Winter Newsletter:

Case Law Update

dundas street

August 2024

04 471 2013 | Level 8, 44 Victoria Street, Wellington 6011
PO Box 25556 Wellington 6140 | www.dundasstreet.co.nz

Case law update

Adhering to additional contractual obligations when restructuring – *TVNZ v E Tū Inc* [2024] NZEmpC 93

Good faith obligations – including the requirement to consult in situations of restructuring – have been part of our employment law for almost 25 years. While is generally well understood by many employers, but what can be overlooked are the more specific change management obligations that might have ended up in their employment agreements, as happened in the well-publicised recent decision relating to TVNZ.

TVNZ had been experiencing a decline in revenue primarily due to the trend toward online digital services. In March 2024 it advised staff that it was proposing to cancel various shows and make a substantial number of positions redundant. E Tū took legal action in the Employment Relations Authority, claiming that TVNZ had not complied with its obligations under the relevant collective agreement.

The Authority found in favour of E Tū and ordered TVNZ to start its process again (unless mediation could resolve matters). Matters were not resolved, and TVNZ challenged the Authority's determination in the Employment Court.

The point at issue was the correct interpretation of a clause in the collective agreement which provided for workforce participation in the business planning of the organisation. The Court considered the clause to be an uncommon one which imposed more onerous obligations on TVNZ than would generally apply under statute or common law, requiring it to actively involve staff at a developmental stage with a view to reaching agreement and making recommendations to management. TVNZ retained managerial prerogative, but active participation had to be stepped through before getting to the point of exercising that prerogative.

In applying the facts to the correct interpretation of the clause, the Court found that in putting forward a *"well-advanced"* proposal to staff for consultation, TVNZ had not met its obligations under the clause. In breach of the clause, staff were denied the opportunity to participate in formulating proposals to address the problem TVNZ was facing. The Court considered that TVNZ had *"bunny-hopped"* over the required problem-solving engagement with staff.

This case serves as a reminder to employers to carefully check the terms of their own employment agreements before commencing a change process in order to ensure that

obligations over and above statutory and common law obligations can be built into such processes at an early stage.

Adhering to additional contractual obligations when restructuring – *Public Service Association – Te Pukenga Here Tikanga Mahi Incorporated v Secretary for Education* [2024] NZERA 432

A similar situation arose in the wake of the *TVNZ* decision, this time in relation to the change management provisions contained in a collective agreement between the Ministry of Education and the PSA.

Those provisions became relevant in the wake of the Government's directive to the Ministry to achieve 7.5% in savings from its 2024/2025 baseline, when a proposal for significant change to its organisational structure was released for consultation in March.

The collective agreement provided that the change management process steps outlined within it would be undertaken with "*the aim*" of the parties reaching agreement with, and making recommendations to, management, which would then "*endeavour to take the views into account as far as possible in making final decisions*".

The Authority applied the well-established 'plain and ordinary meaning' approach to contractual interpretation to find that the parties were required to engage collaboratively in change situations with the aim of reaching agreement and making recommendations to Ministry management, even though those recommendations may not necessarily be joint or agreed.

The Authority held, further, that this collaborative engagement "*must be between members of the Ministry and PSA at an appropriate level and the contractual right of the PSA to be an active participant in the change management process must be secured*". That engagement was not required to be included as an additional 'step' in the change management process (although that could be one approach taken) but would require clear evidence that it had occurred as part of or ahead of the broader consultation process.

Despite what it described as "*evidence of a significant volume of engagement*" between the Ministry and the PSA at various levels and throughout the consultation period, and the Ministry's commendable approach to dealing at the time with the contract-related concerns raised by the PSA (which included pausing its processes, reviewing its stance and putting forward proposals designed to "*wind back the clock on critical aspects*") the Authority identified that only one meeting appeared to have been held between senior leaders as a group and the PSA, the purpose of which was unclear.

It was held that the PSA's involvement in the process had been effectively limited to acting as "*a recipient of information from the Ministry and disseminator of information to its members*". There was insufficient evidence that the Ministry had worked deliberately and proactively with the PSA to reach (or try to reach) agreement on recommendations to the decision-makers, and the extensive consultation that had been undertaken therefore fell short of "*the bargain the Ministry signed up to*" and was required to honour.

The Authority noted, however, that its decision that the Ministry had failed to comply with the relevant collective agreement clause had been "*finely balanced*". This effectively means that had the express obligation of collaborative engagement with the aim "*to reach agreement*" and "*make recommendations to management*" not been present, the Ministry's process would likely have been acceptable.

The decision is possibly more noteworthy because of the separate interpretation exercises the Authority undertook in respect of the eight options (which included redeployment, severance and voluntary redundancy) listed in the collective agreement for consideration in surplus staffing situations.

