Employment News

Edition 15 | September 2022

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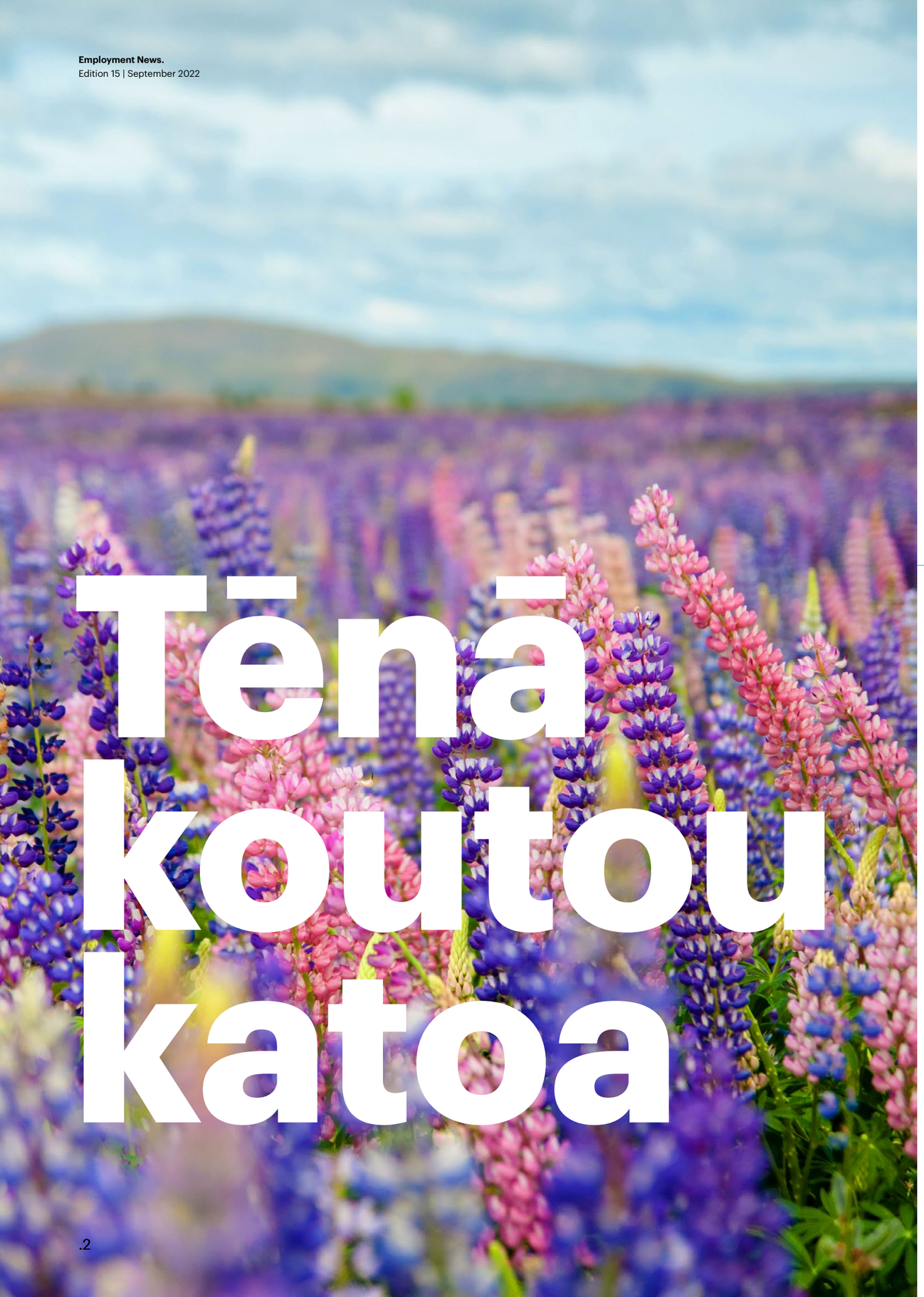
Inside:



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Welcome to our (almost) Spring edition of Anderson Lloyd's Employment Newsletter.

Winter probably has a few bites left but on the bright side, it's been a great season for snow sports. AJ is back from parental leave and Jack is (sadly for us) winging his way overseas to see the big, wide world. Unfortunately, it is an occurrence all too common now that the borders have well and truly re-opened. We wish him all the best and safe travels.

Anderson Lloyd is proud to have been selected as Excellence Awardees in the New Zealand Law Awards in categories of Employer of Choice (>100 lawyers) and Diversity and Inclusion Initiative of the Year.

We hope you will find this Newsletter informative and interesting. It includes articles on the Gloriavale Employment Court ruling; mental capacity issues in relation to Records of Settlement; the Smith's City case emphasising employee's duties of fidelity; and a case involving an employee who engaged in social media posting against her employer. There are also updates on the recent Protected Disclosure Act; Restraint of Trade Private Members Bill; Migrant Workers legislation; and Contractor initiatives.

As always, if there is anything that our Team can do to assist you with your employment needs, please don't hesitate to reach out.

