Vital.

Employment & Immigration News

Edition 25,
December 2025

anderson lloyd.

Inside this issue:

Tēnā koutou katoa

Welcome to our final edition of Vital for 2025.

It has certainly been an eventful year in terms of Employment Law, with a number of proposed changes to the Employment Relations Act and a number of significant Court decisions including the Supreme Court's recent decision regarding Uber and a full bench Employment Court decision regarding deductions. (Soapi)

John covers off the Uber decision and Kelly talks us through the ramifications of the Soapi decision, especially in terms of the potential impact of deductions on minimum wage.

In addition to the proposed legislative changes, Australia and New Zealand have phased in a new drug and alcohol testing standard. Rebecca looks at this and relevant case law in her article.

While we are promised that a total overhaul of the Holidays Act is closer, unfortunately there is no specific timeframe for this. So, to help you navigate the current quagmire that is the Holidays Act, Malcolm has rolled out his essential guidance on holidays and annual closedowns.

Georgie discusses Protected Disclosures. As a team we are finding these to be increasing in prevalence. Employers need to be particularly vigilant and Georgie's article provides valuable insight into potential consequences.

She also covers pay deductions for partial strikes which is also very topical given the recent nurse's and doctor's strikes.

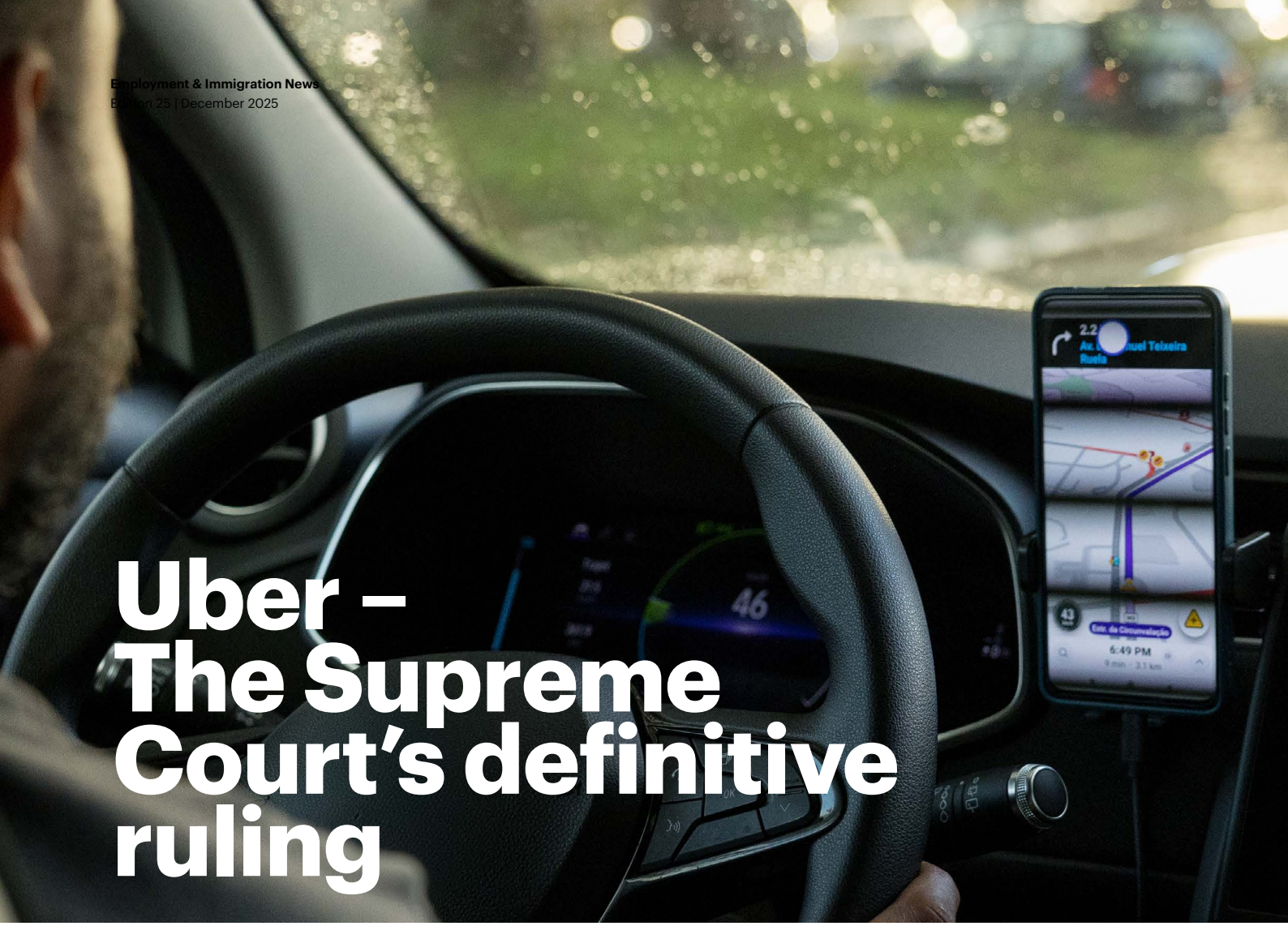
We hope you find the articles both informative and enjoyable.

