

Department of Labour
TE TARI MAHI



EMPLOYMENT CASES SUMMARY

APRIL 2006



Employment Cases Summary

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Editorial

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DISMISSAL FOR INCAPACITY: A SUMMARY OF THE LAW

I. INTRODUCTION

The general law concerning justification for dismissals due to an employee's incapacity has been described by the Employment Court on a number of occasions as "well-established."¹ However, the Court has also commented that the exact nature of the legal requirements in this area varies with the facts and circumstances of each case and that "[n]o hard and fast rules can be laid down."² For that reason, this editorial will examine the general law in this area in conjunction with certain relevant cases in an attempt to provide both a helpful summary of the settled principles, and an illustration of the ways in which some of those principles have been applied in particular circumstances.

II. THE GENERAL POSITION, THE TEST, AND THE BALANCING ACT

It has long been understood that an employer is not bound to hold an employee's position open indefinitely if the employee is unable to carry out his or her duties due illness, injury, or other incapacity.³ A classic statement of the law is that "there can come a point at which an employer can fairly cry halt."⁴ However, if an employer does decide to dismiss for incapacity, that can be challenged through the personal grievance procedure set out in the Employment Relations Act 2000 in the same way as any other dismissal. Therefore, an employer must be able to justify such a dismissal both substantively and procedurally.

The test commonly applied today in cases concerning whether a dismissal for incapacity was justified was set out by the Court of Appeal in *Lang v Eagle Airways*.⁵ The Court of Appeal agreed that "the test to be applied is whether the decision to dismiss was one to which a fair and reasonable employer could come as at the time when it became effective."⁶ That test makes it clear that it is for the employer to make the decision about how long it

¹ *Paykel v Morton* [1994] 1 ERNZ 875, 883; *New Zealand Amalgamated Engineering and Related Trades IUOW v BHP New Zealand Steel Ltd* unreported, Colgan J, 14 October 1996, AEC 67/96, page 13.

² *Barry v Wilson Parking* [1998] 1 ERNZ 545, 549.

³ *Canterbury Clerical Workers IUOW v Andrews and Beaven Limited* [1983] ACJ 875, 877.

⁴ *Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124, 127.

⁵ [1996] 1 ERNZ 574.

⁶ *Lang v Eagle Airways* [1996] 1 ERNZ 574, 582. That test was taken from the general approach to justification for dismissal as set out by the Court of Appeal in *Airline Stewards and Hostesses of NZ IUOW v Air New Zealand Ltd* [1990] 3 NZILR 584 ; [1990] 3 NZLR 549. Note that the test for justification for dismissal, previously found in case law only, has been set out in statute by s38 of the recent Employment Relations Amendment Act (No 2) 2004. That section inserted s103A into the Employment Relations Act 2000 which reads: "...the question of whether a dismissal or action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred." There have not so far been any cases concerning whether this section will have any practical effect on the test for justification for dismissal for incapacity.

can reasonably sustain an employee's absence and at what point dismissal becomes necessary. The Court will only interfere if the decision to dismiss was clearly not open to the employer on the information known to it, or that should reasonably have been known to it, at the time of dismissal.⁷

The employer is required to carry out a fair inquiry and then to make its decision about whether to dismiss the employee "balancing fairness to the employee and the reasonable dictates of its practical business requirements."⁸ The business interests component of that balancing act has been rephrased in one case as whether the employer was "reasonably entitled to a belief that as a result of [the employee's] illness [the employee] could no longer be retained as an economic unit [in the employer's business]."⁹ The Employment Court has commented that the balancing act between the employee's interests and the employer's business requirements is analogous to the considerations that may apply in the redundancy context.¹⁰

III. SUBSTANTIVE JUSTIFICATION: USEFUL GUIDELINES

The case of *Marshall v Harland & Wolff*,¹¹ decided by the National Industrial Relations Court in England, set out a number of factors to consider when deciding whether an employment relationship had been dissolved by operation of the doctrine of frustration. It is clear that termination of employment through the operation of that doctrine is quite a different situation from termination of employment at the employer's initiative. The latter situation requires justification while the former does not.¹² However, the Employment Court has commented that the *Marshall* case "offers useful guidelines that may apply, by analogy, in situations where the doctrine of frustration has not been invoked, to test whether the employer can be said to have reached a point where, as a result of an employee's absence, it can conclude the contract can be ended."¹³ These guidelines are set out, and elaborated upon, below.

A. The terms of the contract

As with all personal grievances, an important factor to consider is the terms of the contract which governs the employment relationship. Along with the general context provided by the contract of employment, an obvious but important consideration is whether the contract contains any terms which are directly applicable to the situation of the employee's incapacity. One example might be a clause which deems the employment terminated after a certain period of absence due to illness or injury. In *Nagels Creations v Walker*¹⁴ the relevant collective employment agreement provided that if an employee became incapacitated and was unable, within a period of six weeks of such incapacity arising and continuing, to resume his or her normal employment duties, his or her employment would be terminated. The Employment Court commented that, if the respondent's employment

⁷ *New Zealand Amalgamated Engineering and Related Trades IUOW v BHP New Zealand Steel Ltd* unreported, Colgan J, 14 October 1996, AEC 67/96, page 14.

⁸ *Barry v Wilson Parking* [1998] 1 ERNZ 545, 549.

⁹ *Williams v Air New Zealand Ltd* unreported, Finnigan J, 28 April 1997, AEC 32/97, page 29.

¹⁰ *Wilson v Johnathons Catering Co Ltd* unreported, Travis J, 13 November 2000, AC 44A/00, para 26.

¹¹ [1972] 2 All ER 715.

¹² See *Taylor v Air New Zealand* unreported, Colgan J, 28 October 2004, AC 61/04, paras 24-31 for a useful summary of the doctrine of frustration. Although the doctrine of frustration has been raised in many of the cases mentioned in this editorial, the Employment Court, while recognising the validity of the doctrine, has so far declined to apply it.

¹³ *Wilson v Johnathons Catering Co Ltd* unreported, Travis J, 13 November 2000, AC 44A/00, para 35; and see a similar comment in *Method Media Limited v Collins* unreported, Travis J, 22 June 2001, AC 41/01, para 22.

¹⁴ *Nagels Creations v Walker* unreported, Palmer J, 24 December 1998, AC 99/98.

had been governed by the collective agreement (which it was not), then (procedural fairness issues aside) her employment would have terminated through the application of the incapacity provision as soon as the employer had notified her that it was invoking that provision.

It will also be necessary to consider any applicable sickness leave provisions. Although a common sense approach might suggest an employee cannot be dismissed for incapacity prior to the expiry of his or her sick leave entitlements, there will undoubtedly be situations in which an employer will be justified in doing so. The Court of Appeal indicated as such when it commented in *Lang v Eagle Airways* that, although the appellant's conditions of employment entitled her to sick pay for generous periods, it did not follow that the employer was bound to continue to employ a pilot who consistently needed to use her sick leave to such an extent.¹⁵ In the recent case of *Taylor v Air New Zealand* the plaintiff's contractual entitlement to "unlimited sick leave" did not preclude his dismissal for incapacity when it became clear that he would be unable to return to his duties within a reasonable time.

B. How long the employment was likely to last in the absence of sickness or injury

The second factor to consider is how long the employment was likely to last in the absence of sickness or injury. Generally speaking, it will be easier to justify termination due to incapacity if the employment was inherently temporary in its nature or for the duration of a particular job, than if it was expected to be long term. This factor weighed in the respondent's favour in *Shu-Bar Partnership v Mason*¹⁶ where the Employment Court agreed with the Tribunal's conclusion, as a matter of probability, that the respondent would have been a long-term employee had she not been dismissed. The importance of this factor should not, however, be overstated. In *Innes-Smith v Wood*,¹⁷ the respondent was dismissed for incapacity after less than two months absence. The Employment Court did not consider it relevant to the question of justification for dismissal that the respondent had had significant disciplinary issues at work and that the future of her employment with the appellant had been tenuous even before her back injury.

C. The nature of the employment

The third factor to be looked at is the nature of the employment and in particular the importance of the position the employee held to the employer's business. Where an employee is one of many in the same type of position it is likely to be harder for an employer to justify dismissal for incapacity than where the employee occupies a key position which must be filled and filled on a permanent basis in the event of a prolonged absence. In terms of the "balancing act", the absence of a key employee obviously has a greater effect on an employer's business than the absence of an employee who occupies a less crucial position. It may also be easier for an employer to arrange temporary cover for a less crucial position and that may influence the question of whether dismissal for incapacity was justified.

In *Hoskin v Coastal Fish Supplies* the employee in question was the manager of a shop and had been incapacitated for lengthy periods. The Arbitration Court considered that in that situation the employer was justified in dismissing the employee and appointing a permanent replacement. The Court considered that it would have been unreasonable to expect the employer to obtain a temporary shop manager to cover for the employee's absence but

¹⁵ *Lang v Eagle Airways* [1996] 1 ERNZ 574, 582.

¹⁶ Unreported, Colgan J, 7 August 1996, AEC 44/96.

¹⁷ [1998] 3 ERNZ 1298.

commented that “[h]ad [the employee] just been a counterhand (or similar) the position may well have been different.”¹⁸

A similar consideration influenced the Employment Court in *Wilson v Johnathons Catering*. In that case, the Court upheld the Tribunal’s decision that the termination for incapacity of the appellant’s employment as the supervisor of a catering contract was justified. The Tribunal had accepted that it was not possible for the employer to do without a supervisor for the length of the appellant’s intended absence and it was not practicable to hire a temporary reliever for the appellant’s role or to cover her work in other ways. The Court was not persuaded on appeal that those conclusions were wrong.

D. The nature of the illness or injury, its duration and prognosis

Another factor to consider is the nature of the illness or injury which had rendered the employee unable to perform his or her employment duties, and in particular, how long the illness or injury has already continued and the prospects of recovery. The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it will be to justify dismissal. The Employment Court has consistently confirmed the importance of this consideration: it stated in *Innes-Smith v Wood* that “[a] good reason [to dismiss for incapacity] usually consists of a combination of the length of absence to date of the employee and the prospects for the future as to a return to work.”¹⁹ On a practical note, in most circumstances it will be virtually impossible for an employer to fairly and reasonably undertake the balancing act required of it if it has not considered when the employee is likely to return to work.

In *Shu-Bar Partnership v Mason* the respondent was willing and able to return to light duties by the ultimatum date set by the appellant for full fitness. Medical evidence which would have been available to the appellant following a reasonable inquiry established that the respondent would have been able to return to full duties three weeks after that. In those circumstances the Court found that the appellant’s decision that the length of absence would affect its business interests to such an extent that dismissal was justified was unfair and unreasonable.

The employee in *Parker v Lake View Farm Fresh Limited*²⁰ had been removed from his managerial position with the employer following a heart attack and a period of recovery. The Employment Court granted him interim relief and commented that he had established his case for unjustified dismissal “to a much higher level than the low threshold [required].”²¹ The Court was clearly influenced by the speed with which the employee was removed from his position, just a fortnight after his heart attack and less than a fortnight after his early release from hospital (which in turn suggested the likelihood of an early recovery and return to work).

E. The period of past employment

The length of the employment prior to the incapacity is another relevant consideration. It may be easier to justify dismissal where the relationship has a short history than where the relationship is of long standing. The Court in the *Marshall* case commented that that was “good sense and, ...no less good law, even if it involve[d] some implied and scarcely detectable change in the contract of employment year by year as the duration of the

¹⁸ *Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124, 128.

¹⁹ *Innes-Smith v Wood* [1998] 3 ERNZ 1298, 1304.

²⁰ Unreported, Goddard CJ, 6 May 1996, WEC 26/96.

²¹ *Parker v Lake View Farm Fresh Limited* unreported, Goddard CJ, 6 May 1996, WEC 26/96, page 14.

relationship lengthen[ed]. The legal basis [was] that over a long period of service the parties must be assumed to have contemplated a longer period or periods of sickness than over a shorter period.”²²

The length of time that must pass before a relationship is considered “long standing” may vary according to the nature of the position. In *Shu-Bar Partnership v Mason* the Court commented that “although for some, an employment period of almost four years was not one of long-term, for a manager/salesperson of a retail shoe shop it was probably longer than many, perhaps even most these days.”²³

F. Any other relevant factors

The factors listed above are not necessarily the only factors which must be taken into account in determining whether a dismissal for incapacity was substantively justified. The fundamental question remains whether the employer’s decision to dismiss was fair and reasonable decision in all the circumstances, balancing the interests of its business with the interests of the employee. Any other factors which bear on that question must also be considered.

One example of another factor which may need to be considered in certain cases is whether it was reasonable for the employer to impose a date by which the employee was required to return to work or obtain medical clearance to do so. The answer to that question will depend on the circumstances of the case. In the recent case of *Taylor v Air New Zealand* such an ultimatum was found to be justified in all the circumstances of the case, but in *Shu-Bar Partnership v Mason* and *Innes-Smith v Wood* the arbitrary imposition of time limits, without adequate consultation, was not.

IV. PROCEDURAL FAIRNESS: PARTICULAR REQUIREMENTS AND COMMON ERRORS

Even if there is substantive justification for a dismissal for incapacity, the dismissal may still be unjustified if the employer has failed to follow a fair procedure in carrying out the dismissal. The presence of significant procedural defects may even cast doubt on the fairness and reasonableness of the employer’s conclusion as to the substantive justification for dismissal. In many respects the procedural requirements for dismissal for incapacity are similar to the general requirements in relation to dismissals for other causes, such as misconduct or redundancy. Those common requirements may include: adequate notice of the possibility of dismissal; the opportunity to be represented; a fair and adequate inquiry including appropriate consultation; keeping the employee fully informed of the information held by the employer; and so on. However, there are some material differences which will be examined as part of the discussion below concerning particular requirements, and common errors, of procedural fairness in the context of dismissal for incapacity.

A. Open and honest communication

i. Notification of the possibility of dismissal

A reasonably common procedural error in cases of dismissal for incapacity is failure to notify the employee, or notify them far enough in advance, that the continuation of his or her incapacity may result in dismissal. In *Wilson v Shannon*,²⁴ *Motor Machinists Ltd v*

²² *Marshall v Harland & Wolff* [1972] 2 All ER 715, 719.

²³ *Shu-Bar Partnership v Mason* unreported, Colgan J, 7 August 1996, AEC 44/96, page 28.

²⁴ [1998] 3 ERNZ 68.

Craig,²⁵ and *New Zealand Amalgamated Engineering and Related Trades IUOW v BHP New Zealand Steel Limited*, the employees were given little or no warning of the possibility that their employment would be terminated due to their illness or injury. In each of those cases the Employment Court considered that failure a serious procedural error which contributed to the decision that the dismissals were unjustified.

The need for specific notification of the imminent possibility of dismissal is not removed by a previous acknowledgement from the employee that their job may be in jeopardy, or by an “out of date” notification by the employer that dismissal may occur. In *Method Media v Collins*, which was not a case of dismissal for incapacity but involved the analogous situation of an employee taking an unspecified period of leave for personal reasons, the employee was dismissed with no prior warning after four days absence. It was accepted that before the employee’s departure he had said to the employer that she might need to replace him eventually if the length of his absence was going to cause major problems. The Court found that, despite that agreement, the employer should have contacted the employee before making the decision to dismiss.

The employer in *Paykel v Morton*²⁶ notified the employee almost three months before his eventual dismissal that his absence due to a back injury was causing the company severe difficulties and that the situation could not continue indefinitely. The Employment Court considered that the length of time and events which had occurred between the notification and the dismissal made it inequitable for the employer to rely on the notification as evidence that it had complied with its obligations of fair treatment. The employer should have reiterated at a later date its intention to consider dismissal.

ii. Misleading impressions

A communication error perhaps more serious than the failure to notify an employee of the possibility of dismissal occurs when the employer misleads the employee in some positive way concerning their future with the employer, or the conduct of the decision making process. The Employment Court has taken a serious view of such behaviour.