The collective agreement specified that the parties "*will meet to reach agreement on the options which are appropriate to the circumstances and will be available*", with the stipulation that "*How these options, or other options…are implemented, will be negotiated on a case by case basis between the Ministry and the PSA*".

The Authority held that a two-stage process is required. First, the Ministry must meet with the PSA to agree which of the eight options will be available to surplus employees in the particular ("*case by case*") change process at issue. Second, once that agreement has been reached, then implementation of the available options must be negotiated between the Ministry and the PSA in respect of each ("*case by case*") surplus employee represented by the PSA.

That interpretation then led the Authority to find that this approach also applied to severance itself – "*The severance option (which includes a redundancy payment) can only be implemented once the Ministry and the PSA have* [stage one] *agreed it is an available option, and* [stage 2] *once the individual has agreed to take the option*". What this means for the Ministry's ability to terminate employment for redundancy outside of this particular provision (i.e. unilaterally) was "*unnecessary to determine*" in this case.

Whether or not the parties originally intended for the provisions they likely agreed to many years ago to result in these outcomes is something now lost in the mists of time. What is far less mysterious is the increasingly obvious potential for the words the parties choose to use

in employment agreements to be interpreted in ways that can have significant and far-reaching consequences for the employer party's managerial prerogative.

Secret recordings – *Downer v LM Architectural Builders Ltd* [2024] NZERA 204

As an investigatory body, the Authority has broad powers in terms of the evidence that it can consider in cases brought before it. However, that power must be balanced against ensuring the rules of natural justice are met, that good faith behaviour is promoted, and the principles of equity and good conscience are met.

On occasion, employees can be tempted to secretly record conversations that occur within the workplace. The Employment Relations Authority has recently considered whether such recordings will be admissible in evidence.

Ms Downer had recorded two conversations without her employer's knowledge. The first recording was of a conversation with her employer (Mr Meredith) that she was a party to. Such recordings are generally considered admissible as evidence in the investigation of an employment relationship problem. However, the employer claimed the recording was of a without prejudice conversation and therefore privileged and inadmissible as evidence.

The Authority referred to the three requirements that must be met for a communication to be regarded as being without prejudice:

- There must be a dispute between the parties in existence;
- The communication was intended to be private; and
- The communication was made in an attempt to settle the dispute.

In the current situation, there was no dispute between the parties. The Authority considered that there was probably some expression of dissatisfaction from both sides as to how Ms Downer's role was progressing, but this was not at the level of being an employment relationship problem that might give rise to litigation such that any admission in the conversation might be significant. The parties then discussed a matter that might be serious misconduct – Ms Downer had been working on her CV during work time, thinking in the circumstances that this was acceptable. Mr Meredith said it might amount to serious misconduct and offered to pay her two weeks wages, otherwise disciplinary action might eventuate.

The Authority did not consider that this conversation amounted to a dispute of the type required to attract the without prejudice privilege. Rather, it was an allegation of misuse of company time, which Ms Downer accepted occurred, and a threat to take disciplinary action.

The first recording was therefore admissible before the Authority.

The second recording was recorded when Ms Downer left her mobile phone on her desk with the record function operating. Mr Meredith was recorded speaking on the telephone to a third party (who could not be heard). Mr Meredith did not know that he was being recorded and there was no one else around, and the Authority member considered the conversation to have been a private one.

As Ms Downer was not a party to the conversation and did not have consent to record the conversation, the Authority accepted that on the face of it, it was an illegal recording. Given these circumstances, it was deemed to be improperly obtained.
However, there is no automatic presumption that improperly obtained recordings are inadmissible in the Authority. The Evidence Act 2006 does not apply to the Authority, although it can be a useful and persuasive guide for evidential matters.

The Authority's starting point for evidential matters is sections 157 and 160 of the Employment Relations Act 2000 which set out its role and powers. In this case, its approach was to balance its investigatory mandate, which allows consideration of evidence regardless of its acquisition method, against principles of natural justice, good faith, and equity. That balancing act led to a view that admitting improperly obtained recordings could undermine good faith and privacy expectations, in turn potentially violating the principles of equity and good conscience.

The Authority also noted that allowing improperly obtained recordings to be admitted as evidence does not promote good faith behaviour in the workplace, and the Authority should not encourage such behaviour.

Given these considerations, the second recording was held to be inadmissible.

Constructive dismissal – *Caldeira v LCNZ Ponsonby Pty Ltd* [2024] NZERA 255

Celina Caldeira was employed by LCNZ Ponsonby Pty Limited, a laser clinic in Auckland. Ms Caldeira started working part-time as a beauty therapist in June 2022, having previously worked as a clinic manager. Shortly after commencing work, Ms Caldeira found out she was pregnant and advised LCNZ of this.

Due to her pregnancy, Ms Caldeira felt unwell and requested flexible working, but considered that she faced criticism and shaming for health-related absences, despite having medical documentation.

