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Vital.

Employment & Immigration News

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Inside:

Tēnā koutou katoa

Welcome to the first edition for 2023 of Vital., Anderson Lloyd's Employment and Immigration Law Newsletter.

2023 has started off with a number of our team presenting across the country at both internal and external conferences and seminars. We are increasingly finding high demand for bespoke internal employment law training for our clients, and are happy to offer this if it is something your organisation would benefit from – please reach out to discuss.

Earlier this year, James Cowan and John Farrow were successful in the Employment Relations Authority with an award in favour of Scott Technology Limited of $410,000 in salary and taxes mistakenly overpaid to an ex-employee. www.employment.govt.nz/assets/elawpdf/2023/2023-NZERA-8.pdf

Also just this month John Farrow and Kelly Thompson were again successful in the case of Thorpe v Hokotehi Moriori Trust. The Trust successfully defended its claim that Ms Thorpe was a contractor as opposed to an employee. www.employment.govt.nz/assets/elawpdf/2023/2023-NZERA-128.pdf

We anticipate this year will see a quietening in changes to employment law through until the election, and then potentially a flurry of changes either being consulted on or pushed through post-election and into 2024. Already we've seen the government defer consultation on how the law could provide more clarity on the difference between employees and contractors.

This year we are excited to have welcomed William Fussey, Associate, to our team. William is based in Christchurch and comes to us having experience in a boutique employment law firm, another large law firm and a specialist employment barrister. William is passionate about (among other things) the nuances of the Holidays Act 2003, which makes me (AJ, not so passionate about the Holidays Act) very happy to have him on board.

Welcome to 2023. We'd love to chat.

Noho ora mai rā, stay well.

AJ Lodge, Partner

John Farrow, Partner

Is immigration New Zealand's key to winning the talent war?

Immigration has been chaotic over the past few years, and yet we need skilled workers now more than ever. In February 2023 our Immigration expert and Senior Associate Tash Rae spoke to NZLawyer about the difficulties in attracting skilled workers to New Zealand. Her interview discusses the biggest challenges employers are facing, and highlights what needs to change.

A WORLDWIDE labour shortage is sweeping the globe, and New Zealand is facing some tough competition for skilled workers. But with recent border closures, complicated visa requirements and constantly changing immigration rules, are we doing enough to attract migrants in the global war for talent?

As we emerge from the pandemic, no industry has been immune to the labour shortage. New Zealand desperately needs more healthcare workers, engineers, IT professionals and construction project managers. However, these occupations are in high demand across the globe. This means that New Zealand is competing with the likes of the UK, Canada and Australia for the same pool of migrants.

Anderson Lloyd senior associate and immigration expert Tash Rae says New Zealand's reputation as a migrant destination has "suffered" over the past few years. Prolonged border closures, split families and the suspension of the Skilled Migrant visa category left many migrants in limbo, and the introduction of a new employer accreditation scheme has also thrown up roadblocks. However, Rae says the most challenging issue has been the sheer volume of change to immigration policy in the last several years.

"The most common feedback I get from employers is just around all of the recent change," Rae says.

"I've been doing this for a long time now, and the rules were fairly stable for many years. But now, I can't predict the updates that will come through my inbox. At times there have been several key updates within just a few weeks."

"It's difficult for employers, lawyers and advisers to get on top of, and I also feel for the immigration officers processing these applications. Just as we learn the rules, new ones come in, and we all have to start from scratch. It's challenging, and I think some stability would go a long way."

What are the biggest pain points?

One of the most significant developments in recent years has been the introduction of the Accredited Employer Work Visa (AEWV). This requires employers to become accredited and take the lead on the visa process. To qualify, employers need to demonstrate that their businesses are viable, have a good history of immigration compliance, and are committed to providing settlement support to migrants.

Rae says the new accreditation system has been "a real change" for some employers, particularly with regard to costs and compliance.

"In the past, employers could be really hands-off in the immigration process if they wanted to be" she explains.

"Under the new AEWV scheme, employers need to drive the process and cover much of the cost. As part of this process, they need to commit to all sorts of obligations. The key risk is that it's a simple initial application that requires declarations only. In practice, many employers are quickly forgetting the commitments made, with no plan to track compliance. I'm regularly having to remind employers of their post-accreditation obligations."

"A recent announcement automatically extending accreditation by 12 months may just delay employers becoming aware of compliance issues that could impact on their long-term ability to support migrants for work visas."

"Rae notes that new hourly threshold rates have also been difficult for employers. Many migrant workers will now need to be paid the new median wage of $29.66 per hour a "big jump" from what's been required under previous schemes and well above market rate for some occupations."

When it comes to highly skilled workers, Rae says some strong policies have been implemented; however, the requirements are often still too narrow, thus excluding a lot of promising migrants from obtaining visas and residence.