The team wishes you all the very best for the Christmas break and hopefully a long hot summer.

Next year we'll see the proposed changes to the Employment Relations Act actually take effect. It will be intriguing to watch the case law develop as we all attempt to navigate our way around these changes.

AJ Lodge, Partner

John Farrow, Partner



Uber – The Supreme Court's definitive ruling

The recent Supreme Court decision regarding Uber drivers is not surprising when all the facts are considered. However, how the scheme actually operates will come as a surprise to many.

While unsurprising, the decision is likely to have significant ramifications. The Parliament Education and Workforce Select Committee is currently considering the Employment Relations Amendment Bill which includes a gateway test to determine whether workers should be classified as contractors or employees.

This test is widely viewed as a response to the previous Uber decisions. The Supreme Court's recent decision will only serve to better inform the legislation which is designed to give certainty and flexibility to both employers and employees. The Select Committee was due to report back to Parliament last Monday, but this has now been rescheduled for release on Christmas Eve.

Uber has consistently argued that it supplies digital services to drivers and riders enabling them to connect and form their own business relationship. It has claimed that the rider pays the fare to the driver and Uber earns a service fee, paid by the driver, for its services. The Court however, found that Uber was in the business of supplying passenger transport services and that Uber engages drivers to deliver those services. That is also how Uber earns its revenue; it charges riders for trips. Although it describes itself as a technology business, it does not make money by distributing its software. Its revenue takes the form of fares paid.

In reaching this finding the Court considered a number of factors:

- drivers and riders are not given one another's phone numbers;
- the fare is not communicated to the driver when the trip is accepted;
- the driver is only given the fare information when the trip has been completed;
- Uber collects fares from users and facilitates payment to the drivers;
- off-app pickups are prohibited as are street hails or touting while using the Uber apps;
- the driver can't negotiate a higher fare, nor can they solicit tips;
- Uber controls the amount and payment of other charges such as cancellation fees or cleaning charges, and reserves the right to adjust payment for reasons such as an inefficient route.

Significantly, drivers are not given any real information they might use to contact their rider outside of the app. The Service Agreement between the parties prohibits them from doing so. There is no pre-trip contact between rider and driver, let alone negotiation. Users and drivers are practically anonymous throughout the entire transaction. The Court found that anonymity is not consistent with the idea that drivers and passengers form a contractual relationship through Uber's claimed delivery of an online platform. A passenger could not reasonably be expected to think they were contracting with the driver when they got in the car. They ordered the service from Uber and agreed to pay Uber for it.

Uber argued that the drivers may work as little or as much as they like and are permitted to compete with it on alternative platforms such as Ola.

However, when all other factors are revealed, the Court found that freedom was illusory. Uber operates a rewards system for completing trips. The rewards system is integral to Uber's tight control of their work. The system does not work to inform users' choice of supplier as is normal for most platform businesses; rather it operates as an internal management tool for Uber and is the basis for making termination decisions when driver ratings are not meeting Uber's performance levels.

Drivers who do not accept three trip requests in a row will be logged off. Drivers whose acceptance rate is too low, receive warnings. The Court found that the rewards programme creates powerful incentives to be available for work at Uber's preferred hours, to accept and complete trips and to maintain a very high driving rating. It also found that multi-apping is not an available option in reality because of Uber's close monitoring of drivers' locations and acceptances.

The amount of control that Uber exercises over drivers is a significant consideration. Drivers are prohibited from using subcontractors. The only way that drivers can increase their earnings is by managing their costs, especially those relating to their cars. By standardising the service and prohibiting off-app contact with riders, Uber's terms and conditions deprived drivers of the opportunity to earn goodwill. The Court found that Uber's control is more extensive than necessary for efficient safety and that it leaves drivers with very little real autonomy. Uber's disciplinary processes also maintain close control of drivers' performance.

The Court also found that the drivers were integrated into the Uber business. Uber engages drivers to deliver the transport service it supplies to users. This means that drivers are fundamental to Uber's business.

It was also significant that there is no ability for a driver to build their own businesses by virtue of contact with Uber's customers. This means customers are Uber's customers and not those of the driver. Where there are areas where drivers have some autonomy, these are limited and are overridden by the extent of the drivers' integration into Uber's business, as well as the drivers lack of control over quantity and quality of the work they receive, the price paid for it and their inability to develop their businesses through contact.

Concerns have been raised about what the Court's decision means for the gig economy. However, the United Kingdom Supreme Court and the New Zealand Court of Appeal found that all digital platforms which connect sellers and buyers of goods and services on a pro-service basis are not the same and it is important to consider the way in which Uber differs.

While booking agents for services such as hotel accommodation typically book on standard terms and handle payment in return for a service fee, they do not offer a standardised product which they define or set the price. Customer ratings are used to help new customers choose a supplier, and the platforms do not try to restrict customers from dealing directly with suppliers. Examples of other platforms which merely connect tradespeople and homeowners who negotiate their own terms of service without becoming a party to those arrangements were also given.