Ngā mihi nui
John and AJ

John Farrow
Partner

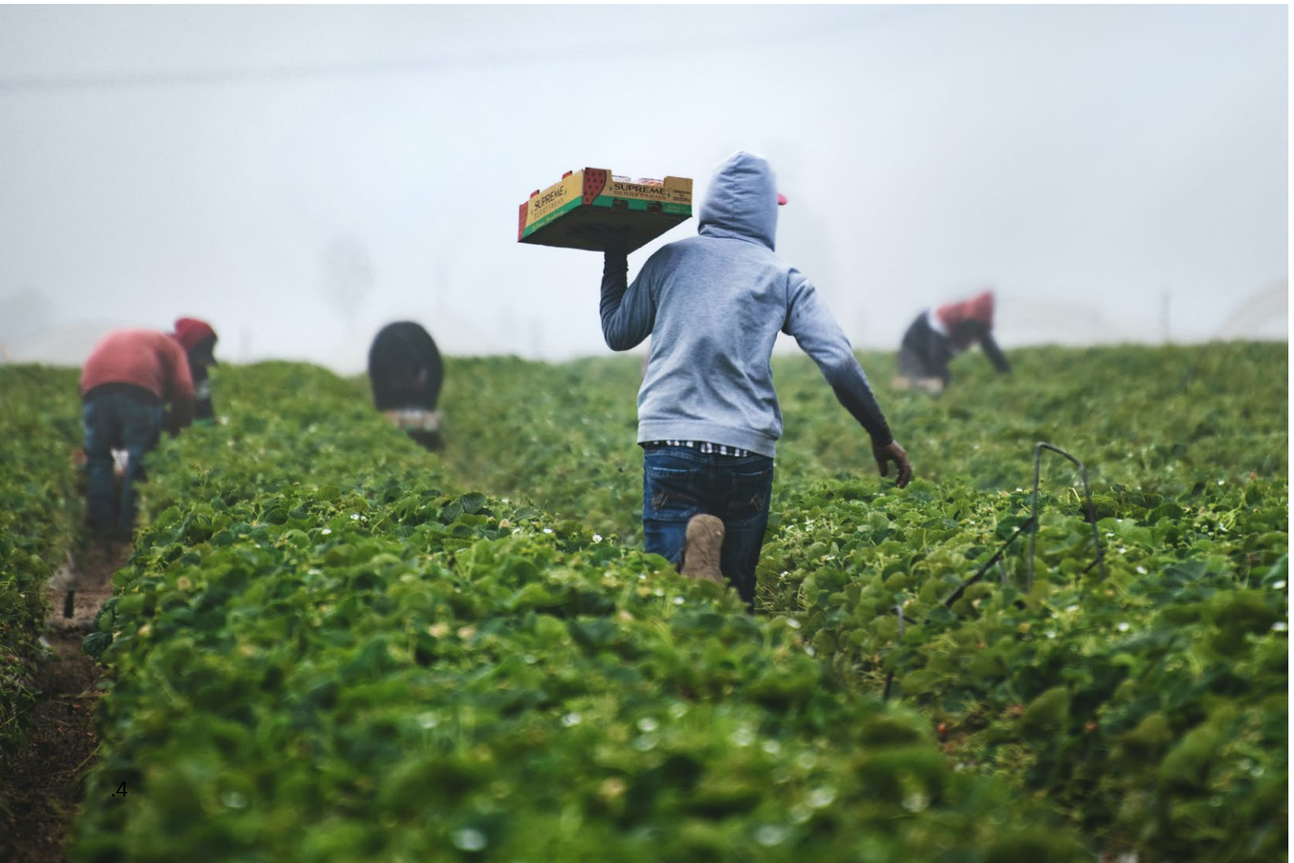
AJ Lodge
Partner

Employing Migrant Workers: The "Accredited Employer Work Visa" explained.

On 4 July 2022, the new Accredited Employer Work Visa (AEWV) came into effect. This means that employers seeking to hire migrant workers need to become an "accredited employer" before they can hire a migrant worker.

With New Zealand's boarders fully re-opening on 31 July 2022, the AEWV process will encourage Kiwi businesses to train, upskill, and hire Kiwi workers where possible, before considering hiring migrant workers. It will also ensure businesses meet immigration and employment standards, and prevent businesses from exploiting any migrants they do hire.

Read on to learn how your business can become an accredited employer.



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Employer Accreditation

There are three key requirements for becoming an accredited employer. The employer must:

1. **Be a viable, genuinely operating business:**

   To prove the employer has a 'genuinely operating business' they must meet one of the following financial requirements:

- Have not made a loss (before depreciation and tax) over the last 24 months;
- Have a positive cashflow for each of the last 6 months;
- Have sufficient capital and/ or external investment to ensure business is ongoing and viable; or
- Have a credible, minimum 2-year plan to ensure ongoing and viable business.

   There are extra requirements if the employer is a franchisee or plans on placing workers with a controlling third party.

2. **Complete settlement support activities:**

   The employer must then provide information about the local community and services and employee work-related matters to AEWV employees. This includes providing; accommodation options, transportation costs, the cost of living, how to access healthcare services, Citizens Advice Bureau services, relevant community groups, how to get an IRD number, any industry training and qualification information and options, specific job or industry hazards. Employers must also provide sufficient time during paid work hours to complete Employment New Zealand online modules within one month of employment.

3. **Be compliant with immigration, employment and business standards:**

   To be considered 'compliant with standards', the employer must not be on the Labour Inspectorate's non-compliant list or subject to a stand-down, and have no history of immigration non-compliance. In other words, directors, partners, or any other individuals exerting overall influence of the business must be squeaky clean. Everyone who makes recruitment decisions within the employer organisation must complete Employment New Zealand's online employer modules once within every accreditation period.

   The employer must also pay all recruitment costs in and outside NZ and not pass these on to the migrant.

Obtaining an AEWV for Incoming Migrant Workers

Once an accredited employer, further requirements must be met before the employer can offer employment to a migrant worker on an AEWV.

1. **The Job Check**

   When looking to fill a certain role, the employer will need to advertise for suitable Kiwi workers for at least two weeks before looking overseas (the exception to this is where the role pays at least twice the median wage, or is on the green list). The employer must also apply for a 'job check' before offering work to a migrant. This involves:

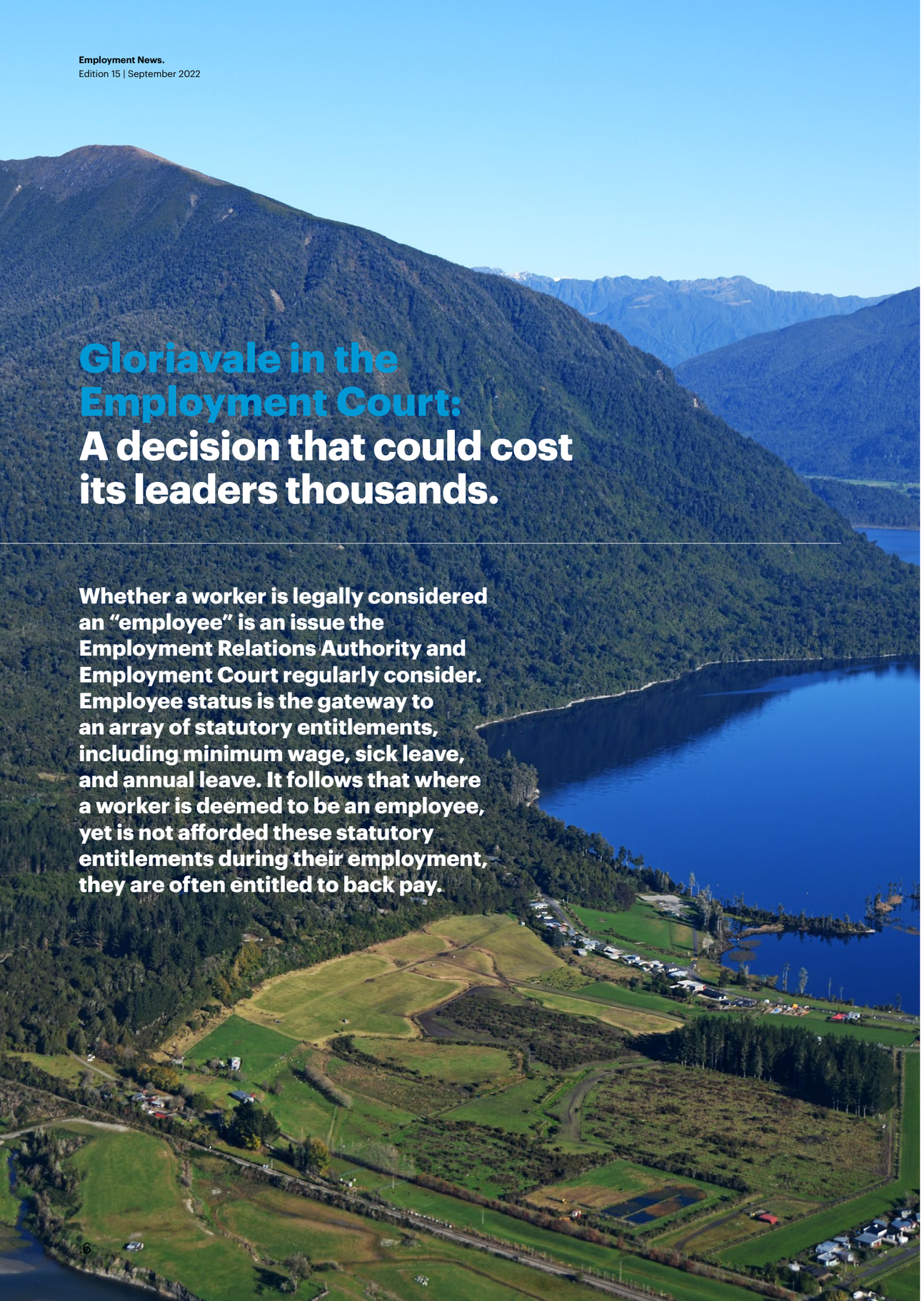
- Confirmation that the job is for least 30 hours a week;
- Confirmation that the minimum pay rate for the job is at least $27.76 per hour (New Zealand's median wage);
- Labour market testing (unless the pay rate is 200% of New Zealand's median wage median wage); and
- Confirmation that the employment agreement meets acceptable standards.

2. **The Migrant Check**

   If the employer finds a suitable applicant from overseas, they will need to show that the applicant has adequate qualifications and experience for the role, and meets health and character requirements.

   If approved, the applicant will be granted a 3-year visa to work under the employer.

Samuel Deavoll
Senior Solicitor



Gloriavale in the Employment Court: A decision that could cost its leaders thousands.

Whether a worker is legally considered an "employee" is an issue the Employment Relations Authority and Employment Court regularly consider. Employee status is the gateway to an array of statutory entitlements, including minimum wage, sick leave, and annual leave. It follows that where a worker is deemed to be an employee, yet is not afforded these statutory entitlements during their employment, they are often entitled to back pay.

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Three former Gloriavale members (the Plaintiffs) were recently successful in the Employment Court after Chief Judge Inglis ruled they were employees at the Community from the age of 6.

Read on for a breakdown of the judgment.

Working Conditions

From the age of 6 to 14, Gloriavale children perform work outside of school hours, either early in the morning or in the late afternoon and evening. For the plaintiffs, this involved working in the Community gardens, the operational moss factory (Lakeview Moss Ltd), and one of the Community's dairy farms. One plaintiff did the morning milking from 4am-7am or 3:30am to 7:30am, two or three times a week for six years. He was also required to do milking on Sundays. Another plaintiff worked in the moss factory, separating sticks from moss on a conveyor belt. When he turned 14, he began working at the Community's piggery cleaning out pig stys.

At the age of 15, children enter their final year of school and take part in a "transitional education programme", also referred to as work experience. This programme is approved by the New Zealand Qualifications Authority (NZQA), but the Court accepted that the programme was not administered in accordance with NZQA standards. The Court determined that Gloriavale used the programme to transition its members into full-time work when they were still legally required to attend school.

At the age of 16, children sign a Deed of Adherence. The Deed signifies commitment to a range of religious principles underpinning the way of life at Gloriavale, including a commitment to serving the Community through work. From this point, working conditions became especially gruelling for the plaintiffs. They worked an average of 60-70 hours per week across Gloriavale's different businesses, including Forest Gold Honey Ltd, Harvest Honey Ltd, Wilderness Quest New Zealand Ltd, and Apetiza Ltd. The plaintiffs were required to complete timesheets, and were given six days of holiday per year.

The legal test

Ascertaining whether a person is an "employee" requires the Court to determine "the real nature of the relationship".[1] This involves an inquiry into all relevant matters relating to the conduct of the parties, and the intention that such conduct conveyed.

Does religion change the application of the legal test?

In determining how to apply the above legal test, Chief Judge Inglis briefly considered the relevance of religion, and whether that affected the application of the law. Gloriavale's leaders (the Leaders), the defendants in this case, argued that the way of life at Gloriavale and its structures around work were all "deeply rooted in the way in which members expressed their belief". They further suggested that the Court should make their determination upon a presumption against the existence of an employment relationship.

This argument was rejected by the Court. The intermingling of "the spiritual life and the practical life" at Gloriavale was indeed a relevant consideration for determining the real nature of the relationship, but could not give rise to a presumption against employment status. Although Christian faith informs the "practical life" at Gloriavale, the Community's activities go far beyond practising religion. As put by the Court, this is clearly reflected in the Community's extensive commercial operations, within which the plaintiff's worked. Gloriavale owns a number of substantial assets, and has funded these purchases through its commercial endeavours.