When a colleague resigned, her hours were increased from 15 hours per week to 24 hours per week, adding Mondays to her days of work.

In September 2022, Ms Caldeira raised concerns, including her dissatisfaction with the manager, the impact on her health and wellbeing, and that she felt she was not being treated equally in terms of her work flexibility compared to another therapist who was also pregnant at the time. A meeting was held with Ms Caldeira to discuss her concerns but she did not consider that it, or her employer's follow-up email, addressed her key concerns.

In October, Ms Caldeira requested a later start time due to feeling unwell. That request was denied. The next day, Ms Caldeira found out she was no longer rostered to work Mondays. She raised this with LCNZ and was told that the company was entitled to change the roster and that Ms Caldeira's agreed hours of work were an average of 15 hours per week. In communications, the reduction in her hours was also attributed to business profitability and the need to save cost, and (as the shift was promptly given to another employee) to the training of new staff after a difficult short-staffing period.

Ms Caldeira applied for a role at another LCNZ clinic and subsequently resigned. In her resignation email she referred to the unfair treatment, lack of understanding, targeted actions, and overall disregard that she had faced. She stated that the impact on her mental wellbeing was so profound that despite needing the job, she felt that she had no choice but to resign.

The Authority found that Ms Caldeira was not treated appropriately by the manager, that LCNZ did not sufficiently accommodate her needs, and that although she was only guaranteed an average of 15 hours per week, LCNZ should have consulted with her in good faith before making such a significant change to her roster. The Authority also noted that the Parental Leave and Employment Protection Act 1987 provided Ms Caldeira with up to 10 days' unpaid special leave for reasons connected with her pregnancy but that this did not appear to have been considered by LCNZ.

The Authority considered LCNZ's breaches to have been sufficiently serious to make it reasonably foreseeable that Ms Caldeira might resign and that she had therefore been constructively dismissed. She had repeatedly put LCNZ on notice of her need for understanding and flexibility due to her pregnancy, but her requests fell on deaf ears, and were followed by an abrupt reduction in her hours of work.

Ms Caldeira received $20,000 in compensation for hurt and humiliation.

Conflicts of interest, suspension and disciplinary processes – *E Tū Inc v Singh* [2024] NZEmpC 84

Mr Singh was employed by E Tū as a union organiser. He also had links to the Migrant Workers' Association (MWA). In 2018, he became friends with an employer of migrant workers (referred to as HVF in the decision). He subsequently assisted this employer when she was accused of non-payment of wages and requiring a premium for employment. Mr Singh coordinated a meeting between the parties, on E Tū premises after office hours, during which he appeared to act as HVF's support person, and as mediator and adjudicator.

Around two years later, in 2020, HVF made a number of serious complaints of harassment against Mr Singh to E Tū. E Tū sent some of the material provided by HVF to Mr Singh, notifying him of serious concerns in relation to his employment and inviting him to provide a response. In Mr Singh's initial response, he alleged that some of the messages HVF had provided to E Tū had been fabricated. He also noted that he had been receiving threatening calls from a group of employers which he alleged had been established to bully and threaten everyone working against exploitation, and that HVF was involved with this group.

E Tū invited Mr Singh to a meeting to address allegations of serious misconduct. The meeting was scheduled for the following day, but Mr Singh requested additional time to find representation. Subsequently, HVF notified E Tū that she had interviews pending with the media about her story. E Tū therefore wrote again to Mr Singh, proposing to suspend him from his employment. He was given three hours to respond to the proposal, and he was informed that the meeting would go ahead the following day. Mr Singh did not respond to the proposal to suspend as he was focussing on ensuring representation for the meeting the following day.

In response to submissions from E Tū, the Court confirmed that it is appropriate to differentiate between procedural matters and the substantive issue when considering justification for an employer's actions. The Court stated that there is a clear distinction in s103A(2) of the Employment Relations Act 2000 between the "what" (the dismissal or disadvantage) and the "how" (the way in which the employer arrived at the what). This is further supported by the fact that s103A(5) makes it clear that a minor defect in the process followed by an employer which did not result in the employee being treated unfairly will not support a finding that the action was 'unjustified'.

In terms of the suspension, the Court accepted that E Tū was legitimately feeling under pressure due to the potential for the matter to break in the media. However, the Court did not accept that a fair process had been followed or that E Tū had satisfied the requirements of Mr Singh's employment agreement in suspending him. Substantively, the Court held that the suspension was not justified in order to ward off reputational damage. In this regard, a

statement in response to the allegations would likely have sufficed, and Mr Singh had himself offered to make a public statement.

In relation to the dismissal, the Court noted that, as a union, E Tū should be held to a higher standard in terms of being a 'good employer'.