The other significant concern arising from the decision centres around certainty of contractual arrangements. In this case the agreement between the parties explicitly stated that the drivers were not employees. However, the Court of Appeal described the language as "window dressing" and "fiction, evidently designed to confer control over drivers' labour while skirting the margins of employment law".

Section 6, which is the relevant provision of the Employment Relations Act 2000, focuses on the real nature of the relationship. The parties' intention in striking an agreement is relevant, but not decisive. It is hard to see how businesses can gain greater certainty around contracts within the current legal framework. Inevitably Parliament will need to provide that certainty by legislative change. Come Christmas Eve and the select committee's report we will have a better idea of what this legislative change might look like.

John Farrow,
Partner

Q&A

anderson lloyd.

Holidays – all I want for Christmas

For how long now I cannot exactly remember, but there is just one thing I have needed and wanted for Christmas and that is a new Holidays Act!

Successive and numerous Governments have tried (and failed) to amend the Holidays legislation, which everyone agrees is unworkable. In September we saw for the first time ambitious changes announced that might actually work for everyone.

The proof will be in the pudding, but the fairytale is alive and all our dreams may come true, but ultimately I will believe it when I see a draft Bill and the select committee phase gets underway. Optimistically the target is that new legislation will be introduced this term, so next Christmas, bells will be ringing and we can celebrate.

That said, with the countdown to the Christmas period well and truly on it is important for employers to understand what their existing obligations are over the upcoming festive period.

In this article some of the more commonly asked questions are answered.

Continued >

Holidays – all I want for Christmas (Continued)

Q: What is an annual closedown?

A: A period where businesses can close down (either in whole or in part) for a set amount of time. A closedown period usually includes and runs through Christmas and New Year and is often for at least two weeks.

Q: Can all employers closedown?

A: Absolutely, provided the annual close down has become a tradition (custom and practice) or it is provided for in your employment agreements.

Q: What do I need to do in order to have a closedown?

A: You must give employees at least 14 days' notice. That notice should be in writing and an email or letter will meet the requirements.

Q: Can I operate more than one closedown?

A: Unfortunately, no you can only have one closedown per year. You cannot close at Christmas and then again over, say, the Easter break. You can by agreement, with your employees, have another period where the business does not operate, but that will not be an official closedown.

Q: Can an employee refuse to take their annual leave over a close down?

A: Some employees may feel aggrieved at being forced to take annual leave at times when they would prefer not to, but if it is provided for in an agreement, or is custom and practice, then an employer can direct an employee to take annual leave.

Q: What do I pay an employee?

A: This is a question that employers grapple with. The answer depends on the nature of the employment and whether the employee is permanent, part-time or casual, whether the employee has worked for more than 12 months and if there is sufficient annual leave available. It also depends on whether the public holidays that fall during the close down period would normally be working days for the employees. Each situation is different and there is no one size fits all approach.

If an employee does not have sufficient leave, then they must be paid 8% of their total gross earnings at the start of the closedown (less any leave taken remainder in advance). An employer and an employee must discuss and negotiate whether the closedown period will be taken as unpaid leave or as annual leave in advance. Good faith applies, but there is no obligation on an employer to grant leave in advance. In some cases, it may be a risk to do so if the employee reflects over the closedown and does not come back to work. The employer will have overpaid the employee and will be faced with the prospect of not being able to recover the overpayment or spend a disproportionate amount to recover.

For permanent employees who work a 5-day week, Monday to Friday, then with the way the holidays fall there is no Mondayisation of holidays this year.

For part-time employee who work, for example, Thursday to Sunday then they will have an entitlement to Christmas Day, Boxing Day as well as New Year's day and the 2nd of January as paid public holidays.

If the public holiday falls on a day that the employee would otherwise work, then they are entitled to be paid time and a half based on their relevant daily pay or the average daily pay for the hours worked, and also receive an alternative day in lieu of taking the holiday.

If the public holiday falls on a day that the employee does not normally work, and they agree to work, then they are entitled to be paid time and a half but they do not receive an alternative paid holiday.

If the public holiday is a day that the employee would otherwise work, but does not work on that day, then they are to be paid either their relevant daily or average daily pay depending on which calculation is used by the employer.

Casual employees' entitlements are even more complex. To determine if an entitlement to a public holiday exists that will involve an analysis of the casual employee's pattern of work. If a casual employee regularly works a Wednesday then they can reasonably expect to be paid for Christmas and New Year's Day. If the work is more sporadic then there may still be an opportunity to receive payment for a public holiday if the employee's pattern of work establishes that they regularly work one of those days. For example, if a casual employee worked some Thursdays leading up to Christmas then that may well be sufficient. A case from the Authority determined (wrongly, in our view) that working just one weekday day that the public holiday fell on in the past 6 months entitled the employee to a paid public holiday. Other factors need to be considered to determine a casual employee's entitlements so it always best to seek advice.

Q: What happens if the employee is sick or suffers a bereavement during the closedown?