The employer in *Paykel v Morton* failed to tell the employee that it was seeking a replacement for his position. It later misled the employee into believing that his job was still open to be taken up after surgery, despite the fact that a permanent replacement had been appointed the previous day. The Employment Court considered that fair process required the employer to honestly communicate with the employee its intentions and actions at all material times. The Court held that “[the employer’s] failure to do so amounted...to quite fundamental breaches of the [employer’s] obligations of trust, confidence and fidelity towards a senior employee of long standing.”²⁷

In *New Zealand Amalgamated Engineering and Related Trades IUOW v BHP New Zealand Steel Limited* the Employment Court considered that the employer had given the employee the clear impression that his employment would continue when its medical officer certified him unfit for work for a relatively short period and required a reassessment of his condition at the end of that period. The Court found that it was unfair for the employer to have given that impression and, at almost the same time, to have dismissed him.

²⁵ [1996] 2 ERNZ 585.

²⁶ [1994] 1 ERNZ 875.

²⁷ *Paykel v Morton* [1994] 1 ERNZ 875, 882.

A similar sort of principle can be seen in *Schenker & Co v Elliot*²⁸ where the employer gave the employee the clear impression at a meeting that it would not take any further steps in relation to her employment without first ascertaining the prognosis for her return from her surgeon. The Employment Court found that, in those circumstances, dismissing the employee without first having received the surgeon's opinion was unfair.

B. A fair inquiry

An employer who wishes to dismiss for incapacity must carry out a fair inquiry before making the decision to dismiss. That requirement of procedural fairness is shared with all other dismissals (no matter what the cause) requiring justification. However, the focus of a fair inquiry in cases of dismissal for incapacity is unique. The Employment Court emphasized that point in *Innes-Smith v Wood*:²⁹

[What is] meant by consultation in this context is that the employer made inadequate attempts to inquire into and ascertain the facts before dismissing. A dismissal for incapacity is not a dismissal for misconduct and it is therefore not a matter of putting suspicions or allegations to an employee and affording an opportunity for a response. Nor is it an inquiry, as in a redundancy situation, into what the employee actually does and into whether there are other openings in the organisation the employee could fill. In the case of incapacity, the inquiry is into the nature and likely duration of the incapacity...It is only when the employer is in possession of the full facts including the medical situation that a sensible decision can be made that is fair to both employer and employee.

i. Adequate information

The above quote from *Innes-Smith v Wood* demonstrates that an employer must obtain enough information so that it can fairly make a decision which balances both the interests of its business and the interests of the employee. As has already been mentioned, that will usually include reliable and up to date medical evidence and/or opinions concerning the nature of the injury or illness and the prognosis for recovery and likely return to work. Although an employer may sometimes be able to safely act on the basis of information volunteered by the employee, the obligation to obtain information is generally considered a positive obligation: the employer will need to actively seek relevant information, especially if the information already held is stale.³⁰ Without adequate and up to date information on which to base its decision, the employer is unlikely to be able to justify a decision to dismiss.

In *Method Media v Collins* the Employment Court found that the dismissal of an employee who had taken leave of unspecified length for personal reasons was unjustifiable because the employer had made no attempt to ascertain the likely length of the employee's absence before deciding to dismiss him.

In *Schenker & Co v Elliot* the employee was dismissed for incapacity prior to a scheduled specialist's appointment which the employer knew would provide a more accurate prognosis concerning the employee's recovery and return to work. The dismissal was found to have been unjustified.

²⁸ Unreported, Colgan J, 13 July 1999, AC 53/99.

²⁹ [1998] 3 ERNZ 1298, 1304.

³⁰ *Barry v Wilson Parking* [1998] 1 ERNZ 545, 549.

It is important to bear in mind when considering the requirement to make a decision based on adequate information that the test set out in *Lang* is whether the decision to dismiss was fair and reasonable “as at the time when it became effective.” This may mean that, in certain situations, ongoing reassessment of the situation is required after the conclusion of the employer’s initial inquiry. For example, if an employer gives an ultimatum date for a return to work, then the employer may need to actively seek, and reconsider the situation in the light of, any new information which arises prior to that ultimatum date. The employer’s failure to do so in *Shu-Bar Partnership v Mason*, where new evidence indicated that the employee would be ready to return to light duties by the “conditional termination” date set by the employer and full duties three weeks after that, rendered the dismissal unjustified. The Court commented that, applying the test set out in *Lang v Eagle Airways*, requirements of fair process and reasonable decision making remained until the employer notified the employee that the “conditional termination” was to take effect.³¹

ii. Input from the employee

A further, but interrelated, aspect of a fair inquiry is the obligation on the employer to obtain input from the employee during the decision making process. The kind of input sought in an inquiry concerning incapacity, and the reason for seeking it, will be very different from the input sought in an inquiry in relation to possible dismissals for other causes, such as misconduct. The Employment Court in *Parker v Lake View Farm Fresh* commented that the employer considering dismissal for incapacity needed input from the employee “not in the sense of giving him a hearing as would be required if he was accused of some indiscretion amounting to misconduct but, rather, in the sense of allowing the plaintiff an opportunity to throw light on his ability to return to the workplace and to perform his duties.”³² The fundamental reason for obtaining input from the employee in cases of incapacity is to allow them the opportunity to provide information (including, but not limited to, medical reports) which may avert a conclusion by the employer that dismissal is necessary. The failure to provide an employee with that opportunity, or in many cases ongoing opportunities, will be a serious obstacle for an employer who wishes to justify a dismissal for incapacity.

Not only must an employer seek input from the employee, it must make it known at the time the information is sought that it may be used for the purposes of a decision to terminate the employment relationship. The Employment Court in *Barry v Wilson Parking* noted that that requirement was “to ensure that the employee understands the seriousness of the issue and will have a motive for ensuring that the information is as full and accurate as he or she can make it to be.” The Court commented that “[i]t would not be reasonable to expect so diligent a response to a mere casual inquiry after the employee’s health.”³³

V. CONCLUSION

The parties in cases involving dismissal for incapacity may well be considered unfortunate, for the circumstances leading to the dismissal have often arisen through no fault of either the employer or the employee. In that situation, the Employment Court requires the employer to make a fair decision, balancing its own business interests with the interests of the employee. Procedural fairness in cases of dismissal for incapacity is as important as in any other case where a dismissal must be justified, but some significant differences exist particularly in the focus of the inquiry and the type of input that must be sought from the

³¹ *Shu-Bar Partnership v Mason* unreported, Colgan J, 7 August 1996, AEC 44/96, page 25.

³² *Parker v Lake View Farm Fresh Limited* unreported, Goddard CJ, 6 May 1996, WEC 26/96, page 9.

³³ *Barry v Wilson Parking* [1998] 1 ERNZ 545, 549.

employee. The Employment Court commented in *Knight v Gates*³⁴ that the “cumulative effect [of the guidelines laid down by the Employment Court in relation to dismissal for incapacity] can be described in one phrase, the need for open and honest communication between both parties of their positions and intentions.”

³⁴ *Knight v Gates* unreported, Colgan J, 15 July 1997, AEC 1/97, page 11.

Significant Judgments/Decisions added to the Employment Law Database

1 March 2006 - 31 March 2006

Under the Employment Relations Act 2000

Singh v Sherildee Holdings Ltd t/a New World Opotiki

AC 53/05

Heard: 1 Aug 2005 - 2 Aug 2005 (2 days) Tauranga

Judgment Date: 22 Sep 2005

Court/Authority/Tribunal: Couch J

Appearances: S Cuddon ; RW White

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY - Serious misconduct - Misunderstanding about Plaintiff's change of work hours - Produce left outside overnight - Suspension - Indefinite suspension without pay unjustifiable - Dismissal - Inappropriate to take into account sexual harassment allegation from two years earlier - Allegation of falsification of time records lacked substance - Failure to ensure that produce properly secured at end of day was capable of being regarded as misconduct - Procedurally unfair - Dismissal unjustified - Challenge granted - Remedies - Contributory conduct 60 percent - Produce manager

This was a successful de novo challenge to a determination of the Employment Relations Authority. The Employment Court found that the plaintiff's suspension and dismissal were unjustifiable.

The plaintiff was employed as a produce manager by the defendant in 1996. Towards the end of 2003, the parties had a misunderstanding regarding the plaintiff's hours of work, which was resolved in early 2004 ("the misunderstanding"). During the misunderstanding, the plaintiff did not work on Saturdays but the defendant was unaware of that prior to the matter being resolved. During the misunderstanding one of the plaintiff's time records sheets had the word "normal" written on it. Another had no time entries relating to the plaintiff.

The plaintiff, who was responsible for ensuring that produce was secured on the defendant's premises, left for the day while two pallets of produce remained outside. The checkout supervisor discovered the pallets, one of which was preventing the closing of the storeroom door. The supervisor requested that the plaintiff return and move the pallets. The plaintiff declined and the supervisor arranged that one pallet be brought in to enable the door to be closed. One pallet remained outside in an area accessible to the public ("the incident").

The following morning the manager and owner of the defendant ("the manager") learned

of the incident, met with the plaintiff and discussed the incident. The manager did not tell the plaintiff the meeting was a disciplinary meeting nor suggest his employment was at risk. During the 30 minute meeting (“the meeting”), the plaintiff alleged he had asked the storeman to put the pallets away but that the grocery manager had directed the storeman not to put the pallets away. The grocery manager was called to the meeting and denied the allegation made. At the conclusion of the meeting the defendant indefinitely suspended the plaintiff, without pay. The possibility of suspension was not raised with the plaintiff. The following day the manager met with the storeman.

Four days later, the plaintiff enquired about his employment and was told to attend a meeting with the manager. The meeting occurred 15 minutes later and early in the meeting the manager told the plaintiff he was dismissed (“the dismissal meeting”). Later, the plaintiff sought confirmation in writing, with reasons, for the dismissal. Four days later, the plaintiff was handed a final warning letter, and a dismissal letter. The dismissal letter recorded a number of reasons for the dismissal, including sexual harassment, falsifying of time records, lateness and the incident. The reasons were cross-referenced against the “company business rules” which were incorporated as a term of the plaintiff’s employment agreement.

The Authority found that the plaintiff’s suspension was unjustified but that his dismissal was justified.

The storeman was not called to give evidence before the Court. However, the parties relied on hearsay evidence regarding the storeman’s version of events.

HELD: (1) Pursuant to s189(2) Employment Relations Act 2000 (“ERA”), the Court had wide powers to admit evidence which would not be admissible in other jurisdictions. It was a moot point, however, whether the Court should admit evidence of what was said to a member of the Authority in the course of an investigation meeting when the Court was conducting a de novo hearing. Although it would be proper in many cases to admit such evidence where the purpose of doing so was to demonstrate that a witness before the Court has made a prior inconsistent statement on oath, different considerations might well apply where it was sought to adduce such evidence as proof of the accuracy of what was said to the Authority and in substitution for evidence being given to the Court by that witness. In the present case, the Court was prepared to have regard to what was recorded in the Authority’s determination but it did so with considerable caution and did not place any great weight on it.

(2) The allegation of sexual harassment occurred at a time when the manager was away and was handled by the manager’s son-in-law. He carried out only a cursory inquiry and there was no basis upon which to conclude that the plaintiff had engaged in any significant misconduct. Effectively recognising that, no warning was given to the plaintiff at the time. It was entirely inappropriate for the manager to take that into account in his decision to dismiss the plaintiff nearly two years later.

(3) There was no evidence that the manager ever raised allegations of lateness with the plaintiff as a disciplinary issue. If, that had occurred throughout the period of eight years of the plaintiff’s employment, the plaintiff would be entitled to regard the pattern of attendance as being acceptable to the manager. In those circumstances, that was not an issue the manager could fairly take into account in reaching the decision to dismiss the plaintiff.

(4) The allegation that the plaintiff would regularly leave the premises during his normal daily working hours appeared to be something which the manager was aware of. It was

not suggested that the manager had ever raised that with the plaintiff as a disciplinary issue. It was therefore something which could not properly be taken into account by the manager in his decision to dismiss the plaintiff.

(5) The allegation that the plaintiff falsified his time sheets related principally to the misunderstanding. However, the plaintiff was a salaried employee rather than being paid by the hour worked. There was therefore no reason to record his daily or weekly hours of work. If the plaintiff reasonably believed that he was not obliged to work on Saturdays, any omission to record that he had not done so was not wilful and not culpable. That issue was fairly put to the plaintiff during the meeting, however, for the above reasons, it lacked substance and could not fairly have been relied on by the manager in his decision to dismiss the plaintiff a week later.

(6) For the pallet incident to fall within a specified provision of the company business rules, it would have to be established that the plaintiff had been trained to deal with produce in a particular way and that the manner in which he dealt with the two pallets was inconsistent with that training. The word "trained" connoted some form of organised or systematic instruction. There was no evidence that the plaintiff had been given any form of training in that sense. More specifically, there was no evidence that the plaintiff had been given training in the handling of produce. On that basis, the plaintiff's misconduct did not fall within the scope of the specified clause of the company business rules. Equally, it did not fall within the scope of any of the other paragraphs of the company business rules.

(7) On a more general approach, however, the plaintiff's conduct was capable of being regarded as serious misconduct. There was no doubt that, once he had received the supervisor's telephone call, the plaintiff knew that any arrangement he may have made with the storeman had not been carried out. He also knew that the pallets of produce belonging to the defendant were at risk unless some action was taken to secure them. He deliberately chose not to take that action.

(8) The manager had not conducted a full and fair investigation of the plaintiff's conduct in relation to the pallet incident. A full and fair investigation of an employee's conduct would have included a candid disclosure to the employee of the information which the employer regarded as significant and a real opportunity for the employee to respond before the employer drew any conclusions. In the present case the only real discussion between the manager and the plaintiff about the incident took place at the meeting. The manager conceded that he had very little knowledge of events at that time. If the investigation was to be a fair one, the plaintiff should have been told what the storeman had said and then given a proper opportunity to respond to that information before the manager drew any conclusions.

(9) In addition to the failure to give the plaintiff an opportunity to respond to what the storeman said, there were other aspects of the process adopted by the manager which fell short of the standard required for a full and fair investigation. It was clear that, from the outset, the manager regarded the incident as potentially serious for the plaintiff. In such circumstances he ought properly to have given the plaintiff notice of his concerns and the potential consequences of them before the meeting. His failure to do so significantly prejudiced the plaintiff's position. He had to respond to the manager's questions without an opportunity to collect his thoughts and to have regard to the seriousness of the matter in formulating his response. Equally, the lack of advance notice made it impossible for

the plaintiff to seek advice or representation.

(10) The above deficiencies in process would not have been so significant had the manager given the plaintiff a full opportunity to be heard at a subsequent meeting and retained an open mind in the meantime. That was not the case. The manager made a decision to dismiss the plaintiff two days after the incident and put that into effect a few days later without an opportunity for further discussion. As a result, the meeting was the only opportunity the plaintiff had to be heard and the deficiencies in process associated with the meeting and the subsequent investigation were therefore very significant.

(11) Where an employer had failed to carry out a full and fair investigation, it was usually not possible for that employer to show that the decision to dismiss was one which a reasonable and fair employer could have taken. That was because a reasonable and fair employer would not make a decision to dismiss other than as a result of a full and fair investigation. On that basis, the plaintiff's dismissal was unjustifiable.

(12) In the absence of an express contractual provision authorising suspension, it would only be in unusual cases that it was justifiable. The fact that an employer may have reason to suspect that an employee has engaged in misconduct, or even serious misconduct, did not of itself justify suspension while those concerns were investigated. To justify suspension, an employer must have good reason to believe that the employee's continued presence in the workplace would or might give rise to some other significant issue. The manager said that he and the plaintiff had both become somewhat heated during the meeting and that he felt "all parties should be separated at [that] stage just for a cool down period". While that might justify a brief time out and a walk around the block, it did not justify indefinite suspension, which was what occurred.

