

Vital.

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Inside this issue:

Determining whether a worker is an employee – an overlapping jurisdiction?

Mind the (Legal) Gap: Sexual and reproductive health in employment law

Return to office policies under the spotlight again

Privacy Issues in Employment

Minimum hours per week: Are waged employees entitled to be paid for hours they have not worked?

Can an employee still be made redundant if another employee resigns during the restructure process?

An employer's right to surveillance – can employers play detective when they suspect their employee has pulled a sickie?



Tēnā koutou katoa

Welcome to the latest edition of Vital., packed with timely insights and critical updates designed to help you navigate the ever-evolving landscape of workplace relations. As we move further into 2025, employers and employees alike continue to face complex legal questions, and our goal is to provide clarity and practical guidance on these pressing issues.

This edition kicks off with a deep dive into the murky waters of worker classification. “Determining whether a worker is an employee – an overlapping jurisdiction?”, explores the intricate legal frameworks that determine employment status, a distinction that carries significant implications for rights, responsibilities, and liabilities. With the rise of the gig economy and flexible work arrangements, understanding whether a worker is an employee or an independent contractor has never been more crucial.

Next, we tackle a scenario that many employers will recognise: suspicions about an employee feigning illness. In “An employer’s right to surveillance – can employers play detective when they suspect their employee has pulled a sickie?”, we examine the delicate balance between an employer’s right to protect their interests and an employee’s right to privacy, offering guidance on the permissible scope of surveillance in such situations.

Another common query, particularly relevant in times of economic fluctuation, is addressed in “Are waged employees entitled to be paid for hours they have not worked?”. This piece clarifies the legal obligations surrounding payment for non-worked hours in the context of contractual minimum hours.

We also bring you up to speed on recent developments in employment-related privacy cases, highlighting key rulings and trends that are shaping the boundaries of data protection and individual privacy in the workplace. This is a rapidly developing area of law, and staying informed is essential.

In another topic and evolving space, we delve into “Sexual and reproductive health in employment law.” This piece explores the legal obligations and best practices for

employers in supporting employees’ sexual and reproductive health, covering topics from infertility to menopause.

The debate around hybrid work continues, and our article “Return to office policies under the spotlight again” revisits the legal and practical considerations for employers implementing and enforcing these policies, especially in light of ongoing discussions about flexibility and employee well-being.

Finally, we address a common question that arises during organizational change: “Can an employee still be made redundant if another employee resigns during the restructure process?”. This article provides a clear analysis of redundancy law, offering insights into the factors employers must consider when navigating restructures and workforce adjustments.

As always, we’d love to hear from you. Keep warm, safe and healthy!

E mihi ana

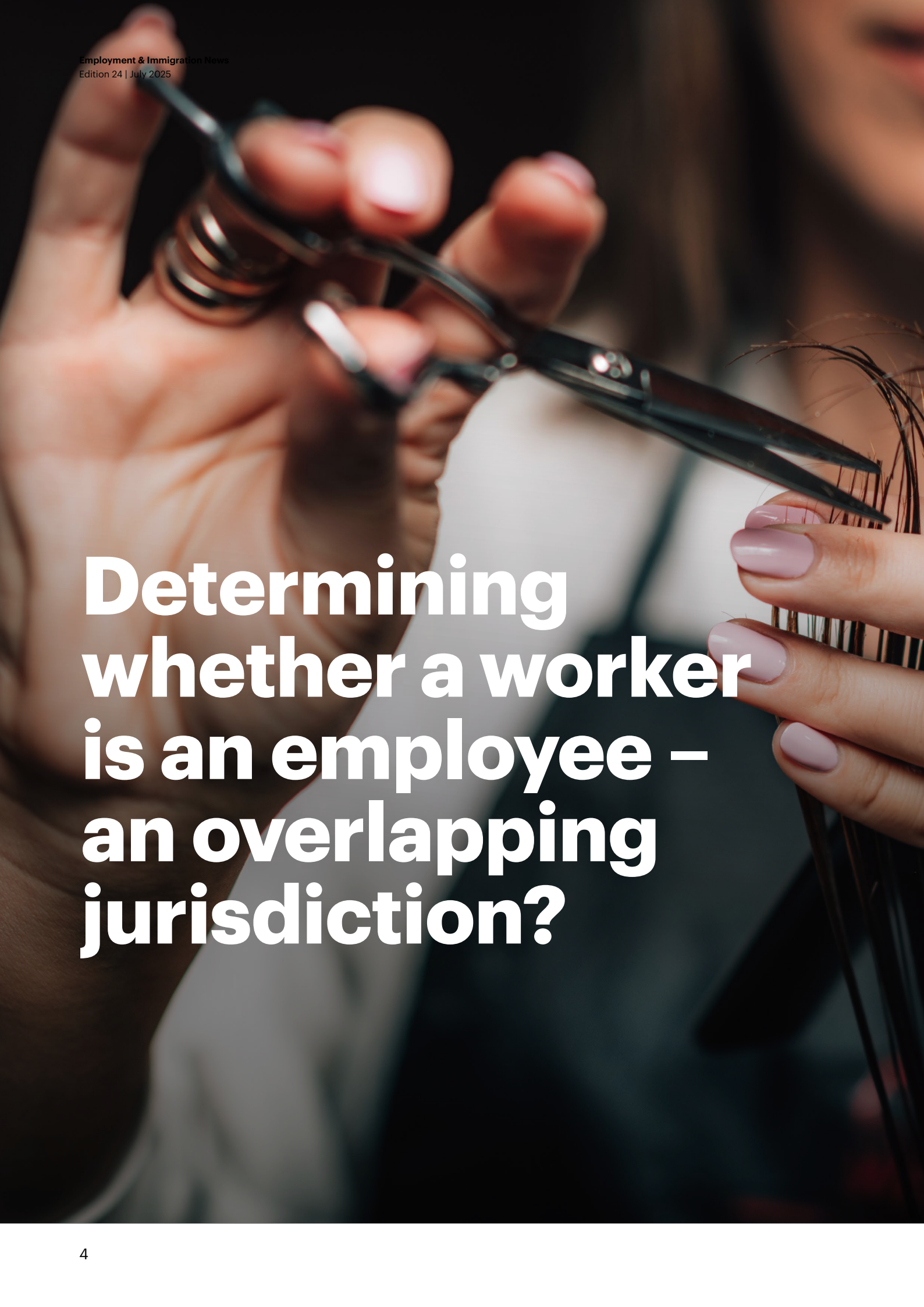
AJ and John



AJ Lodge, Partner



John Farrow, Partner



Determining whether a worker is an employee – an overlapping jurisdiction?