A: If the day on which the employee is sick, or suffers a bereavement, is a day that the employee would otherwise have been working (but for the annual closedown) then they are entitled to be paid sick or bereavement leave rather than using up their annual leave.

This contrasts with the situation where an employee is on annual leave outside a closedown period and becomes sick. In those circumstances, there is no mandatory obligation on the employer to allow the employee sick leave, although a fair and reasonable employer acting in good faith might grant sick leave subject to satisfactory evidence being provided.

Q: Can an employer grant some employees annual leave over the Christmas / New Year period, but not others?

A: Yes, an employer is not required to grant time off to every employee who wants annual leave. Employers need to be able to resource and operate their business as they see fit.

Q: Can I make my employees work overtime?

A: If you have set guaranteed hours included in an employee's employment agreement then only salaried employees can be required to work outside those hours.

For waged employees any additional overtime must be agreed, unless the employment agreement contains an availability provision and compensation to the employee for making themselves available to work outside their guaranteed hours.

In the absence of an availability provision, then an employee's free to agree or decline any requests to carry out overtime.

Q: My employee has resigned and their last day is Christmas Eve, 24 December? Do I still have to pay them for the Christmas and New Year public holidays?

A: That depends on whether or not the employee has untaken annual leave. If the employee's annual leave entitlement, when added to their last day of employment, takes them through Christmas Day, Boxing Day and into the New Year then the employee must also be paid for the public holidays.

Q: An employee wants to cash-up some of their annual leave so they can enjoy themselves over the holiday period. What are the obligations?

A: An employee can only request that one week of their statutory annual leave entitlement to be 'cashed-up. If an employer pays out more than one week's statutory annual leave then the employee's entitlement remains, which means the employee will receives more 'annual leave' than they are entitled to. For example, if an employee has four weeks' annual leave then they are only entitled to cash-up one of those weeks. If the employer allows them to cash-up two weeks then they will still have three weeks annual leave remaining but would have also received the equivalent payment for two weeks, giving them a total 'entitlement' to five weeks.

For employees who receive more than 4 weeks annual leave an employee and an employer may agree arrangements to cash up the additional 5th week. This would need to be at the employee's request and documented. An employer might do this if the employee had a large outstanding leave liability. The preferred course of action would of course be to agree with the employee that they take an extended period of annual leave over the holidays rather than cashing up too much of the leave entitlement.

Malcolm Couling,
Special Counsel

Drug and Alcohol Rules: Avoiding Holiday Headaches

The holiday season is here, time for BBQs, beach days, and a few celebratory drinks. But while we're all winding down, it's worth remembering that workplace expectations don't take a holiday and showing up fit to work is non-negotiable.

The festive season is a great reminder of why clear drug and alcohol policies matter. Drug and alcohol management in the workplace is evolving fast. Oral fluid testing is now widely used as a quick and less invasive screening option, medicinal cannabis prescriptions are more common, and the AS/NZS 4308:2023 standard is being phased in. All of this makes now the ideal time to review your approach and practices.

Recent Cases

In *C3 Limited v O'Brien*[1], Mr O'Brien worked as a stevedore in a hazardous port environment, operating heavy machinery such as cranes, top lifters and forklifts. He was dismissed after a random drug test produced an invalid urine sample (cool temperature, no thermal strip reaction, low creatinine). C3 relied on its policy allowing dismissal where a sample's integrity was suspect.

Mr O'Brien challenged the dismissal and sought reinstatement. The Employment Court found he had an arguable case, noting a fair employer would likely have taken a second sample as recommended by the relevant standards. The Court also said C3 failed to properly consider his explanation that tampering was not feasible during a monitored, no-notice test, and expert evidence raised concerns about the reliability of the testing process.

[1] *C3 Limited v O'Brien* [2024] NZEmpC 6

The Court declined interim reinstatement to the workplace due to health and safety risks but ordered payroll-only reinstatement until the substantive hearing.

In *Hadfield v Atlas Concrete*[2] Ltd it was common ground that Mr Hadfield held a safety-sensitive role as a concrete truck driver. He was selected for a random drug test and produced a non-negative result, after which he was sent home immediately. Once the laboratory confirmed the result exceeded the policy cut-off levels, he was dismissed.

Mr Hadfield challenged his dismissal. While he admitted smoking cannabis during the weekend prior to the Monday test, he claimed his employer wrongly concluded he was under the influence of drugs. He maintained he was not impaired while at work.

The Authority found the dismissal substantively justified in a safety-sensitive context. Expert evidence confirmed urine testing cannot pinpoint impairment because it only detects the presence of a substance, not whether the person is currently affected. The Authority accepted that while the test could not prove impairment, the nature of the role, driving heavy concrete trucks, meant any risk was unacceptable. This justified the employer's reliance on the prescribed cut-off levels and its zero-tolerance approach in a safety-sensitive environment.

However, Mr Hadfield's personal grievance succeeded on procedural grounds. The employer's process was flawed in several ways:

- Suspension was rushed and imposed without proper consultation.
- The employer closed its mind to alternatives to dismissal and did not properly consider other options.
- The letter sent to Mr Hadfield was deficient and failed to advise him of the possible disciplinary consequences of the non-negative test.
- The policy required all employees with a positive result to be referred to a rehabilitation programme, but this did not occur.