(13) A decision to suspend an employee would normally only be justifiable if it was made as a result of a fair process. The minimum requirement for a fair process was that the employee be told that suspension was being considered and the reasons why, and then given a proper opportunity to be heard on that issue before a decision was made. The manager did not raise the prospect of suspension with the plaintiff before actually telling him near the end of the meeting that he was suspended.

(14) In the absence of express agreement to suspension without pay, either in the applicable employment agreement or by agreement between the parties at the time, suspension without pay would not be justifiable other than in a very few truly exceptional circumstances. It was certainly not justifiable in the present case. For the above reasons the manager's suspension of the plaintiff was entirely unjustifiable.

(15) Guided by s189(1) ERA, the Court awarded 6 weeks' wages. That period was assessed on a very conservative basis to reflect the paucity of evidence. Regarding the disadvantage claim arising out of the unjustifiable suspension of the plaintiff, the evidence was clear, the plaintiff lost three days' wages. He was awarded that amount.

(16) Considering the claim for compensation for distress on the above basis, an appropriate award under s123(c)(i) ERA would be \$5,000. In doing so, the Court recognise that any long-standing employee such as the plaintiff would almost inevitably suffer significant distress when dismissed unjustifiably.

(17) The plaintiff did contribute significantly to the situation which gave rise to both of his personal grievances. The Court assessed the plaintiff's contribution at 60 percent.

Result: Challenge granted ; Reimbursement of lost wages \$1,597.20 (6 weeks 3 days) ; Compensation for humiliation etc (\$5,000 reduced to \$2,000) ; Costs reserved

Statutes considered:

ERA s123(c)(i)
ERA s124
ERA s189(1)
ERA s189(2)

Words and phrases: Trained

Cases referred to in judgment:

Makatoa v Restaurant Branch New Zealand Ltd [1999] 2 ERNZ 311
Singh v Sherildee Holdings Ltd t/a New World Opotiki, unreported, K Anderson, 23 November 2004, AA 378/04
St Catherines Court Rest Home v Nicholson unreported, Palmer J, 4 May 1994, CEC 11/94
W & H Newspapers Ltd v Oram [2001] 3 NZLR 29 ; [2000] 2 ERNZ 448

Pages: 22
[971895]

Butler and Ors v Carter Holt Harvey Ltd

AC 57/05
Heard: 3 Aug 2005, Tauranga
Judgment Date: 14 Oct 2005
Court/Authority/Tribunal: Couch J
Appearances: I Yukich ; R Towner

NON DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY - Mediated settlement - Term of settlement to establish performance recognition scheme to provide incentives and rewards to staff - Staff made redundant prior to scheme's development - Authority declined to order compliance with term of settlement - Whether work done to which performance recognition scheme could apply - There was in fact a period of time during which the plaintiffs did work for which they were entitled to recognition under the scheme - Challenge granted - Maintenance workers

This was a successful non de novo challenge to a determination of the Employment Relations Authority which had declined to issue an order requiring the defendant's compliance with a mediated settlement.

The defendant owned a pulp mill at Kawerau which had originally been part of a pulp and paper mill, operated together as a single business. The plaintiffs were maintenance workers. Despite the pulp and paper mill being run as separate businesses, the terms of employment of the staff continued to include a profit sharing scheme based on the overall

performance of both mills.

The scheme was regarded as unsatisfactory and the defendant reached a settlement on the issue with the plaintiffs, with mediation assistance on 27 August 2004. The settlement included a lump sum payment and incorporated by reference a clause which included a commitment by the parties to establish a performance recognition scheme to provide more appropriate awards and incentives to staff. The scheme was to operate from no later than 1 July 2004.

At the same time, the defendant entered into an agreement to contract out maintenance work. The plaintiffs' positions were to be made redundant. That matter was also dealt with in the mediation and it was agreed in the settlement that the positions would be disestablished on 7 September 2004. The settlement was to take effect on 8 September 2004.

The scheme was never established and the plaintiffs did not receive any recognition of their performance from the 1 July 2004. As a result they applied to the Authority for an order that the terms of the settlement be complied with.

The Authority declined to award compliance with the performance scheme clause, finding as a fact that there was no performance to recognise. The plaintiff challenged the Authority's determination.

HELD: (1) The record of settlement explicitly provided that the performance scheme was "... to operate from no later than 1 July 2004". Although that agreement was reached almost two months later, the only possible construction of the document was that the parties intended the application of the performance scheme to be backdated to 1 July 2004. Any other construction would be inconsistent with the plain words of the agreement.

(2) The plaintiffs all continued to perform their normal duties until 7 September 2004. It followed that, during the period of nearly ten weeks from 1 July 2004 until 7 September 2004, the plaintiffs were involved in performance of their duties for the defendant which was not only capable of being recognised under the agreed performance scheme but was required to be recognised in accordance with that scheme.

(3) The Court did not need to decide whether the period of three months from 8 September 2004, during which some of the plaintiffs were in a pool, should also be taken into account under the performance scheme in order to answer the narrow question posed by the plaintiffs. Thus, the Court did not do so.

(4) There was in fact a period of time commencing on 1 July 2004 and extending at least until 7 September 2004 during which the plaintiffs did work for which they were entitled to recognition under the performance scheme provided for in the terms of settlement reached between their unions and the defendant.

Result: Challenge granted ; No order for costs

Pages: 7

[971993]

King v PPCS Richmond Ltd (formerly Richmond Ltd)

AC 61/05

Heard: 19 Sep 2005 - 20 Sep 2005 (2 days) Auckland

Judgment Date: 19 Oct 2005

Court/Authority/Tribunal: Colgan J

Appearances: S Mitchell ; G Pollak

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Unjustified dismissal – Serious misconduct – Hitting another employee at work – Whether defendant failed to investigate properly plaintiff’s assertion of self defence – Whether defendant failed to consider complainant’s aggressive behaviour towards the plaintiff – Whether fair inquiry – Whether defendant relied wrongly on the plaintiff’s admission that was not properly considered in context – Transitional provisions of the Employment Relations Amendment Act (No 2) 2004 clarified that s103A ERA did not apply – Test of investigative fullness and fairness was not minute and pedantic scrutiny of individual elements of process – Required broad assessment of fairness of investigation in light of seriousness of allegation and potential consequences – Despite infelicities defendant’s investigation full and fair – Even when matter considered from plaintiff’s point of view conduct still capable of being regarded as serious misconduct – Fact that complainant might also have faced summary dismissal did not make plaintiff’s dismissal unjustified – Serious consequences of loss of employment could not cause it to have been unjustified – Dismissal justified in all the circumstances – Meat processor

This was an unsuccessful de novo challenge to a determination of the Employment Relations Authority which held that the plaintiff’s dismissal was justified.

The plaintiff was employed by the defendant as a meat processor. During an argument the plaintiff hit a co-worker (“the complainant”), causing the complainant to be off work for five days and be diagnosed with a sprained jaw. During the defendant’s investigation, the plaintiff admitted striking the complainant and, when asked, said he would do it again. The defendant proceeded to summarily dismiss the plaintiff for serious misconduct.

The Employment Relations Authority found the dismissal justified and rejected the defendant’s claim to a personal grievance.

The broad grounds for the plaintiff’s challenge were (i) that the defendant failed to investigate properly the plaintiff’s assertion that he had acted in self defence when he struck the complainant, (ii) that the defendant failed to take into account the complainant’s aggressive behaviour towards the plaintiff, (iii) that the defendant’s inquiry was conducted unfairly and that that prejudiced his position, and (iv) that the defendant failed to consider all relevant circumstances and relied wrongly on the plaintiff’s admission which was not properly considered in its context.

HELD: (1) Although not referred to at all by the Authority, the relevant provisions of the collective employment agreement governing the employment relationship between the parties were the starting point for determining justification for dismissal. The circumstances of the present case were also governed by the Employment Relations Act 2000 (“ERA”) which included statutory terms and conditions of employment applicable to all employment relationships. The Employment Relations Amendment Act (No 2)

2004 was to be ignored as that came into force after the plaintiff's dismissal. (paras 12-17)

(2) The investigation of an allegation of misconduct that might result in dismissal of an employee was one of those matters to which s 4(1) ERA applied. So there were statutory good faith obligations affecting the defendant's investigations that led to the plaintiff's dismissal. (para 17)

(3) The tests to be applied to determining justification of dismissal were those propounded by the Court of Appeal in *W & H Newspapers Ltd v Oram* (cited below). Although on its face alone, the new s103A of the ERA altering those tests statutorily may have appeared to apply, the transitional provisions of the Employment Relations Amendment Act (No 2) 2004 clarified that was not so. The matter arising in the present case was the plaintiff's dismissal and the justification for it. It took place before the 2004 Amendment Act came into force. (paras 75-76)

(4) The plaintiff had established a prima facie case of unjustified dismissal. However, the Court was satisfied that the defendant had conducted a full and fair investigation into the allegation by the complainant that he was struck by the plaintiff in the course of work. While there were imperfections in the employer's investigative process, long-established case law confirmed that the test of investigative fullness and fairness was not minute and pedantic scrutiny of individual elements of that process but, rather, a broad assessment of its fairness in light of the seriousness of the allegation and its potential consequences. (para 78)

(5) Against the infelicities in the defendant's investigation, there were a number of stark and indisputable conclusions that the defendant was entitled to reach and did reach going directly to the substance of the allegations against the plaintiff. The plaintiff admitted striking the complainant. Even if, as the plaintiff claimed, the grievant had waved his butcher's knife about in the course of an argument with the plaintiff, striking him in the head was, at the very least, a dangerously inappropriate response. The blow delivered by the plaintiff was severe enough to cause the complainant's head gear to be dislodged and to cause him to stumble to one knee. The injury suffered to the complainant as a result of the blow was sufficient to justify his absence from work for several days. Even if it was in self-defence, the plaintiff's blow to the complainant's head was not the application of reasonable force to dissuade the complainant from a threat of violence. Put another way, even considering all relevant matters at their best and from the plaintiff's point of view, the investigation disclosed conduct by the plaintiff capable of being regarded as serious misconduct. (para 81)

(6) In a workplace where employees carry and use very sharp knives as integral work instruments, and there were potential and actual conflicts between different employees undertaking different jobs in what ought to be a co-operative environment, a fair and reasonable employer could have dismissed the plaintiff for his breach of the collective employment agreement's prohibition upon "hitting", "threatening", or "intimidating people". The fact that the complainant, if the plaintiff's account of events were true, might also have faced the prospect of summary dismissal did not make the plaintiff's dismissal unjustified. The very regrettable consequences to the plaintiff of his loss of employment were serious but these too could not cause it to have been unjustified. In all the circumstances, the dismissal had been shown to have been justified. (paras 82-83)

Result: Challenge dismissed ; Costs reserved

Statutes considered:

- ERA s4
- ERA s4(1)
- ERA s4(4)
- ERA s4(4)(b)
- ERA s4(5)
- ERA s103A
- ERA s124(a)
- Employment Relations Amendment Act (No 2) 2004 s73(1)

Cases referred to in judgment:

- Hakaraia v Foodstuffs (Wellington) Co-operative Society Ltd [2001] ERNZ 105
- NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd [1990] 1 NZILR 35
- McGregor v Armour Creations Ltd & Northern Labour District Saddlers & Canvas Workers Union [1990] 1 NZILR 610
- Murphy and Routhan t/a Enzo’s Pizza v Van Beek [1998] 2 ERNZ 607
- W & H Newspapers Ltd v Oram [2000] 2 ERNZ 448

Pages: 21
[972000]

New Zealand Police Association Inc v Commissioner of Police

WC 21/05

Heard: 20 Sep 2005 - 22 Sep 2005 (3 days) Wellington

Judgment Date: 21 Oct 2005

Court/Authority/Tribunal: Travis, Shaw, Couch JJ

Appearances: RM Crotty, SJ Ross ; WM Wilson QC, JC Holden

MATTER REMOVED FROM EMPLOYMENT RELATIONS AUTHORITY – Dispute – Whether collective employment agreement (“cea”) complied with s51 Holidays Act 2003 (“HA”) – Whether payments under the cea for time off in lieu could be used to satisfy the requirements of the HA – Entitlements of staff on standby on public holidays – Whether employer contribution to superannuation fund was part of “relevant daily pay” as defined in s9 HA – Comprehensive salaries contained genuinely negotiated component for work on public holidays – However s51 HA required quantifiable amount – Cea did not meet objectives of s50 and therefore did not attract benefit of s51 – Provision of time off in lieu related to overtime and did not satisfy HA requirements – Staff on standby on public holidays not allowed day in lieu under cea as well as alternative holiday under s59 HA – However were allowed to choose standby allowance as well as alternative holiday under s59 HA – Employer contribution to superannuation fund not part of relevant daily pay for purposes of s9 HA – Sworn member of Police

This was a matter removed from the Employment Relations Authority concerning the compliance with the Holidays Act 2003 of certain aspects of the 2003 Sworn Members Collective Employment Agreement.

For many years, sworn members of the police were paid salaries which included allowances, loadings, penal rates, and compensation for working on public holidays (“comprehensive salary”). In the 2003 Sworn Members Collective Employment Agreement (“cea”), and in its predecessors, compensation for the requirement to work on public holidays was not separately quantified but was included as a component of the comprehensive salary. The cea also allowed employees on standby on public holiday to choose between day of in lieu or payment of a standby allowance.

A dispute arose (i) whether the comprehensive salary provision of the cea complied with s50 and s51 of the Holidays Act 2003 (“HA”); (ii) whether the payments under the cea for time off in lieu could be used to satisfy the requirements of the HA; (iii) what the entitlements were of staff on standby on public holidays; and (vi) whether an employer contribution to a member’s superannuation fund was part of “relevant daily pay” for purposes of s9 HA when a member worked on a public holiday.

The respondent argued that provided there was a component of compensation in the comprehensive salary for working on public holidays it was not necessary to establish the quantum. The respondent argued that while the comprehensive salary could not be determinatively broken down to show the exact dollars and cents attributable to its elements, the fact that it included an allowance for penal rates meant that the pay arrangement met the objectives of s50 HA. Consequently, the transitional provisions in s51 HA validated the comprehensive salary for work done on public holidays until the expiry of the cea.

As to the entitlements of staff on standby on public holidays, the applicant submitted that the standby provisions of the cea, requiring them to be available either immediately or within fifteen minutes, were so restrictive of a member’s freedom of action that a member on standby on a public holiday could not be said to have had a holiday even if not required to return to duty. The applicant submitted that a member who was required to be on standby on a public holiday while on leave was entitled to an alternative holiday pursuant to s59 HA and, in addition, to have a further day in lieu by taking that option under the cea.

The applicant argued the definition of “relevant daily pay” in s9 HA included the employer contribution to members’ superannuation funds.

The respondent argued that “relevant daily pay” was to be defined as the amount of pay an employee would have “received” had the employee worked on the day concerned. The respondent argued that the superannuation contribution was not “received” by the employee, but rather paid to a superannuation fund which held the funds on trust for the ultimate benefit of the member. On that basis, the contribution was not part of the relevant daily pay.