Mr Singh provided responses to E Tū's concerns, but E Tū made no attempt to further investigate the matters that Mr Singh had raised. The Court considered that *"a broader understanding"* of some of the allegations was relevant to E Tū's assessment of culpability. Given the concerns Mr Singh had raised about HVF's credibility and involvement in a campaign against those seeking to work against the interests of exploitative migrant employers, more *"in-depth inquiries"* were required.

E Tū had put aside some of the disputed material received from HVF and the allegations of sexual harassment. However, investigating these matters was directly relevant to HVF's credibility which had been raised by Mr Singh. Resolving the validity of these allegations would have *"reasonably informed"* the disciplinary process to follow.

Further, it became clear during the course of the hearing that E Tū's true concern in relation to Mr Singh's behaviour was that he had supported an employer, not an employee, and that this was totally incompatible with E Tū's core values. This was never expressly explained to Mr Singh at the time that E Tū was conducting its investigation into serious misconduct. Rather, the investigation and E Tū's communications had focused on other matters, including the multiple roles Mr Singh had played at the meeting and the *"inappropriate"* communications with HVF.

The Court referred to E Tū's *"shifting concerns"* and stated that *"reasons cannot be retrofitted to a decision to justify it."* Claiming at the hearing that other factors were in play at the point the decision was made – reasons that were not reflected in contemporaneous communications with Mr Singh – was problematic.

Additional issues included that:

- E Tū did not have due regard to the fact that the events complained about had occurred two years previously, when Mr Singh was relatively inexperienced, and that he had been working for E Tū in the intervening period without any issue arising.
- There was a significant degree of confusion as to who the final decision maker was. The Court noted that an employee is entitled to know who is making decisions impacting on them, and to have a full opportunity to engage with them, and this did not occur.
- Alternatives to dismissal must be considered and there was no evidence that E Tū considered whether its concerns in relation to Mr Singh (the lack of insight into his

role as a union organiser) could have been addressed in another manner (such as coaching / training).

Ultimately, both the suspension decision and the decision to dismiss Mr Singh were unjustified. The Court awarded compensation of $25,000 as a global figure (given that the suspension and dismissal were inextricably linked); and twelve months' lost remuneration.

Injuncting disciplinary proceedings - *Aladdin Al-Bustanji v Corrections Association of New Zealand Incorporated* [2024] NZEmpC 76

In this case, two members of the national executive of the Corrections Association of New Zealand (the union) applied for an interim injunction to prevent the union's national executive conducting a disciplinary meeting into allegations against them.

The applicants were not employees of the union, but members of the national executive. They filed separate judicial review proceedings in relation to the union's proposed actions, and this interim injunction application to prevent the process continuing until the judicial review application had been heard and decided.

The Court accepted that the applicants had legitimate concerns about the process being followed by the union, was not satisfied that the investigation could be carried out fairly in light of those concerns. The Court therefore held that interim orders were necessary to preserve the applicants' position.

The Court granted an interim injunction preventing the union from conducting a disciplinary process against the applicants until further order of the Court.

Varying the collective agreement – *Millar v Tegal Foods Ltd* [2024] NZERA 317

Tegal Foods Ltd and E Tū were parties to a collective agreement covering the work E Tū's members performed in the Tegal hatchery in New Plymouth. The collective agreement provided that staff were entitled to a 30-minute unpaid meal break when they worked for more than five hours; and that where the break was not allowed within five hours, overtime rates would be paid until the break was taken.

In 2017, an issue arose with an employee who, after getting to his five hours, would simply walk off the production line to take his 30-minute break. This caused difficulties within the team and in 2018, Tegal met with staff to discuss the issue, and how staff wanted to resolve it. The team's response was that if there was only about ten minutes of work left, they would rather keep working to finish the processing, than stop and take the break immediately at the five-hour mark. The meeting resulted in a Memorandum of

Understanding (MoU) recording that the majority of staff agreed to work 15 minutes past 11.30am without being paid overtime rates, in order to finish the processing prior to taking their lunch break.

The MoU was applied without issue for three years. However, in 2021, the applicants (E Tū members), applied to the Authority for arrears of wages in respect of each occasion on which overtime had not been paid for the first 15 minutes worked past 11.30am.

Tegal claimed that the applicants were estopped from raising the claim because they had enjoyed the benefits of the MoU for over three years; and that they had themselves breached their duty of good faith by bringing the claim.

The Authority found the MoU to have been an unlawful and ineffective variation, firstly because it did not comply with the collective agreement's variation requirements and secondly, because it was not between the parties to the collective (which were Tegal and E Tū). Good faith had not therefore been breached and Tegal was ordered to comply with the collective agreement, and to pay the outstanding arrears in full.

Constructive dismissal following poor PIP process – *Gaarkeuken v Orthomed NZ Ltd* [2024] NZERA 298

Mr Gaarkeuken was employed by Orthomed to sell surgical medical implants and associated supplies. Orthomed had concerns about Mr Gaarkeuken's performance and attempted to implement a performance improvement plan (PIP). Mr Gaarkeuken went on leave due to 'workplace stress' and subsequently resigned, effective immediately, and claiming constructive dismissal.

