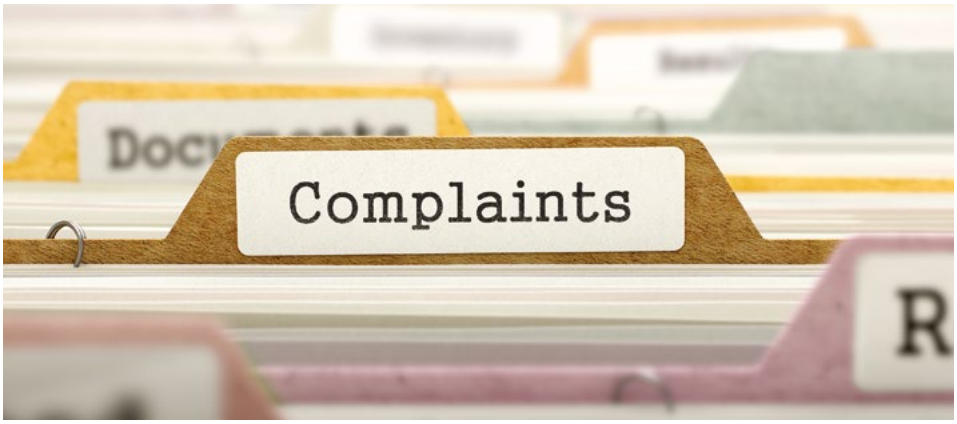
Employee dismissed after ongoing anonymous complaints wins job back

The Employment Court has ruled that an employee who was dismissed by her employer, the Ministry of Health, must be reinstated to a similar position at the Ministry on terms no less favorable than before her dismissal

Ms Rayner was employed by the Ministry in 2005. In 2008 she successfully applied for the position of investigator in the Audit and Compliance Unit. In her application she said she had relevant previous work experience.

Anonymous complaints were made about Ms Rayner in 2007, 2010 and 2017 which questioned her experience and said she had lied about her work history to obtain her positions in the Ministry. The 2007 complaint was resolved by making enquiries with Ms Rayner's referees. The 2010 complaint was resolved by Ms Rayner providing the Ministry with a folder of documents which left the Ministry in no doubt Ms Rayner had previously worked as an investigator as she had claimed. A memo to this effect was put on her personnel file.



The 2017 complaint was investigated by Mr Merrett, with who Ms Rayner had a chequered history. Mr Merrett wanted to make enquires with Ms Rayner's former employers but Ms Rayner declined to give consent. She was concerned about her privacy and considered another investigation was pointless as her work history had already been confirmed by the Ministry in 2007 and 2010, and the memo recording this remained on her personnel file. Ms Rayer was placed on suspension. During this process she commented to a Ministry employee that she no longer trusted her managers.

The Ministry found that the 2017 complaint could not be substantiated, but summarily dismissed Ms Rayner on the basis that the trust and confidence in the employment relationship had been destroyed partially due to Ms Rayner's comments about not trusting her managers and the fact Ms Rayner had not cooperated with the Ministry by withholding consent. Ms Rayner raised two personal grievances; disadvantage by unjustified suspension and unjustifiable dismissal.

The Employment Court held that the Ministry had not acted as a fair and reasonable employer. The Ministry never asked Ms Rayner why she was reluctant to give consent or tried to understand the complex issues that lay behind Ms Rayner's distrust of her managers. The Ministry had raised performance concerns during the investigation process in support of the inference drawn from the complaint being that Ms Rayner was not qualified to be an investigator. Threats of suspension and dismissal and the suspension itself were used to coerce Ms Rayner to provide the consent the Ministry sought.

The Employment Court ruled that Ms Rayner should be reinstated in a similar position on the same remuneration as she was paid at the time of her dismissal, be paid six months' salary and $42,500 for humiliation, loss of dignity and injury to feelings.

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Quick Reference

Take away point

Investigations into complaints about employees can be a delicate exercise especially where an employee seems reluctant to cooperate. Employers must communicate in good faith to understand the employee's reluctance. It is important to appoint an investigator that all parties have confidence in and in some cases it may be necessary to appoint an external third party investigator. Disciplinary action should never be used as a threat to coerce an employee to agree to do something.

New protections for employees dealing with domestic violence

On 1 April 2019 the Domestic Violence - Victims Protection Act 2018 came into force to provide employees affected by domestic violence with:

- 10 days paid domestic violence leave per year; and
- the right to make a request for a short term variation to their working arrangements.

The purpose of domestic violence leave and the variation to working arrangements is to deal with the effects of domestic violence on the employee. An employee can take domestic violence leave and request the variation regardless of how long ago the violence occurred, even if it occurred before the employee's employment began.