HELD: (1) The comprehensive salary was not a substitute for penal rates. Rather, it incorporated them. There was also clear evidence that the agreement to include public holiday penal rates in the composite rate was genuinely negotiated. The total remuneration provided for in the cea included a component of compensation for members’ requirement to work on public holidays. That composite rate, genuinely negotiated, included recognition not only for rostered work on public holidays but also for the potential for overtime to be worked on public holidays. (paras 31-33)

(2) The word “amount” in s51(3) HA must be either a number or some other means of deriving a number, such as a proportion or a formula, which quantified the component of an employee’s pay attributable to working on public holidays. That view was supported

by s50(2) as amended by the Holidays Amendment Act 2004. That section defined “penal rates” as meaning an identifiable amount. (paras 37-38)

(3) Although the comprehensive salary provided by the cea expressly contained a component intended to compensate an employee for working on a public holiday, there was no formula contained in that document by which an actual amount could be ascertained. Therefore, the requirement of s51(3) HA that an “amount” had been negotiated into the employees’ regular pay had not been met. It followed that the transitional provisions of s51 did not apply to the cea. (paras 39-40, 59)

(4) An additional reason that the cea did not attract the benefit of the transitional provisions in s51 HA was that the objectives of s50 were not met in the present case because it could not be demonstrated that, overall, the comprehensive salary included payment for work done on public holidays at a rate not less than time and a half. (para 47)

(5) As to the entitlements of staff on standby on public holidays, if a member entitled to make an election under the cea chose to have a day in lieu, the provision of that day’s holiday also satisfied the obligation to provide an alternative holiday pursuant to s59 HA. To find otherwise would mean that a member who was on standby on a public holiday and did not work would be in a better position than a member who was actually called in to work on a public holiday. That would be an illogical and unacceptable result. There was also no reason in principle why overlapping and effectively identical obligations under statute and contract could not be satisfied by the provision of the single benefit, which met the requirements of each. That conclusion did not affect the right of a member, who was entitled to make an election under the cea, to choose the standby allowance. In such a case, the member would be entitled to that allowance pursuant to the cea, and to an alternative holiday pursuant to s59 HA. (paras 53-54, 59)

(6) The employer contribution to the member’s superannuation fund did not form part of the relevant daily pay as defined in s9 HA for the purposes of calculating the amount to be paid to members who worked on public holidays. The Court reluctantly accepted the respondent’s submissions because of the inequities it might be seen to create. (paras 58, 59)

COMMENT: (1) Submissions only addressed the questions on the terms of the cea. Consequently, conclusions in the present judgment related only to that agreement. The Court expressed no views as to the provisions of the non-sworn cea. (para 29)

(2) As matters developed at the hearing and during final submissions, the issue whether payments under the cea for time off in lieu could be used to satisfy the requirements HA no longer appeared to be an issue. It was accepted that the provision of time off in lieu related to overtime and did not satisfy the HA requirements. (para 48)

Result: Declarations accordingly ; Costs reserved

Statutes considered:

ERA s178

Holidays Act 2003 s9

Holidays Act 2003 s46

Holidays Act 2003 s50

Holidays Act 2003 s50(2)

Holidays Act 2003 s51

Holidays Act 2003 s51(1)

Holidays Act 2003 s51(2)
Holidays Act 2003 s51(3)
Holidays Act 2003 s51(3)(a)
Holidays Act 2003 s51(3)(b)
Holidays Act 2003 s55
Holidays Act 2003 s59
Holidays Act 2003 s59(2)
Holidays Act 2003 s59(3)
Holidays Amendment Act 2004 s6
Police Act 1958 s5
Police Act 1958 s30(1A)
Police Act 1958 s37
Police Act 1958 s67
Police Regulations 1992

Words and phrases: Amount ; Non-sworn member of the Police ; Sworn member of the Police ; Relevant daily pay

Cases referred to in judgment:

Tucker Wool Processors Ltd v Harrison [1999] 1 ERNZ 894

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Saint Kentigern Teachers Ass Inc v Saint Kentigern Trust Board

AC 63/05

Heard: 21 Oct 2005, Auckland

Judgment Date: 26 Oct 2005

Court/Authority/Tribunal: Colgan J

Appearances: S Mitchell ; R Harrison

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Dispute – Interpretation of collective employment agreement (“cea”) – Defendant sought to appoint existing employees to temporary management positions – At end of management term employee could re-apply but if unsuccessful would return to previous permanent position – Whether temporary management appointments permitted by cea – Cea did not preclude such appointments – Whether lawful under s66 Employment Relations Act 2000 – Section 66 addressed situations where at end of fixed term employee would no longer be employed – In present case employees did not lose entire employment at end of fixed term - Employment was as teacher with additional temporary managerial responsibilities – Section 66 did not apply – Even if s66 applied Court was inclined to find genuine reasons based on reasonable grounds for fixed term – Challenge dismissed – Teachers

This was an unsuccessful de novo challenge to a determination of the Employment Relations Authority which held that the plaintiff’s members’ employment agreement was not for a fixed term although the additional responsibilities were for a finite period.

Members of the plaintiff union were employed by the defendant as teachers in a non-state school, pursuant to a collective employment agreement (“cea”). The defendant wished to allocate a number of “head of house” management positions to certain teachers on a temporary basis. The role included additional responsibilities and remuneration. However, 60 percent of a head of house’s duties involved continuing classroom teaching. At the end of a term as head of house, the teacher could re-apply for the position and, if unsuccessful, he or she would return to his or her previous permanent position as a teacher. The remuneration clause of the cea expressly allowed for “management units”, based on the State salary rates, to be awarded to teachers who undertook specific management tasks.

The first question was whether such temporary management appointments were contemplated and permitted by the cea. However, the heart of the present case was whether the temporary promotion to a managerial position amounted to “fixed term employment” under s66 Employment Relations Act 2000 (“ERA”).

The plaintiff’s principal argument was that despite the continuation of an employment relationship between the defendant and a teacher at the conclusion of the temporary promotion to a managerial position, the “employment” (of the head of house position) of the employee would end. The plaintiff submitted that a teacher promoted to a head of house position took on a “whole new role” including substantial additional and different duties. It argued that the “head of house” position was “employment” contemplated by s66 ERA.

In response, the defendant argued that the employee’s “employment” was and remained as a teacher but with temporary additional managerial responsibilities, and that s66 ERA did not apply.

HELD: (1) It was significant that management units for teachers in the state sector might, by express agreement in the relevant cea, be for fixed terms. Although the cea in the present case addressed the position in a non-state school, there was a direct linkage in the present cea with “the State rate” addressing the formula for calculating the remuneration for the unit. The acceptance of fixed term management unit eligibility in teaching generally was a well established fact and a helpful guideline in interpreting the cea. (para 12)

(2) Although the relevant clause in the cea addressed remuneration rather than appointments to managerial positions, the cea did not prohibit or otherwise constrain the defendant from making temporary managerial promotions as part of which management units were paid to teachers. The cea did not preclude such arrangements. (para 13)

(3) Case law that preceded the s27 Employment Relations Amendment Act (No 2) 2004 amendments to s66 ERA did not deal with the issue in the present case. That was because those judgments dealt with situations of employees on fixed term contracts who lost their entire employments with their employers at the conclusion of those terms. In the present case, employees would not lose their entire jobs with the defendant but rather would resume their former roles. (paras 15, 19)

(4) It were the consequences of earlier cases decided by the courts before 2000 that Parliament purported to address in constraining, but not outlawing, fixed term contracts of employment or employment agreements when enacting s66 ERA. Job losses, sometimes after many successive fixed term agreements, were the undesirable outcomes that Parliament sought to avoid by enacting a regime that was intended to make fixed term employment transparent and dependent upon the establishment of a series of tests of

justification and clear notice imposed on employers. (para 19)

(5) The parties had not agreed that the employment of the teachers would end in any one of the three circumstances described in s66(1) ERA. Such teachers would continue to be employed by the defendant. A broad, rather than a narrow, concept of “employment” was intended by Parliament so that s66 addressed situations where, at the end of a specified period or after a specified event, or at the conclusion of a specified project, an employee would no longer be employed by the employer. Here, that would not be so. (para 21)

(6) The head of house position was not the employment contemplated by s66 ERA. The Court agreed with the Employment Relations Authority that the “employment” was employment as a teacher with additional temporary managerial responsibilities. It followed that s66 was not applicable to the circumstances of the present case. (para 22)

COMMENT: (1) Even if s66 ERA had applied, the Court would have been inclined to find the existence of a genuine reason based on reasonable grounds for the fixed terms. That was the wish to give a range of teachers experience of managerial tasks without requiring them to commit irrevocably to a “permanent” management position. (para 23)

Result: Challenge dismissed ; Costs reserved

Statutes considered:

- ERA s66
- ERA s66(1)
- ERA s66(2)(b)
- Employment Relations Amendment Act (No 2) 2004 s27

Words and phrases: Employment

Cases referred to in judgment:

- Clarke v Norske Skog Tasman Ltd [2003] 2 ERNZ 213 (EC)
- Norske Skog Tasman Ltd v Clarke [2004] 1 ERNZ 127; [2004] 3 NZLR 323 (CA)
- Principal of Auckland College of Education v Hagg [1997] ERNZ 116; [1997] 2 NZLR 537

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Significant Judgments/Decisions added to the Employment Law Database

1 March 2006 - 31 March 2006

Under the Employment Contracts Act 1991

NCR (NZ) Corporation Ltd v Blowes

CA 186/04

Heard: 24 Aug 2005, Wellington

Judgment Date: 23 Sep 2005

Court/Authority/Tribunal: Robertson, Williams, Wild JJ

Appearances: PT Kiely, DJ France ; PA Morten

COURT OF APPEAL – Appeal against decision of Employment Court – Redundancy – Non-economic loss – Respondent employed for ten years by appellant – Seven years later respondent “head hunted” back to appellant – Four years later respondent assigned to overseas project but advised of likely redundancy five months later – Employment Court found respondent entitled to redundancy for entire length of service – Not treated fairly through redundancy process and awarded \$15,000 compensation – Appellant alleged no evidentiary basis for Employment Court’s findings – Employment Court’s findings upheld – Alleged error in interpreting redundancy provisions of employment agreement – Had it been necessary for the Court to consider that ground would have been dismissed – Alleged \$15,000 compensation for unjustified dismissal erroneous in law – In circumstances \$15,000 compensation so excessive as to be wrong in law – Reduced to \$7,000 – Project manager

This was a partially successful appeal from the Employment Court, in which the Court of Appeal reduced the respondent’s award for humiliation etc.

The respondent first worked for the appellant in New Zealand from 1976 to 1986. After a period of employment elsewhere he was “head-hunted” back to the appellant in 1993. In 1997, on the appellant’s urging, he applied for a position on assignment in Melbourne, Australia, to which he was appointed. The appointment involved a specific project (“the project”) which was estimated, but not guaranteed, to last two to three years. He and his wife, having sold her business to accompany the respondent, relocated to Melbourne. Five months into the assignment the appellant decided to abandon the project. The respondent was advised of the likely redundancy during an unexpected conference call from a restaurant carpark. Nine weeks later he was offered the option of returning to his old position in Wellington or electing to take a redundancy package. The respondent elected to take redundancy. He was required to continue working in the “wind-down” phase of the assignment, and the payment to him of his redundancy was conditional on his continuing to perform. The stress he experienced required medical intervention. The appellant refused to take into account the respondent’s first period of service when

calculating his redundancy compensation.

The Employment Court found that the respondent was entitled to redundancy compensation for his entire length of service with the appellant. The Court found that the respondent had not been treated fairly and reasonably throughout the redundancy process and awarded him \$15,000 compensation for humiliation and distress.

In its first ground of appeal the appellant submitted that there was no evidential basis to support the Employment Court's finding that the respondent's prior service was to be recognised for calculating redundancy compensation, and that the respondent was not treated fairly and reasonably during the redundancy process. It submitted the Employment Court had impermissibly implied into the employment agreement a redundancy entitlement. In its second ground of appeal it submitted that the Employment Court had erred in interpreting the employment agreement's redundancy entitlement. In its third ground of appeal the appellant submitted that there was no evidence to support any compensation award for humiliation and distress, or, alternatively, that any evidence there was justified an award of no more than \$7,000.

HELD: (1) As to the first ground of appeal, the Employment Court's findings did not lack proper evidentiary basis. The Tribunal had the respondent's uncontroverted evidence that he had accepted re-employment with the appellant in 1993 on the basis that his service would be regarded as continuous for employment purposes. A final piece of evidence was that the respondent received from the appellant his 15 year long service pin just a few days before the respondent was given formal notice of termination. There was an evidentiary basis for the Employment Court's finding that the respondent had a contractual entitlement to have his redundancy calculated on the basis of all his service with the appellant. (paras 14-20)

(2) The Employment Court did not err by impermissibly implying into the employment agreement a redundancy entitlement. The Employment Court found that the redundancy entitlement to which it gave effect was in the respondent's employment agreement with the appellant; the Employment Court did not somehow add such an entitlement to the agreement. The orally negotiated term together with the written terms comprised the respondent's employment agreement with the appellant. (para 21)

(3) The evidence supported the Employment Court's finding that, for redundancy purposes, the respondent's service with the appellant was his entire 15 years' service, despite the break in it. The Court was satisfied also that there was a proper evidentiary basis for the Employment Court's finding that the appellant did not treat the respondent fairly and reasonably during the redundancy process. (para 26)

(4) As to the second ground of appeal, it was unnecessary for the Court to consider the alleged error in interpreting the redundancy provisions of the employment agreement because the Court had found against the appellant regarding whether the respondent's prior service could be recognised for calculating redundancy compensation. Had it been necessary to consider that ground, the Court would have dismissed it. The Court agreed with the Employment Court's approach to the interpretation of the redundancy provision in the respondent's employment agreement. (paras 27-29)

(5) As to the third ground of appeal, the \$15,000 award for non-economic loss made by the Employment Court was, in the circumstances of the present case, so excessive as to be wrong in law. The circumstances of unjustified dismissals and unjustified disadvantage in employment were infinitely variable. But the \$20,000 award upheld by Court of Appeal in 1992 in *Telecom South v Post Office Union* (cited below) must have

been at or near the upper end of the permissible range. (paras 39, 40)

(6) Allowance had to be made for inflation during the 13 years which had elapsed since *Telecom South v Post Office Union* (cited below) was decided. Applying the Consumer Price Index increase during that period, \$20,000 yielded \$26,852. The upper end of the permissible range of compensatory awards for non-economic loss might need to be lifted to \$27,000 to allow for inflation. (paras 41, 42)

(7) The Court did not consider the circumstances of the respondent's case justified an award sitting between halfway and two-thirds of the way up the permissible range. What happened to the respondent was not, in terms of its consequences, half as serious as what happened to the grievant in *Telecom South v Post Office Union* (cited below), let alone comparatively more serious than that. (para 43)

(8) The respondent was not humiliated. He was not abruptly or brutally dismissed. He was dealt with insensitively. His particular predicament, as the only expatriate affected by the abandonment of the project, was not recognised by the appellant or, if it was, was not appropriately dealt with by the appellant. The Court did not consider that the circumstances justified the award of \$15,000 made by the Employment Court, when compared with the amount and circumstances of other awards. (para 44)

(9) The decision of the Court of Appeal in *Aoraki Corporation Ltd v McGavin* (cited below) further reinforced the Court's view that the Employment Court's \$15,000 award for non-economic loss was considerably too high. (para 45)

(10) The Court found some more general support for the view that an award of \$15,000 was altogether too high in the Employment Relations Service statistics. For the 2004 calendar year, the Employment Court and the Employment Relations Authority made awards for non economic loss of \$15,000 or over in only 2.5 percent of cases. The Court could not accept that the circumstances of the present case put it in the top 2.5 percent of awards for non-economic loss in cases which included unjustified dismissal. (para 47)

(11) The highest award justifiable was \$7,000. Accordingly, the Court quashed the award of \$15,000 made by the Employment Court and substituted an award of \$7,000. (para 48)

Result: Appeal allowed in part ; Compensation award by Employment Court set aside ; Compensation for humiliation etc (\$7,000) ; No order for costs

Statutes considered:

ECA s40(1)(c)(i)

ECA s135

Cases referred to in judgment:

Aoraki Corporation Ltd v McGavin [1998] 3 NZLR 276 ; [1998] 1 ERNZ 601

Blowes v NCR NZ Corporation Ltd unreported, Colgan J, 22 July 2004, AC 40/04

Bryson v Three Foot Six Ltd [2005] NZSC 34 ; [2005] 3 NZLR 721

Edwards (Inspector of Taxes) v Bairstow [1956] AC 14 ; [1955] 3 WLR 410 ; [1955] 3 All ER 48

McKimmie v Thomson [1962] NZLR 963

Talbot v Air New Zealand Ltd [1996] 1 NZLR 414 ; [1995] 2 ERNZ 356

Telecom South v Post Office Union [1992] 1 ERNZ 711 ; [1992] 1 NZLR 275

Telecom New Zealand Ltd v Nutter [2004] 1 ERNZ 315

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[971894]

Waitakere City Council and Anor v Ioane and Anor

CA 21/03 CA 113/03

Heard: 6 Sep 2005, Wellington

Judgment Date: 27 Sep 2005

Court/Authority/Tribunal: Anderson P, Hammond, William Young JJ

Appearances: JE Latimer, MG Berryman ; PJ Pa'u

COURT OF APPEAL – Appeal against decision of Employment Court – Unjustified dismissal – Procedural unfairness – Appeal against level of compensation awarded by Employment Court – Alleged respondent’s contributory conduct warranted no award of compensation – If fair procedure would inevitably result in justified dismissal, procedural infelicities associated with dismissal did not warrant award of compensation – The “situation that gave rise to the personal grievance” extended to entire history of dispute – Respondent author of his own misfortune – Probable that appellants would have dismissed respondent if appropriate procedure followed – Substantial diminution of remedies by 75 percent – Parking warden

This was a successful appeal from the Employment Court in which the Court of Appeal reduced the compensation awarded to the respondent.

