



Mahony Horner Lawyers

EMPLOYMENT BULLETIN

8 SEPTEMBER 2023

RESTRUCTURING - GETTING IT RIGHT

Restructuring is a frequent issue facing our employer clients. As we continue to move forward into uncertain economic times, the spectre of change remains an issue.

Restructures are often painful for both employers and employees, but getting the process right can relieve some of the pressure.

We are pleased to offer a free webinar on restructuring to our network.

Join [Chris Scarrott](#), Senior Associate, and [Daniel Hilton](#), Solicitor, to learn about what to do and what to avoid.

Friday 6 October 2023, 2pm. Sign up [HERE](#).

Restructuring a role that never really existed

The Department of Corrections learnt a costly lesson in a recent case involving an employee who had been hired under an outdated job description. The employer knew the JD was out of date at the time of hiring, but thought they could remedy this through their discussions with the candidate. The JD was for a policy role; the work was really administrative.

The employee was confused once she started the job, and tried several times to resolve the matter. Eventually the employer proposed a new JD that was predominantly administrative. The employee refused, on the basis that she had been hired to work policy not admin.

The employer then instituted a restructure, proposing redeployment to one of two fixed term roles. The employee did not take either of them, and her employment ended by way of redundancy after three years of employment.

The employee claimed unjustified dismissal.



The Authority found that the restructure was tainted from the outset by the employer employing the worker in a role that never really existed. The employee was awarded six months' salary and \$23,000 compensation for hurt and humiliation.

This case serves as a reminder to make sure job advertisements are accurate and up to date. It is difficult to see what options the employer had to fix the situation once they had made this fundamental error. Employers should also be aware that they have obligations under the Fair Trading Act 1986 not to engage in misleading or deceptive conduct when advertising jobs.



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Constructive dismissal without knowledge of breach

An employee at an Auckland restaurant resigned from his job because he felt he was not being paid enough. Neither the employer nor the employee at the time realised that he was being paid less than the minimum wage.

The employee subsequently claimed constructive dismissal, on the basis of an insult by the employer three months prior to resignation, and on the basis of a breach of minimum wage by the employer.

Constructive dismissal arises in three circumstances:

- a) Where the employer tells the employee to resign or they will be dismissed;
- b) Where the employer commits a breach of their obligations to the employee that is intended to force the employee to resign; or
- c) Where the employer commits a fundamental breach of their obligations that is so significant the employee had no choice but to resign.

In each circumstance, it must have been reasonably foreseeable to the employer that the employee would resign in the circumstances.

This case looked at version (c).

The Employment Relations Authority found there was no constructive dismissal, as the employee had continued to work for three months after the insult and was not aware at the time of resignation that he was not being paid the minimum wage.



The employee challenged the determination to the Employment Court.

Judge Kathryn Beck overturned the Authority's decision, finding that the test of whether the resignation was reasonably foreseeable was an objective one.

The employee and employer's lack of subjective knowledge that the Minimum Wage Act had been breached was immaterial. The employer ought to have known its obligations and that it was not meeting them, and it was reasonably foreseeable that an employee not being paid minimum wage would resign.

The employee was awarded \$8,000 compensation for hurt and humiliation, the wage arrears having already been remedied.

Interestingly, the employee had also found new employment when they resigned. Often this will be fatal to a constructive dismissal claim, as the Authority or Court will find the new job was the reason for the resignation, not the breach by the employer. Here the employee had a visa tied to their employment, so the Court found that new work was an essential step to enable the employee to resign, but was not the reason.