[1] Section 6(2) of the Employment Relations Act 2000.

Continued >

Gloriavale in the Employment Court: A decision that could cost its leaders thousands. (Continued)

Application to the facts

The Leaders argued that the plaintiffs were volunteers who performed chores from the ages of 6 -14, NZQA-approved work experience at the age of 15, and volunteer work from the age of 16. The Court rejected all three arguments.

The Court instead favoured the plaintiff's argument – that the real nature of their relationship was one of employment given the extensive control the Leaders exercised over the plaintiffs and the commercial benefit obtained from their labour. The Leaders determined which job each boy over the age of 6 would perform. Boys were required to attend their work at times determined by the leaders, and at the direction and control of those managing each workplace. Gloriavale's commercial businesses reaped the benefits of the plaintiffs' work, the activities were consistently performed over an extended period of time, and the activities were physically demanding or dangerous.

The Court also based its determination on the definition of "employee" found at s 6(1)(a) of the Employment Relations Act. Section 6(1)(a) makes clear that an "employee" works for hire or reward. In this case, it was abundantly clear that work was performed in exchange for the food, clothing, and the ability to participate in Community activities, and thus amounted to a reward. Each of the plaintiffs testified that it was drilled into members from a young age they would receive those rewards in exchange for their work. The plaintiffs (and other members of the Community) equally understood that they would be deprived of those benefits if they did not work. One plaintiff gave evidence that he was prohibited from eating dinner one night after his work manager said he had not been pulling sticks out of the moss fast enough in the moss factory. Another plaintiff gave evidence that he was made to stand on stage in front of the entire Community at dinner time when he was 10 or 11 years old.

The Labour Inspector

The plaintiffs also claimed that the Labour Inspector failed to exercise its protective statutory duties. This claim arose from two inquiries conducted by the Labour Inspector in 2017 and 2020/2021. Both inquiries concluded the members of Gloriavale were not employees, and rather had agreed to "give up all individual rights to their personal assets in order to contribute communally".

A definitive determination was not made with regard to this claim, and will be dealt with at a later time. What Chief Judge Inglis did say was that "large alarm bells ought, in my view, to be ringing...". She determined that the evidence provided to the Labour Inspector during its inquiry made very clear that the Leaders held absolute power in relation to work, that the members of the Community submitted to the leaders, and that the members were not to report concerns to external agencies.

What next?

The decision amounted to a declaration that each of the plaintiffs were employees from the age of 6 years. The next matter for determination is the identity of the true employer – whether that is the Leaders, or the businesses the plaintiffs worked for. Evidence presented on the matter in this judgment failed to shed any light on the matter, and will be dealt with by the Court at a later date.

Once it is determined who the employer is, a claim for wage arrears and holiday pay could be brought. If other workers at Gloriavale bring similar claims then Gloriavale could be ordered to back-pay not only current members, but former Gloriavale members that have left the community.

Lucy Gallagher,
Law Clerk

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Restraint of Trade private member's bill.

A private member's bill which seeks to restrict restraint of trade provisions in employment agreements has been drafted and is going into the parliamentary ballot.

Restraint of trade provisions are commonly used by employers to protect their commercial or proprietary interests, however they are void (both unlawful and unenforceable) unless they can be established as reasonable.

The two restraint of trade provisions often used in combination are non-competition clauses and non-solicitation clauses. Non-competition clauses seek to prohibit an employee from setting up their own business, and/ or working as an employee for a competitor of the employer. Non-solicitation clauses seek to prohibit employees from approaching customers/ clients, contractors, suppliers and/ or employees from the previous employer.

The starting position when interpreting a restraint of trade provision is that they are contrary to public law and unenforceable. The onus then falls on the party wishing to enforce the restraint to establish that it is reasonable.

See our article here for more on what ought to be considered when assessing the enforceability of a restraint of trade.

Private member's bill

Politician Helen White has drafted her Employment Relations (Restraint of Trade) Amendment Bill to restrict the use of restraint of trade provisions further. The Bill will now go into the parliamentary ballot, and if it is drawn out, could go through the legislative process and become law.

The Bill as it stands would amend the law to:

- provide that restraints of trade have no effect wherever an employee earns less than three times the minimum wage;
- limit the use of restraints to those situations where the employer has a proprietary interest to protect;
- require employers to pay half the employee's weekly earnings for each week that the restraint of trade remains in effect; and
- limit the duration of restraints of trade to no more than six months.

White says that she is expecting push back at select committee if the Bill makes it that far on the three times minimum wage restriction. She says however, *"it is in the public interest that lower-paid employees should be free to take a job with a competitor for more money or better conditions, or to use their skills to start their own business"*.

The Anderson Lloyd employment team will provide further information on how the Bill progresses if it is pulled from the ballot.

Kelly Thompson
Solicitor

"Not Open For Instruction": When are Secondary School teachers entitled to reimbursement of costs associated with work done outside of school hours?

Since 1996, the Secondary Teachers' Collective Agreement (SCTA) has contained a provision stating that where teachers are required to attend school or elsewhere when the school is "not open for instruction", they are to be reimbursed for any actual or reasonable costs incurred[1]. 26 years on, the Employment Court has determined what these words truly mean in *New Zealand Post Primary Teachers' Association v Board of Trustees for Rodney College* [2022] NZEmpC 118.

The Court found in favour of the NZ Post Primary Teachers' Association (NZPPTA), who successfully argued that a school is "not open for instruction" during weekends, public holidays, vacations, and outside of 8:30am-4:30pm on school days. This means that secondary school teachers are entitled to reimbursement for time spent on professional development and administration tasks during those times.

The dispute

The proceedings first arose in 2012 following a dispute over reimbursement of various expenses incurred by teachers when they were required to attend school after 3 pm during the school term for parent-teacher conferences, prize giving, and open school evenings.

The focus of the challenge solely came down to the interpretation of "not open for instruction" in clause 5.4 of the 2019 STCA. The NZPPTA argued that it means periods other than the "half-day" periods of two hours or more as defined in s 60 of the Education Act 1989 (**the Act**)[2]. The Secretary for Education on behalf of the Ministry argued that it means vacation or school holiday periods only.

To resolve the dispute, the Court considered:

1. The factual background;
2. The statutory context;
3. The principles of contractual interpretation; and
4. The application of those principles to clause 5.4.