The respondent was employed as a parking warden in 1995. Towards the end of 1998 a number of employment difficulties arose. The respondent had a number of meetings about those difficulties with his team manager and the Field and Services Unit manager, before he was dismissed by the Director of Operations. The respondent raised a personal grievance.

The Employment Tribunal dismissed the respondent's personal grievance claim. The Tribunal indicated that, had the dismissal been procedurally unfair, it would have declined to award a remedy due to the respondent’s 100 percent contributory conduct.

The Employment Court accepted the Tribunal's findings of fact: that the appellants had grounds for complaint against the respondent which, substantively, were sufficient to justify dismissal. However, the Employment Court found that the dismissal was procedurally unfair. The Employment Court found that the team manager and the Field and Services Unit manager did not have the power to dismiss the respondent. That power vested in the Director of Operations, and he had made the decision to dismiss when he had not had direct personal contact with the respondent. In a further judgment, the Employment Court declined to reinstate the respondent but awarded compensation of \$67,666 (\$60,166 reimbursement of lost wages and \$7,500 for compensation for humiliation etc), with no reduction for contributory conduct.

The appellants appealed against the Employment Court's decision not to reduce the compensation awarded for contributory conduct. By way of cross-appeal, the respondent appealed against the Employment Court's decision to decline to make an order for reinstatement. The Court of Appeal allowed the appellants’ appeal and indicated that the Court would fix compensation if the parties were unable to agree. The cross-appeal was dismissed.

The parties were not able to reach agreement about the level of compensation.

The appellant submitted that the level of contributory conduct was so great that no award of compensation should be made. The respondent submitted that the reduction should be no more than 10-15 percent.

HELD: (1) Actual loss suffered by an employee set the upper ceiling on an award which could be made. If the employee had suffered no loss, no award of compensation was appropriate. It followed, therefore, that if a fair procedure would inevitably have resulted in a justified dismissal, procedural infelicities associated with the dismissal did not warrant an award of compensation. So the fixing of a maximum sum for compensation must reflect the likelihood, where it was relevant, that had a proper procedure been followed, the employee would have been dismissed. (para 28)

(2) The case for the appellant was not run on a loss of a chance basis either in the Employment Tribunal or the Employment Court. Had it been run on that basis, the Court would have expected the Director of Operations to give evidence and a notable feature of the present case was that he did not do so. In those circumstances the Court proposed to determine the case by reference to ss 40 and 41 of the Employment Contracts Act 1991 (“ECA”), albeit that the quality and significance of an employee’s misconduct could not be assessed without considering whether it would have warranted dismissal had a fair process been followed. Given that, the likelihood of dismissal if a fair process had been followed was necessarily part of the exercise required by ss 40 and 41. (para 29)

(3) Sections 40 and 41 ECA referred to “the situation that gave rise to the personal grievance”. That language was to be considered broadly and, in the present context, extended to the entire history of the dispute between the respondent and his superiors. In other words, the assessment required by ss 40(2) and 41(3) was not confined to considering whether the actions of the respondent were causally linked to the procedural infelicities that resulted in the decision that his dismissal was procedurally unjustified, see *Ark Aviation Ltd v Newton* (cited below). (para 30)

(4) The respondent was very much the author of his own misfortune. Any award of compensation would be entirely unjust if it did not reflect that reality. Further, it was important to recognise that even at the hearing before the Employment Tribunal (some 12 months after the dismissal) the respondent was still displaying the same sort of attitude which was at the heart of the breakdown of the relationship between him and his team manager. (para 31)

(5) It was unfortunate that the decision to dismiss was so heavily influenced by the team manager and the Field and Services Unit manager given that they were the managers who were primarily in the firing line in the appellant’s interactions with the respondent. That supported the respondent. How the Director of Operations would have addressed the issue had he been fully engaged in the process to dismiss the respondent was necessarily a matter of speculation. (para 32)

(6) The Court’s impression of the present case as a whole was that if the Director of Operations had become fully engaged in the decision whether or not to dismiss the respondent, and in particular, if there had had been personal interaction with the respondent, a dismissal would not necessarily have resulted. However, the fact remained that the situation which developed was basically the fault of the respondent and the probabilities were that the appellant would have dismissed him for misconduct if an appropriate procedure had been followed. In those circumstances there must be a

substantial diminution in the remedies quantified by the Employment Court. Accordingly, the Court reduced the award made to \$17,000 (representing broadly a 75 percent reduction from what would otherwise have been appropriate). (paras 34, 35)

Result: Appeal allowed ; Compensation (\$17,000) ; No order for costs

Statutes considered:

- ECA s40
- ECA s40(2)
- ECA s41
- ECA s41(3)
- ECA s135(3)

Cases referred to in judgment:

- Ark Aviation Ltd v Newton [2002] 2 NZLR 145 ; [2001] ERNZ 133
- Ioane v Waitakere City Council unreported, BW Stephenson, 14 March 2001, AT 28/01 (ET)
- Ioane v Waitakere City Council [2003] 1 ERNZ 104 (EC)
- Ioane v Waitakere City Council unreported, Goddard CJ, 2 April 2003, AC 1A/03 (EC)
- Ioane v Waitakere City Council [2004] 2 ERNZ 194 (CA)
- Ioane v Waitakere City Council (2004) 17 PRNZ 399 ; [2004] 2 ERNZ 552 (SC)
- Telecom New Zealand Ltd v Nutter [2004] 1 ERNZ 315

Other workers/site names etc: Ioane, Waitakere City Council

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[971902]

Arrears - Employment Relations Act 2000

Culley v Martin t/a Starlight Funeral Services

31 Jan 2006, J Crichton, CA 14/06, (4 pages)

ARREARS OF WAGES - Whether wages owing - Applicant alleged parties agreed that respondent was to pay her "under the table" hourly rate - Also alleged there was no employment agreement, and that loan she made to respondent did not signify to her that respondent was in financial difficulty - Respondent's witnesses alleged that there was no commitment made to pay any wages at all, and that applicant was there exclusively for work experience purposes - Reason no wages were paid over specified period was because respondent had no money, and evidence for this was loan respondent took out with applicant - Evidence supported view that no arrangement was made to pay applicant during specified period - No wages due - Dispute over identity of employer now academic

Result: Application dismissed ; Costs reserved

Kumar v Cool Units Ltd

20 Jan 2006, YS Oldfield, AA 12/06, (3 pages)

JURISDICTION - No appearance by respondent because respondent was about to be placed in voluntary liquidation - Since liquidation had not yet taken place Authority proceeded to determine matter - Whether employee or independent contractor - Applicant first employed by respondent in 2002 - Subsequently worked for respondent again for one week in 2005 - Was not paid so did not work after that - Respondent alleged he took applicant on as contractor - Insufficient evidence to establish that it was agreed applicant's status would be different than when employed in 2002 - Applicant was employee - ARREARS OF WAGES - No dispute some payment owed - Authority found rate of pay was \$18 per hour - Respondent alleged arrears had been paid in part - Authority accepted applicant's evidence that part payment was not made - Applicant entitled to payment for 45 hours at \$18 per hour - Fish tank constructor

Result: Application granted ; Arrears of wages (\$810)

Reij and Anor v Cammand Holdings Ltd

18 Jan 2006, P Cheyne, CA 1/06, (7 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - First applicant ("R") involved in relationship with respondent's sole director ("M") - R lived on respondent's premises and helped with its operation - Relationship ended and R moved out - Authority accepted R's evidence that M asked her to continue her duties with respondent as an employee on salary - Second applicant ("C") worked for respondent as head chef - C and R commenced relationship - Fight occurred between M and C - Authority found that M abused C, C hit M and then M hit C back - M told C he was sacked and told R she was banned from premises - Respondent sent letter to C accusing him of serious misconduct - Whether C's dismissal justified - Inevitable that punching employer would compromise serious misconduct justifying summary dismissal by fair and reasonable employer despite provocation - C's dismissal justified - Whether R's dismissal justified - No attempt by respondent to justify R's dismissal - Unjustified dismissal - Remedies - No power to compensate R for M's abuse, assault and dismissal of C - Untrue comments M made about R's drug use and mental health sufficiently connected with dismissal to be compensatable - Repayment of R's loan not part of oral employment agreement - Various personal items R left at premises were because of personal relationship not employment so no orders in respect of those - ARREARS OF WAGES - C alleged

he was owed bonus and salary - Parties did not agree on targets for bonus so bonus claim not made out - Authority accepted C's evidence about salary owing - R entitled to week's salary but necessary to deduct items purchased by R on respondent's account

Result: Application dismissed (C's unjustified dismissal claim) ; Application granted (R's unjustified dismissal and C and R's arrears claims) ; Reimbursement of lost wages (\$11,750)(3 months) ; Compensation for humiliation etc (\$6,000) ; Arrears of wages (C)(to be calculated by parties) ; (R)(\$1,084.65) ; Other monies (R to pay respondent)(\$512.24) ; Costs reserved

Bargaining - Employment Relations Act 2000

NUPE v Legal Services Agency

30 Mar 2006, H Doyle, CA 45/06, (4 pages)

BARGAINING - Reference for facilitation - Applicant alleged bargaining had been unduly protracted under s50C(1)(b) ERA - Respondent's employees currently on individual employment agreements (green fields situation) - Applicant had about 20 members working for respondent out of about 90 grants staff whose work could potentially be covered by a collective employment agreement - Since July 2004 there had been meetings, correspondence and offers, mediations and low level industrial action but no concluded collective agreement - Authority needed to be satisfied that bargaining had been unduly protracted and that extensive efforts which included mediation had failed to resolve difficulties that precluded parties from entering into collective agreement - Where there was no existing relationship it could take longer for parties to conclude collective agreement - Balanced against that there were only about 20 union members employed by respondent, and limited occupational groups of members who could potentially be covered - Parties attended mediation for third time in knowledge that application for reference to facilitation before Authority - Authority accepted that, with assistance of mediator, parties did make real effort to resolve difficulties but could not do so - Authority satisfied bargaining unduly protracted - Parties referred to Authority for facilitation - Both parties agreed Wellington was suitable venue for facilitation - COSTS - Parties agreed costs to lie where they fall

Result: Application granted ; Orders accordingly ; Costs to lie where they fall

Breach of Contract - Employment Relations Act 2000

Ranburn Rest Home Ltd t/a Ranburn Home & Hospital v Senora

29 Mar 2006, RA Monaghan, AA 95/06, (8 pages)

BREACH OF CONTRACT - Applicant alleged respondent was employed for minimum term of three years, and she breached agreement by resigning after less than four months - Sought damages for respondent's airfare, board and lodgings and tuition, recruitment fee, expenses in finding replacement, and time spent on matter by applicant's director - Applicant was client of recruitment agency ("AIMS"), and AIMS assisted in recruitment of respondent from Philippines - AIMS sent respondent a purported agreement between respondent and an employer (yet to be named) which provided that employer offered to pay certain costs for immigration to New Zealand and that respondent agreed to work for minimum period of time - No suggestion applicant ever became party to this document - Agreement between AIMS and respondent amounted to a "loan" of \$5,600 (covering tuition, airfare and board and lodging) which was repayable to AIMS if respondent left employment before end of three years - Applicant paid AIMS for this "loan" and now sought to recover it from respondent - Respondent accepted she owed applicant \$5,600 - Applicant approached employment relationship on basis that it could compel respondent to work for entire three year period - Common law prohibition on servile incidents of employment - Nothing in parties' written employment agreement provided for minimum term of three years - Documents showed no clear distinction between possible stand-alone minimum term and bond arrangement - No meeting of minds that there was agreed minimum term of employment - Respondent understood she was expected to work for three years but was also entitled to conclude she could leave earlier but repay "loan" if she did - Authority considered it a stretch to say respondent's obligations concerning repayment of "loan" related to or arose out of employment relationship, but ordered respondent to pay applicant \$5,600 - Authority did not accept respondent's alternative submissions that rectification or relief under Contractual Mistakes Act 1977 available - PENALTY - Applicant sought penalty for breach of good faith under s4A Employment Relations Act 2000 - Section 4A did not say whether applications for such penalties were within jurisdiction of Authority or Court - Not enough evidence to persuade Authority that respondent deliberately set out to use her employment with applicant to do no more than obtain work and residence permits - Even if purported resignation for health reasons was spurious, that did not necessarily mean she acted in bad faith in entering into relationship - COUNTERCLAIM - PENALTY - Respondent sought penalty under s63A ERA - Applicant alleged respondent received advice about employment agreement through AIMS - AIMS did not have authority to represent respondent in matters arising out of her rights as an employee - Applicant in breach of s63A ERA but not in interests of justice to order penalty - Costs reserved - Nurse

Result: Application granted ("loan" damages) ; Damages (\$5,600)(airfare, tuition, board and lodging) ; Application dismissed (other damages, penalties) ; Counterclaim dismissed

Compliance Order - Employment Relations Act 2000

Hakiwai v Marshall t/a The \$15 Salon

27 Jan 2006, GJ Wood, WA 10/06, (1 pages)

COMPLIANCE ORDER - Parties entered into confidential settlement in which respondent agreed to pay \$3,000 by way of instalments - Respondent had not made any payments due to applicant - Applicant applied for compliance order - At investigation meeting respondent offered to pay applicant weekly instalments of \$100 - Agreed Authority would adjourn employment relationship problem

Result: Orders accordingly ; No order for costs

Henning v Thompson

23 Jan 2006, J Crichton, CA 2/06, (2 pages)

COMPLIANCE ORDER - Compliance with demand notice sought - No objection to demand notice - No appearance for respondent - Satisfied that demand notice was properly served on respondent - Respondent directed to comply with demand notice within 14 days of determination

Result: Compliance ordered ; Costs to lie where they fall

McLeman v New Zealand Commercial Care Ltd

23 Jan 2006, J Crichton, CA 3/06, (2 pages)

COMPLIANCE ORDER - Applicant sought compliance with two Authority determinations - First determination ordered respondent to pay arrears of wages and holiday pay plus interest - Second determination ordered respondent to pay costs - Respondent had not paid any of the sums ordered in determinations - Respondent ordered to comply with determinations by specified date

Result: Application granted ; Compliance ordered ; Disbursements in favour of applicant (\$70)(Filing fee)

Safe Site Systems Ltd v Bee

16 Jan 2006, R Arthur, AA 9/06, (3 pages)

COMPLIANCE ORDER - Enforcement with mediated settlement sought - No appearance by respondent - No payments made by respondent as agreed under settlement - Applicant entitled to orders to enforce terms of agreement - Respondent liable to pay entire amount without delay - Ordered to pay \$1,040 no later than specified date - Further payments each fortnight until debt paid in full - Leave reserved for applicant to make immediate further application to Authority including applying for penalty in the event respondent further breached terms of agreement or did not comply with orders in determination

Result: Compliance order granted ; Orders accordingly ; Disbursements in favour of applicant (\$70)(Filing fee)