The recent decision of the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) and Hairland Holdings Limited raises some interesting issues.

The Court of Appeal delivered a split decision with MBIE being successful on appeal.

The Facts

Hairland Holdings Limited (**HHL**) operates a walk-in hairdressing business. In 2018, when the proceedings began, it had approximately 150 hairstylists working in 25 salons nationwide.

The business was investigated by a Labour Inspector who concluded that the workers were 'employees' and that there had been a breach of minimum entitlements. She sought a response from HHL on possible enforcement action on the basis that the employees had not received their minimum statutory entitlements.

HHL considered the hairstylists were independent contractors and that there had been no breach of minimum entitlements.

Rather than wait for the Labour Inspector to take further steps (such as a claim for breach of minimum entitlements), HHL pre-emptively filed a Statement of Problem with the Employment Relations Authority (**Authority**) seeking a determination that the hairstylists were not employees. MBIE argued that the Employment Relations Authority did not have jurisdiction to determine the claim because there was no employment relationship problem between the Labour Inspector and HHL.

Determining whether a worker is an employee – an overlapping jurisdiction? (Continued)

The legal issues

The arguments centered around s161 of the Employment Relations Act (**Act**). That section deals with jurisdiction. Section 161(1)(c) provides the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including – matters about whether a person is an employee.

There is a limitation to that aspect of the jurisdiction. Specifically, the Authority does not have jurisdiction in relation to matters arising under an application under s6(5).

Section 6(5) allows the Court, on application of a Union, Labour Inspector or one or more other persons, to declare whether the person or persons named in the application are employees under the Act.

The Labour Inspector subsequently filed a claim seeking unpaid minimum entitlements. HHL argued that the Authority did not have jurisdiction to determine that claim because the workers were not employees and their status could only be determined by the Employment Court under Section 6(5).

The Authority decided that it did not have jurisdiction to determine HHL's claim but did have jurisdiction to determine the status of the hairstylists in the context of the Labour Inspector's claim.

HHL pursued the matter to the Employment Court, which determined that the Authority did, in fact, have jurisdiction to determine HHL's application. MBIE then appealed the matter to the Court of Appeal.

The Court of Appeal

The Court of Appeal observed that both the Authority and the Employment Court had jurisdiction to determine the status of workers, although the jurisdiction of each is distinct.

Under s161 of the Act the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally. That includes, at subsection 1(c), matters about whether a person is an employee subject to the s6(5) carve out. The Employment Court has exclusive jurisdiction to determine applications made under s6(5).

The Authority held that because there was no employment relationship between HHL and MBIE, there was no employment relationship problem. The Employment Court however ruled that an employment relationship is not necessary for an employment relationship problem to arise – all that is needed is a problem or controversy arising in the work context. HHL maintained that the disagreement between it and the Labour Inspector fell within this definition and therefore fell within s161(1)(c).

There was extensive argument regarding the Supreme Court's decision of FMV v TZB.

The Court of Appeal noted that Justice Williams, writing for the majority, confirmed that the Employment Relations Authority has exclusive jurisdiction to make determinations about problems generally but that the only requirement is that the problem must be an employment relationship one, that is, it must relate to or arise from the employment relationship.

The Court of Appeal ruled that the Authority's jurisdiction under s161(1) only arises where there is both an employment relationship and a problem that relates to or arises from that relationship, in the work context. If there is no employment relationship, there can be no employment relationship problem.

The Court went on to observe that, in terms of the tests articulated in FMV v TZB, there is no employment relationship problem. HHL rejected the possibility of its workers being employees yet, at the same time, relied on the Labour Inspector's assertion of an employment relationship as the basis for an employment relationship problem.

Interestingly, if HHL had not filed pre-emptively and had waited for MBIE to file its claim for unpaid minimum entitlements, then there would clearly have been an employment relationship problem relating to minimum entitlements and the Authority would have had exclusive jurisdiction to determine HHL's counter-argument that its workers were not employees.

However, because HHL's claim pre-empted MBIE's claim, it was left arguing that the Labour Inspector's assertion that HHL was an employer gives rise to an employment relationship problem and, as a result, it should be able to seek a determination without waiting for the Labour Inspector to take action.

In issuing its judgment, the Court of Appeal acknowledged the apparent tension between the s5 definition of 'employment relationship problem' and the s161(1)(c) jurisdiction of the Authority to determine whether a person is an employee.

However, the Court of Appeal ruled that this tension could be readily reconciled by interpretation of the relevant provisions.

The threshold requirement for bringing a claim before the Authority is that one of the parties asserts that there is an employment relationship problem. If the other party denies the existence of an employment relationship (as HHL did) then, in essence, that is a challenge to the Authority's jurisdiction.

However, in the Court's view, the scheme of the Act does not contemplate a person in HHL's position accessing the Authority for a bare declaration as to employment status, independent of any allegation of a substantive employment relationship problem. Allowing a person in HHL's position to seek a determination from the Authority as to the existence of an employment relationship could expose workers to the expense, inconvenience and stress of contesting the proceedings, or risking an outcome that may be contrary to their interests.

The Court also believed that allowing status to be determined by the Authority in the absence of any other problem would undermine s6(5) which confers on the Employment Court exclusive jurisdiction to make declarations as to status.

In conclusion, the Court found that the Labour Inspector's assertion of an employment relationship has no practical effect unless the Labour Inspector brings proceedings. In those proceedings, the worker status will be a jurisdictional factor for the Labour Inspector to prove and which HHL can contest. Therefore, HHL is not disadvantaged by the Court of Appeal's ruling.

The minority judgment

In my opinion, Justice Cooke delivered a compelling dissenting judgment.

In summary, Justice Cooke's view was that s161 is clear. The Authority is given jurisdiction to determine whether a worker is an employee. There does not need to first be an employment relationship before the Authority has that jurisdiction. That argument would be circular and deprive the legislation of its plain meaning. Justice Cooke stated that whether or not there is an employment relationship is precisely the issue that the Authority is given jurisdiction to determine. By definition, a disagreement over whether a worker is an employee is an employment relationship problem.