[1] Clause 5.4.3 of the 2019 SCTA.
[2] Since replaced by the Education and Training Act 2020.

The Court's determination

The factual background

Prior to clause 5.4's introduction in 1996, bargaining was protracted and difficult, and there was a greater focus on wider issues of remuneration. Negotiation around clause 5.4 was "down to the wire", and the final wording was not settled until the last minute.

When bargaining took place three years later in 1999, the context was the same. Wider issues were the main focus of bargaining, and the scope of clause 5.4 remained unclear. Outside of bargaining, the Minister wrote to the NZPPTA to advise it was of the view that "open for instruction" is defined in related to the number of "half-days" a school is required to be open for instruction, and that report evenings and other activities that take place on days which a school is open for instruction would not fall within the parameters of clause 5.4. At a later stage, the NZPPTA wrote to the Ministry asserting that report evenings and other school events occurred outside of half-day periods which the school was open for instruction and thus were covered by clause 5.4.

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The Court found that the parties never reached an agreement on the meaning of clause 5.4, and the matter was not taken further before the present proceedings arose.

The statutory context

Like the written discussions between the Ministry and the NZPPTA, the statutory context suggested that the term "open for instruction" is strongly linked to the concept of "half-days". Based on the statutory definition of "half-days", a secondary school is "open for instruction" for two-half days per day, 10 half-days per week, and 380 half-days per year, as required under ss 65A and 65B of the Act. From this, the Court stated that a school is not open for instruction on weekends, vacations, public holidays and school holidays.

> What was not so clear was whether a school would be considered "open for instruction" for the entirety of any day which a half-day occurred. This was important to determine because it is on such days that parent teacher conferences and the like typically occur.

Both parties advanced arguments which the Court found to be commercially absurd. The Ministry's argument suggested that once a school has been open for one half-day, then that whole day is rendered "open for instruction". The problem with this argument is it suggests that a school which is open for any half-day is "open for instruction" from 12am until midnight – an interpretation that is not only absurd, but also inconsistent with the SCTA's definition of overtime. The NZPPTA's argument was that "not open for instruction" has a consequential meaning from "open for instruction", suggesting that a school is "not open for instruction" outside of the two two-hour, half-day periods on a day that a school is open for instruction (equating to 20 hours per week). The Court again rejected this suggestion, as it was inconsistent with the SCTA's timetabling policy, which requires teachers to have 25 hours of timetabled class time per week.

The Court proceeded to carry out its own interpretation exercise of clause 5.4. This required the court to ascertain the ordinary and natural meaning of clause 5.4 in its contractual context, and then consider whether the structure of the bargain, any specialised meaning, the history of the clause, or considerations of commercial absurdity affected that assessment.[3]

The Court held that Part 5 of the SCTA, within which clause 5.4 is contained, is clearly intended to retain flexibility for both schools and teachers in how they manage the delivery of the curriculum and meet the pastoral needs of students. Clause 5.1.2 of the SCTA specifically acknowledges and accepts that the hours of opening of schools are designed to meet the curriculum and pastoral need of students. This indicated to the Court that there is an expectation that school is "open for instruction" not solely for the purpose of meeting the statutory half-day requirements. Further, the Court again stated that the SCTA requires every employer to have a timetabling policy where timetabled class time of at least 25 hours is required. This presumes that a teacher is at school and working for more than the four hours per day, 20 hours per week, that an interpretation solely based on the statutory half-day requirements would allow. Additionally, unchallenged evidence from the NZPPTA provided that while formal school instruction typically begins at 9 am and finishes at 3-3:15 pm, a teacher's working day will generally be from approximately 8:30 am to 4:30 pm.

Taking into account clause 5.1.2, timetabling requirements, and the NZPPTA's evidence, the Court ruled that a school is "open for instruction" between 8:30 am and 4:30 pm. It followed that the natural and ordinary meaning of the words "not open for instruction" in clause 5.4 were taken to mean any time outside of those hours on any school day, in addition to weekends, vacations, and public holidays.

This interpretation was also said to be consistent with the purpose of clause 5.4 itself, which is to enable the employer to require teachers to be at school or elsewhere for professional development or administrative purposes at times when they would not generally be required to be at work.

The Court concluded its judgment by making clear that the Court's interpretation does not inhibit school activities like prize giving, quiz nights or report evenings:

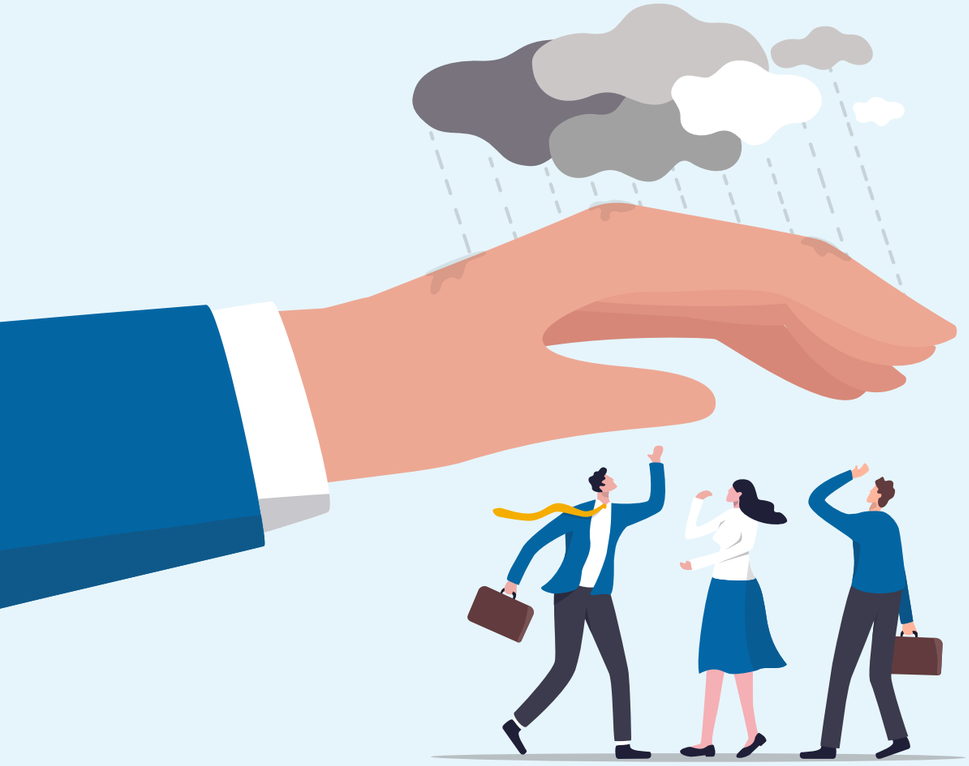
> There is nothing to prevent a school scheduling courses or events and requiring attendance by the teacher at times during the school week but when the school is not open for instruction. It simply means that the time should be credited towards either their professional development or administration days and if reasonable costs were actually incurred as a result, they be reimbursed.[4]