Due to these procedural breaches, the Authority awarded Mr Hadfield lost wages of $7,310.12, compensation for injury to feelings of $16,000, and a contribution towards legal costs.

In *Vulcan Steel Ltd v Manufacturing & Construction Workers Union*[3], the Court considered who decides the method of drug testing. The company's policy referred to both urine and oral fluid testing and incorporated standards for each, but they did not specify who chooses the method. The union argued employees could select oral fluid testing, while Vulcan Steel claimed the employer had that right. The Court found the parties had included both references because it had been unable to agree to a preferred method of testing during bargaining and declined to imply a term giving the employer sole discretion.

In this case, gaps and ambiguity in the policy created uncertainty. Simply referencing multiple testing methods does not give employees the right to choose, nor does it automatically grant employers discretion.

Lastly, in *Cummings v KAM Transport Ltd*[4], the Human Rights Review Tribunal awarded an employee $30,000 after his refusal to take a random drug test was disclosed internally, leading to rumours across the company. The Tribunal confirmed that drug and alcohol testing information is personal information under the Privacy Act and must be kept confidential.

Check your internal processes to ensure that information sharing is genuinely on a need-to-know basis, preventing unnecessary disclosure.

The AS/NZS 4308:2023 Standard

The new AS/NZS 4308:2023 Standard that is being phased in introduces updated cut-off levels for certain substances, including benzodiazepines and cocaine. A "non-negative" test result will also now be reported as "not-negative" under the updated standard.

Employers who use drug testing should confirm with their providers that testing processes meet the new standards, so results can be relied upon in employment decisions and provide accurate information for workplace safety decisions.

Practical Tips for Employers

A little clarity now saves a lot of trouble later. Make sure your policy spells out when testing can happen, what consent looks like, and what happens if someone breaches the rules. As you can see from the snippet of cases above, the Courts take a strict approach when interpreting drug and alcohol policies and testing procedures. That's why it's crucial to train managers so they know their obligations and can apply policies consistently. Training should also help them spot potential impairment risks early and deal with them appropriately. And don't forget to reinforce the basics: fair process, clear communication, consent, and privacy protections.

[2] *Hadfield v Atlas Concrete Ltd* [2023] NZERA 470

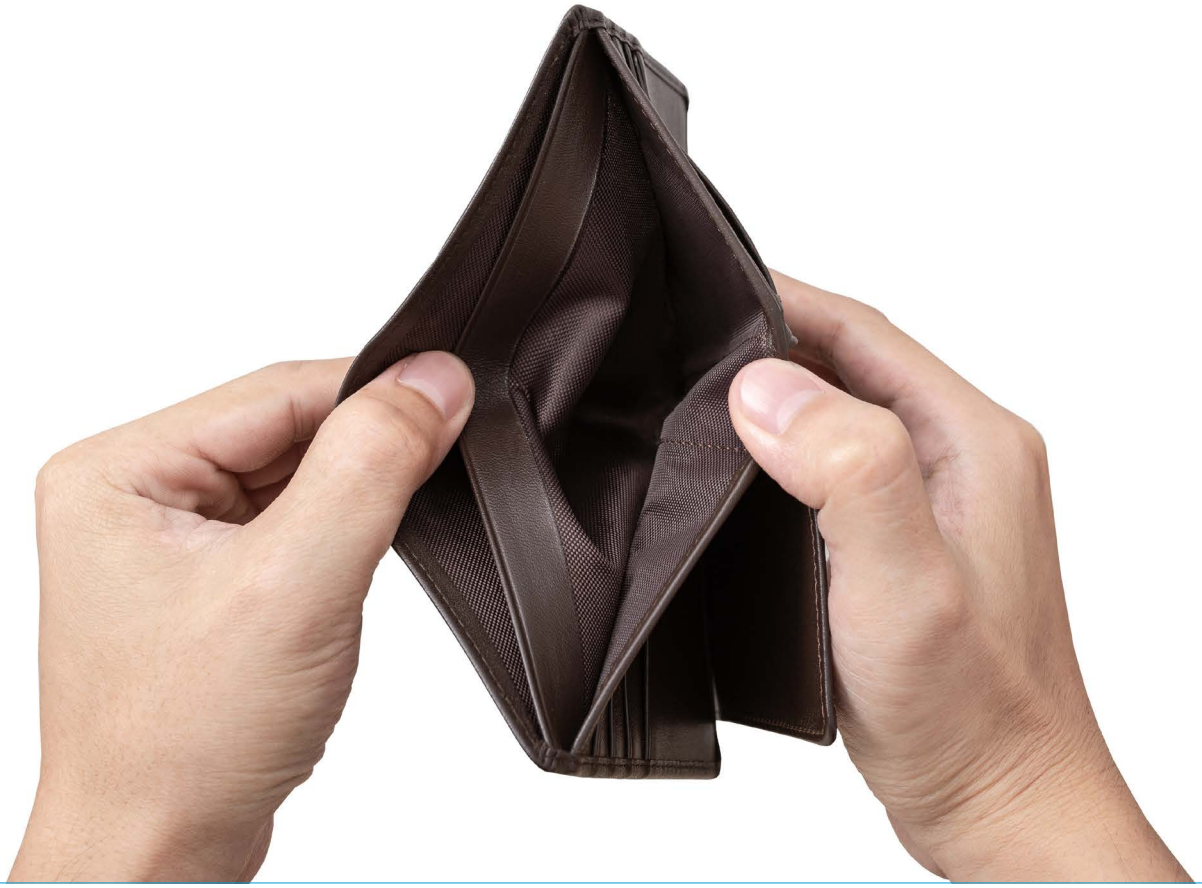
[3] *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2022] NZEmpC 78