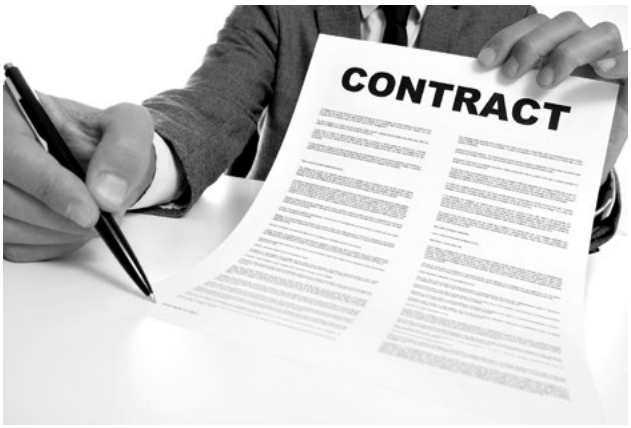
The changes are welcomed by many in the face of New Zealand's dire domestic violence statistics and the effect domestic violence has on its victims' ability to retain employment. While the changes will positively affect those affected by domestic violence, there are a number of areas which employers should consider carefully:

- When an employee requests domestic violence leave or a variation to working arrangements, employers may require proof that the employee is affected by domestic violence. The legislation does not provide detail as to what might constitute proof. Many victims will not have reported the violence to the police or their injuries to a doctor so will have no contemporaneous or formal proof that they are domestic violence victims. In these circumstances employers should be prepared to accept their employee's word in most cases that they are a domestic violence victim. Receiving reliable corroboration from a support person may also be of assistance to an employer in this regard.
- Privacy concerns will be of great importance to many domestic violence victims. For instance, if an employee is still living with the perpetrator of the violence, an employer may need to consider how any domestic violence leave is coded onto pay slips or other documents to avoid it being seen by that perpetrator. This is something that may cause further harm.
- A new ground for a personal grievance claim has been created for situations where an employee that is, or is suspected/assumed to be, affected by domestic violence is treated adversely by their employer.
- Employers might want to develop a policy that covers these issues, as well as who should manage and be privy to domestic violence employment issues. Employment agreements entered into after 1 April 2019 should contain an explanation of the domestic violence leave each employee will be entitled to.

Availability provisions - broad application

The Employment Court has confirmed the broad application of availability provisions

The Employment Court has held that the availability provision rules in the ERA apply broadly to ensure all employees who make themselves available for work outside of their normal hours are compensated for that availability.



An availability provision is a provision in an employment agreement where the performance of work is conditional on the employer making that work available to the employee, and where the employee is required to accept that work. Availability provisions are only lawful if:

- the employment agreement provides agreed hours of work including guaranteed hours; and
- the employment agreement provides reasonable compensation to the employee for making themselves available for additional work; and
- the reason for including the availability provision is genuine and based on reasonable grounds.

Where an availability provision does not provide reasonable compensation for availability the employee may refuse to be available to perform work additional to the guaranteed hours.

In the case before the Employment Court, the employment agreement stated that employees may be required to work reasonable overtime in excess of their standard hours. The agreement did not provide compensation for this requirement to be available to work overtime.

The Court held this was an availability provision but as it did not provide compensation for availability it was not enforceable, i.e. the employees could refuse to perform overtime. The Court also rejected the employer's arguments that the availability provision rules only apply to "zero-hour" contracts.

Take away points

Any clause in an employment agreement that requires employees to agree to additional hours is an availability provision. The employee will be entitled to refuse to be available if they are not paid compensation for their availability (this is in addition to payment for the hours where actual work was performed). Where an employee is salaried, the parties can agree that the salary is in compensation for availability under an availability provision. This should be clearly stated in the employment agreement.

Termination on grounds of medical incapacity

Employees who are medically incapacitated cannot hold their employers to ransom by remaining absent from work indefinitely or by dictating the terms on which they will return to work.

While employers are not bound to hold a position open indefinitely for an employee who is medically unfit to work, employers must have regard to their good faith obligations and their obligation to act as a fair and reasonable employer when terminating an employee's employment on medical grounds.

The starting point for any justified dismissal is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. In applying this starting point to medical termination cases the Employment Court has provided a number of principles that employers should take note of:

1. Employees must be given a reasonable time to recover from injury or sickness;

2. If the employer caused the employee's injury or sickness, the employer may have an ongoing responsibility to take reasonable steps in the employee's rehabilitation;

3. Employers should carry out a reasonable enquiry into the circumstances of the illness. What is 'reasonable' will be influenced by the terms of the employment agreement, relevant policies, the nature of the position, the duration of the employment relationship, and so on.

4. Employment is a 'two way street' - employees should be positively engaged with their employer regarding their condition and recovery.

In a case before the Employment Court an employee suffering from PTSD and a serious injury to his right shoulder and elbow was away from the workplace from 2 December 2014 until his employment was terminated on 8 December 2015. Throughout that period the employee's doctor provided a series of non-specific medical certificates. The employer began its enquiry into the employee's absence in late July 2015. A specialist occupational physician's report, arranged by the employer in November 2015, concluded that it would be several more months before the employee could resume his duties. By 8 December 2015 the employer had reached the decision to terminate the employee's employment on the grounds of medical incapacity.