Implications

Employers of secondary school teachers should take careful note of this decision and put in place systems for determining whether reimbursement of costs is required in association with events and training that occur when their school is "not open for instruction".

[3] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] .
[4] At [141].

Lucy Gallagher,
Law Clerk



How protected are your employees' disclosures?

Recent legislative updates facilitate and afford individuals specific protections around whistleblowing of serious wrongdoing in or by an organisation.

On 1 July 2022, the Protected Disclosures Act 2000 ('the 2000 Act') was replaced by the Protected Disclosures (Protection of Whistleblowers) Act 2022 ('the 2022 Act'). The purpose of the 2022 Act remains the same, which is to facilitate the disclosure and investigation of serious wrongdoing in the workplace, and to provide protection for employees and other workers who report concerns.

The 2022 Act aims to better facilitate protected disclosures through more accessible legislation, and strengthen and clarify available protections for those who 'blow the whistle' on serious wrongdoing in their workplace or former workplace.

The 2022 Act allows disclosers to report serious wrongdoing directly to an appropriate authority at any time without first having to raise concerns within their own organisation. The 2000 Act only provided an ability to report straight to an appropriate authority if the alleged wrongdoing concerned the head of the discloser's organisation, or in an exceptional or urgent situation.

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What is a protected disclosure?

A protected disclosure is the disclosure of information in good faith by a discloser who believes on reasonable grounds that there is or has been, serious wrongdoing in or by the discloser's organisation.

Who are protected?

The rights under the 2022 Act apply to a discloser, which in relation to an organisation, means an individual who is (or was formerly)—

- an employee;
- a homeworker;
- a secondee to the organisation;
- engaged or contracted under a contract for services;
- concerned in the management of the organisation; or
- a volunteer.

What is serious wrongdoing?

Under s10 of the 2022 Act, serious wrongdoing includes any act, omission, or course of conduct in (or by) any organisation that is:

- an offence; or
- a serious risk to, public health, public safety, the health or safety of any individual, or the environment; or
- a serious risk to the maintenance of law; or
- oppressive, unlawfully discriminatory, or grossly negligent, or that is gross mismanagement (in a public sector organisation).

The 2022 Act has extended the previous definition of serious wrongdoing to cover private sector use of public funds and authority and to cover behaviour that is a serious risk to the health and safety of any individual (which could include instances of sexual harassment and bullying). This places a significant obligation on an organisation when protected disclosures are made.

What protections do employees have?

The 2022 Act prohibits 'retaliation' which is defined as any of the following circumstances:

- Dismissing an employee.
- Not offering the employee the same terms of employment, conditions of work or opportunities as other similar employees in the organisation.
- Causing detriment to the employee (including the detrimental effect on the employee's employment, job performance or job satisfaction).
- Retiring the employee or causing the employee to retire or resign.

The 2022 Act also prohibits employers from treating another less favourably because the person has:

- made or intends to make a protected disclosure;
- encouraged someone else to make a protected disclosure; or
- provided information in support of a protected disclosure.

A discloser is also protected even if they are mistaken and there is no serious wrongdoing. Further, another discloser, who discloses information in support of, or relating to, a protected disclosure matter is also entitled to protection even if they are required to disclose that information.

What are the organisations' obligations?

The 2022 Act provides recommended guidance that the receiver of a protected disclosure should within 20 working days, where practicable, acknowledge receipt to the discloser, consider whether the disclosure warrants investigation, check if the disclosure has been made elsewhere, deal with the matter appropriately, and inform the disclosure of outcome.

An organisation receiving a disclosure has a positive obligation to inform the discloser of what they have done, or are doing, to deal with the matter and provide reasons. If a receiver decides that no action is required in respect of a disclosure, they must now inform the discloser and provide reasons for their decision. Where a matter may take more than 20 working days to practicably deal with the matter appropriately, the receiver should inform the discloser how long the receiver expects to take to deal with the matter and appropriately update the discloser as the matter is dealt with.

We suggest employers review their current whistleblowing policies and procedures in light of the upcoming changes.

Samuel Deavoll
Senior Solicitor

Kelly Thompson
Solicitor

Smiths City awarded over $800,000 after employees found to have acted in competition while employed.

The Employment Court has found two senior Smiths City employees breached their employment agreements and duties of fidelity for engaging in business activities that directly competed with Smiths City while employed.[1]

Mr Claxton

Mr Claxton was employed by Smiths City as Flooring Manager. While employed, he worked as a 'consultant' for "Can Do Flooring Ltd", which sold and installed flooring products. He would work out costings and quotes for work, attend to measuring the jobs and arrange installation. He also assisted with invoicing and answering customer queries. This relationship began in 2011, and transactions continued until early 2019, totaling about $397,000 plus GST.

Gradually, Mr Claxton began operating as a sole trader. He would purchase, or arrange purchases of carpet and flooring through other Smiths City customer account holders for himself. This allowed him access to credit and enabled him to circumvent Smith City's staff purchasing policy.

In 2017, Mr Claxton incorporated his own company "Cando Creative Flooring Limited", undertaking flooring activities in direct competition with Smiths City.

11 witnesses gave evidence to the effect that Mr Claxton interposed himself, Can Do Flooring, or Cando Creative Flooring, in transactions the customer thought were with Smiths City.

One example was a customer who would go to Smiths City on behalf of her son's business to look at samples and get quotes. She got a quote from Smiths City in an email from Mr Claxton, signed by him as the Flooring Manager. Subsequently, she received an invoice from Cando Creative Flooring Limited. She phoned Mr Claxton and asked for an explanation and he told her the transaction was "all good" and that she was "not to worry and it was not a problem" because "Cando was another division of Smiths City".