Turkish House Ltd t/a Techloom Carpet & Rug Creations v Goris and Ors

18 Jan 2006, J Wilson, AA 10/06, (6 pages)

COMPLIANCE ORDER - DAMAGES - In 2003, applicant had asked Authority to issue injunctions against first respondent, restraining him from continuing his employment with the second respondent - Also sought to enforce a restraint of trade clause - Matter settled by settlement deed - Deed provided that applicant withdrew

proceedings and respondents would not undertake certain activities - First respondent was ex-employee - Second respondent was ex-employee's new employer - Third respondent was from second respondent - Private investigator hired by applicant sought suggestions for interior design - Alleged respondents' response was in breach of deed - Sought damages - Even if it could be said that respondents breached deed, such breach did not cause any financial damages to applicant since private investigator did not purchase a rug from anyone - No evidence given that respondents carried out any commercial activity in breach of deed - Also, first respondent had not been employed in this line of business since February 2004 so was extremely unlikely to have breached the deed since then - Little chance of applicant proving claims - Also, while not a consideration that the Authority should give undue weight to, if such losses could be established, it was unlikely that those would be of such a magnitude as to justify the legal and other expense expended by the various parties

Result: Application dismissed ; Costs reserved

Costs - Employment Relations Act 2000

Aarts v Red Bus Ltd

30 Jan 2006, P Cheyne, CA 11/06, (2 pages)

COSTS - Unsuccessful dispute - 2½ hour investigation meeting - Respondent sought contribution of \$4,000 to costs of \$17,800 (excluding mediation) and reasonable contribution to disbursements of \$500 - Applicant alleged costs should lie where they fall - Matter could be seen as a dispute but also a claim by applicant for arrears following on from his view of the contractual requirements - Could not be seen as a test case - Case for modest award of costs

Result: Costs in favour of respondent (\$700)

Carlton v Geary

24 Jan 2006, P Montgomery, CA 5/06, (4 pages)

UNJUSTIFIED DISMISSAL - No written employment agreement - Applicant alleged she was employed for trial period of two months and when this passed she became permanent employee - Respondent alleged applicant employed on casual, job-by-job basis - Parties had totally different goals and when work the respondents required to be done was achieved, they advised applicant her services no longer needed - Authority found that employment was fixed term agreement which would come to an end when tasks set out for applicant had been completed - Applicant not a casual employee and nor was she offered ongoing employment - Dismissal not unjustified because work required of applicant had come to an end - UNJUSTIFIED DISADVANTAGE - Applicant unjustifiably disadvantaged in that respondent's failure to provide written employment agreement led directly to confusion that followed - COSTS - Length of investigation meeting not specified - Just to award applicant \$400 as contribution to reasonably incurred costs - Vineyard worker

Result: Application dismissed (unjustified dismissal) ; Application granted (unjustified disadvantage) ; Compensation for humiliation etc (\$500) ; Costs in favour of applicant (\$400)

Church v Gunton Farms Ltd

30 Jan 2006, H Doyle, CA 10/06, (2 pages)

COSTS - Unsuccessful constructive dismissal claim but Authority found applicant was unjustifiably dismissed during notice period - One day investigation meeting - Applicant sought contribution of \$3,500 to costs - Respondent alleged it was more successful overall and should receive contribution of \$6,238 to costs - Not satisfied that this a case for depriving applicant of costs entirely - However evidence about constructive dismissal claim took much of investigation meeting - Usual daily rate of \$2,000 per day appropriate but this reduced because applicant not successful with respect to major claim

Result: Costs in favour of applicant (\$800) ; Filing fee (\$70)

An Employee v An Employer

27 Jan 2006, P Cheyne, CA 9/06, (2 pages)

COSTS - Unsuccessful personal grievance - One day investigation meeting - Respondent sought full solicitor/client costs of \$9,500 - Applicant alleged award of no more than \$2,000 appropriate - Not a case for award of full costs - Adjustment of usual range of costs would deal with extra time visited on respondent due to very

large volume of irrelevant material provided by applicant - Matter could not properly be described as straightforward one day investigation meeting - Application of notional daily rate not appropriate in present case - Modest award of costs in present circumstances was \$5,000

Result: Costs in favour of respondent (\$5,000)

Green v Marexim Export-Import Ltd

13 Jan 2006, RA Monaghan, AA 6/06, (2 pages)

PRACTICE AND PROCEDURE - Authority previously determined costs against applicant - Mistakenly believed both parties had made submissions on costs issue - In interests of justice that part of investigation relating to costs be reopened for purpose of considering applicant's submissions - COSTS - Unsuccessful unjustified dismissal claim and application to raise unjustified disadvantage claim out of time - Length of investigation meeting not specified - Applicant alleged costs should lie where they fall - Allegations about respondent's evidence at investigation meeting - Nothing to indicate that any matters complained of added to applicant's costs in sense they should be reflected in order for costs - Applicant alleged he had made a Calderbank offer - Calderbank letters province of respondents, not applicants, and applicant was losing party - Conclusion on costs had not changed from original determination - Costs in favour of respondent

Result: Orders accordingly ; Costs in favour of respondent (\$2,200)

Hutchinson v Impexpersonnel Ltd

26 Jan 2006, L Robinson, AA 15/06, (2 pages)

COSTS - Unsuccessful personal grievance - One day investigation meeting - Respondent sought full costs of \$5,500 and disbursements of \$132 - Respondent entitled to costs on contribution basis rather than full indemnity - Notional sum of reasonable costs \$3,000 - Contribution of \$2,000 including disbursements appropriate - No express amendment to Employment Relations Act 2000 allowing payment of costs by way of instalment - However Employment Court had held its identical costs discretion permitted payment by periodic instalment - Authority did too and invited parties to reach mutually acceptable payment schedule to discharge costs award, with leave reserved if no agreement reached

Result: Costs in favour of respondent (\$2,000) ; Orders accordingly

Khan v Uno Design Ltd

26 Jan 2006, L Robinson, AA 14/06, (2 pages)

COSTS - Authority determined applicant not an employee so not entitled to recover arrears of wages - One day investigation meeting - Respondent sought 70 percent of actual costs of \$5,250 - Weighed significantly with Authority that applicant provided her labour to respondent for one year unremunerated - In circumstances, and in equity and good conscience, neither party should have costs against the other

Result: Costs to lie where they fall

Muir v Savour & Devour Ltd

2 Feb 2006, R Arthur, AA 21/06, (2 pages)

COSTS - Successful personal grievance - One day investigation meeting - Applicant sought full costs of \$11,500 - Respondent alleged award of about \$2,000 appropriate - Applicant raised concern about income lost as result of dismissal - Respondent referred to its success in resisting urgency application and reinstatement, and finding

of contribution on applicant's part - These factors not relevant to costs - Notional sum of reasonably incurred costs \$4,000 and applicant entitled to reasonable contribution to that - Authority noted that applicant's actual legal costs appeared to have taken most, if not all, of remedies he received and costs he was awarded - Matter applicant may have wished to discuss with his representative

Result: Costs in favour of applicant (\$3,000)

Mullay v Southern Institute of Technology

31 Jan 2006, H Doyle, CA 15/06, (4 pages)

COSTS - Unsuccessful personal grievance - Applicant on legal aid - Whether exceptional circumstances justified an order of costs that exceeded amount of applicant's contribution to legal aid (\$50) - Applicant put on notice by respondent that her claim was problematic - Sensible settlement proposal by respondent - Several amendments to nature of applicant's problem, but this not exceptional - Adjournment not exceptional - Unusual that evidence from applicant's own witness did not support applicant's claim as reframed several times - Not in itself exceptional but suggested strengths and weakness of applicant's case not carefully analysed - Claim and how it was progressed came perilously close to exceptional but on balance did not reach high threshold required - Respondent sought order specifying what order for costs would have been made against applicant if not legally aided - Appropriate to do so - Respondent's actual solicitor/client costs and disbursements \$10,519 - One day investigation meeting - Balancing issues previously discussed against applicant's financial position, fair and reasonable award would have been \$4,350 if applicant not legally aided

Result: Costs in favour of respondent (\$50) ; Orders accordingly

NUPE v Legal Services Agency

30 Mar 2006, H Doyle, CA 45/06, (4 pages)

BARGAINING - Reference for facilitation - Applicant alleged bargaining had been unduly protracted under s50C(1)(b) ERA - Respondent's employees currently on individual employment agreements (green fields situation) - Applicant had about 20 members working for respondent out of about 90 grants staff whose work could potentially be covered by a collective employment agreement - Since July 2004 there had been meetings, correspondence and offers, mediations and low level industrial action but no concluded collective agreement - Authority needed to be satisfied that bargaining had been unduly protracted and that extensive efforts which included mediation had failed to resolve difficulties that precluded parties from entering into collective agreement - Where there was no existing relationship it could take longer for parties to conclude collective agreement - Balanced against that there were only about 20 union members employed by respondent, and limited occupational groups of members who could potentially be covered - Parties attended mediation for third time in knowledge that application for reference to facilitation before Authority - Authority accepted that, with assistance of mediator, parties did make real effort to resolve difficulties but could not do so - Authority satisfied bargaining unduly protracted - Parties referred to Authority for facilitation - Both parties agreed Wellington was suitable venue for facilitation - COSTS - Parties agreed costs to lie where they fall

Result: Application granted ; Orders accordingly ; Costs to lie where they fall

Parohinog v ANZ Bank Ltd

25 Jan 2006, RA Monaghan, AA 13/06, (2 pages)

COSTS - Successful personal grievance in respect of unjustified disadvantage

claim, but unsuccessful in respect of sexual harassment claim - Applicant sought contribution of \$3,000 to costs plus disbursements of \$155 - Respondent alleged costs should lie where they fall - Authority agreed that applicant took an adversarial and intransigent approach to resolution of employment relationship problem - Applicant's own conduct was culpable in respect of disadvantage grievance - Limited success - Applicant rejected reasonable efforts on part of respondent to resolve problem - Costs should lie where they fall

Result: Costs to lie where they fall

Rawlings v Sanco NZ Ltd

26 Jan 2006, J Wilson, CA 7/06, (4 pages)

COSTS - Unsuccessful personal grievance and dispute - Applicant did not appear at investigation meeting so it was very brief - Respondent sought contribution of \$1,000 towards costs of \$1,300 - Applicant wrote to respondent opposing any order of costs - First ground of opposition was that respondent had made costs submission outside of time frame - Not correct as respondent was granted an extension of time - Second ground of opposition was that applicant had filed appeal against Authority determination - Well established practice that where costs requested, Authority will determine question even if challenge filed - Applicant should have expected to make contribution to respondent's costs - Respondent's suggestion of contribution seemed reasonable

Result: Costs in favour of respondent (\$1,000)

Tamarua v Toll NZ Consolidated Ltd

30 Jan 2006, D Asher, WA 9/06, (3 pages)

COSTS - Unsuccessful personal grievance - Respondent sought contribution of \$2,500 to actual costs of \$18,557 (including travelling costs) - Applicant alleged costs order would create considerable hardship and that as a challenge had been filed in Employment Court, the Authority should decline an application for costs - No reason to depart from principle that costs should follow event - Respondent entitled to reasonable costs

Result: Costs in favour of respondent (\$1,500)

Thamer v Massey University

25 Jan 2006, GJ Wood, WA 7/06, (10 pages)

UNJUSTIFIED DISADVANTAGE - Parties agreed to consent order in March 2005 - Events before then not able to be taken into account - Applicant's concerns re-emerged after first settlement - Were a number of allegations - In the interests of justice, and since was ongoing employment relationship, Authority decided to investigate and determine all matters before it in evidence rather than restrict it to matters prior to filing of employment relationship problem - Applicant alleged was effectively required to do 2-3 others jobs - Was a staff vacancy but not appropriate to lay blame on any party - Manager decided to deal with issue by prioritisation, delegation and contracting out of work if necessary - Decision entirely within his prerogative - Review of IT instituted - Applicant declined to be involved - Not accepted that was an exercise designed to make applicant's job even more intolerable - Respondent entitled to undertake such reviews - No legal grounds to challenge it - Applicant declined assistance by contractors because he had past difficulties dealing with contractors - Applicant voluntarily worked significant amount of overtime - Did not have overtime approved as required - Accepted health and safety concerns of respondent should that amount of hours allowed to be continued unchecked - Applicant unwilling or unable to accept direction from

manager in any area he disagreed with - Insisted on taking full responsibility for overall functioning of his part of the IT operation despite his manager making it clear that he was not so responsible - No threatening or unreasonable behaviour by manager - Manager's occasional tardy response to communication not disadvantage - Authority could not intervene in yet to be completed performance assessment process - Racial harassment - Alleged comment about applicant's birth country not being a safe place to visit not racial harassment - Made in conversational context and others present could not recall such comments - Concern that applicant the only one who had been treated in the way he was too general to ever be sustained as racial harassment - No unjustified disadvantage - COSTS - Process made more difficult because of generalities of claims and lack of specific details - Costs in favour of respondent \$3,000 - Manager

Result: Application dismissed ; Costs in favour of respondent (\$3,000)

Ward v Twin Turbines Ltd

2 Feb 2006, R Arthur, AA 20/06, (2 pages)

COSTS - Successful application for declaration that applicant an employee and award of arrears of holiday pay - Applicant sought costs and expenses of \$3,442 - Did not appear to be legal costs and expenses to which applicant entitled to have contribution - Not entitled to legal costs in relation to mediation - Costs of travel, parking and lost income in relation to time required for Authority investigation were normal incidence of application to Authority - No information about how expenses for accountant or tax consultant related directly to claim - Award of costs to either party not warranted

Result: Costs to lie where they fall

Warren v Xpressions Fashion Clothing Ltd

17 Jan 2006, GJ Wood, WA 3/06, (2 pages)

COSTS - Costs sought in relation to 90 day issue and successful personal grievance - No appearance for respondent - Applicant sought costs of \$8,639 plus GST plus reimbursement of filing fee - Matter involved two investigation meetings - However, both meetings were conducted quite expeditiously - Costs of \$4,000 plus disbursements appropriate

Result: Costs in favour of applicant (\$4,000) ; Disbursements (\$70)(Filing fee)

Wylie v Benge t/a Bencarri Farm

1 Feb 2006, J Crichton, CA 16/06, (4 pages)

COSTS - Unsuccessful personal grievance - Meeting between ½ day and 1 day - Respondent sought contribution to costs of \$5,000 and alleged that was 50 percent of costs actually incurred - Authority commented it was often useful to Authority to have before it copies of bills of legal costs - However \$5,000 was reasonable in circumstances - Authority frequently awarded costs against notional daily rate, but important that Authority continued to update its consideration of such notional daily rate to reflect actual practice and any movement in costs reasonably incurred by successful parties - Authority accepted that respondent entitled to additional recompense by reason of applicant's late withdrawal of significant additional claim which caused respondent to have to brief additional three witnesses - Sum of \$2,500 appropriate

Result: Costs in favour of respondent (\$2,500)

Jurisdiction - Employment Relations Act 2000

Kumar v Cool Units Ltd

20 Jan 2006, YS Oldfield, AA 12/06, (3 pages)

JURISDICTION - No appearance by respondent because respondent was about to be placed in voluntary liquidation - Since liquidation had not yet taken place Authority proceeded to determine matter - Whether employee or independent contractor - Applicant first employed by respondent in 2002 - Subsequently worked for respondent again for one week in 2005 - Was not paid so did not work after that - Respondent alleged he took applicant on as contractor - Insufficient evidence to establish that it was agreed applicant's status would be different than when employed in 2002 - Applicant was employee - ARREARS OF WAGES - No dispute some payment owed - Authority found rate of pay was \$18 per hour - Respondent alleged arrears had been paid in part - Authority accepted applicant's evidence that part payment was not made - Applicant entitled to payment for 45 hours at \$18 per hour - Fish tank constructor

Result: Application granted ; Arrears of wages (\$810)