The Employment Court held it was open for the employer to commence its enquiries in July 2015 as the employee had already been absent for 7 months and had provided very limited information to the employer. It was not unreasonable for the employer to not consider the employee for light or alternative duties such as administration work given that the employer had limited administration roles available and those roles bore no relation to the employee's usual duties. It was reasonable for the employer to have relied on the physician's report and to discount the final medical certificate that said he would be fit to resume work in early February 2016. Ultimately the Employment Court held that the Employer had waited for reasonable amounts of time throughout the process, conducted a full and fair enquiry which allowed for feedback, and the dismissal was justified.

Take away points

Times of sickness and injury will always be challenging for employers that are balancing having to manage the business efficiently with treating the employee with dignity and fairness. Employers should seek as much information as possible to place themselves in an informed position before making any decisions. Employers would be wise to seek legal advice to ensure they follow a fair investigation and termination procedure.

Overseas snippets

Whistleblowing

The UK Court of Appeal has upheld the Employment Appeal Tribunal's decision that an employee can make a claim against a colleague personally for detriment

Shortly after his appointment to CEO at International Petroleum Ltd (IPL) Mr Osipov made protected disclosures which led to two of IPL's directors deciding to dismiss him. The Employment Tribunal and Employment Appeal Tribunal found that the dismissal was unjustified and Mr Osipov had been subjected to detriment. The ET and EAT held that the directors in their personal capacity and IPL were jointly and severally liable for that detriment/loss. The Employment Court dismissed an appeal; there was nothing in the legislation preventing an employee from being personally liable where their decision to unjustifiably dismiss led to detriment.

This decision may see an increase in employees choosing to pursue decision makers personally for detriment. Respondents will be more motivated to settle claims where their personal assets are at risk from legislation. Conflict of interest issues arising from larger groups of respondents will also motivate settlement. Compared to unjustified dismissal claims, detriment claims in the UK require a lower standard of proof and can give rise to injury to feelings compensation.

To decrease risk to all parties, employers should ensure decision makers are trained to properly manage a dismissal. Training on employee's protected disclosure rights should be considered.

Variations to discretionary bonuses

The UK's Employment Appeal Tribunal has found that discretionary bonuses can become an entitlement by variation if it is clear how the variation occurred

Mr Swinnerton's employment agreement provided for a discretionary bonus. He was promoted to the position of General Manager. It was intended that he would be paid quarterly bonuses of 6.5% of the net profit and become a shareholding director. It was agreed that before Mr Swinnerton could be made a shareholding director, the bonus payments would be processed as loans to be repaid from his outstanding dividend entitlements. But before he became a director he was suspended and dismissed for gross misconduct. The bonuses stopped being paid when he was suspended.

The Employment Tribunal found that Mr Swinnerton had a contractual entitlement to receive 6.5% of business operating profit. However, it was unclear whether the Employment Tribunal found that his employment agreement which provided for a discretionary bonus had been varied, or if there was an express agreement as to the 6.5% entitlement between the parties. The Employment Appeal Tribunal held that the Employment Tribunal had failed to engage with the issues before it and make the relevant factual findings. The Employment Appeal Tribunal remitted the matter back to the Employment Tribunal to be determined afresh.

This case reinforces that variations to employment agreements should be made in clear written terms. In any case, many employment agreements only allow for written variations to be enforceable.

Dismissal after anti-gay adoption comments not religious discrimination

The UK's Employment Appeal Tribunal has found that a dismissed director did not face religious discrimination after anti-gay adoption comments

Mr Page was a Non-Executive Director of an NHS Trust and a lay magistrate involved in adoption cases. In January 2015 Mr Page gave a radio interview where he made anti-same sex adoption comments based on his Christian beliefs. On 22 January 2015 the Trust asked Mr Page to inform the Trust of further media involvement.

In March 2015 Mr Page appeared on BBC Breakfast News, ITV News and Good Morning Britain and in various newspapers repeating his beliefs that adoption by a same sex couple could never be in the best interests of the child. Mr Page was suspended by the NHS Trust and his term as a Non-Executive Director was not renewed. Mr Page claimed the trust was directly and indirectly discriminating against him because of his religion.

The Employment Tribunal dismissed the claims finding that the Trust acted as it did because of the manner in which Mr Page expressed his beliefs. Mr Page spoke to the media without informing the Trust as he was instructed to do, and in the knowledge the Trust's ability to engage with the community would be adversely affected by his conduct. On appeal, the Employment Appeal Tribunal found no errors of law or fact in the lower decision and the appeal was dismissed.

This case is interesting in light of its parallels with the April 2019 dismissal of Israel Folau by Rugby Australia after he posted on Instagram a message indicating that homosexual people would go to hell unless they repented. This came after Rugby Australia warned Mr Folau in 2018 that his previous anti-gay comments were in breach of the Rugby Australia's Inclusion Policy.