Justice Cooke referred to the decision of the Supreme Court in Gill Pizza in which the Court stated that it did not see any reason to adopt an interpretation that differs from the plain meaning of the words in s161(1)(c) in order to exclude from the jurisdiction of the Authority matters relating to status that are not, in fact, raised in the context of an application under s6(5).

Justice Cooke indicated that the jurisdiction to determine whether someone is an employee contained in s6(5) and s161(1)(c) is overlapping. Both the Court and the Authority have jurisdiction to determine that question. The Authority's jurisdiction is only excluded if there is, in fact, an application on foot before the Court.

Justice Cooke further noted that the Court's jurisdiction under s6(5) is broader than that of the Employment Relations Authority as it enables the Court to make declaratory orders binding non-parties and on the application of parties other than the alleged employer or workers in question.

The Authority's power, on the other hand, is confined to addressing individual employment problems between parties.

Summary

The arguments advanced by the Appellant and Respondent are interesting. The Court's split determination perhaps raises more questions than provides answers. While the pre-emptive steps taken by HHL were probably designed to avoid the cost and effort of defending wage arrears claims, the fact that the proceedings progressed to the Employment Court and ultimately to the Court of Appeal, likely resulted in substantial legal costs. Had HHL simply waited for the Labour Inspector to bring its claim, then the Authority's jurisdiction would have been unequivocal.



John Farrow,
Partner

Mind the (Legal) Gap: Sexual and reproductive health in employment law



While New Zealand employment law offers protections for pregnancy, childbirth, and breastfeeding, it remains silent on other critical aspects of women's health that significantly impact the lives of those impacted.

Sexual and reproductive health, particularly for women and those with female reproductive systems, has become increasingly topical, and rightly so. Historically, it's an area that has been underfunded, overlooked, and poorly understood, despite affecting nearly half the population.¹ In the context of the paid workforce, this neglect can be partly attributed to the fact that men previously made up the vast majority of the workforce. But that's no longer the case, with women's growing participation in the labour market having been a significant contributor to New Zealand's economic development.²

The reality is that sexual and reproductive health can significantly impact a person's ability to engage in and maintain employment. Although there are some existing legal protections, health matters like menstruation, perimenopause, menopause, endometriosis, and infertility are not specifically dealt with in our current legal framework. These issues can affect a substantial portion of the workforce at one time or another, and can seriously impact wellbeing, job performance, and participation. Given this, it's worth considering a few of these health concerns and whether the current framework adequately guides employers as to how to respond.

Legislation

Although there is currently no specific statutory recognition of these health matters within New Zealand employment law, several existing legal obligations may be applicable. Under section 36 of the Health and Safety at Work Act 2015, a person conducting a business or undertaking (PCBU) has a primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers while at work. This duty encompasses both physical and mental health. Consequently, it may be interpreted to require consideration of these health matters, particularly where associated symptoms have a material impact on a worker's ability to safely perform their role.

¹ Statistics New Zealand "Women in paid work" (March 2019) Stats NZ < <https://www.stats.govt.nz/news/women-in-paid-work/>>.

² Manatū Wāhine, Ministry for Women "Labour market participation" (December 2025) < <https://www.women.govt.nz/women-and-work/labour-market-participation>>.

Furthermore, the Human Rights Act 1993 addresses unlawful discrimination in the workplace. Section 21(1)(a) of the Human Rights Act prohibits discrimination based on sex, and s 22 applies this protection specifically to employment relationships. It makes it unlawful for an employer – or anyone acting on their behalf – to treat a person less favourably on any prohibited ground, including to:

- Refuse to hire a qualified applicant for available work;
- Offer less favourable terms and conditions of employment, including benefits, training, or promotion opportunities;
- Terminate employment or subject the employee to any other form of disadvantage not applied to others in similar roles; or
- Force or pressure an employee to resign or retire.

Discrimination on the basis of sex may, in certain circumstances, include a failure to reasonably accommodate gender-specific health conditions, such as menstruation, perimenopause, menopause, endometriosis, and infertility, thereby potentially constituting unlawful discrimination.

Individual Health Issues

Perimenopause & Menopause

Perimenopause is the transitional phase leading up to menopause, where levels of oestrogen and progesterone, two key hormones, start to fluctuate. The onset typically occurs around the age of 45, but it can be earlier. The decline in hormone levels, particularly oestrogen, and are associated with a wide range of symptoms. This includes hot flashes, night sweats, sleep disturbances, brain fog, short-term memory difficulties, reduced concentration, anxiety, mood changes, depression, urinary and bladder issues, headaches, and heart palpitations. The severity and duration of these symptoms differ between individuals, but for many, the physical and cognitive effects are significant and enduring. Menopause is the point in time where there has been no menstrual period for one year, and typically occurs around the age of 51.³

³ Menopause & Wellness "Creating a new pathway in menopause care" (2024) Menopause.org.nz <https://www.menopause.org.nz>.

The symptoms of perimenopause and menopause may, in turn, affect attendance, productivity, confidence, and overall engagement with work. Despite this, they remain a largely invisible issue in most employment settings. Many women report feeling unsupported, misunderstood, or reluctant to disclose what they are experiencing, for fear of stigma or lack of empathy in the workplace.⁴

While New Zealand employment case law involving perimenopause and menopause is limited, the District Court case *CD v ACC* offers some insight. In assessing a woman's work incapacity, the court recognised surgically induced menopause as a contributing factor, suggesting a willingness to acknowledge menopause as relevant in work-related contexts.⁵

There are relevant cases in other jurisdictions too. In the UK decision *Rooney v Leicester City Council*,⁶ the Employment Appeal Tribunal found that an employee experiencing severe menopausal symptoms met the legal definition of disability. This judgment reinforced earlier, tribunal decisions which held that significant menopausal symptoms can amount to a disability. Other UK employment cases have similarly acknowledged the impact of menopause on an employee's health and wellbeing. In one instance, a woman was dismissed for alleged dishonesty successfully claimed disability discrimination, with the tribunal accepting that her menopausal symptoms particularly confusion and forgetfulness had contributed to the conduct in question.⁷

Although UK law differs from New Zealand's, these cases reflect a growing judicial willingness to recognise menopause as a valid ground for protection. In theory, sex-based discrimination under the Human Rights Act or the Employment Relations Act could offer similar protection in New Zealand.