"Since the borders have opened up, there have been several categories that have opened up to try and attract some of the talent that we really need," Rae says.

"One of these is the Green List, which allows eligible migrants to go straight for residence, using a simple and quick online process. The downside is that it has strict qualification, experience and salary requirements which exclude many migrants in these in-demand occupation groups."

"As an example, a civil engineer who doesn't have a listed qualification but has been working at a reputable global engineering firm for many years won't be able to move 'Straight to Residence' and will only have the option of a two-year Work to Residence pathway if they earn double the median wage - now more than $123,300 for a 40-hour week. If they don't meet this requirement, they will need to apply under the Skilled Migrant category."

"This is a pretty clunky, multi-step process, which is set to be overhauled in mid-2023," Rae says.

"In my opinion, this type of migrant should be going straight to residence. If they can't, they may just go to our competitor jurisdictions, such as Canada, Australia or the UK."

'Decide on the rules, and stick to them'

If New Zealand wants to plug its talent gap, there's no way around it – it needs to make it easier to migrate and settle here, Rae points out. This means a simple immigration system with straightforward requirements, as well as a clear pathway to residence.

"Making immigration policy is challenging, but there are several things that could be done to increase stability," she says.

"Deciding on some rules, sticking with them and trying not to change them so frequently would be very useful."

Rae says the restrictions on working rights for partners should also be reconsidered. From May 2023, partners of Essential Skills and AEWV holders will need to work for an accredited employer and in most cases earn at least the median wage ($29.66 hourly) to take up employment in New Zealand.

"The new condition that a partner work for an accredited employer makes sense, because it aligns with the government's attempts to reduce migrant exploitation. What needs to be reconsidered is the median wage threshold. The reality is that many partners take up lower-paid employment to supplement a household income. With labour shortages across all industries, this should be allowed. While there are exceptions in place for Green List occupations and high-income earners, this doesn't cover all of the skilled workers that NZ needs." she says.

"If partners can't find acceptable employment, the cost of living will make it very difficult for families to fund their household."

"In my experience, if the partner and the kids aren't happy, there's a risk that the family is going home," she adds.

"One of the key ways that partners can settle is by working, getting out in the community and meeting people. Making this more difficult for many partners is something that really needs to be reconsidered if New Zealand is to stay competitive."

Ultimately, Rae acknowledges how difficult the last three years have been for employers, migrants and immigration officers. The constant flurry of change has also been challenging for lawyers and immigration advisers. However, she says there is no better time to seek out the expertise of someone who has worked in this field for a long time and knows the patterns of Immigration New Zealand's decision-making.

"One issue is that immigration officers have been delegated the discretion to make decisions outside of the rules in the temporary visa space, if they think it's justified," Rae says. "What the rules say and what happens in practice are often two different things"

"So you can imagine how difficult it is to predict how an application will be decided. This is where engaging an immigration lawyer really adds value. We do this every day and can see the patterns."

Tash Rae
Senior Associate

Upward trend in the supply of accommodation for workers

The pandemic has prompted its share of workplace challenges, motivating employers to come up with new ways to attract and retain talent; hybrid working, sign-on bonuses, and fully virtual roles. We are now seeing an upward trend in the supply of accommodation for workers both to entice new employees but also out of necessity due to the lack of available accommodation in some regions, such as Queenstown

We are currently experiencing an increase in queries from employers who are looking to buy or rent residential property to house workers, and who are unsure what obligations will apply and how best to manage the arrangement.

Types of arrangements

Providing accommodation will usually mean the employer is taking on a dual role as a landlord, as well as an employer. Accommodation for workers will generally fall into two categories:

- The most comment arrangement is known as a 'service tenancy'; that is a worker is granted the use of accommodation as a term of the employment agreement, between the landlord as the employer and the tenant as the employee. The Residential Tenancies Act 1986 (**RTA**) will apply to these arrangements.
- A lesser-known category is called a 'service occupancy'. This is where accommodation is provided to a worker, and they are required to stay in this accommodation in order to adequately perform their duties. For example, a matron at a school boarding house, or a lighthouse keeper. This situation is exempt from the RTA and instead arises directly from an employment relationship and forms part of an employment agreement.

Additional requirements may also apply in the event the accommodation meets the definition of a 'boarding house' which is accommodation that has shared facilities and is occupied by 6 or more tenants. On the flip side, the RTA also expressly excludes several very specific types of accommodation.

Documentation

Regardless of the type of arrangement and whether the RTA applies or not, our recommendation is to have a robust agreement detailing the arrangements relating to the provision of the accommodation. Contemplate how the arrangement can be terminated, how rent is to be paid, what occurs if the employee is not currently working or receiving remuneration but remains in the property, what right to access the property will the employer have.