The Authority considered whether Orthomed had breached a duty serious enough to make Mr Gaarkeuken's resignation reasonably foreseeable. Mr Gaarkeuken had been given little or no detail to respond to about the need for a PIP (which was treated as a sales plan), he was not properly informed about the actual performance concerns, and Orthomed's communications were inconsistent – *"a moveable feast of communication"*.

The Authority found that Orthomed breached its duty of good faith to Mr Gaarkeuken to be constructive, and to responsively communicate with him to maintain the employment relationship. Further, the Authority considered that was reasonably foreseeable that Mr Gaarkeuken would have lost any faith that future communications would be any different if he remained in his employment. The breach was therefore held (perhaps a little surprisingly) to have been sufficiently serious to result in a finding of constructive dismissal.

The dismissal was unjustified and the Authority awarded Mr Gaarkeuken $15,000 compensation for hurt and humiliation and three months' lost wages.

Constructive dismissal following change in work location – *Wishart v Idea Services Ltd* [2024] NZERA 335

Joyce Wishart was employed by Idea Services Limited (ISL) as a support worker in the Wairarapa Region from March 2008 until she resigned in January 2023. She performed the majority of her work at a residential care facility at a specific address in Carterton, although she worked at other locations in the Wairarapa.

ISL required Mrs Wishart to move from the house where she had performed the majority of her work to another location. Mrs Wishart *"felt unhappy and didn't settle down"* at the new location and resigned from her employment, claiming that she had been unjustifiably constructively dismissed by ISL due to its unfair action in changing the location of her employment.

ISL submitted that *"why, how, and what it decided, were all within the scope of* [Mrs Wishart's] *terms and conditions of employment"*. ISL also maintained that her choice to move to the new location *"extinguished, or broke the chain of causation in relation to, her claim of (alleged) breach of duty"*. ISL said Mrs Wishart resigned as she was close to retirement and wished to *"drop the grievances she had and just move on"*.

The location change had occurred following receipt of a series of complaints about Mrs Wishart. ISL proposed the location move for her feedback, stressing that it was not *"a punitive measure"* but rather, was *"to ensure continuity of service can be provided to [ZPT] a person we support in line with our obligations."*

Mrs Wishart met with ISL to respond to the proposal and the meeting developed into a standoff, with Mrs Wishart ultimately stating that she would not be moving. ISL offered Mrs Wishart a number of other locations to choose from. Mrs Wishart did not wish to accept any of the options, maintaining that she had not *"been given sufficient reasons to warrant a move"*. ISL then made the decision to proceed with the move. Following a period of annual leave, Mrs Wishart worked one shift at the new location, before resigning.

The Authority found that Mrs Wishart's resignation was due to ISL's improper action in transferring her to a new work location. Whilst ISL had a broad contractual power to change work schedules on notice, the Authority did not consider that a fair and reasonable employer could have utilised that ability against a background of unsubstantiated complaints and a live complaint. That power had in this case been used *"to bypass the*

difficult situation of needing to address the complaints about Mrs Wishart" and that amounted to a breach of duty.

As Mrs Wishart had *"clearly and vociferously objected to the proposal to change her work location"*, it was reasonably foreseeable that she would resign if the location change was enforced, and the Authority found that Mrs Wishart had been unjustifiably constructively dismissed. She was awarded three months' lost wages and compensation of $15,000.

Disadvantage and breach of good employer and health and safety related obligations - *Wiles v The Vice-Chancellor of the University of Auckland* [2024] NZEmpC 123

COVID-19 was recently the catalyst for legal action for reasons other than the application of statutory vaccination orders and involved one of the most prominent faces of the pandemic – Associate Professor Siouxie Wiles.

Associate Professor Wiles is employed by Auckland University, and throughout 2020 and 2021 regularly provided expert public comment and insight on COVID-19 itself, and on the measures being taken by the New Zealand Government to manage it. She became something of a minor celebrity in her own right, and on occasion also undertook engagements, both paid and unpaid, in a more private, "*Brand Siouxie*" capacity.

Unfortunately, the ugly side of notoriety struck early and hard. Associate Professor Wiles received a significant and ongoing volume of email and online criticism, including threats of physical harm and incidents of "doxing" (deliberate online exposure of personal contact details) and in-person confrontation, as she undertook her work. That understandably took an increasingly significant toll on her wellbeing as the feedback continued to escalate.

At the same time, Associate Professor Wiles made repeated attempts to engage with Auckland University for assistance and protection, as she considered her public commentary efforts to be part of her employment as an academic. Its response over the next 12 – 18 months left her even more concerned, and ultimately led to her taking legal action.