Menstrual & Reproductive Health

The topic of menstrual leave has become the subject of discussion after an Auckland woman, took a day of sick leave due to menstruation-related illness and subsequently made a complaint to the Human Rights Commission, alleging sex discrimination. She had communicated her reason for leave to her manager, who she says criticised her the following day, stating that a period isn't a good enough reason to take sick leave.⁸ Section 65 of the Holidays Act entitles employees in New Zealand to paid sick leave where they are unable to work due to illness or injury. The dispute was taken up and settled by the Office of Human Rights Proceedings, which considered it as a claim of gender discrimination. This case demonstrates an emerging recognition of the legitimacy of taking sick leave for health conditions

associated with menstruation. While the use of sick leave for menstrual symptoms remains contested, some jurisdictions have either introduced or are considering introducing specific entitlements to menstrual leave.

Employers may choose to introduce their own workplace policies, though menstrual leave remains uncommon. Pacific Media Network became one of the first companies in New Zealand to adopt a menstrual leave policy, offering E tū union members an additional 12 days' paid leave annually for menstruation and menopause-related symptoms.

Infertility

Fertility treatment is another significant health consideration for many in the workplace. Currently, there is no legislative framework or established case law in New Zealand addressing the rights of employees undergoing such treatment. Infertility is not only a medical condition but also a source of profound psychological stress. Many individuals continue working while navigating treatment, which can be physically demanding, emotionally draining, and logistically challenging. The intensity of the process varies depending on the type of treatment, and the financial burden adds yet another layer of pressure for employees.

While there is limited case law in the New Zealand context, international developments offer some guidance. In *Mayr v Bäckerei und Konditorei Gerhard Flöckner*, the European Court of Justice held that a woman undergoing in vitro fertilisation (**IVF**) is not considered pregnant until implantation of the fertilised ovary.⁹ However, the Court found that adverse treatment of a woman due to her IVF treatment constitutes sex discrimination, as IVF is a procedure exclusive to women.

This reasoning may signal how New Zealand courts could interpret similar cases under s 21(1)(a) of the Human Rights Act. In some situations, fertility-related discrimination may also fall under s 21(1)(h), which covers physical and mental impairments, protecting individuals with disabilities. For instance, an employee may have an underlying medical condition causing infertility or experience mental health challenges related to treatment. In such cases, employers may be required to consider reasonable accommodations, depending on the circumstances.

Around one in four couples in New Zealand experience infertility.¹⁰ In the absence of specific legal protections, employees undergoing treatment often rely on sick leave, annual leave, unpaid leave, or special leave to manage its demands.

⁴ Dita De Boni "Menopause could be grounds for fighting workplace dismissal at some point soon" (8 June 2025) The Post <https://www.thepost.co.nz/business/360713862/menopause-could-be-grounds-fighting-workplace-dismissal-some-point-soon>.

⁵ *CD v Accident Compensation Corp* [2021] NZACC 189.

⁶ *Rooney v Leicester City Council* [2021] UKEAT 000104_21_0710.

⁷ *Davies v Scottish Courts and Tribunals Service* [2017] UKET S/4104575.



The emotional toll of infertility is significant, with many individuals experiencing increased anxiety and depression. From both a legal and ethical standpoint, it is in an employer's interests to support affected employees by offering flexibility and understanding. This approach not only supports employee wellbeing but also helps individuals stay connected and productive at work during an intensely challenging time in their lives.

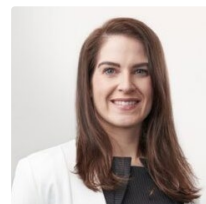
⁹ Human Rights Commission "Period stigma in the workplace - a human rights issue" (24 February 2022) Te Kāhui Tika Tangata Human Rights Commission <https://tikatangata.org.nz/news/period-stigma-in-the-workplace-a-human-rights-issue> .

¹⁰ *Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* (C-506/06) [2008] IRLR 387 (ECJ).

¹¹ Fertility NZ " Infertility in New Zealand" (September 2021) Fertility Week 2021 <<https://www.fertilityweek.org.nz/fertility-topics/any-us-can-face-challenges-building-whanau/infertility-new-zealand/>>.

Concluding Comments

Sexual and reproductive health is an increasingly important and evolving area within employment law. Conditions such as perimenopause, menopause, menstruation, endometriosis, and infertility, while not yet explicitly recognised in legislation, have clear and significant impacts in the workplace. In the absence of specific legal requirements, it falls to employers to take initiative by developing their own supportive practices and policies. Introducing measures such as tailored leave entitlements demonstrates good practice and can play a crucial role in supporting affected employees. Ultimately, these steps foster greater engagement, wellbeing, and retention, outcomes that benefit everyone involved in the employment relationship.



AJ Lodge,
Partner

Return to office policies under the spotlight again

There are many differing opinions about the benefits and drawbacks of flexible working. It is now common for businesses to operate hybrid and work-from-home models. But perhaps the tide is turning.

Employers are beginning to retreat from their post-COVID flexible working policies and many, including the whole public sector, are considering reimplementing in-office mandates. Putting to one side the arguments about productivity, wellbeing and the like, a recent case is a reminder employers and employees will not always see eye-to-eye about where work should be performed.

In *Petrie v Alphero Limited* the Employment Relations Authority considered a claim involving a dispute about remote working arrangements. Whether Alphero Limited (the employer) had agreed to certain flexible working arrangements was the key issue, as Mr Petrie (the employee) argued he was unjustifiably (constructively) dismissed when he resigned. He said that was because Alphero breached a prior remote working agreement. Mr Petrie had recently moved to Whanganui, whereas Alphero's office was in Wellington.

The Authority ultimately held Mr Petrie was not unjustifiably disadvantaged, constructively dismissed or subjected to a breach of good faith when it altered an arrangement of four days at home and one in the office to three days a week in the office and two at home.