Similarly, it is important to have mirroring obligations in the employment agreement. Among other things this might contemplate the type of arrangement, whether the RTA applies, consent to make deductions from wages or salary for the rent, and a termination/notice provision. This is particularly important for migrant workers on Accredited Employer Work Visas. Immigration New Zealand (INZ) allows lawful deductions for accommodation but asks that these be included in the employment agreement. The details of the deduction should be presented to INZ to be considered as part of the Job Check and AEWV applications.

Rebecca Laney
Associate

Redundancies: Factors affecting costs for employers.

As the economic landscape becomes more uncertain, there are various factors employers need to consider when making workers redundant.

In order to safeguard against a personal grievance, employers need to ensure their process is substantively fair. However, there are also various economic factors employers should consider before concluding that redundancy is the best solution.

Employers are currently battling rising costs. It is important to consider if redundancy is really the best option.

Currently, there are many factors contributing to rising costs for employers. Some of these include:

- **Labour and skill shortages.**
- **Supply chain issues.**
- **Inflation.**
- **Immigration requirements.**
- **Wage increases.**
- **Increasing interest rates.**
- **Increases to employee sick leave entitlements.**

While it is important that employees receive fair pay to match the economic circumstances we are currently experiencing, some employers may not be able to absorb increasing costs. The combination of increasing costs of labour and resources may result in employers beginning to pass these costs on to the consumer... This in turn, has a flow on effect on inflation and the cost of living. Spending in the retail and hospitality sector may be holding up for now, but that is expected to take a downturn.[1] If employers are unable to absorb increased costs, there is risk of business closure.

There is suggestion that rising unemployment may combat the current need for employers to keep increasing pay due to the labour shortage. However, for small to medium businesses, particularly in retail and hospitality, this benefit needs to be balanced against the decrease in customer spending.

[1] https://www.nzier.org.nz/publications/inflation-and-rising-interest-rates-remain-key-headwinds-for-the-economy-quarterly-predictions-december-2022

It has been suggested that the rise to minimum wage will have minimal impact on costs for employers, because the current skill and labour shortage has already forced wages beyond minimum wage.[2] However, small to medium sized business will wear the impacts of this the most.[3] Raising the minimum wage has a ripple effect on other workers above minimum wage, who expect the relative difference between them and minimum-wage workers to remain. If labour shortages start to reduce and unemployment increases together with economic downturn, the relativity of the increased minimum wage rate may become an issue.[3]

One reason we are seeing a rise in redundancies lately is because the demand for services has reverted back to pre-COVID-19 numbers. Certain industries, such as the tech industry, saw an increased demand during COVID-19. Now, almost three years on from our first lockdown, those numbers have returned to baseline rates, and the number of staff is now surplus to the needs of the business. Or alternatively, roles that were required in response to COVID-19 demand are no longer needed.

The Government has recently announced that it will not proceed with the Income Insurance Scheme Act, which would have created security for workers, by effectively requiring contribution to a redundancy payment fund.

Against all of this economic uncertainty, employers contemplating redundancies should stop to consider if it is really the best option. It is important to hold on to valuable employees, especially considering the fact that customer and client demand will eventually bounce back. The cost of training employees, and the damage to culture often caused by redundancies, are important considerations.

Regardless of your perspective, if an employer is relying on financial or economic grounds to disestablish roles in their business, they need to be transparent about their decision-making process, and they need to provide financial information evidencing that the redundancy is for a genuine business reason. It should be noted that just because some employers in the same industry are able to justify redundancies for economic reasons, it does not mean that other employers in that same industry will necessarily be able to as well.

Redundancy requirements – when can an employer make a role redundant?

A redundancy needs to be both justifiable and procedurally fair. Even if an employee only claims that one of those requirements were not met, the court will still examine both.[3] The Employment Relations Act section 103A 'fair and reasonable employer in all the circumstances' test of justification also applies to redundancies.[4]

In regards to the procedure that needs to follow, the test for justification is what a fair and reasonable employer could have done in the circumstances. The courts will determine this on an objective basis.

Under section 4 of the Employment Relations Act, employers have 'good faith' obligations that need to be adhered to.[5] If an employer's process throughout the redundancy procedure is found wanting, the employee will likely have a personal grievance, even if the redundancy dismissal itself is justifiable. Section 4(1A)(c) in particular requires employers who are proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment, to provide:

- Access to information relevant to the continuation of the employee's employment, and to the decision.
- An opportunity to comment on the information to their employer before the decision is made.

Even in the exceptional circumstances of Covid-19 and its impact on employment, the 'fair and reasonable' standard test still applied. Maintaining this standard will also be expected of employers during difficult economic times. Simply stating that *'labour makes up the majority of company costs'* is not a sufficient reason to make roles redundant. An employer has to be able to show they considered all cost cutting measures including other overheads.