Parental Leave - Employment Relations Act 2000

Hull v The Department of Labour

9 Mar 2006, A Dumbleton, AA 68/06, (3 pages)

PARENTAL LEAVE – Application for relief to be granted in respect of a claimed irregularity in applicant’s application for parental leave – Applicant’s employment on fixed term basis (had been three engagements of that kind) – Employment ceased a few days before expected date of delivery - Most recent employer had written letter to IRD stating that if she had not been pregnant her fixed term agreement would have been extended and there was a good possibility that her position would have been made permanent – Parental Leave and Employment Protection Act 1987 (“PLEPA”) required that the period of employment was to “immediately” precede the expected date of birth and that parental leave was to cease being payable from the date on which fixed term employment ends – Those requirements made applicant ineligible – Authority agreed with respondent that the reasons for applicant’s ineligibility were not matters of irregularity as defined under s68 PLEPA that the Authority could grant relief in respect of – Authority did not consider that election under s66(6)(a) Employment Relations Act 2000 (to treat fixed term as ineffective) could be made after fixed term employment has ended (In any event had been no such election) – Applicant raised concerns about level of information given by Department of Labour – Matter had not been investigated but even if Authority was able to find reasonable basis for applicant’s concerns about information given, that would still not permit the Authority to disregard the relevant provisions of the PLEPA or rewrite the applicant’s employment agreement - In this case it seemed that applicant’s employment agreement could have readily been structured without prejudice to her employer to achieve the wider purposes of the PLEPA for applicant by allowing her access to paid parental leave

Result: Application dismissed ; No order for costs

Penalty - Employment Relations Act 2000

Jack v Faithfull Funeral Services Ltd

24 Mar 2006, RA Monaghan, AA 84/06, (5 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Parties reached agreement terminating applicant's employment because of redundancy - Applicant subsequently alleged redundancy not genuine - Whether agreement capable of being cancelled under Contractual Remedies Act 1979 on ground of misleading or deceptive conduct - Applicant alleged he had been led to believe that respondent would not be offering permanent employment to a work experience person ("J") - However J was offered permanent employment after applicant made redundant - Authority accepted that respondent's director's representation that he intended to pick up many of applicant's duties was true - However, representation that J would not be offered permanent employment probably did not accurately reflect director's intentions - However, J not offered applicant's job and it was likely that personal assistant's request to reduce her hours meant J picked up more of applicant's duties than he would otherwise have done - Redundancy genuine - Authority declined to cancel agreement terminating applicant's employment - PENALTY - Applicant sought penalty under s4A Employment Relations Act 2000 ("ERA") for breach of good faith - Director breached s4(1) ERA by being less than full and frank to applicant about plans for J - Section 4A did not say whether Authority or Court had jurisdiction in respect of good faith penalties - On assumption that appropriate for Authority to deal with present application, Authority did not accept that director's failure was of a kind warranting a penalty - Embalmer/general hand

Result: Application dismissed ; Costs reserved

Ranburn Rest Home Ltd t/a Ranburn Home & Hospital v Senora

29 Mar 2006, RA Monaghan, AA 95/06, (8 pages)

BREACH OF CONTRACT - Applicant alleged respondent was employed for minimum term of three years, and she breached agreement by resigning after less than four months - Sought damages for respondent's airfare, board and lodgings and tuition, recruitment fee, expenses in finding replacement, and time spent on matter by applicant's director - Applicant was client of recruitment agency ("AIMS"), and AIMS assisted in recruitment of respondent from Philippines - AIMS sent respondent a purported agreement between respondent and an employer (yet to be named) which provided that employer offered to pay certain costs for immigration to New Zealand and that respondent agreed to work for minimum period of time - No suggestion applicant ever became party to this document - Agreement between AIMS and respondent amounted to a "loan" of \$5,600 (covering tuition, airfare and board and lodging) which was repayable to AIMS if respondent left employment before end of three years - Applicant paid AIMS for this "loan" and now sought to recover it from respondent - Respondent accepted she owed applicant \$5,600 - Applicant approached employment relationship on basis that it could compel respondent to work for entire three year period - Common law prohibition on servile incidents of employment - Nothing in parties' written employment agreement provided for minimum term of three years - Documents showed no clear distinction between possible stand-alone minimum term and bond arrangement - No meeting of minds that there was agreed minimum term of employment - Respondent understood she was expected to work for three years but was also entitled to conclude she could leave earlier but repay "loan" if she did - Authority considered it a stretch to say respondent's obligations concerning repayment of "loan" related to or arose out of employment relationship, but ordered respondent to pay applicant \$5,600 - Authority did not accept respondent's alternative submissions that rectification or relief under Contractual Mistakes Act 1977 available - PENALTY -

Applicant sought penalty for breach of good faith under s4A Employment Relations Act 2000 - Section 4A did not say whether applications for such penalties were within jurisdiction of Authority or Court - Not enough evidence to persuade Authority that respondent deliberately set out to use her employment with applicant to do no more than obtain work and residence permits - Even if purported resignation for health reasons was spurious, that did not necessarily mean she acted in bad faith in entering into relationship - COUNTERCLAIM - PENALTY - Respondent sought penalty under s63A ERA - Applicant alleged respondent received advice about employment agreement through AIMS - AIMS did not have authority to represent respondent in matters arising out of her rights as an employee - Applicant in breach of s63A ERA but not in interests of justice to order penalty - Costs reserved - Nurse

Result: Application granted ("loan" damages) ; Damages (\$5,600)(airfare, tuition, board and lodging) ; Application dismissed (other damages, penalties) ; Counterclaim dismissed

Personal Grievance - Employment Relations Act 2000

Hitchiner' v New Zealand Management Academies Ltd

27 Jan 2006, K Anderson, AA 16/06, (10 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Whether applicant's redundancy genuine - Not able to find that redundancy was simply vehicle to terminate applicant's employment for other reasons - However, because of faulty selection process there was question over whether or not it should have been applicant's position that was made redundant - Whether procedurally fair - Selection process sadly wanting given indecent haste decision made - Little analysis or consideration given to applicant's overall skills and experience - Applicant not given opportunity to express view as to why her position should have been retained - Selection criteria not discussed with applicant - Whether breach of good faith - Redundancy took place prior to s4(1A)(c) Employment Relations Act 2000 coming into force but amendment seemed to be largely a codification of existing common law that required employers to act in fair and reasonable manner when anticipating termination of employment of employee on grounds of redundancy - Applicant fairly and reasonably entitled to better explanation to selection criteria - Manner in which applicant treated on last day of employment unfair and unreasonable - Subjected to unnecessary and unreasonable disciplinary process at meeting where told of redundancy - Applicant entitled to conclude by respondent's conduct that it wanted her gone with as little delay as possible - Final departure harrowing and hurtful process which in itself made dismissal unjustified - Redundancy procedure not exercised with requisite good faith - Unjustified dismissal - Remedies - Applicant entitled to benefit of doubt that she may not have been made redundant and receive reimbursement of lost wages of three months less one month's paid notice - PERSONAL GRIEVANCE - Discrimination - Applicant alleged she was discriminated against on basis of sex when her pay rate compared to male tutors's pay rates - No evidence of any inequality on basis of sex - Hospitality tutor

Result: Application granted ; Reimbursement of lost wages (\$5,050)(9 weeks) ; Compensation for humiliation (\$15,000) ; Costs reserved

Personal Grievance - Dismissal - Employment Relations Act 2000

Carlton v Geary

24 Jan 2006, P Montgomery, CA 5/06, (4 pages)

UNJUSTIFIED DISMISSAL - No written employment agreement - Applicant alleged she was employed for trial period of two months and when this passed she became permanent employee - Respondent alleged applicant employed on casual, job-by-job basis - Parties had totally different goals and when work the respondents required to be done was achieved, they advised applicant her services no longer needed - Authority found that employment was fixed term agreement which would come to an end when tasks set out for applicant had been completed - Applicant not a casual employee and nor was she offered ongoing employment - Dismissal not unjustified because work required of applicant had come to an end - UNJUSTIFIED DISADVANTAGE - Applicant unjustifiably disadvantaged in that respondent's failure to provide written employment agreement led directly to confusion that followed - COSTS - Length of investigation meeting not specified - Just to award applicant \$400 as contribution to reasonably incurred costs - Vineyard worker

Result: Application dismissed (unjustified dismissal) ; Application granted (unjustified disadvantage) ; Compensation for humiliation etc (\$500) ; Costs in favour of applicant (\$400)

Halliday v Schizophrenia Fellowship NZ Inc

24 Jan 2006, J Crichton, CA 4/06, (10 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Resigned after altercation at meeting - However, reconsidered and returned to work - One year later resigned after notice of allegations against her about financial management and financial probity - Whether breach of employment agreement - Applicant alleged that had respondent reviewed her performance in accordance with agreement, she might have continued in her employment because she would have had an opportunity to resolve outstanding issues in a timely fashion - Was no review after 6 months as required, however applicant received salary increase so was no deficit to her - No breach in relation to other performance reviews - No breach of obligation to provide safe workplace - Applicant knew the nature of environment in which she was choosing to work before she applied for the position - Matters that post-dated her employment were relevant - Meeting which became so unpleasant that applicant tendered her resignation called into question whether there was a safe workplace - However, she affirmed the agreement since she proceeded with her employment - No deliberate course of action designed to obtain resignation - Applicant was well thought of and the respondent was shocked at the allegations and hoped they could be satisfactorily explained - Proximate cause of resignation was receipt of letter detailing three pages of complaints - No constructive dismissal - UNJUSTIFIED DISADVANTAGE - Alleged disadvantage because of process used to present allegations against applicant and also the substance of the letter - Applicant alleged letter ensured that everybody else knew about complaints except her - No improper process - No problems with substance of the letter - No unjustified disadvantage - Chief executive

Result: Applications dismissed ; Costs reserved

King v Far North Holdings Ltd

3 Apr 2006, R Arthur, AA 104/06, (11 pages)

UNJUSTIFIED DISMISSAL – UNJUSTIFIED DISADVANTAGE – Constructive dismissal - Applicant kidnapped by armed robber and had cash stolen from the security truck he was driving – Alleged respondent breached obligations by not providing proper training, support, and counselling after robbery and making inaccurate reports to the Police about him – Applicant ended up working alone on day of robbery – Department of Labour Guidelines for the Safety of Staff from the Threat of Armed Robbery used as helpful guide as to what could be reasonably expected of employers – Applicant attended a one-day course before robbery – Applicant was adequately trained in company's procedures regarding cash pick-up work – After robbery applicant was positively encouraged to undertake counselling and was provided with support – Applicant alleged he suffered intense police scrutiny because the respondent wrongly suggested he did not follow proper procedures – No specific breach of duty – Authority decided to look at matter as one of unjustified disadvantage - Fact that applicant was able to go to work on his own on a cash transit run did not support finding of constructive dismissal but did amount to unjustified disadvantage – Respondent's unsafe work system increased risk of robbery occurring - Applicant advised his sick leave had expired and his pay was stopped – Asked to provide medical certificate for absences from work from date of robbery – Was told he should see whether he was eligible for income from ACC or WINZ – Unjustified disadvantage – Applicant to be reimbursed for costs of psychologist and doctor's consultation - Non publication order prohibiting publication of any evidence or pleadings filed which disclosed amount of money taken in robbery and details and circumstances or manner of robbery and treatment of applicant during robbery (other than information already in public domain as result of police statements to media) - Security officer

Result: Application dismissed (Constructive dismissal) ; Application granted (Unjustified disadvantage) ; Compensation for humiliation etc (\$4,000) ; Reimbursement of psychologist expenses (\$1,012.50) ; Reimbursement of doctor's expenses (\$18) ; Costs reserved

Kostic v Dodd and Milligan (partnership) t/a Allan Milligan Cars and/or Motoworld Systems Ltd t/a Allan Milligan Cars

30 Jan 2006, H Doyle, CA 12/06, (9 pages)

PRACTICE AND PROCEDURE - Identity of employer - Agreed by parties that not required to determine identity of respondent but any orders could be made jointly or severally against both respondents - UNJUSTIFIED DISADVANTAGE - Alleged failure to provide applicant with assistance in establishing good relationships with colleagues and failure to warn him about perceived behavioural problems - Respondent tolerated applicant's behaviour but this did not disadvantage him - Alleged racial harassment and discrimination - Applicant alleged one director ("D") would make weekly comments referring to applicant's ethnicity - Not satisfied that D made racial comments or harassed applicant - No unjustified disadvantage - UNJUSTIFIED DISMISSAL - Whether dismissed or resigned - Angry exchange - Authority found that D was upset and annoyed that other director ("M") had undertaken appraisal of trade-in vehicle contrary to earlier conversation with applicant and wanted an explanation from applicant - Not unreasonable for D to question applicant about this - Applicant quickly became very angry - D did not dismiss or intend to dismiss applicant during exchange - Applicant indicated that he wanted his final pay check - Not rational when he made statements indicative of resignation - Respondent should have attempted to verify situation when all parties were calm - Case where applicant was, against his will, treated by respondent as

having resigned - Heat of the moment - Not open to respondent to decide applicant had resigned without further discussion - Dismissal - More probable than not that applicant sped up to crash into D while both were walking back to office - Conduct capable of amounting to serious misconduct - No opportunity for applicant to provide explanation for behaviour - Unjustified dismissal - Remedies - 100% contributory conduct - Applicant only entitled to contribution to costs - Motor vehicle salesman

Result: Application granted ; Costs reserved

Mann v Cannon Hygiene NZ Ltd

31 Jan 2006, J Crichton, CA 13/06, (9 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Applicant resigned after hours were reduced - Applicant did not like installing part of job so had informal arrangement to share duties with another employee - With passage of time arrangement became less satisfactory for other employee so discussed issue with manager - Manager initiated discussions with applicant - Respondent sought to re-design applicant's job so that she only did sort of work she wanted to do but effect of that was to reduce hours - Respondent sought to find other work to supplement that - Applicant said she objected to reduction in working hours - No particular guidance to be derived from employment agreement - Was not until third meeting that applicant was told that the so-called "status quo" situation was not acceptable to respondent - That was fatal to the process the respondent adopted because without that information available to the applicant at the beginning of the discussions, the applicant was not in full possession of material information - Was then confronted with letter which gave applicant option of accepting new role with dramatic reduction in guaranteed hours or possibly facing the reality of a dismissal - Constructive dismissal - Remedies - Contributory conduct 50 percent - Applicant turned down number of possibilities for being provided with extra hours - Noted that Authority was impressed with honesty and integrity of respondent's manager - Deep cleaner/installer

Result: Application granted ; Compensation for humiliation etc (\$5,000 reduced to \$2,500) ; Reimbursement of lost wages (\$1,137.50 reduced to \$568.50)

Personal Grievance - Dismissal - Misconduct - Employment Relations Act 2000

McKee v General Distributors Ltd

16 Jan 2006, J Scott, AA 7/06, (7 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Unauthorised consumption of respondent's product - Video camera footage showed applicant consuming some danish and handful of apricots - Applicant signed security memo prohibiting consumption and sampling of respondent's product - Applicant alleged he had authority to taste test product when necessary - Videotape had been lost so Authority could not view it - Unfortunate that tape not available but absence of it not fatal to investigation and determination of matter - Credibility finding in favour of respondent's witnesses - Applicant well aware of company policies - Authority found that applicant ate the products - Even if Authority wrong on that point, he did not have required authority to taste the products - Respondent did not base decision to dismiss on videotape alone - No disparity of treatment - Investigation thorough and fair in all respects - Dismissal justified - Assistant bakery manager