Mr Petrie started working for Alphero in December 2021. He initially worked fully from the office but not long after starting, began to work one day per week from home. COVID-19 concerns in late-January 2022 meant all Alphero staff were permitted to work from home for a period. Seemingly Alphero had agreed remote and hybrid working arrangements with many of its staff. Some of these were formally agreed, some were project-specific, and some were informal policy decisions at Alphero's discretion.

In the second half of 2022 Alphero updated its flexible working policy. The policy confirmed that existing work-from-home agreements did not need to be re-negotiated.

Mr Petrie was working on a project for Alphero's client TVNZ. The unique characteristics of that project, and TVNZ being

a remote client, meant there was project-specific flexibility where staff were permitted to work four days remotely and one day in the office (described as being a "4:1" basis). But the project-specific flexibility was exactly that—limited to that project. Alphero's communications about it were consistent, being that employees working on the TVNZ project were able to work from home for longer "but not forever". The employer's communications also appear to have reserved its right to require employees to work from the office more regularly.

In late 2023 Mr Petrie's new manager resolved to have one-on-one discussions with staff reporting to him, including about flexible working arrangements. Around this time Mr Petrie had purchased a home in Whanganui. He had not told Alphero about his plan to move to Whanganui. Mr Petrie then requested a fully remote working arrangement.

Shortly prior to Christmas 2023, Mr Petrie's manager reiterated that Alphero could not support fully remote working arrangements on a permanent basis. Alphero agreed to provide a temporary flexible-working arrangement until March 2024. It seems Alphero anticipated Mr Petrie was looking for alternative (remote) work and that he would likely resign from his role. That is understandable, given Mr Petrie was now living in Whanganui and appeared reluctant to travel to Wellington for work.

Some confusion arose, and Mr Petrie clarified he was not intending to resign. In turn, Alphero sought to clarify that it was not agreeing to a permanent flexible working arrangement, and that it required Mr Petrie from the beginning of April to start working three days a week from the Wellington office. Mr Petrie resigned about a month later. He then raised a personal grievance, alleging he had been unjustifiably (constructively) dismissed and had been unjustifiably disadvantaged by the employer requiring him to work from the Wellington office.

The Employment Relations Authority found the "4:1" arrangement was only a temporary arrangement, contingent on the employee being engaged on the specific TVNZ project and the employer's needs. The employer retained the discretion to rescind the temporary arrangements and to direct employees to work from the office in accordance with its own policies. Alphero had been open and transparent in the way it communicated about flexible working arrangements, and it had not arbitrarily removed the flexible working arrangements solely in response to Mr Petrie purchasing a house in a different city.



Given those findings, Mr Petrie had not been unjustifiably disadvantaged and it followed his constructive dismissal argument must also fail as it was predicated on the employer having breached a prior arrangement about flexible working.

The key lesson for employees and employers is to get on the same page about what is agreed and what is not. If both parties are happy with informal flexibility then that is fine, but an employee who decides to move cities assuming they will be able to work remotely certainly takes a risk their employer will not agree. Formal arrangements should be documented. Parties to an employment relationship should approach discussions in good faith, openly and transparently. Part 6AA of the Employment Relations Act 2000 includes a statutory right to make a flexible working request, which employers must consider and decide whether to approve or refuse.

There are good reasons for flexibility, but there are also good reasons for requiring staff to work from the office. Proponents of in-office work say many types of work are less effectively done remotely. Benefits of in-office work include collaboration, connectivity, innovation, mentorship, and skill

development. But employers should also recognise that one-size-will-not-fit-all, and policies should include the flexibility to respond to individual circumstances. The worst outcomes—and the highest likelihood of grievances and disputes—will be from employers communicating poorly or failing to explain why they made the decision they did.



James Cowan,
Senior Associate

Privacy issues in employment



Recent case law has highlighted once again how costly it can be for an employer to breach the privacy of an employee.

Privacy hit the spotlight ten years ago when the Human Rights Review Tribunal (the HRRT) awarded \$168,000 in remedies for a significant privacy breach.¹ The latest cases are a salutary reminder for employers to understand and comply with their privacy obligations, or risk considerable financial remedies being awarded against them.

BMN v Stonewood Group Ltd

[2024] NZHRRT 64

Stonewood's Chief Operating Officer invited BMN (a Stonewood employee) to coffee, where he was issued a letter detailing performance concerns. While BMN was away from his desk, another senior employee removed his work laptop, personal USB flash drive, and personal cellphone.

BMN requested the return of his personal information, but Stonewood only gave his cellphone back. A week later, Stonewood terminated BMN's employment, but did not return the USB (which it denied taking) or the personal information from the laptop.

Eventually, Stonewood agreed to return the personal information on certain conditions, such as BMN sending in a USB drive, paying \$299 and signing an undertaking. However, despite BMN complying with these conditions, Stonewood still did not return the personal information.

The HRRT determined that a number of information privacy principles had been breached.

Information Privacy Principle 1 was breached because BMN's personal information had been collected for an unlawful purpose. Stonewood knew there would be personal information on the devices, and it acknowledged there was no good reason to collect it.

¹ *Hammond v Baywide Credit Union* [2015] HRRT 6.

Information Privacy Principle 2 was breached because in deliberately collecting the personal information while he was away from the office, the information had not been collected directly from BMN.

Information Privacy Principle 4 was breached because the information was collected in a manner which was manifestly unfair and an unreasonable intrusion upon BMN's personal affairs.

The HRRT held that Stonewood's actions were an interference with privacy in accordance with section 66 of the Privacy Act 2020 and awarded damages of \$60,000 for humiliation, loss of dignity and injury to feelings. In particular, the HRRT was influenced by BMN's medical issues caused by the privacy breaches, and Stonewood continually declining to provide the personal information and constantly changing its requirements when BMN requested the information.

Cummings v KAM Transport Limited [2025] NZHRRT 8

Mr Cummings, a driver for KAM, refused a routine drug test and was stood down. Subsequently, after Mr Cummings did later undertake and pass a drug test, Mr Cummings attended a work site where an employee of KAM's client accused him of being a drug dealer.

Mr Cummings later discovered the KAM Branch Manager had informed another KAM employee, Mr Kremm, that he had failed a drug test, leading to the damaging and untrue rumour that he had been dismissed for dealing drugs. Although KAM denied having said anything to Mr Kremm, the HRRT held that KAM had disclosed Mr Cummings' personal information to Mr Kremm.