Furthermore, an employer has to make a role redundant for the reasons stated. For example, if an employer states that a role is surplus to the needs of the company, but actually selected that role because it would result in a significant salary saving, this may give rise to a successful personal grievance claim.[6]

Use of financial forecasting in justifying redundancies.

With suggestions of a recession and worsening economic conditions, employers may be tempted to reduce staff for anticipated financial circumstances. However, it is not clear whether anticipated financial circumstances will justify redundancies.

When relying on financial forecasting, an employer has to be able to show the redundancy was for genuine business reasons. To determine if this is the case, the courts will look at all the information relied on in coming to a redundancy situation. Historically, the courts did not enquire into the business reasoning of employers. However, a line of cases including *Grace Team Accounting Ltd v Brake* signalled a change.[7]

[2] https://www.stuff.co.nz/business/money/300802287/small-businesses-will-struggle-with-minimum-wage-increase-businessnz-says

[3] *Crombie v Mosscar Services Ltd* [2021] NZERA 518

[4] Employment Relations Act 2000, section 103A

[5] Employment Relations Act 2000, section 4.

[6] *Hogan v SP Blinds Ltd* [2022] NZERA 88.

[7] *Grace Team Accounting Ltd v Brake* [2014] NZCA 541.

If an employer can prove that the dismissal was justifiable and for genuine business reasons, the Court is unlikely to substitute its judgment for that of the employer's.[8] However, the Court must establish whether or not the actions taken were those a fair and reasonable employer could take in the circumstances. That will inevitably involve an analysis of the financial imperative for redundancies. It is likely that if the employer's justification for redundancy is purely based on financial forecasting, satisfying the Court that the decision was fair and reasonable in all the circumstances may be difficult.

Good faith obligations and trends in case-law suggest there will likely need to be real evidence of financial downturn already, if not in the near future. An employer would need to reasonably prove that the downturn they anticipate will happen. The Court will look at the information the employer provided the employee, and scrutinise whether it reasonably establishes the need for redundancies.

Procedural tips

First and foremost, it is important that an employer document every step of a redundancy process, and put all communications in writing, so that they can provide evidence of their reasoning and process if required.

We recommend the following steps:

1. **Determine the plan for the business, and what needs to be achieved.**
    - If cutting costs is needed, determine if costs can be saved in other areas of the business. As part of the duty to be a fair and reasonable employer, redundancies should be a last resort. The employer should consider any alternatives to a full redundancy. It may be the case that only a 'technical redundancy' is necessary (where only part of a role is disestablished).
    - If the relevant employment agreement has a redundancy provision, the procedure in that must be followed.
    - It is important to note that a redundancy is when the particular role you are seeking to disestablish is no longer needed, or is surplus to the needs of the business. This is distinct from a particular person not being wanted.
    - The employer should not have a pre-determined decision regarding redundancies. Whilst an employer is entitled to develop a plan for its business, it is important that an employer can show they have remained open to the possibility of changing their plan.[9]
2. **Inform potentially affected employees of the proposal that may result in the disestablishment of their position, and invite them to provide feedback (either by submission or in person). If the feedback is given in person, they should be encouraged to bring a support person and/or take advice.**
    - Employers need to provide the reasoning for their proposal, together with supporting information. The reasons given need to be genuine.
    - Sufficient information that provides evidence of the reasoning for the proposal should also be provided. This should enable the employee to understand the need for the business restructure.
    - If the employer is seeking to disestablish some but not all roles, then they must also provide the employees with the selection criteria they have established to determine successful applicants for the remaining positions. Failure to provide selection criteria to the employee may amount to a significant procedural error resulting in unjustified dismissal.[10] [4]
3. **After providing all relevant information, the employer, should then seek feedback from the employees. This includes the opportunity to suggest alternative options to redundancy.**
    - The employer must give the employee a reasonable amount of time to provide such feedback.
    - The employer should not have pre-determined any decision regarding the proposed redundancy.
4. **Once the employee provides their feedback, the employer should be able to show that they have genuinely considered it. This includes considering any alternatives to redundancy, which may include but are not limited to: redeployment, re-training, or reduced hours/duties.[11]**
    - The employer is under an obligation to investigate such alternatives.[12]
5. **The employer, considering all the information they have in addition to the employee's recommendations, can then come to a decision as to whether the proposed redundancy needs to go ahead.**
6. **After receiving feedback, if an employer decides to modify its proposal, then it should consult again with potentially affected workers, receive and consider their feedback before making a final decision in relation to the modified proposal.**

[8] *Petrich v SMX Ltd* [2021] NZERA 32 at [46].
[9] *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [54].
[10] *Crombie v Mosscar Services Ltd* [2021] NZERA 518
[11] *Hogan v SP Blinds Ltd* [2022] NZERA 88 at [54].
[12] *Hogan v SP Blinds Ltd* [2022] NZERA 88 at [55].