[4] *Cummings v KAM Transport Ltd* [2025] NZHRRT 8

Rebecca Laney,
Associate

Deductions and the minimum wage: can employers deduct below minimum?

A recent full bench decision of the Employment Court clarifies the boundaries of lawful wage deductions, setting out when employers can, and cannot, deduct from an employee's pay if it results in take-home earnings falling below the minimum wage.



The facts

The plaintiffs were employed by Pick Hawke's Bay under the Recognised Seasonal Employer (RSE) scheme, which allows accredited employers to employ workers from specified Pacific Island nations for seasonal horticulture/viticulture work.

Accreditation under the scheme requires compliance with immigration and employment laws, financial stability, and a commitment to worker welfare.

The claims

The plaintiffs claimed that Pick Hawke's Bay made unlawful deductions from their wages in breach of the Wages Protection Act 1983 and the Minimum Wage Act 1983.

The deductions in question included weekly deductions made by Pick Hawke's Bay, to recover costs for accommodation, health/travel insurance, and transport. Pick Hawkes Bay would also recover costs through a 'reducing balance deduction' for half the plaintiffs return airfare, the RSE visa, domestic travel, and wage advances.

Pick Hawke's Bay denied the claims, and counterclaimed, seeking restitution or to off-set the amount of the deductions.

Employment Court

The Court found that many deductions were made without proper written consent or approval from INZ under the ATR (Agreement to Recruit) process.

Pick Hawke's Bay was criticised for not making it clear to INZ or the plaintiffs how repayment of debts would operate in practice. For example, Pick Hawke's Bay had disclosed the existence of the reducing balance debt, however the resulting effect that workers often had their entire weekly pay deducted except for $100, was not disclosed to INZ.

Pick Hawke's Bay was also criticised for making deductions in a way other than expressly consented to by the workers. For example, costs which were incurred prior to the plaintiff's starting work were recovered through deferred deductions, and the deductions consent forms did not allow for this.

Although the plaintiff's hourly rate met the minimum wage, deductions reduced their take-home pay below that threshold. The plaintiff's claimed that the Minimum Wage Act required that they receive payment in the hand at not less than the applicable minimum rate, subject only to the exceptions in section 7 to 9 of the Minimum Wage Act.

The Court rejected the submission that where deductions are made under the Wages Protection Act, they constitute part of an employee's wages for the purposes of "receiving" the minimum wage.

The Court concluded that it was a breach of the Minimum Wage Act for Pick Hawke's Bay to make deductions from the plaintiff's pay that reduced their wages below the minimum wage, insofar as the deductions were not permitted by section 7.

The Court said this was consistent with the earlier decision of *Faitala* where the Court of Appeal held that the right to receive the minimum wage is "subject to statutory or other legal deductions".

Section 7 Minimum Wage Act prevents deductions for board or lodging from exceeding such amount as will reduce the worker's wage calculated at the appropriate minimum rate by more than the cash value as fixed by or under any Act, determination, or agreement relating to the worker's employment. Alternatively, if it is not fixed, the deduction shall not exceed such amount as will reduce the worker's wages by more than 15% for board or by more than 5% for lodging.

The plaintiff's claim was that the accommodation deductions exceeded the 5% allowed by section 7 for lodging, and that there was no Act, determination, or agreement within the meaning of the section that fixed the cash value of that lodging.

The Court concluded that the value of board or lodging can be fixed by an individual employment agreement, but that did not happen under the ATR process.

The Court accepted in principle that an agreement in some situations can fix the cash value for accommodation through a deductions clause, but that will not always be the case. The text of section 7 suggests that the amount able to be deducted for accommodation is dependent on whether the cash value was fixed as a separate step. If the cash value can be fixed by needing only to state an amount to be deducted, the limits provided for in section 7 would be deprived of effective meaning.

The employment agreements stated the amount to be deducted from the plaintiffs' wages for accommodation per week as a dollar amount, but they did not fix the cash value of the accommodation. The deductions for accommodation therefore did not comply with section 7 where the amounts taken exceeded 5% of the plaintiffs' minimum rate of pay.

The Court said for completeness, even if the cash value was found to be fixed, the amounts deducted were not reasonable and would have been unlawful under the Wages Protection Act, s 5A. They did not reflect actual costs because the calculation included costs incurred by Pick Hawke's Bay during off-season periods.