Even though this was an internal disclosure within KAM, the HRRT concluded it was a breach of Information Privacy Principle 11 (disclosure of personal information) within the scope of employment. Mr Kremm *"had no need to know such sensitive personal information about Mr Cummings as part of his employment duties"*.

Although Information Privacy Principle 11 is ambiguous as to whether internal disclosures are permissible, the HRRT commented that there is *"nothing...to suggest... personal information may be disclosed by employees within an agency without restriction"*. The HRRT added further that *"disclosure of personal information within an agency may result in significant damage to the privacy interests of an individual"*.

The HRRT held that the disclosure had caused Mr Cumming harm amounting to significant humiliation, loss of dignity and injury to feelings, and awarded him \$30,000. However, it did not award damages for lost wages as it considered that, despite the privacy breaches, Mr Cummings' employment was not untenable at the time of his resignation.

Strauss v Fire and Emergency New Zealand [2025] NZERA 227

The Employment Relations Authority (ERA) has held that Fire and Emergency New Zealand's (FENZ's) disciplinary process against an employee, Mr Strauss, was in breach of the Privacy Act 2020, and was consequently unjustifiable and a breach of good faith. As such, the disciplinary process, which had been paused due to Mr Strauss' injunction application, should not continue.

At issue in this case was a concern that had arisen about transactions relating to a mess allowance FENZ pays to fire stations to purchase communal items such as tea, coffee, and biscuits. The employee had set up a personal account, labelled "Blue Watch Mess - Station" to pool leftover money and make purchases for Wigram Blue Watch to cook shared meals.

When the employee left the Blue Watch and was stationed elsewhere, FENZ gained access to the account for administrative purposes, only to consider there were *"discrepancies"*. FENZ then decided to commence a disciplinary process.

The ERA noted that *"the Privacy Act can be relevant to an employment relationship and is in this case"*. Its view was that FENZ's actions breached five of the Information Privacy Principles, including collecting personal information it was not authorised to collect, doing so in a way that was unreasonably intrusive, and failing to notify the employee of the collection.

In particular the ERA held that the use of the employee's bank account to collect and pool money for Wigram Blue Watch did not change the account from a personal one to an employer controlled one, stating *"an employer cannot take control over an employee's property because it has been intermingled with employer property or colleagues' property or has been used for work purposes"*.

Ultimately, the ERA considered that the evidence was *"improperly and unlawfully obtained and in breach of the Privacy Act 2020",... taint[ing] all...aspects of FENZ's actions,... breach[ing] the duty of good faith and not act[ing] as a fair and reasonable employer could in all the circumstances"*.

If you would like to discuss any privacy issues arising in your workplace, please contact one of the team.



William Fussey,
Senior Associate

Minimum hours per week: Are waged employees entitled to be paid for hours they have not worked?

Many employment agreements for waged employees include a provision for minimum hours of work per week. However, is an employer required to pay an employee for the minimum hours when the employer provides the employee fewer than the minimum hours agreed in the employment agreement? A recent Employment Court case *Happy Belly Production Limited v Harry Dawson*¹ considered this question.



¹ *Happy Belly Production Ltd v Dawson* [2025] NZEmpC 92.

It is a requirement in New Zealand for every employee to have a written employment agreement that includes, among other things, either the agreed hours of work as set out in section 67C of the Employment Relations Act 2000, or, if no specific hours are agreed, information about the arrangements for when the employee is expected to work.

Section 67C(2) confirms that the “hours of work” to be specified in an employment agreement include any or all of the following:

- a) the number of guaranteed hours of work;
- b) the days of the week on which work is to be performed;
- c) the start and finish times of work;
- d) any flexibility in the matters referred to in (b) or (c).

In the case of *Happy Belly Production Limited v Harry Dawson*, Mr Dawson was employed as an acting duty manager in a bar and restaurant owned and operated by the plaintiff company, Happy Belly Production Limited (**Happy Belly Production**). Mr Dawson was a waged employee, and his employment agreement between the parties dealt with hours of work as follows:

Hours of work – As a full-time employee, you agree to work a minimum of 40 hours per week to discharge your duties. However, due to the nature of our business, your hours of work will be in accordance with our roster schedule which is decided from time to time.

He claimed that he had not been paid for the minimum contracted hours of 40 hours of work a week in accordance with the terms of his employment agreement. As such, he pursued a grievance in the Employment Relations Authority (**ERA**) claiming Happy Belly Production was required to pay him wages in arrears for any weeks that he was available to work and had been paid for less than 40 hours.

Happy Belly Production’s position was that Mr Dawson was a full time employee and as a full time employee, he was guaranteed a minimum of 32 hours per week, but he was offered an opportunity to work “up to” 40 hours per week.

The ERA concluded that Mr Dawson had not been paid in accordance with his contractual entitlements and ordered the company to pay him \$1,726.64 by way of unpaid hours, interest on that amount, and reimbursement of the Authority lodgement fee.² Happy Belly Production challenged this decision in the Employment Court.

² *Dawson v Happy Belly Production Ltd* [2024] NZERA 635.

³ *Happy Belly Production Ltd v Dawson* [2025] at [6].

⁴ At [14].

⁵ The ERA has cited the cases *Gate Gourmet New Zealand Ltd v Sandhu* [2020] NZEmpC 237, [2020] ERNZ 561; and *Mana Coach Services Ltd v New Zealand Tramways and Public Transport Employees Union Inc* [2015] NZEmpC 44, [2015] ERNZ 452.

In interpreting what was agreed under Mr Dawson’s employment agreement, Employment Court Chief Judge Inglis summarised the well-established framework for interpreting an employment agreement:³

The approach is objective. The aim is to ascertain the meaning which the agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the agreement. This objective meaning is taken to be that which the parties intended. While the meaning of a clause in an agreement may appear clear, meaning is informed by context. A provisional conclusion as to meaning is to be cross-checked against the context provided by the agreement as a whole, and any relevant background.

The Employment Court took a view that the express words in the agreement to work “a minimum” of “40 hours per week” clearly connotes a baseline of hours. The Court concluded:⁴

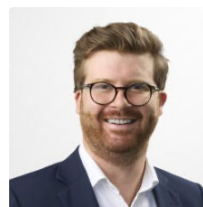
The natural and ordinary reading of the clause is that Mr Dawson would be rostered on for at least 40 hours per week and would be paid for that time. The natural and ordinary meaning points squarely away from the interpretation advanced by the company.