Abbey Munro
Law Clerk

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Deducting wages for unworked notice periods

If an employee does not work their notice period, an employer cannot utilise a deduction clause without consultation and written consent.

Even if an employment agreement contains an appropriate and reasonable deduction clause for unworked notice periods, section 5 of the Wages Protection Act 1983 (WPA) stipulates that an employer still needs to consult the employee, and get their written consent to deduct from wages.[1] A signed employment agreement with a deduction clause can be considered 'written consent', but the consultation obligation still applies.[2]

Section 5 of the WPA also states that a worker can withdraw their consent for deduction from wages by giving the employer written notice of such withdrawal.[3] After an employer receives a withdrawal of consent notice, they must cease making deductions either within 2 weeks of receiving the notice, or as soon as is practicable.[2]

Utilising a deduction clause without consultation and written consent is considered a penalty, and is unlawful.

What is an employee liable for if they do not work their notice period?

All deduction clauses need to be reasonable for an employer to rely on them.[4]

If an employer has consulted with the employee and has written consent to do so, the employer may claim 'actual losses'. This may include the reasonable costs of finding, or paying for a replacement during the rest of the notice period. The full wages of the replacement will not be claimable, only the additional amount that the employer wouldn't have needed to pay if the employee had worked out their notice period. If an employer withholds pay from an employee who does not work their notice period, the Employment Court has held that this is also an unlawful penalty. The Court explained that deductions need to be a genuine pre-estimate of damage caused by the employee failing to work their notice period.[5]

If there is no deduction clause in the employment agreement, or no other form of written consent, then the employer will have to go to the Employment Relations Authority to claim these costs.

Making an employee work out their notice period will not always be the best option.

With the 'talent drain' overseas, employers may be tempted to increase the length of notice periods, in order to allow for sufficient time to find replacements. However, if an employee has given notice and made the decision to leave, there may not be any benefit in requiring a demotivated employee to stay on for an extended period of time. The employer should make an assessment based on the circumstances of the employee leaving, and what their continued performance is estimated to look like throughout the rest of the notice period.

[1] Wages Protection Act 1983, section 5.
[2] https://www.employment.govt.nz/hours-and-wages/pay/deductions/
[3] Wages Protection Act 1983, section 5(2).
[4] Wages Protection Act 1983, section 5A.
[5] *Livingston v G L Freeman Holdings Ltd* as cited in *Labour Inspector v Victoria 88 Ltd (t/a Watershed Bar and Restaurant)* [2018] NZEmpC at [15].

Abbey Munro
Law Clerk

Raising personal grievances out of time

A worker generally has a "90 day period" to bring a claim against their employer but there are exceptions to this rule. When would the court be likely to grant an exemption to the 90 day rule?

Section 114 Employment Relations Act 2000 (Act) says that an employee has 90 days to notify their employer of a personal grievance. A personal grievance is one of the main ways that a worker can take a legal claim against their employer if they believe that their employer was unfair and unreasonable towards them.

The 90-day period begins on the date on which the action, allegedly amounting to a personal grievance, occurred or came to the notice of the employee (whichever is later). If the 90 day time period is missed then the employee must make an application for leave of the Employment Relations Authority to raise the personal grievance out of time. This will only be granted where exceptional circumstances are established.

For this reason, it is important that workers bring their claims in time.

Immediate steps

Where the 90 day time period is missed, as a practical first step, a worker (or an advocate or lawyer who acts on their behalf) can ask the employer to give their consent to raise a personal grievance out of time. Before the employer grants their consent, the employer would need to consider things like the likelihood of the worker bringing proceedings in the Employment Relations Authority (**ERA**) and the likelihood of the ERA granting leave.

If the employer does not consent, the worker may apply to the ERA for leave to raise the grievance out of time. The application can be raised as a standalone matter although often the ERA will hear the application for leave as part of the substantive grievance application. For these reasons, it is wise to detail the grievance at the same time as making the application for leave.

Exceptional circumstances

The ERA will accept the worker's application to bring a personal grievance claim only if its satisfied that the delay in bringing the personal grievance claim was caused by exceptional circumstances, and that it is just and fair to grant an exemption.

Those exceptional circumstances include:

a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period.

   Generally, the court has said that "traumatised" means a "very substantial injury";[1]

b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf and the agent (advocate or lawyer) failed to ensure that the grievance was raised within the required time;

c) where the worker's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that are required by sections 54 or 65 of the Act;

d) where the employer has failed to comply with the obligation under s120(1) of the Act to provide a statement of reasons for dismissal.

Purpose of the exemptions to the 90-day rule

It is important to note that the ERA will consider the purpose behind each of the exemptions before granting consent to bring a personal grievance out of the 90 day period. For example, the purpose of the inclusion of sections 54 or 65 of the Act is to inform the employee of their resolution process, so if the employee is already aware of that information (including, for example, obtaining legal advice on statutory timeframes) then the ERA may not grant consent to the worker bringing a personal grievance out of the 90-day period. For that reason, an employer may choose to ask whether the worker has received legal advice before giving their consent to bring the personal grievance out of time.