Allegations included that Associate Professor Wiles had been unjustifiably disadvantaged, and that key terms of her employment agreement and/or the employment relationship had been breached, by what she described as Auckland University's "*purely reactionary and inadequate*" response to her serious and significant concerns.

In determining that Associate Professor Wiles had suffered unjustifiable disadvantage, and that certain key employment obligations had been breached by Auckland University (and meriting a compensatory award of $20,000), the Employment Court held that:

- The University had been wrong to maintain that the vast majority of Associate Professor Wiles' commentary and engagement over this time was not work she performed, or was required to perform, in her role as an employee, and therefore was not something it was responsible for addressing. Various statutory, contractual, policy and procedural provisions in place within the relationship pointed unerringly to a very different conclusion.

- Further, those activities that Associate Professor Wiles did undertake in her personal capacity were not themselves causative of the "*relentless campaign of vile hate and vitriol*" she experienced, and the University's decision to focus on that activity as somehow relevant was unfortunate and misplaced.

- The University's incorrect position in these regards meant that while some commendable efforts were made to assist with Associate Professor Wiles' safety and security at various points, the University's overall response, and the slowness with which it acted, were ultimately insufficient and in breach of health and safety and 'good employer' obligations.

- The hazard, and the potential for harm, had not only been clearly and repeatedly identified by Associate Professor Wiles herself, but was also already more than reasonably foreseeable and in fact already well-recognised by the University even prior to the advent of COVID-19. Abuse of academics had long been an acknowledged reality, and this meant that the University should already have had strategies and plans in place to enable a far quicker, more comprehensive and far more individually tailored response on this occasion.

- Of particular concern to the Court was the length of time – nearly a year and a half – taken before any form of individualised risk assessment (which had been repeatedly requested) was undertaken in respect of Associate Professor Wiles, and the reliance the University appeared to place on her to tell it what measures should be taken or implemented. As Holden J noted "*While it was expected and reasonable for the University to have consulted with [her] over steps she might wish the University to take, the onus was on the University to obtain the right advice and put in place a plan proactively*".

- Simply telling Associate Professor Wiles that she should limit or stop her public commentary activities as a way to mitigate the health and safety risk she faced was unreasonable. Instead, a proper strategy should have been developed to support her to continue her public activities.

- That advice did not, however, breach or suppress her right to academic freedom or attempt to do so (as she also alleged). In some cases (like this one), appropriate health and safety management may require some compromise in the way in which academic freedom is exercised, and the University's advice did not substantively impede or suppress that right.

- The University had been wrong to maintain that some of the engagements Associate Professor Wiles undertook over this time were undertaken both in her personal capacity and in potential breach of University policy. Its decision to put her on notice that her activities in this space were inconsistent with or might breach her own employment obligations to the University was unjustifiable and distressing to her and breached the University's 'good employer' and good faith obligations.

The case is also noteworthy as another in which Te Tiriti o Waitangi and tikanga obligations and considerations were put forward as having been breached or impeded.

Associate Professor Wiles argued that in telling her that she should stop or limit her commentary activities, the University was breaching its Te Tiriti obligations because "*its conduct had compromised her ability to speak publicly on matters of national interest which, by definition, included those of Māori interest*".

The Court noted that whilst the University's Te Tiriti obligations could only be discharged in practice by the people working for the organisation, those obligations do not devolve to create personal obligations on individual staff members, and even if that was not the case, Associate Professor Wiles could and did continue her significant engagement with Māori over the relevant period and would have fulfilled them in any event.

Separately, the Court agreed that as it had expressly incorporated tikanga values into its documentation, the University "*is bound to act consistently with tikanga insofar as it applies to the employment relationship*". However, it also noted the Law Commission's comment that tikanga is "*a coherent, integrated system of norms not a mere 'grab bag' of principles or values*" and as an emerging area of law, it was appropriate for the Court to exercise restraint in applying it.

Associate Professor Wiles had not introduced expert tikanga evidence from pukenga, nor provided detailed submissions as to exactly how she alleged that tikanga had not been followed or what it required. On that basis, the Court was satisfied that separate findings of breach were not needed, as its findings were already broadly consistent with the principles of manaakitanga, whanaungatanga, kotahitanga and kaitiakitanga that had been identified in Associate Professor Wiles' claim.

Reinstatement – *Ormsby v Fonterra Co-operative Group Ltd* [2024] NZERA 397

Mr Ormsby was dismissed from his position as an L6 charge hand at Fonterra Te Awamutu Distribution Centre in September 2022. The incidents leading to the dismissal were that Mr Ormsby had allegedly acted in an aggressive and intimidating manner towards team leader Mr Y on two occasions, and towards the centre's operations manager, Mr Z, on a third.