The Employment Court also agreed with the ERA’s view that, in light of the express wording, paying fewer than 40 hours would be inconsistent with the common law principle obliging an employer to pay a worker for their agreed hours of work provided the worker was ready, willing and able to work those hours.⁵

As such, the Employment Court upheld the ERA’s decision and considered that Mr Dawson had been underpaid for weeks where he worked less than 40 hours per week but had been ready, willing and able to work a minimum of 40 hours.

This case is a useful reminder of the pitfalls of minimum hours of work agreed in the employment agreement. When an employee is ready, willing and able to work, they are entitled to be paid for their agreed minimum/ guaranteed hours of work.

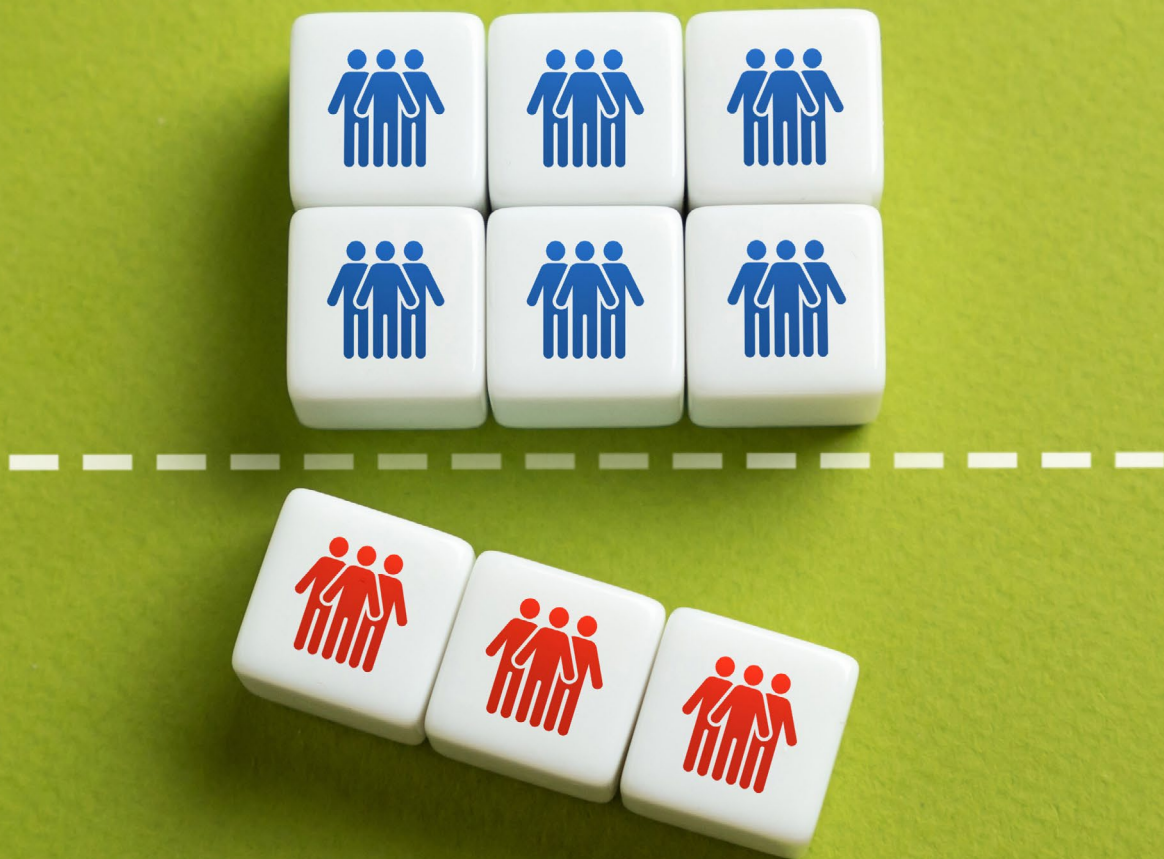
To avoid the risks of similar wages, it is important for employers to ensure that the agreed hours of work in an employee’s employment agreement accurately reflect the intentions and expectations of the parties. However, this does not preclude the parties from mutually agreeing to fewer hours of work.



Samuel Deavoll,
Associate

Can an employee still be made redundant if another employee resigns during the restructure process?

A recent Employment Relations Authority determination highlights the importance of considering any changes in circumstances, such as employee resignations, during a restructure. It is also a reminder to avoid letting factors that haven't been consulted on form part of the decision making.



Facts

Mr Penny was one of five employees in the software development team.

Frello Ltd was in a poor financial state, and decided to restructure to address the situation. Frello advised staff of the restructure proposal which involved reducing the team from five members to three. Two other positions were to be disestablished, and a new position would be created.

Because the team were all in the same situation of being in a pool of people who may have their position disestablished, a selection criteria process was to be followed. The selection criteria included factors such as length of service, attendance, whether there were any performance or disciplinary issues, attitude and work ethic.

Frello advised there were two possible outcomes:

- Contest for one of the 3 roles. If unsuccessful, you would likely be made redundant; or
- If you did not want to be considered for one of the 3 roles, there were unlikely to be any alternatives to redundancy, but Frello was open to discussing any suggestions.

Mr Penny gave feedback on the proposal, and expressed he wished to be considered for a role.

Frello acknowledged in evidence that Mr Penny had scored highly on the selection criteria, and was considered to be a very experienced member of the team. Nonetheless, he was informed that he had been unsuccessful in retaining his position and he was to be made redundant.

Mr Penny raised a personal grievance, alleging his dismissal was not justified. He sought compensation and lost wages.

Employment Relations Authority

Problematically for Frello, there was evidence that another employee in the software developer team had resigned (either before the proposal was announced, or during the process-the timing was disputed).

Mr Penny also gave evidence that the same day he was made redundant, a second employee in the software development team told him they had also resigned earlier in the week. Frello disputed this, stating the employee had indicated they were considering resigning, but had not actually resigned.

In any event, the Employment Relations Authority noted that the proposal was to reduce the number of software developers in the team from five to three. It transpired that one developer had already resigned, so the information consulted on was incorrect.

