or loss of productivity and revenues, and/or additional administration and payroll costs. Hopefully, further decisions with similar impacts on employers are less hastily rushed through, to give businesses the time to make decisions and prepare.

Victoria Waalkens (Senior Associate)



Protected disclosures – whistling while they work

New Zealand recently introduced updated whistleblowing legislation – the Protected Disclosures (Protection of Whistleblowing) Act 2022 (the Act). The Act's purpose is simple – facilitating disclosure and investigation of serious misconduct in organisations and protecting those who disclose. The aim is to support ethical behaviour by providing a safe way for people to raise serious concerns.

Although New Zealand has had protected disclosure legislation since 2000, a speak-up culture has been slow to develop. Employees are well-placed to report serious misconduct in the workplace, but government consultation before the Act showed people didn't feel safe raising concerns. Awareness of protections was also low – according to research, nearly 30 percent of employees across Australian and New Zealand workplaces did not know what support their organisation provided to reporters of wrongdoing. The Act also follows the 2017 inquiry into fraud by Ministry of Transport employee Joanne Harrison, who stole over $723,000 from her employer. The inquiry exposed disadvantage suffered by three staff who reported valid concerns, and recommended a redress and settlement package.

The Act strengthens whistleblower protections, widens the definition of serious misconduct, and provides clearer pathways for organisations handling whistleblowing reports. Disclosers are entitled to confidentiality, freedom from retaliation or being treated less favourably, as well as immunity from civil, criminal and disciplinary proceedings. Disclosers can bypass reporting internally and go to an appropriate external authority at any time.

Like its predecessor, the Act applies to both the public and private sectors. Private sector organisations with connections in the public sector may have increased exposure. The Act now states serious misconduct includes:

- unlawful, corrupt, or irregular use of public funds or public resources, and
- conduct that is oppressive, unlawfully discriminatory, or grossly negligent, or gross mismanagement by a person performing a function or duty or exercising a power on behalf of a public sector organisation.

International examples of serious misconduct reported by whistleblowers include financial wrongdoing, such as procurement fraud, tax avoidance and money laundering, and worker exploitation.

The new Act broadens serious misconduct to include a serious risk to the health or safety of any individual. We expect bullying and harassment to be increasingly reported under this provision.

Disclosures can cause disruption and division, and employers must be careful not to discipline, disadvantage or dismiss a whistleblower who has become a thorn in their side. The Act confirms that an employee has personal grievance if an employer retaliates, or threatens to retaliate, against them for a protected disclosure. Claims are also available under the Human Rights Act if a person is victimised for disclosing.

A recent UK Employment Tribunal case illustrates the risk for employers[4]. A surgeon, Dr Kumar, was seconded as a specialist advisor for the Care Quality Commission (CQC) to oversee hospital inspections and patient safety. He made 11 disclosures, mainly about patients suffering significant harm and death due to negligently performed operations. The CQC terminated the secondment role, essentially because Dr Kumar raised these concerns. An Employment Tribunal found the CQC had disadvantaged Dr Kumar and that his protected disclosures had materially influenced their conduct. It awarded him compensation of GBP23,000 (approximately NZ$46,000).

Employers should act scrupulously when dealing with whistleblowers. Appropriate internal procedures are compulsory for public sector organisations. However, both public and private sector organisations should ensure that their protected disclosures policies and procedures are updated in line with the Act, and that employees understand whistleblowing processes and protections.

> The Act strengthens whistleblower protections, widens the definition of serious misconduct, and provides clearer pathways for organisations handling whistleblowing reports.

Rebecca Scott (Partner)

[4] *Dr S Kumar v Care Quality Commission* (CQC) Case No: 2410174/2019

Fair Pay Agreements Act 2022 is in force

The Fair Pay Agreements Act is in force from 1 December 2022, creating a framework for a collective bargaining process for fair pay agreements (FPA). The aim is to specify industry and/or occupation-wide minimum employment terms to prevent 'the race to the bottom' and encourage competition without employers undercutting each other by driving down wages and conditions.

There is some confusion and complexity regarding the application and practicalities of the Act. While employees will be represented by unions, there is still uncertainty about who will represent the employer bargaining side following the decision by Business New Zealand not to take on this role. There are also concerns that employer groups will not have enough coordination or resources to organise themselves and respond when bargaining is initiated. This could result in an employee-driven process that implements standards and processes employers cannot sustainably adhere to.

We suspect that as these processes begin and businesses are forced to compete by other means, there will be an increase in competition and movement within industries. We may see an increase in redundancies (and subsequently, unjustified dismissal claims). Employers have to adhere to new industry and/or occupation minimum standards if they are streamlining staffing levels to accommodate the better terms and conditions they are required to provide.

Ella Morrison (Solicitor)

The aim is to specify industry and/or occupation-wide minimum employment terms to prevent 'the race to the bottom' and encourage competition without employers undercutting each other by driving down wages and conditions.

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