Counterclaim

Pick Hawke's Bay succeeded only in recovering wage advances made under a mistaken belief they could be deducted. Other counterclaims failed.

Outcome

The Court held that Pick Hawke's Bay breached section 4 of the Wages Protection Act and sections 6, 7 and 11B of the Minimum Wage Act. The plaintiffs were awarded recovery of monies owing, interest on those amounts, and the matter was referred to Immigration New Zealand.

While this decision arose in the context of the RSE scheme, its interpretation of the Minimum Wage Act and Wages Protection Act applies broadly to all employers.

The key takeaways for all employers are:

- Accommodation deductions must be fixed (i.e in an employment agreement) at a reasonable amount to be lawful.
- If they are not fixed, they cannot exceed such amount as will reduce the worker's wages by more than 15% for board or 5% for lodging.
- Other contractual deductions cannot reduce an employee's wages below minimum wage, even if the employee consents to them.

Kelly Thompson,
Senior Solicitor

Whistleblown Away: A Costly Lesson for Employers in Protected Disclosures

The Employment Relations Authority has awarded over $500,000 to a former employee whose redundancy was considered to be "retaliatory" following a protected disclosure complaint.

Background

In 2024, the Employment Relations Authority in *Bowen v Bank of New Zealand* concluded Ms Bowen had been unjustifiably dismissed through a retaliatory redundancy[1]. Ms Bowen previously made protected disclosure complaints concerning two colleagues, one of whom was later involved in a restructuring process that led to the disestablishment of her position. After unsuccessful attempts at redeployment and mediation, Ms Bowen was ultimately made redundant.

Ms Bowen alleged the restructuring was motivated by retaliation for having made the protected disclosures. She brought several claims including personal grievances for unjustified action causing disadvantage and unjustifiable dismissal, breach of the duty of good faith and breach of her employment agreement. Although many of these claims failed, Ms Bowen was successful in showing BNZ acted in an unjustified manner through the retaliation.

The Authority held there were various key aspects that showed the disestablishment of Ms Bowen's role was done in retaliation. Some of these included:

- Only 5 months earlier extensive work was undertaken in redefining the team roles and it made "no business sense to unwind all of that."
- There was a lack of evidence of business drivers prompting such a change and evidence to the contrary showed the work required of Ms Bowen's team remained.
- Unlike Ms Bowen's earlier input in redefining the roles of the team, all work done to disestablish the team occurred without her involvement.
- The restructuring proposal itself raised red flags including that the initial proposal was for the team to remain. A decision to disestablish the team was made only after one of the parties Ms Bowen complained about became involved in the process. The Authority found that the logical conclusion that followed was that person (who was the manager) influenced that change.
- Some of the roles in Ms Bowen's team were kept but sat in a newly created team which showed there was ongoing work for the team.

The Authority found that disestablishing Ms Bowen's role and her resulting redundancy was unjustified, retaliatory, and caused disadvantage to her employment. As a result, BNZ failed to meet its good faith obligations and Ms Bowen was unjustifiably dismissed. In particular, the Authority noted the disestablishment "had no commercial basis" because work was still available for the team members.

Remedies awarded to Ms Bowen

In a recent determination the Authority set out what remedies would be awarded to Ms Bowen[2]. Ms Bowen provided evidence illustrating the impact on her health, including being diagnosed with PTSD, a Major Depressive Disorder and displaying a significant level of clinical depression, anxiety and stress.

As a result, the Authority ordered BNZ to pay Ms Bowen:

- $105,000 for compensation ($60,000 for unjustified dismissal and $45,000 for retaliation)
- $329,687 for lost wages
- $48,000 for lost bonuses
- $4,378 for KiwiSaver contributions
- $8,975 for medical costs incurred
- $10,000 for special damages (for legal fees)

BNZ was also ordered to pay the Crown $8,000 for the breach of the duty of good faith.

What does this case mean for employers

This case follows other recent determinations involving substantial monetary awards. It is therefore a good reminder of the importance of ensuring any restructuring is supported by a genuine, well-documented business rationale, particularly where an employee has previously raised complaints. Employers should also maintain clear whistleblowing policies and provide confidential reporting options for staff to raise concerns. Ultimately, decisions around redundancy must be based on legitimate commercial needs and not be influenced by irrelevant or retaliatory factors.

If you want to read more about the protections afforded to whistleblowers, please see our article here.

[1] [2024] NZERA 361.
[2] [2025] NZERA 380.

Georgina Anderson-Brooks, Solicitor

Deducting Doubts: Navigating Specified Pay Deductions and Partial Strikes Under the Employment Relations (Pay Deductions for Partial Strikes) Act

The Government recently reinstated the ability for employers to make specified pay deductions from an employee who is a party to a partial strike. We explore how this has been applied by the Employment Court in two recent decisions.

Employment Relations (Pay Deductions for Partial Strikes) Amendment Act

On 1 July 2025 the Government introduced an amendment to the Employment Relations Act 2000 (the **Act**) through the Employment Relations (Pay Deductions for Partial Strikes) Amendment Act (the **Amendment Act**). The amendment reintroduced an employer's ability to make specified pay deductions from the salary or wages of an employee who is a party to a partial strike.

