



Take 'em back

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

Where an employee is dismissed, and a claim for unjustified dismissal upheld, reinstatement is one of the remedies available. When the Employment Relations Act 2000 (“**ERA**”) was first enacted, it was the “*primary remedy*”. The primacy changed in 2011, and reinstatement became one of the remedies available, then returned again to being the primary remedy in December 2018.

As a precursor to reinstatement, interim reinstatement can be sought under section 127 of the ERA by a claimant in order to preserve their position until the claim can be fully heard. Section 127 provides that the Employment Relations Authority (“**Authority**”) or Employment Court (“**Court**”) may order interim reinstatement:

- (1) *...on the application of an employee who has raised a personal grievance with his or her employer, ...*
- (4) *When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act.*

The purpose of interim reinstatement, as with any injunctive action, is to preserve the status quo until the claim is fully heard. Investigations and hearings are limited to reviewing evidence provided by affidavits and limited submissions by necessity, given the generally urgent nature of the applications. Limits and conditions are often placed on the applicant, and not least, applicants are subject to repaying any pay and benefits received during the period of interim reinstatement.

The threshold for interim reinstatement of an “*arguable case*” is lower than the normal threshold of “*balance of probabilities*”. Cases before the Authority and Court have focused on this threshold and other matters generally in the context of the practicality of a dismissed employee returning to work on an interim basis.

However, given the low threshold, these cases can be an issue for employers. The recent decision of the Court illustrates this issue. *WXN v Auckland International Airport Ltd* [2021] NZEmpC 205 concerned a border worker subject to the Covid-19 Public Health Response

(Vaccinations) Order 2021 (the “**Order**”). WXN chose not to be vaccinated based on his concerns about potential health consequences relating to an existing medical condition. WXN’s employment was terminated and he sought interim reinstatement in the Authority. However, WXN was unsuccessful in the Authority, so he challenged the determination of the Authority to the Court.

Two main issues were identified in the Court:

The first was that WXN claimed he was not covered by the Order. The Court determined this claim was only “*weakly arguable*”. Presumably, if this was the only issue, interim reinstatement would not have been granted. Otherwise, the Court would be reducing the already low threshold for interim reinstatement.

The second was that the process leading to his dismissal was inadequate. In relation to this issue, the Court considered the alleged procedural defects to be arguable. In the Court’s opinion, this included that AIAL was obliged to do more in terms of considering WXN’s proposals and arguably owed WXN an increased obligation in good faith to accommodate WXN because of his disability and was noted by the Court that:

“It is arguable that in circumstances such as the COVID-19 context, where a ‘no-job, no-job’ outcome is under consideration, there is an active obligation on the employer to constructively consider and consult on alternatives where there is an objectively justifiable reason not to be vaccinated.”

Applying the above, and considering the remaining factors, which includes balance of convenience and the overall interests of justice, interim reinstatement was ordered with conditions.

This case illustrates that even in the Covid-19 environment, and in the context of the Order, Government or employers who require vaccination must undertake a complete process for employees who refuse vaccination before dismissing them. As always, we can assist where issues arise in the context of vaccination being required for workers for any reason.

MGZ Covid-19 Vaccination Requirements:



MGZ Employment Law continues to take steps to ensure our offices remain safe for our clients and staff.

From 25 January 2022 the following will apply:

- All clients, contractors and visitors to our office must be fully vaccinated and provide proof of vaccination status 'My Vaccine Pass' upon entry.
- A face covering must be worn consistent with Government guidelines . Spare masks are available at reception.
- The QR code on the door must be scanned or contact details noted on the Contact Tracing Register at reception. Details provided will be kept confidential and only disclosed to the Ministry of Health officials if necessary.
- Hand sanitiser is available at our reception counter and also in meetings rooms.
- If you are unwell, we ask that you do not come into our offices. We can easily arrange to meet you over the phone or virtually.

What a rollercoaster the last 4 years have been . . .



With the founding partners getting a bit long in the tooth a plan was hatched in late 2017 to bring Dean Kilpatrick back into the fold as part of the succession plan (well at that stage actually the total succession plan) to take MGZ into the future. Dean returned to MGZ in January 2018 initially as an employee, and then in June 2018 the legend that was Neil McPhail retired after over 40 years in the industry, and Dean then became a Director.

And then the dominos began to fall. Next to go was Raewyn Gibson at the end of March 2020, a few days into New Zealand's first lockdown with numerous challenges to be faced by not only MGZ but all our clients. Luckily for MGZ Jane Taylor had jumped on board in January 2020 and ultimately stepped into the large shoes left vacant by Raewyn's departure, becoming a Director in April 2020. The final domino fell with Peter Zwart retiring at the end of March 2021. Peter left his clients in the capable hands of David Appleton, or so he thought! Sadly that wasn't to last with David returning to the UK in December 2021 following many unsuccessful attempts to get his partner a spot in MIQ so she could join him in New Zealand . A call was put out and the cavalry arrived in the form of Raewyn and Peter coming out of retirement to step into the breach left by David's return to the UK.

After a hectic few months Deborah Hendry was appointed to the position of Associate a few weeks before the Christmas break and MGZ now has a full complement again. Deborah's appointment led us to think that we should have a client function to introduce Deborah to clients. However over the last few years we have attempted to organise farewell functions for Neil, Raewyn and Peter only to be met with Covid restrictions that have scuttled our plans, having to instead opt for small send offs with staff, family and friends. So we have put plans for a client function on the back burner for the time being.

In late 2021 MGZ morphed into a law firm. This is a significant milestone for the firm. However this will not have any impact on the way we interact with our clients it will be business as usual.

MGZ has survived the last 27 years not only because of the dedication and hard work of the MGZ team, but largely due to the support and loyalty of our clients for which we are truly grateful. Clients can be rest assured that Neil, Raewyn and Peter have left their 'baby' in the very capable hands of Dean Kilpatrick and Jane Taylor.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor or Deborah Hendry.**

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