Mr Ormsby was suspended while an investigation was conducted. The investigation focused on his alleged aggressive behaviour, including his comments and refusal to follow instructions. The regional supply chain manager, Mr Shepherd, reviewed witness statements, CCTV footage, and other evidence, and, after considering Mr Ormsby's responses and evidence, concluded that Mr Ormsby's behaviour breached Fonterra's conduct standards. He proposed dismissal, citing Mr Ormsby's lack of remorse and accountability.

At a meeting for Mr Ormsby to provide his response to the proposal to dismiss, Mr Ormsby's union representative suggested a demotion, a performance improvement plan, and/or a transfer to another site, but Mr Shepherd decided the most appropriate option was to dismiss Mr Ormsby with immediate effect. He considered that Mr Ormsby's *"continued lack of ownership"* meant that he could not be trusted to not engage in further aggressive and intimidatory behaviour, and to follow all future instructions given to him.

Mr Ormsby raised a personal grievance, arguing that the investigation was unfair and that there was no reasonable basis for his dismissal. He requested reinstatement, back pay, and compensation. Fonterra defended its investigation as thorough and fair, including that it had given consideration to alternatives to dismissal.

During the Authority's investigation, it became apparent from the evidence filed for Fonterra that the organisation had concerns about Mr Ormsby's alleged gang connections, and that these concerns had influenced the perception of his behaviour. However, these allegations had not been formally raised during the disciplinary process.

The Authority determined that the decision to dismiss Mr Ormsby for serious misconduct was not what a fair and reasonable employer could have done in all the circumstances at the time for the following five reasons:

- Mr Ormsby was not given a chance to address Fonterra's concerns regarding his alleged "gang connections" and the effect this may have had on how he acted at work and the influence he was believed to exert over his workmates. The failure to address the *"rumour of some gang connection"* directly with him was unfair.

- Similarly, Fonterra had concerns about Mr Ormsby's behaviour at a staff day but had failed to disclose and seek responses to those concerns. A *"bad impression"* had been formed of Mr Ormsby, but he was never given the opportunity to respond to those concerns.

- The disciplinary inquiry was flawed, with limited efforts made to corroborate evidence from other workers or to address their accounts thoroughly. Mr Shepherd's reliance on incomplete or unverified information contributed to the unfairness.

- The disciplinary inquiry unfairly targeted Mr Ormsby alone for issues involving other workers, without considering the others' actions or statements. This selective focus contributed to the unjust outcome.

- Fonterra's assessment of Mr Ormsby's conduct did not fairly consider whether his actions aligned with the company's values as expressed in its code of conduct. Specifically, Fonterra's 'Do What's Right' value asked Fonterra workers to *"speak openly and honestly, have the tough conversations, [and] have the courage to challenge when things don't seem right"*. Mr Ormsby had robustly raised concerns about safety issues which appeared to be within the scope of the values in the code of conduct.

Mr Ormsby's application for reinstatement then needed to be considered. The Authority noted that Fonterra could not continue to oppose reinstatement on the grounds of a loss of trust and confidence, given it had not fairly and reasonably established grounds for taking that position in the first place.

In addition, the fact that an employee may have been challenging for supervisors to manage did not necessarily disqualify that employee from reinstatement. In this case, Mr Ormsby could be reinstated to an L5 role rather than to an L6 charge hand position and would then have less frequent and direct interaction with team leaders and operations managers about how work was to be done. Finally, measures (such as coaching and a performance improvement plan) that had been previously proposed to assist Mr Ormsby with earlier disciplinary concerns could also now be implemented.

Fonterra was ordered to pay Mr. Ormsby six months' lost wages, and the value of KiwiSaver and holiday pay entitlements for that same period. While he had been out of work for 16 months, the Authority considered he ought reasonably to have done more to seek alternative work and declined to extend the order to the full period.

The Authority also considered a compensatory award of $20,000 to be appropriate in the circumstances, reduced by 15 percent to $17,000 due to Mr Ormsby's own contribution to

the situation. In this regard, his refusal to follow an instruction from his supervisor could reasonably be seen as amounting to misconduct, albeit not serious, and his communication style was another factor that had contributed to the overall situation.

Whistleblowing – *Bowen v Bank of New Zealand* [2024] NZERA 361

In this landmark case, New Zealand has had its first substantive finding of retaliation against a whistleblower for raising a protected disclosure. The case involved consideration of the predecessor to the current Protected Disclosures (Protection of Whistleblowers) Act 2022 (the Protected Disclosures Act 2000), but remains relevant, nonetheless. A significant number of other personal grievance and breach of duty claims were also raised.

Ms Bowen was employed by BNZ as the Manager of the Acquisition Specialists team, which was part of the larger Small Business Acquisition team. Ms Bowen reported to HDM (the Manager of the Small Business Acquisition team). The Small Business Acquisition team was itself one of four teams making up the Small Business unit, which was headed up by IWV.