Employers should very carefully consider granting an employee consent to bring the grievance out of time. The same applies when agreeing to attend mediation. The employer should always preserve its position by attending mediation without prejudice to its position that the grievance has been notified out of time.

Personal grievance claims of sexual harassment

If a worker brings a personal grievance of sexual harassment, workers may have 12 months to bring their personal grievance claim. As at the date of this article, this extension is not in force under the Act. Please see our discussion on this point further here.

Zoe Hollander
Senior Solicitor

[1] *Telecom New Zealand Ltd v Morgan*, EMC Auckland AC38/04, 12 July 2004.

When can an employer pry into an employee's private life?

An employee's conduct outside the workplace can give rise to disciplinary action in some circumstances, but not all. There must be a link between the misconduct and the work environment.

The tricky part in these types of cases is often establishing whether that link exists. Once an employer is notified of a complaint/incident, they must first turn their mind to whether it is an employment issue.

The Court of Appeal in *Smith v Christchurch Press Company* said:[1]

> *" there must be a clear relationship between the conduct and the employment. It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way: because the conduct is incompatible with the proper discharge of the employees' duties; because it impacts upon the employer's obligations to other employees or for any other reason it undermines the trust and confidence necessary between employer and employee."*

Broadly speaking, some common overlapping areas between an employee's private life and work life can include when the conduct impacts on work performance, impacts the business' reputation, or where an employee discloses confidential information.

Activity on social media can be cause for disciplinary action. The problematic content could be related to the workplace, such as commenting negatively about the workplace online. Alternatively, it could be content that is unrelated to the workplace/employer, but is objectionable and it is clear who the employees' employer is.

In deciding whether a link exists, an employer must consider each case on its own facts, taking into account all of the context and circumstances. If a link is established, and the employer proceeds with an investigation, as with any employment process, they must act in good faith and within the test of justification (as set out in s 103A Employment Relations Act 2000).

Case examples

Hallwright v Forsyth Barr Ltd

Mr Hallwright was involved in a 'road rage' incident where he, albeit accidentally, drove over another motorist causing him serious injury. He was convicted of causing grievous bodily harm with reckless disregard.

The actions were not carried out in the course of Mr Hallwright's employment, and the nature of his employment, nor his employer were identifiable. However, the information was eventually publicised in the course of significant media attention that followed the incident.

Forsyth Barr initiated a disciplinary process into whether Mr Hallwright's conduct had brought it into disrepute. It raised a number of factors, including the extensive media coverage that described Mr Hallwright as an "investment banker" or a "senior employee" of Forsyth Barr. Forsyth Barr had received queries about how it could employ someone

[1] *CA292/99 at [25]*

capable of acting as Mr Hallwright had. It was an integral component of Mr Hallwright's job that he be available to make public statements and provide commentary to the media. The integrity and probity of senior employees in the investment industry is of enormous importance, with public confidence being critical to success in the marketplace. Forsyth Barr's reputation had been damaged, and Mr Hallwright's name and that of Forsyth Barr had been inextricably linked.

Forsyth Barr ultimately dismissed Mr Hallwright for serious misconduct in that his actions amounted to conduct bringing his employer into disrepute, and breached an obligation in his employment agreement not to engage in activity that was likely to compromise his ability to carry out his duties.

Mr Hallwright challenged his dismissal in the Employment Relations Authority (**ERA**), however it dismissed his claim.[2]

Mr Hallwright then challenged the ERA determination in the Employment Court, however it also dismissed Mr Hallwright's claim. It concluded it was open to Forsyth Barr to conclude Mr Hallwright had committed serious misconduct and the decision to dismiss and how Forsyth Barr acted was what a fair and reasonable employer could have done in all of the circumstances.[3]

A v Chief Executive Child Youth and Family

A senior manager (**A**) of Child Youth and Family (**CYF**) was witnessed slapping his son across the mouth following a club squash match. Complaints were made to the police and to CYF's.

CYF's initiated a disciplinary process and ultimately dismissed A. He challenged his dismissal in the ERA. The ERA however found[4]:

- The conclusion that A's actions were inconsistent with the values embraced by CYF, and thus prevented him from leading by example, was a reasonable conclusion in all the circumstances.
- The conclusion that A's behavior constituted serious misconduct was a finding that a fair and reasonable employer would have reached given all the circumstances at the relevant time.
- The conclusion that A's conduct had brought CYF into disrepute was a valid one.
- The conclusion CYF no longer had the requisite trust and confidence in A as a senior manager was a finding a fair and reasonable employer would have reached.
- Dismissal was the appropriate outcome.