Essentially, each customer thought they were dealing with Smiths City, but Mr Claxton was diverting the purchases away from Smiths City for his own benefit.

Employment Court

The Court was satisfied that Mr Claxton undertook business in direct competition with Smiths City from about October 2011 right up until his employment ended in 2019 by way of resignation, and he did not have permission to do this.

Mr Claxton was found to have breached multiple provisions in his employment agreement by:

- establishing and maintaining a conflict of interest for a long time and competing with Smiths City; and
- using Smiths City's property to store his carpet and show it to customers; and
- influencing potential transactions with Smiths City's customers by diverting them for personal gain; and
- incorporating Creative Flooring and acting as its director and being a director of Cando Creative Installs.

Mr Claxton was also found to have breached his duty of fidelity to Smiths City. Employees owe a duty of fidelity to their employer. The duty is broken when there is conduct that undermines the relationship of trust and confidence between employer and employee.

The Court upheld the findings of Judge Travis in Rooney Earthmoving Ltd v McTague[2] which found the duty of fidelity is more extensive when applied to senior employees.

[1] Smiths City (Southern) Ltd (in rec) v Claxton [2021] NZEmpC 169.

[2] [2009] ERNZ 240, [2012] ERNZ 273.

Judge Travis found that the duty prohibits competing with an employer directly, or working at the same time for a competitor. It includes precluding soliciting clients prior to departure, and any other acts that involve an actual incompatibility.

The Court in Rooney found that it was no great extension of the duty to require the employee to report that conduct to the employer. It stopped short of concluding that the duty required all employees to disclose their plans to leave to begin competing businesses.

Mr Claxton was found to have breached the duty by:

- failing to advise Smiths City before he began to compete with it that he intended to do so, and subsequently by not disclosing that he was competing with it; and
- failing to disclose Mr Milne's competing activities and plan to establish a competing business.

Immediately before his employment ended, Mr Claxton had also emailed confidential information to himself intended for the use of Cando Creative Flooring. This was also held to be a breach of the duty of fidelity.

Mr Claxton was held liable for damages totalling $732,399.

Mr Milne

Mr Milne undertook some work for Mr Claxton as early as December 2015. Mr Milne eventually admitted he worked for himself, describing his business as "Tip Top Flooring" to undertake flooring installations for Mr Claxton and Cando Creative Flooring Limited.

Mr Milne had arranged for Smiths City installers to work on behalf of Can Do Flooring Ltd and Cando Creative Flooring Limited during the working day. Similarly to Mr Claxton, these were situations where the customer thought they were dealing with Smiths City.

In 2018, Mr Claxton and Mr Milne began making plans for the creation of "Cando Creative Installs Ltd".

Employment Court

The Court found that Mr Milne had been operating in competition with Smiths City which was in breach of his employment agreement, and the trade agreement which restricted the use of his trade skills outside working hours.

The Court concluded that Mr Milne had also breached his duty of fidelity by:

- undertaking work in competition with Smiths City; and
- approaching existing Smiths City employees inviting them to transfer to Cando Creative Installs Ltd; and
- retaining confidential information; and
- not reporting to Smiths City that Mr Claxton was operating a competing business.

The Court awarded damages against Mr Milne of $83,568.

Key takeaway points:

Although both employees were plainly in breach of their employment agreements, a key takeaway is the discussion on the duty of fidelity. The duty may hold employees to account for actions wider than is specified in their employment agreement, particularly senior employees.

Kelly Thompson
Solicitor

Employment Relations Authority: DHB Nurse justifiably dismissed for posting anti-vaccination sentiments on Facebook.

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A palliative care nurse employed by the Wairarapa District Health Board (DHB) was dismissed after an investigation revealed she had posted anti-vaccination advice and information on Facebook, as well as criticisms of the government's response to COVID-19.

The Employment Relations Authority recently held the dismissal was substantively justified.[1] The trust and confidence the DHB previously placed in the nurse was destroyed as a result of her inability to recognise the impact of her posts, and her lack of remorse for making them.

Amanda Turner's Facebook posts were brought to the DHB's attention by a manager from a local aged care facility. Although the content of Turner's posts was not reproduced in the judgment, the Authority gave an example of one post where Turner described the then only available COVID-19 vaccination as "murderous".

The Decision to Dismiss

The DHB interviewed Turner twice as part of an investigation into her conduct. Turner did not understand why her Facebook posts had been called into question because, according to her, they were private posts and shared with likeminded people. During one meeting with the DHB, Turner acknowledged that her posts "may offend some people", but that she was entitled to express her personal opinion. She further explained that she did not ever speak about the content of her posts in the workplace, and thus could not influence others thinking on matters regarding COVID-19 and vaccination.

Given Turner's ongoing inability to understand and acknowledge the impact of her Facebook posts, the DHB confirmed their decision to dismiss Turner without notice. Turner subsequently raised a personal grievance.

The Authority agreed with the DHB held that Turner lacked complete insight throughout the DHB's investigation. Turner was working in a community-based role, nursed vulnerable patients, and it was not unreasonable to expect Turner to refrain from making critical and controversial comments on the COVID-19 related matters. Turner failed to understand that her occupation and standing in the community made her specific posting about vaccination inappropriate.

[1] Turner v Wairarapa District Health Board [2022] NZERA 259.

Conduct outside of the workplace bringing the DHB into disrepute?

As part of its conclusion that Turner's dismissal was justified, the Authority found that the DHB was lawfully entitled to believe that Turner's posts had brought the DHB's reputation into disrepute, and could potentially continue to do so.

Turner argued that because her posts were shared with 200 Facebook friends only, there was no causal nexus between her posts and her employment, and thus no impact on the DHB's reputation. The Authority rejected this argument with reference to *Hook v Stream Group (NZ) Pty Ltd* [2013] NZEmpC 188. There, the Employment Court held that Facebook posts (including those protected by privacy settings) may not be regarded as protected communications beyond the reach of employment processes where the information can be passed on to a "limitless audience". Here, the Authority found there was a significant risk of harm to the DHB's reputation had her posts been viewed by the wider community.

Breach of Right to Freedom of Expression?