In 2016, Ms Bowen complained about the conduct of IWV and an employee in her own team (KCX). The complaint was investigated by BNZ and a decision reached that there had been no bullying by KCX as alleged, and no wrongdoing in respect of Ms Bowen's allegations in respect of IWV's business conduct. That complaint was later claimed by Ms Bowen to have been a protected disclosure.
Following completion of BNZ's investigation into Ms Bowen's complaint, a proposal to restructure the Small Business Acquisition team was announced, which included a proposal to disestablish the Acquisition Specialists team (Ms Bowen's team). Ms Bowen raised a personal grievance alleging that the proposed disestablishment of her team was retaliatory conduct by IWV for the complaint / protected disclosure that she had raised.

The Authority analysed Ms Bowen's complaint, and how it had been made, against BNZ's protected disclosures policies and procedures. It found that Ms Bowen's bullying allegations against KCX were not a protected disclosure, but that her complaint about IWV's business conduct met the definition of serious wrongdoing and the protected disclosure threshold.

The Authority determined that Ms Bowen had made her complaint in line with BNZ's internal procedures, but that even if she had not, any failure in that regard should be treated as technical given the complexity of and lack of clarity within those procedures, and the consequent difficulty any employee would have in correctly determining what the 'internal procedure' actually required. Finally, given Ms Bowen's various communications and concerns relating to the potential for reprisal and her requests to be protected, BNZ should have treated the complaint as a protected disclosure.

In considering whether the proposed restructure was retaliatory, the Authority noted that the team had already undergone significant restructuring just months prior, and that the subsequent proposal appeared questionable from both a commercial and procedural standpoint. Initial plans formed earlier in the year had been limited to moving all roles into another team, rather than dismantling them entirely, indicating to the Authority that there was an unchanged business need for the team's functions.

However, the evidence indicated that once IWV became involved in the matter, the proposal had then shifted to disestablishment, with allegedly 'new' roles created in the separate Small Business Performance team that in fact mirrored some of the Acquisition Specialists' key tasks. The timing therefore suggested that the restructuring had been influenced by IWV's involvement. Ultimately, the Authority could not identify any clear commercial rationale for dismantling the team, given the continued relevance of their work and the clear overlap with the 'new' roles.

Given IWV's involvement at the time the proposals had changed so significantly, and "*the absence of any compelling explanation*" for the part IWV had played in that, the Authority was *"left with the conclusion"* that IWV had "*caused*" the changes to occur in retaliation for Ms Bowen's complaint. This had disadvantaged Ms Bowen in her employment and her unjustified disadvantage claim in respect of this action was therefore made out. The retaliation finding also amounted to a breach of the duty of good faith that BNZ owed to Ms Bowen.

In November 2016, Ms Bowen raised a second complaint that amounted to a protected disclosure (the details of which were suppressed by the Authority), and BNZ and Ms Bowen agreed that consultation over the proposed disestablishment of the Acquisitions Specialists team would be suspended, and Ms Bowen would take paid special leave, while that complaint was resolved through BNZ's whistleblower process.

That process was completed in December 2017 and in June 2018, consultation in relation to the team's proposed disestablishment recommenced. Ms Bowen's employment with BNZ was ultimately terminated by reason of redundancy in July 2018. Ms Bowen claimed that BNZ's decision to recommence that process, and the subsequent termination of her employment, amounted to further retaliatory action, this time taken in response to her second complaint / protected disclosure.

The Authority concluded that BNZ's decisions to recommence the consultation process and ultimately, to terminate Ms Bowen's employment were not made in retaliation for her second complaint. However, this did not mean that Ms Bowen's dismissal was justifiable. The Authority considered that BNZ took *"a too simplistic approach to recommencing the consultation"* about what was, by that time, a two-year-old proposal for change. The

proposal's purported business rationale was by then defective given the changes that had occurred in the intervening period (and the Authority's finding that the initial business case was already suspect), and substantial additional or updated information should have been sourced, provided and taken into account by BNZ to remedy those defects.

As this had not occurred, Ms Bowen was unjustifiably dismissed from her employment by BNZ through both process and outcome. She was, however, unsuccessful in other related claims for breach of her employment agreement, and unjustifiable disadvantage for threatening her with dismissal.

The Authority was clear that it had no role to play in determining whether there was any basis for either protected disclosure, or the merits of those disclosures. Rather, its role was limited to determining whether there had been any retaliatory conduct from BNZ as a result the complaints / protected disclosures made by Ms Bowen.

This decision reinforces the critical need for all employers to understand from the outset the differences between a standard complaint and a protected disclosure, and to act accordingly. Further, employers should (and in the case of public sector employers must) have a clear and understandable policy available to employees who wish to raise a protected disclosure and ensure that managers are aware of the protections against retaliation, victimisation and unfair treatment that are afforded to disclosers under the 2022 Act.

We look forward to further case law developments as 2024 progresses, and we will keep you updated.