Scott v Department of Corrections

Ms Scott was a Corrections Officer who posted a video on her TikTok account in her uniform, holding up handcuffs and mouthing the words "*ima take your man if I want to*", with the hashtags #thoselooksthoug, #relaxgirlsitsmyjob, #happyinarelationship and #fyp. Text was inserted above the video with the words "when partners come to see the men..."

Corrections received notification of the video from employees and a member of the public whose partner was in prison.

The Acting Prison Director said the ramifications of the video were immediate. She also found another video in which Ms Scott could be seen mouthing the words "*I'm a savage, choke im, shoot im, stab im... what*? That's how it goes" with matching hand gestures. She was not in uniform but is identifiable as a Corrections Officer because other videos show her in uniform.

Corrections conducted an employment investigation and dismissed Ms Scott for serious misconduct. The reasons included that the posting with the text "when partners come in to see their men..." displayed careless and unsafe behaviour that placed Ms Scott and others at risk; that Ms Scott failed to understand the seriousness or the potential and actual ramifications of the posts; and that the videos may have brought Corrections into disrepute.

Ms Scott challenged her dismissal in the ERA, however it dismissed her claim, stating:

> ***" ...despite Ms Scott's intention, and her experience and commitment to the job of a Corrections Officer, she neglected to recognise the inappropriateness of posts she was creating and uploading to TikTok and the likely loss of control of material in an electronic environment. With the consequent actual and potential for reputational damage and the safety risks created by the content and nature of the posts, Corrections had acted as a fair and reasonable employer in all the circumstances."***

Dealing with an employees' conduct outside of work can be challenging. The context and circumstances will be relevant in determining whether it is an employment issue. An employers' usual requirements of procedural fairness will apply to any disciplinary investigation. Any decision made should be informed by contractual provisions and/or relevant policies; a proportionate response; and one a fair and reasonable employer could have come to in all of the circumstances.

Kelly Thompson
Solicitor

[2] [2013] NZERA Auckland 79
[3] [2013] NZEmpC 202 at [99].
[4] [2011] NZERA Wellington 125 at [87]-[93]

Immigration alert
Immigration relief for extreme weather rebuild

Background

Extreme weather events such as Cyclone Gabrielle have created significant destruction for several North Island communities. This has resulted in a substantial demand for occupations like engineers, insurance assessors and construction workers to help with the recovery.

Immigration New Zealand (**INZ**) has acknowledged that employers will need to rely on migrant labour to support New Zealand-based workers.

Specific Purpose Recovery Visa

A Specific Purpose (Recovery Visa) has been announced to assist with the emergency response. This visa will be granted for up to six months and can be used for:

- **Immediate clean-up.**
- **Assessing risk or loss.**
- **Providing emergency response.**
- **Infrastructure, building and housing stabilisation and/or repair (including planning functions).**

All work must be related to recovery from the extreme weather events in the North Island in January and February 2023, although the role can be based anywhere in New Zealand. This includes work that directly supports the recovery e.g. producing relevant material for road rebuilds and transport.

Importantly, an employer does not need to be accredited with INZ and the median wage threshold will not apply.

Application process

Step 1: employer finds migrant worker(s) to assist with the recovery.

Step 2: employer completes a Recovery Visa - Employer Supplementary Form.

Step 3: migrant worker applies for a Specific Purpose (Recovery Visa) online and uploads the employer supplementary form.

Step 4: INZ processes the application within one week.

If the application is approved, the $700 application fee will be refunded.

Visa conditions flexibility

Migrant workers already in New Zealand will be able to change their position and location for up to two months without breaching visa conditions. They must remain with the same employer.

Longer-term work visas

Employers needing assistance for longer than six months will need to rely on the Accredited Employer Work Visa (AEWV).

Changes are currently being considered to support expedited AEWV processing for occupations that support the recovery. This will include labour-market test exemptions.

Our thoughts

This is a welcome update but we anticipate that recovery support will be required for more than six months.

If you are an employer needing to recruit migrant workers to help with the recovery, we recommend you use this temporary option to get migrant workers in quickly.

Employers needing migrant workers for longer than six months should apply for employer accreditation, if this is not already in place. Automatic 12-month extensions will be issued to all employers who apply for accreditation before 4 July 2023.

We expect that this is the first of many immigration announcements to support the recovery effort.

If you would like to receive these alerts please complete the request form.

Please send me Immigration Alerts

Tash Rae
Senior Associate

Webinar

Tips for passing the Job Check.

If your business employs migrant workers, or would like to do so, it is important to understand how the requirements for employers have changed. Unlike previous frameworks, the AEWV scheme requires employers to drive the process and cover a lot of the cost. In practice, it is the Job Check application that is causing issues and delays for employers.