A partial strike occurs when an employee is at work but refuses to complete parts of their role or they breach their employment agreement. This may involve a reduction in the employee's normal duties, normal performance or normal output/rate of work. Previously, if an employee was on a partial strike, their employer could not deduct their pay unless they suspended the employee or issued a lockout notice.

The Amendment Act now allows employers to make a specified pay deduction from the salary or wages of an employee who is a party to a partial strike. Alternatively, employers may impose a 10 percent deduction on the salary or wages otherwise payable to the striking employees. However, before any deduction is made, notice of the specified pay deduction must be provided to the employee in accordance with the requirements set out in the Amendment Act. In addition, if a union believes a pay deduction has been applied incorrectly, it must notify the employer as soon as reasonably practicable.

NZEI Te Riu Roa Incorporated v Secretary for Education

The Amendment Act was recently applied when NZEI Te Riu Roa Incorporated (NZEI), a registered union, sought an interim injunction restraining the Secretary for Education from making specified pay deductions to its members' wages or salaries on the grounds that such anticipated deductions were unlawful[1].

NZEI and the Secretary for Education were involved in two separate collective bargaining negotiations. During bargaining, employees issued strike notices that included bans on overtime, working beyond certain weekly hours, and taking on new cases. In response, the Secretary gave notice that it would make 10 percent deductions from the pay of those taking part, under the Amendment Act. The amount of total deductions was estimated to be $400,000 or higher.

NZEI asked the Employment Court for an interim injunction to stop the deductions. The Court declined, noting that although there was an arguable case that the proposed deductions were unlawful, the arguments were not so strong as to displace other considerations under the balance of convenience. The Court noted:

- NZEI submitted that the Amendment Act only takes effect if the employee is party to the partial strike. The strike notices were provided on behalf of all employees. NZEI argued it could not be established that all of those named would have been party to the strike. However, the Court found the strike notices showed the proposed action would be considered a partial strike under the Amendment Act.
- Although the Amendment Act does not allow deductions for overtime bans, in this case the Secretary's deduction was related to refusing new cases which is permitted.
- The Secretary chose a flat 10 percent deduction. NZEI argued this was disproportionate. However, the Court noted the Amendment Act clearly allows a 10 percent deduction to be imposed even if once properly calculated the amount would have been more or less than 10 percent.

The Court decided it was not appropriate to make an order for an interim injunction and noted if the deductions were found unlawful in the substantive hearing the Secretary will be required to repay them.

Tōpūtanga Tapuhi Kaitiaki o Aotearoa – The New Zealand Nurses Organisation Incorporated v Health New Zealand

The Amendment Act was also tested when the New Zealand Nurses Organisation (NZNO) sought an interim injunction restraining Te Whatu Ora - Health New Zealand from making specified pay deductions from its members covered by strike notices[2]. NZNO argued the anticipated deductions were unlawful.

NZNO and Te Whatu Ora were bargaining for a national collective agreement. Strike notices were issued for partial strikes, where nurses at Whangārei Hospital would not work outside Ward 4 (surgical) and nurses at Auckland City Hospital would not work outside the Cardiothoracic and Vascular Intensive Care Unit. The strike ran from 18 to 23 August 2025, with a Life Preserving Services Agreement in place to provide for patient safety. On 6 August 2025, Te Whatu Ora notified NZNO it intended to deduct 10 percent of wages for affected members under the Amendment Act.

NZNO claimed the notice was non-compliant because it was not given "as soon as reasonably practicable" and was sent only to the union, not individual employees. Te Whatu Ora later issued individual notices on 15 August and a further notice on 18 August, but NZNO maintained these were still non-compliant. NZNO also argued the original notice did not correctly specify the relevant pay period as required by the Amendment Act.

The Court recorded that while all NZNO submissions were arguable, the strongest argument was Te Whatu Ora not specifying the relevant pay period. Therefore, NZNO had an arguable case.

The Court had to weigh which impact was greater: withholding 10 percent of NZNO members' wages or preventing Te Whatu Ora from making deductions it might be entitled to (the balance of convenience). It found that NZNO members would be adversely impacted because even with damages available, they would remain out of pocket for some time. By contrast, Te Whatu Ora's loss was modest (around $45,000) for an enterprise of its size and while it could not recover under the Wages Protection Act, it could recover through the Employment Relations Authority. The Court held the 10 percent deductions would have a greater impact on NZNO members than difficulties faced by Te Whatu Ora in attempting to recover the money or having to forego the amount it was entitled to deduct. As such, an interim injunction was granted restraining Te Whatu Ora from making deductions.

Considering pay deductions under the Amendment Act?

If your business receives a strike notice and you are considering making partial deductions under the Amendment Act, it would be prudent to seek advice first. Careful compliance with the Amendment Act's requirements is essential, as recent case law illustrates that the process can be complex and litigation may follow.

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[1] [2025] NZEmpC 171. [2] [2025] NZEmpC 189.

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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.

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.

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