Turner contested that the DHB's decision to dismiss infringed on her right to freedom of expression under the New Zealand Bill of Rights Act 2020 (NZBORA).

As the Authority stated in its judgment, it does not have jurisdiction to provide any remedies for breaches of NZBORA, or any declarations as to its applicability. Turner would need to apply to the High Court for a judicial review of the DHB's decision if she wished to progress this claim further.

Alternative Option to Dismissal?

As part of its judgment, the Authority considered whether a more suitable alternative to dismissal was available to the DHB. During the hearing, Turner's counsel suggested that a direction to 'cease and desist' her Facebook posts alongside some awareness training would have been more reasonable. The Authority concluded that such measures were not reasonably available to the DHB given Turner's "obdurate defence of her views" and lack of insight.

Lucy Gallagher,
Law Clerk

Can a record of settlement be set aside on the basis of mental incapacity?

Supreme Court confirms the position.

Employment problems are commonly resolved by way of a special settlement agreement prepared pursuant to section 149 of the Employment Relations Act 2000 (Act). These "records of settlement" require sign off from an agent of the Ministry of Business, Innovation and Employment (currently, a mediator).

Records of settlement are widely considered to be robust insofar as they are (seemingly) full and final and cannot be reopened.

A string of cases culminating in a Supreme Court decision examined the validity of these agreements where a party lacked mental capacity at the time the agreement was signed.

The facts

An employee of the New Zealand Defence Force claimed she was subject to bullying and harassment at work. This resulted in an employment dispute, which was settled by way of a record of settlement. Subsequently, the employee argued that she lacked capacity to sign the agreement, which was supported (retrospectively) by medical evidence.

A psychiatrist deemed that the employee was "likely to have been suffering from a significant depressive episode with ongoing anxiety symptoms at the time of signing the [record of settlement] and … [the employee's] ability to understand all the relevant information within this document is likely to have been impaired…"

The Courts agreed that the employee did not have capacity at the time she signed the record of settlement.

The law

Common (case) law has established that a lack of mental capacity to enter a contract, is alone not enough to void the contract. Voiding the contract requires the lack of capacity to be known to the counterparty at the time the agreement was entered into. This "two-limb" approach is already recognised in the commercial law context, but the question for the Courts in this case was the extent to which this approach applies to records of settlement in the employment jurisdiction (with its unique, inherently imbalanced bargaining dynamic recognised both in statute and the common law).

The outcome

In a split decision, the Supreme Court agreed with the "two-limb" approach endorsed by the lower Courts to setting aside records of settlement on the basis of mental incapacity.

In the case at hand, the employee lacked capacity (satisfying the first limb), but this was not known to the employer (failing the second limb). For this reason, the record of settlement was not set aside, and remained in force.

In our view this outcome is sensible and consistent with the object of the Act, which is to promote good faith relations and fast and inexpensive resolution of employment problems.

The alternative outcome would have seen records of settlement being reopened years later where there was no knowledge of incapacity at the time of entering the agreement. As mentioned in the Supreme Court judgment, this would have undercut the utility of these agreements for employers, and resulted in employers requiring that employees undergo intrusive medical examination to ensure their capacity.

Considerations

The decisions usefully examined the point at which an employer has "knowledge" of an employee's incapacity that could result in a record of settlement being set aside.

This includes actual knowledge, such as receiving medical information pertaining to incapacity (such as a medical certificate expressly stating such), and constructive knowledge that may be derived from the employee's behaviour.

For example, significantly increased leave, aggressive or out of character correspondence, volatility, and a decline in job performance may indicate a loss of capacity.

To be clear, the threshold is high. It is expected that resolution of an employment relationship problem will be extremely stressful. However, when there are genuine concerns that an employee may not be able to understand or appreciate a proposed settlement, employers should be cautious of signing the agreement, or risk it later being set aside.

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Employment law updates on the horizon.

With a number of legislative changes on the horizon, we expect another busy year for employment law. We set out below the expected legislative updates.

Fair Pay Agreements Bill

The Government has introduced a comprehensive Fair Pay Agreements Bill (the FPA Bill) into Parliament.

The Fair Pay system would allow industry or occupation-wide bargaining for minimum terms and conditions of employment. Its intention is to address reducing wages or employment conditions; rectify reduction in Union membership and ensure that wages grow proportionately with increases in labour productivity.

There are concerns about not only the cost to businesses of increased wages, but also about the costs of bargaining. There is also the question of who will represent employers in bargaining.

The FPA Bill is currently before the Select Committee with its report due by 5 October 2022. We are hopeful that some of these questions will be ironed out during the process.

Holidays Act reform

Almost two decades since its enactment, the Holidays Act 2003 (the Holidays Act) is finally going to get that long overdue reform. The Government has accepted recommendations to make the Holidays Act clearer and to provide greater certainty to employers and employees.

The Government established a Taskforce in 2018 which suggested improvements to the Holidays Act in 2019. The Government approved the recommendations in full, however we are still awaiting any legislation to be drafted. We are now anticipating the reform will take effect in the first quarter 2023.

Extended time for sexual harassment PG

Currently, under the Employment Relations Act 2000 (ERA) a person has 90 days to raise a personal grievance involving allegations of sexual harassment. The Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Bill (the Bill) has been introduced into Parliament, with a purpose to extend the time available to 12 months.

The Bill is currently before the Select Committee with its report due by 18 November 2022.

Contractors or employees

The Tripartite Working Group of unions, employers and government (the Working Group) has recommended law reform to address the employee/ contractor boundary issue. The Working Group has proposed that the Government develop and publicly consult on a policy proposal based on its recommendations.

We are also awaiting the outcome of an Employment Court case concerning applications by Uber drivers to be declared employees.

Sick leave

Under the Holidays Act, employees currently become entitled to paid sick leave after six months continuous employment. The Government has begun work on implementing a Holidays Act Taskforce recommendation that gives employees access to sick leave from day one of employment.

We will continue to provide updates on the legislative changes as they become available.

Kelly Thompson
Solicitor

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Our Employment team

Anderson Lloyd has a strong team of specialist employment 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.

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

Our employment 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

We are recognised by top global legal directories for our labour and employment law expertise, including the 2020 Asia Pacific legal 500 directory and Best Lawyers in New Zealand. 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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