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A good choice for Employees, a risk for Employers?

The awards gap between the Employment Relations Authority and the Human Rights Review Tribunal continues to grow.

A take home message from the Colin Craig saga for employers and employees alike is to be aware of the increasing gap between the level of awards issued by the Human Rights Review Tribunal (**Tribunal**) and the Employment Relations Authority. The Tribunal found against Mr Craig and in so doing granted its largest award to date to Rachel MacGregor, Mr Craig's former press secretary. Ms MacGregor was awarded $120,000 for humiliation, loss of dignity and injury to feelings. This is double the highest award issued by the Employment Authority or Employment Court since the Employment Relations Act 2000 was passed.[1]

So what does this mean for employees?

If an employee has a claim that can be brought with the Tribunal then the employee might be well advised to pursue their claim through the Tribunal rather than through the traditionally used employment jurisdiction. Generally claims can be brought in the Tribunal for discrimination in relation to sex (including sexual harassment), marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status or sexual orientation. The Tribunal also hears claims relating to breaches of the Privacy Act 1993. Section 79A of the Human Rights Act 1993 confirms that an employee must choose either one jurisdiction or the other, not both. If you face a situation where there is a choice of jurisdiction, it is important to seek early legal advice to ensure you take the best strategic steps for the particular circumstances applying in your situation. The Tribunal is not only able to award damages, but can also grant declarations, make restraining orders, make orders that a defendant undertake specified training or other programme, grant relief under the Illegal Contracts Act 1970, and indeed grant *"any other relief the Tribunal thinks fit"*.[2]

What can an employer do to mitigate the risk?

Employers should be aware that their employee's jurisdiction choice could have an effect on the quantum of any award made against them. Depending on the circumstances, an employer may wish to agree to early referral through the employment jurisdiction processes, and seek to lock in that choice of jurisdiction.

Employers also need to factor in when considering the risks associated with an employee bringing a claim against them that the monetary risk might not be at the $5,000 to $10,000 level usually seen in the Employment Relations Authority,[3] but upwards of this and potentially upwards again from the $120,000 award in *MacGregor*.

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1 *The Human Rights Review Tribunal*, Peter Cullen and Calum Cartwright, 3 December 2015, listing awards under s 123(c)(i) of the Employment Relations Act 2000.

2 Section 92I Human Rights Act 1993.

3 Being the average compensation awards made by the Employment Relations Authority: *MacGregor v Craig, a new record for compensation awards*, Philippa Muir, Samantha Turner and Carl Lake, 5 October 2016.

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The MacGregor award

Ms MacGregor had complained to the Human Rights Commission that Mr Craig had sexually harassed her. Mr Craig and Ms MacGregor entered into a settlement agreement at mediation. Quite apart from the confidentiality that attaches to such mediations, the settlement agreement confirmed that neither party would comment to the media nor other third parties except to say the parties had met and resolved their differences.

The Tribunal found that Mr Craig had breached confidentiality *"repeatedly and intentionally"*[4] and that the breaches were *"deliberate, systematic, egregious and repeated"*.[5] The Tribunal said *"Mr Craig has had legal advice throughout. The most significant breaches were pre-scripted and, as submitted by Ms MacGregor, engineered to attract maximum publicity. He did not stumble into the breaches. He sought, fed and received media attention."*[6] By contrast the Tribunal found "It is difficult to see any basis for criticising Ms MacGregor's conduct. With the exception of the single tweet …"[7]

Is MacGregor the high watermark?

Some might argue that the *MacGregor* award is at the extreme end of the scale and must represent the high watermark of awards. Prior to *MacGregor* the highest Tribunal awards were granted in *Hammond v Credit Union Bay Wide*[8] ($98,000) and *Singh v Singh and Scorpion Liquor*[9] ($45,000). However the Tribunal appears to be on a roll with learned writers Peter Cullen and Calum Cartwright in an article late last year noting with regard to the *Hammond* and *Singh* decisions that *"It is clear that these awards from both these cases would represent the upper range for compensation in the HRRT"*,[10] describing both of these awards as *"exceptionally high"*. Three months later and the upper range has increased by a further $22K.

Though awards are fact specific, the trends are real

Awards of this kind are very fact specific. Commentators should be careful not to jump to the conclusion that one jurisdiction is more favourable than the other. However the trends are certainly there and have already attracted judicial comment. Judge Inglis in *Hall v Diomex Pty Ltd*[11] expressed considerable sympathy for the view that the quantum of compensatory awards in the Authority and Employment Court had fallen *"woefully"* behind. Her Honour referred to commentators noting the average compensatory awards made by the Employment Court had remained stagnant for the last 20 years, despite inflation.

Similarly, Judge Ford in *Rodkiss v Carter Holt Harvey*[12] referred to the *Hammond* and *Singh* decisions and said *"Although it would not be appropriate to attempt to compare the facts of those cases with the present, the awards in question do appear to be substantially in excess of awards made in both the Authority and in this Court for arguably similar wrongs committed on employees"*.

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4 Para [142.6].
5 Para [122].
6 Para [127].
7 Para [119].
8 [2015] NZHRRT 6.
9 [2015] NZHRRT 8.
10 *The Human Rights Review Tribunal*, Peter Cullen and Calum Cartwright, 3 December 2015.
11 [2015] NZEmpC 29.
12 [2015] NZEmpC 34.

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Watch this space

It will be interesting to observe over the coming months whether the levels of awards in the employment jurisdiction increase. The employment judiciary would first have to be minded to increase such awards. It is conceivable that some members of the employment judiciary would be of the view that the awards of the Tribunal are getting too high.

There is a balance to be struck. Awards need to be sufficient to appropriately compensate those who successfully raise a grievance, but not so large that they encourage meritless claims. Depending on your view, one of the argued advantages of the employment jurisdiction is that the awards are modest. This encourages early settlement of matters because often it is simply not financially prudent to pursue a claim past mediation because of the low level of awards compared to the cost of pursuing them. One view is that is a good outcome in that it encourages settlement and does not clog the Court system. The contrary view is that employees and employers alike are not getting a just result. Depending on the factual situation, employers are often advised that they are best to settle, even if they have an arguable defence because it is simply more cost effective to do so. Similarly employees can be advised that if they pursue a matter past mediation, they might be awarded more than they are being offered at mediation, but the cost of pursuing the likely relatively meagre increase does not justify the expense of doing so. We need to be mindful that any significant increase in the quantum of awards in the employment jurisdiction is likely to readjust this balance and we may see a larger volume of cases progressing past the mediation stage.

Melanie Hayes - Associate

- Bachelor of Laws
- Bachelor of Arts

T: 03 474 5716
M: 027 452 1140
E: mhayes@webbfarry.co.nz

Melanie is an Associate in Webb Farry's litigation team. She specialises in commercial litigation, civil litigation and employment.