Further, if the second developer also resigned, there would only be three developers left in the team. That would have meant the proposal's objectives could have been met without making any developers redundant.

The Authority understood Frello's position that any reduction in salary was going to help with the financial position, however noted the obligation to consult and provide all information relevant to a redundancy decision was fundamental for an employer seeking to justify its actions.

The Authority stated "consulting on incorrect information and failing to consider a significant change in circumstances so close to the final decision being made in this case has a direct bearing on the genuineness of both the consultation about the restructure proposal and the decision making".

A further problem arose for Frello when it admitted in evidence that it looked at salaries as part of the wider context. Salary was not listed in the selection criteria as a factor that was being considered. Frello gave evidence that the employee who had indicated an intention to resign was earning significantly less than Mr Penny, and it wanted the other employee to stay because of his experience. The Authority was critical of Frello for considering this information without consulting with Mr Penny on it.

Ultimately the Authority found the dismissal to be both substantively and procedurally unjustifiable. Mr Penny was awarded \$20,000.00 compensation, and three weeks lost wages.

Key takeaway

If circumstances change during a restructure, it is important to pause and ensure the information you are consulting with employees on is still up to date and accurate. It may be that further information needs to be put to employees. It is also crucial to not let factors form part of the decision making which are not properly put to employees to comment on.



Kelly Thompson,
Senior Solicitor



An employer's right to surveillance – can employers play detective when they suspect their employee has pulled a sickie?

In our last issue of Vital., we discussed different types of employee absenteeism and how employers can manage this. A recent determination in the Employment Relations Authority serves as a reminder of what employers' obligations are when they have evidence to suggest an employee may have called in sick without grounds, potentially warranting disciplinary action.

Frew v Oakley's Windows & Doors Limited [2025] NZERA 338 primarily concerned an unlawful variation of employment, coupled with a separate issue that involved the employer taking photos of the employee at community events whilst on sick leave. The employer took the photos out of concern that the employee was abusing his authorised sick leave and was not actually unwell.

Notably, the employer took the photos between April and July 2024. However, they did not disclose them to the employee until February 2025 when the parties were due to attend mediation on a separate employment relationship issue. The employer invited the employee to respond to the photos disclosed at that time, however rather than seeking to discuss their concerns, the employer said the photos would “*help progress talks in mediation effectively*”. The employer's position appeared to be that the photos would be useful in discussions of the employee's credibility.

The employee raised a grievance for unjustified disadvantage once he became aware of the photographs, as well as that the employer had discussed his sick leave with a community member. The employee's view was that the employer had unreasonably conducted intrusive surveillance of him in a manner that caused him distress and breached its privacy obligations to him. The employer's argument was that it was genuinely concerned that the employee's leave of absence on medical grounds was not genuine.

The Authority's main concern was the employer's delay in disclosing the photos to the employee. It found this demonstrated a failure to manage the employee's absence or to engage constructively with him, which caused the employee to feel distressed and humiliated. Ultimately, the employee's disadvantage grievance was successful.

When might employee surveillance be lawful?

In some cases, calling in sick when not unwell may amount to serious misconduct and warrant disciplinary action, including dismissal. However, what the Authority in *Frew* did not consider in depth was whether an employer conducting surveillance of an employee on sick leave is unlawful in and of itself, even if the employer follows a fair and reasonable process in disclosing the photos to the employee and inviting their response, before commencing any disciplinary action.

While the case law on this point is limited, the position appears to be that conducting surveillance on an employee can be lawful, provided that such surveillance is fair and reasonable in the first instance, and is followed by a fair and reasonable process if the employer seeks to take disciplinary action.

Griffith v Sunbeam Corporation Ltd [2006] NZEmpC WC 13/06, involved an employer who paid a visit to its employee's personal building site on the suspicion he had called in sick to continue building his new house.

On arrival, the employer observed the employee working onsite, wearing work boots and a tool belt. The employee saw his employer had arrived and approached him, at which stage the employer stated his understanding that the employee was sick. The employee responded that he had visited the doctor that morning and received an injection that had left him feeling much better. However, when his employer asked for proof of his doctor's appointment, he was unable to provide it.

A disciplinary process ensued and the employee was ultimately dismissed. The Employment Court found the employer's dismissal was justifiable, noting the employer had conducted a full and fair investigation, followed by a fair and reasonable process. No issues regarding breach of the employee's privacy by arriving at the employee's personal building site were raised, seemingly suggesting that searching for and approaching an employee in person whilst on sick leave, may be a lawful and reasonable exercise of surveillance.

Excell Corporation Ltd v Stephens NZEmpC [2003] ARC 19/03 also involved a dismissal, however it was found to be unjustified, owing in part to the employer's acts of surveillance. In that case, the employee had booked a trip to visit his daughter using annual leave. Prior to his trip, the employee was suffering from workplace stress due to a strained relationship with his manager, so he would extend his trip by one day, and call in sick that morning.

Prior to the employee leaving for his trip, the employer discovered he had changed his flight home when his updated itinerary appeared in the workplace fax machine. The employer suspected that employee intended to take unauthorised sick leave the day he arrived home, however did not raise this suspicion with the employee prior to his departure. Rather, the employer waited for the employee at the airport and photographed him getting into a taxi outside. A disciplinary process followed, and the employee was dismissed for abuse of sick leave.

The Court found that while abusing sick leave would, on the face of it, be sufficient reason to dismiss in accordance with the employer's policy, the investigation leading to the conclusion that the employee had, in fact, abused his sick leave was unjustified.

One reason for this was the fact the employer had sat and waited for Mr Stephens outside of the airport to confirm its suspicions, when they had the opportunity to confront the employee at an earlier stage. If the employer had done so, he would have had the opportunity to explain this was due to stress, and to provide medical evidence.

While the case law suggests that surveillance of employees may be lawful, employers must tread carefully. Failing to raise a suspicion of intention to take unauthorised sick leave will likely render the surveillance in and of itself unlawful, and thus incapable of forming the basis for a fair and reasonable disciplinary process. Employers should also be mindful of its obligation to disclose any evidence of unauthorised sick leave, gathered by the employer themselves or otherwise, if it intends to rely on the evidence for any immediate disciplinary action or otherwise.



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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.

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- assisting employers and employees with visa applications
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- employer-based work and residence visa applications
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