Join this webinar to hear from New Zealand Immigration Law Expert and Senior Associate Tash Rae and Employment Associate Rebecca Laney who will provide an update on the Accredited Employer Work Visa (AEWV) framework and tips for passing the immigration Job Check.

Presenters:

New Zealand Immigration Law Expert and Senior Associate **Tash Rae** and Employment Associate **Rebecca Laney.**

27 April 2023

Time: **8:30am–9:15am**

Cost: **Free Webinar**

Register Here

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Immigration implications of a DUI conviction

I often get asked to assist migrants who have been convicted of driving under the influence of alcohol (DUI). This article explains the possible immigration consequences of a DUI conviction.

The character rules

Applicants must meet good character requirements to be approved a New Zealand visa. This is unless they are eligible to be considered for, and have been granted, a character waiver. The character rules for temporary and residence class visas differ. For residence, there is a longer list of character concerns that may result in an application being declined.

Importantly, individuals with particularly serious character concerns are not eligible to be considered for a character waiver, regardless of the visa type. Examples of more serious concerns include prison sentences of 12+ months in the last 10 years, or a previous deportation from any country. These individuals will need to be granted a special direction before any visa can be approved. Special directions are considered at the absolute discretion of the Minister (or a delegated decision-maker) and are granted infrequently.

As evidence of good character police certificates are required for a residence application or when requesting a temporary visa of 24+ months. For shorter stays, Immigration New Zealand (**INZ**) rely on declarations in visa application forms to assess character.

The rules applied to a DUI conviction

If a DUI conviction is declared, it is likely that INZ will request further information. This could include a police certificate (if not already provided) or the court ruling report, including sentencing details.

For temporary entry, any New Zealand conviction with a possible sentence of 3+ months in prison will fail the good character requirements. This would include a DUI, which carries a maximum prison term of 3 months. Confusingly, if an applicant has an offshore DUI conviction, this will only be an issue if they were actually imprisoned.

For residence, a DUI could trigger the character rules on several grounds. Any conviction that results in a prison term will require a character waiver, whether it was served, deferred or suspended. Further, a driving conviction in the last 5 years or any New Zealand conviction with a possible sentence of 3+ months in prison will also fail the residence good character requirements.

What if an individual doesn't meet the character requirements?

If the good character requirements are not met, an applicant will require a character waiver. The relevant (listed) considerations differ between visa classes but these assessments are fairly similar in practice. An Immigration Officer will consider whether the applicant's surrounding circumstances are compelling enough to justify waiving the good character requirements. This will balance the character risk or significance of the withheld information against things like the benefit an applicant will bring to New Zealand and any strong family links.

Character waivers are available for both temporary and residence visa applications. This is provided the applicant does not have a particularly serious character concern that requires a special direction. In practice, DUIs often require a character waiver but are very unlikely to be considered particularly serious character concerns.

It's important to declare DUIs

It is not just criminal offending that triggers the good character rules. Making a statement or providing information, evidence or submissions that are false, misleading or forged, or withholding material information could be a character issue. This would cover a situation where a conviction, such as a DUI, is withheld when completing a visa application form. For INZ to conclude that an applicant does not meet the good character requirements in this situation, an Immigration Officer must determine that it was 'more likely than not' the offence was deliberately withheld.

Deportation liability

If convicted of DUI while in New Zealand a temporary visa holder may receive a deportation liability notice (DLN). If a DLN is received, they will have 14 days to give good reasons for why deportation should not proceed. If this is unsuccessful, there is the option to appeal on humanitarian grounds to the Immigration and Protection Tribunal (IPT) within 28 days of the DLN being received. In practice, we infrequently see DLNs issued in this situation. Instead, a DUI is more likely to be raised with the next visa application.

Residence visa holders can also be issued with a DLN if they are convicted of DUI within two years of becoming a resident. If this happens and the deportation liability is not cancelled, an appeal to the IPT on humanitarian grounds can also be made within 28 days.

To be successful with a humanitarian IPT appeal there must be exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and it cannot be contrary to the public interest to allow them to remain in New Zealand. This is a very high threshold to meet. If all appeal options are exhausted, a deportation order can be issued. This has serious consequences, including a period of prohibition on re-entering New Zealand and possible difficulty travelling to other jurisdictions.

Our advice

All convictions should be declared to INZ. A DUI won't always disqualify an individual from getting a visa, but failing to declare it could result in a visa being declined on character grounds.

If a character waiver is needed, the outcome will depend on the individual circumstances of a visa applicant. For example, a one-off DUI that is declared in the application form is more likely to get a character waiver than multiple offences that are not declared. Further, an individual working in a Green List occupation or with significant family links to New Zealand is more likely to get a character waiver than someone working in a lower skilled role with no New Zealand family.

We recommend individuals seek immigration advice if they have a DUI conviction and hold or will be applying for a New Zealand visa.

Tash Rae
Senior Associate

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Our Employment and Immigration Team

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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