Result: Application dismissed ; Costs reserved

Reij and Anor v Cammand Holdings Ltd

18 Jan 2006, P Cheyne, CA 1/06, (7 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - First applicant ("R") involved in relationship with respondent's sole director ("M") - R lived on respondent's premises and helped with its operation - Relationship ended and R moved out - Authority accepted R's evidence that M asked her to continue her duties with respondent as an employee on salary - Second applicant ("C") worked for respondent as head chef - C and R commenced relationship - Fight occurred between M and C - Authority found that M abused C, C hit M and then M hit C back - M told C he was sacked and told R she was banned from premises - Respondent sent letter to C accusing him of serious misconduct - Whether C's dismissal justified - Inevitable that punching employer would compromise serious misconduct justifying summary dismissal by fair and reasonable employer despite provocation - C's dismissal justified - Whether R's dismissal justified - No attempt by respondent to justify R's dismissal - Unjustified dismissal - Remedies - No power to compensate R for M's abuse, assault and dismissal of C - Untrue comments M made about R's drug use and mental health sufficiently connected with dismissal to be compensatable - Repayment of R's loan not part of oral employment agreement - Various personal items R left at premises were because of personal relationship not employment so no orders in respect of those - ARREARS OF WAGES - C alleged he was owed bonus and salary - Parties did not agree on targets for bonus so bonus claim not made out - Authority accepted C's evidence about salary owing - R entitled to week's salary but necessary to deduct items purchased by R on respondent's account

Result: Application dismissed (C's unjustified dismissal claim) ; Application granted (R's unjustified dismissal and C and R's arrears claims) ; Reimbursement of lost wages (\$11,750)(3 months) ; Compensation for humiliation etc (\$6,000) ; Arrears of wages (C)(to be calculated by parties) ; (R)(\$1,084.65) ; Other monies (R to pay respondent)(\$512.24) ; Costs reserved

Walen v SkyCity Management (Auckland) Ltd

13 Jan 2006, RA Monaghan, AA 5/06, (7 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Patron ("O") complained to respondent about another patron ("W") - O wrongly believed that respondent had identified him to W as originator of complaint and as result W had accosted O in street - O interviewed by applicant - Interview recorded by video camera - Applicant advised O to report matter to Police but also suggested he stand up to W when no one was around - Swear words used - Respondent concerned about appropriateness of applicant's language and fact that he was apparently advocating an aggressive response - Applicant stood by advice - Dismissed for serious misconduct - Applicant crossed the line of acceptable conduct in interview with O - Fair and reasonable investigation - "Ethical belief" as set out in Human Rights Act 1993 did not extend to personal views on matters such as bullying - Applicant drew attention to previously unblemished record - While another manager might have reached different conclusion, applicant's manager's approach within range reasonably available to her - Alleged that if there had been a warning sign that interview was being videotaped he would have been more careful - No excuse for conduct - Authority had no power in respect of information privacy principles under Privacy Act 1993 - No disparity of treatment as no incidents disclosed circumstances directly comparable with applicants - Dismissal justified - Security supervisor and relief manager at casino

Result: Application dismissed ; Costs reserved

Personal Grievance - Dismissal - Redundancy - Employment Relations Act 2000

Aberhart v Simpsons Farms Ltd

20 Jan 2006, V Campbell, AA 11/06, (9 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Applicant's position disestablished and new position created - Whether redundancy genuine - Respondent had identified need to have person operating at a higher level than either of two farm managers that it employed, with more accountability for production and productivity - Restructuring for genuine commercial reasons as direct result of need to reorganise management structure of farms to make business more effective - Whether redundancy process fair and reasonable - Consultation was statutory obligation - Consultation process did not meet tests in *Communication and Energy Workers Union Inc v Telecom NZ Ltd* (cited below) - Respondent discussed proposed restructuring plan but failed to discuss detail and scope of proposed new position - No discussion regarding impact of proposal on applicant's position - Lack of procedural fairness - Unjustified dismissal - Remedies - Took into account that applicant had held job for 15 years, was 58 years old, was not invited to staff Christmas function while still an employee, but did receive more notice than required and in excess of \$10,000 compensation for redundancy - Working manager
Result: Application granted ; Compensation (\$15,000) ; Costs reserved

Hitchiner' v New Zealand Management Academies Ltd

27 Jan 2006, K Anderson, AA 16/06, (10 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Whether applicant's redundancy genuine - Not able to find that redundancy was simply vehicle to terminate applicant's employment for other reasons - However, because of faulty selection process there was question over whether or not it should have been applicant's position that was made redundant - Whether procedurally fair - Selection process sadly wanting given indecent haste decision made - Little analysis or consideration given to applicant's overall skills and experience - Applicant not given opportunity to express view as to why her position should have been retained - Selection criteria not discussed with applicant - Whether breach of good faith - Redundancy took place prior to s4(1A)(c) Employment Relations Act 2000 coming into force but amendment seemed to be largely a codification of existing common law that required employers to act in fair and reasonable manner when anticipating termination of employment of employee on grounds of redundancy - Applicant fairly and reasonably entitled to better explanation to selection criteria - Manner in which applicant treated on last day of employment unfair and unreasonable - Subjected to unnecessary and unreasonable disciplinary process at meeting where told of redundancy - Applicant entitled to conclude by respondent's conduct that it wanted her gone with as little delay as possible - Final departure harrowing and hurtful process which in itself made dismissal unjustified - Redundancy procedure not exercised with requisite good faith - Unjustified dismissal - Remedies - Applicant entitled to benefit of doubt that she may not have been made redundant and receive reimbursement of lost wages of three months less one month's paid notice - PERSONAL GRIEVANCE - Discrimination - Applicant alleged she was discriminated against on basis of sex when her pay rate compared to male tutors' pay rates - No evidence of any inequality on basis of sex - Hospitality tutor
Result: Application granted ; Reimbursement of lost wages (\$5,050)(9 weeks) ; Compensation for humiliation (\$15,000) ; Costs reserved

Hunt and Ors v Transportation Auckland Corporation Ltd t/a Stagecoach Auckland

6 Apr 2006, R Arthur, AA 119/06, (9 pages)

UNJUSTIFIED DISMISSAL – Redundancy – Alleged two of the six redundant jobs still existed and applicants should have had opportunity to apply for those jobs – Alleged breach of duty of good faith – Also claimed that respondent breached statutory duty to provide employee protection provisions in employment agreements – Genuine redundancy - New roles of service delivery manager were sufficiently different from applicants' former roles – Was consultation and applicants' input sought – Was the applicants who brought the process of consultation and decision to a close and early end – No failure to provide relevant information – Respondent conceded that it had failed to include employee protection provisions in applicants' employment agreements (it was now in Collective Employment Agreement) – Purpose of the section under Part 6A Employment Relations Act 2000 requiring employee protection provisions was to give the best prospects for negotiating a transfer where the work was being shifted to a new employer – In circumstances of present case, such a clause would have made little, if any, real difference – Part of the work was staying with the same employer and the other element of the work that was to be contracted out formed such a small part of the role that there were no real prospects of any of the applicants being able to “follow” that work to the new employer – Respondent's breach was more than technical, but was not ongoing and did not warrant a penalty in the circumstances of the case – Applications dismissed - Area quality controllers

Result: Applications dismissed ; Costs reserved

Jack v Faithfull Funeral Services Ltd

24 Mar 2006, RA Monaghan, AA 84/06, (5 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Parties reached agreement terminating applicant's employment because of redundancy - Applicant subsequently alleged redundancy not genuine - Whether agreement capable of being cancelled under Contractual Remedies Act 1979 on ground of misleading or deceptive conduct - Applicant alleged he had been led to believe that respondent would not be offering permanent employment to a work experience person ("J") - However J was offered permanent employment after applicant made redundant - Authority accepted that respondent's director's representation that he intended to pick up many of applicant's duties was true - However, representation that J would not be offered permanent employment probably did not accurately reflect director's intentions - However, J not offered applicant's job and it was likely that personal assistant's request to reduce her hours meant J picked up more of applicant's duties than he would otherwise have done - Redundancy genuine - Authority declined to cancel agreement terminating applicant's employment - PENALTY - Applicant sought penalty under s4A Employment Relations Act 2000 ("ERA") for breach of good faith - Director breached s4(1) ERA by being less than full and frank to applicant about plans for J - Section 4A did not say whether Authority or Court had jurisdiction in respect of good faith penalties - On assumption that appropriate for Authority to deal with present application, Authority did not accept that director's failure was of a kind warranting a penalty - Embalmer/general hand

Result: Application dismissed ; Costs reserved

Personal Grievance - Raising of Personal Grievance - Employment Relations Act 2000

Fallon v Barnados New Zealand Inc

31 Mar 2006, D Asher, WA 51/06, (6 pages)

RAISING OF PERSONAL GRIEVANCE - Respondent alleged applicant had not raised personal grievance within 90 days - Applicant alleged she had raised personal grievance or there were exceptional circumstances upon which Authority could grant leave to raise grievance out of time - Applicant's letter that allegedly raised grievance stated she "intended" to initiate personal grievance, would be "taking legal advice regarding" it and would be "contacting us further" - Letter also stated applicant's belief she had been constructively dismissed - Authority satisfied that letter was clear notice to respondent of grievance - Evidence for this conclusion was respondent's reaction because its representatives were sufficiently alerted to its potential to discuss whether or not letter amounted to advice of a grievance - In this instance, because of language in letter and respondent's own uncertainty, and because of express good faith obligations in Employment Relations Act 2000 ("ERA"), Authority found that respondent was under an obligation to advise applicant it would not be regarding her advice as formal notice of grievance and to explain to her reasons for its position - In alternative, s115(b) ERA applied to applicant's situation: having made reasonable arrangements to have grievance raised by her agent (advocate), agent unreasonably failed to ensure it was raised within required time - Just to grant leave to applicant to raise personal grievance - Senior social worker

Result: Application granted ; Costs reserved

Personal Grievance - Unjustified Disadvantage - Employment Relations Act 2000

Carlton v Geary

24 Jan 2006, P Montgomery, CA 5/06, (4 pages)

UNJUSTIFIED DISMISSAL - No written employment agreement - Applicant alleged she was employed for trial period of two months and when this passed she became permanent employee - Respondent alleged applicant employed on casual, job-by-job basis - Parties had totally different goals and when work the respondents required to be done was achieved, they advised applicant her services no longer needed - Authority found that employment was fixed term agreement which would come to an end when tasks set out for applicant had been completed - Applicant not a casual employee and nor was she offered ongoing employment - Dismissal not unjustified because work required of applicant had come to an end - UNJUSTIFIED DISADVANTAGE - Applicant unjustifiably disadvantaged in that respondent's failure to provide written employment agreement led directly to confusion that followed - COSTS - Length of investigation meeting not specified - Just to award applicant \$400 as contribution to reasonably incurred costs - Vineyard worker

Result: Application dismissed (unjustified dismissal) ; Application granted (unjustified disadvantage) ; Compensation for humiliation etc (\$500) ; Costs in favour of applicant (\$400)

Halliday v Schizophrenia Fellowship NZ Inc

24 Jan 2006, J Crichton, CA 4/06, (10 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Resigned after altercation at meeting - However, reconsidered and returned to work - One year later resigned after notice of allegations against her about financial management and financial probity - Whether breach of employment agreement - Applicant alleged that had respondent reviewed her performance in accordance with agreement, she might have continued in her employment because she would have had an opportunity to resolve outstanding issues in a timely fashion - Was no review after 6 months as required, however applicant received salary increase so was no deficit to her - No breach in relation to other performance reviews - No breach of obligation to provide safe workplace - Applicant knew the nature of environment in which she was choosing to work before she applied for the position - Matters that post-dated her employment were relevant - Meeting which became so unpleasant that applicant tendered her resignation called into question whether there was a safe workplace - However, she affirmed the agreement since she proceeded with her employment - No deliberate course of action designed to obtain resignation - Applicant was well thought of and the respondent was shocked at the allegations and hoped they could be satisfactorily explained - Proximate cause of resignation was receipt of letter detailing three pages of complaints - No constructive dismissal - UNJUSTIFIED DISADVANTAGE - Alleged disadvantage because of process used to present allegations against applicant and also the substance of the letter - Applicant alleged letter ensured that everybody else knew about complaints except her - No improper process - No problems with substance of the letter - No unjustified disadvantage - Chief executive

Result: Applications dismissed ; Costs reserved

King v Far North Holdings Ltd

3 Apr 2006, R Arthur, AA 104/06, (11 pages)

UNJUSTIFIED DISMISSAL – UNJUSTIFIED DISADVANTAGE – Constructive dismissal - Applicant kidnapped by armed robber and had cash stolen from the security truck he was driving – Alleged respondent breached obligations by not providing proper training, support, and counselling after robbery and making inaccurate reports to the Police about him – Applicant ended up working alone on day of robbery – Department of Labour Guidelines for the Safety of Staff from the Threat of Armed Robbery used as helpful guide as to what could be reasonably expected of employers – Applicant attended a one-day course before robbery – Applicant was adequately trained in company's procedures regarding cash pick-up work – After robbery applicant was positively encouraged to undertake counselling and was provided with support – Applicant alleged he suffered intense police scrutiny because the respondent wrongly suggested he did not follow proper procedures – No specific breach of duty – Authority decided to look at matter as one of unjustified disadvantage - Fact that applicant was able to go to work on his own on a cash transit run did not support finding of constructive dismissal but did amount to unjustified disadvantage – Respondent's unsafe work system increased risk of robbery occurring - Applicant advised his sick leave had expired and his pay was stopped – Asked to provide medical certificate for absences from work from date of robbery – Was told he should see whether he was eligible for income from ACC or WINZ – Unjustified disadvantage – Applicant to be reimbursed for costs of psychologist and doctor's consultation - Non publication order prohibiting publication of any evidence or pleadings filed which disclosed amount of money taken in robbery and details and circumstances or manner of robbery and treatment of applicant during robbery (other than information already in public domain as result of police statements to media) - Security officer

Result: Application dismissed (Constructive dismissal) ; Application granted (Unjustified disadvantage) ; Compensation for humiliation etc (\$4,000) ; Reimbursement of psychologist expenses (\$1,012.50) ; Reimbursement of doctor's expenses (\$18) ; Costs reserved

Kostic v Dodd and Milligan (partnership) t/a Allan Milligan Cars and/or Motoworld Systems Ltd t/a Allan Milligan Cars

30 Jan 2006, H Doyle, CA 12/06, (9 pages)

PRACTICE AND PROCEDURE - Identity of employer - Agreed by parties that not required to determine identity of respondent but any orders could be made jointly or severally against both respondents - UNJUSTIFIED DISADVANTAGE - Alleged failure to provide applicant with assistance in establishing good relationships with colleagues and failure to warn him about perceived behavioural problems - Respondent tolerated applicant's behaviour but this did not disadvantage him - Alleged racial harassment and discrimination - Applicant alleged one director ("D") would make weekly comments referring to applicant's ethnicity - Not satisfied that D made racial comments or harassed applicant - No unjustified disadvantage - UNJUSTIFIED DISMISSAL - Whether dismissed or resigned - Angry exchange - Authority found that D was upset and annoyed that other director ("M") had undertaken appraisal of trade-in vehicle contrary to earlier conversation with applicant and wanted an explanation from applicant - Not unreasonable for D to question applicant about this - Applicant quickly became very angry - D did not dismiss or intend to dismiss applicant during exchange - Applicant indicated that he wanted his final pay check - Not rational when he made statements indicative of resignation - Respondent should have attempted to verify situation when all parties were calm - Case where applicant was, against his will, treated by respondent as

having resigned - Heat of the moment - Not open to respondent to decide applicant had resigned without further discussion - Dismissal - More probable than not that applicant sped up to crash into D while both were walking back to office - Conduct capable of amounting to serious misconduct - No opportunity for applicant to provide explanation for behaviour - Unjustified dismissal - Remedies - 100% contributory conduct - Applicant only entitled to contribution to costs - Motor vehicle salesman

Result: Application granted ; Costs reserved

Ruebe-Donaldson v Sky Network Television Ltd

31 Mar 2006, RA Monaghan, AA 99/06, (6 pages)

UNJUSTIFIED DISADVANTAGE - Applicant's supervisor received complaints about unpleasant odour in office - Supervisor and some complainants believed odour came from applicant - Manager arranged for air conditioning to be checked and some changes made but complaints continued - All female employees in dispatch spoken to about personal hygiene - Problem appeared to be resolved for a few months but became noticeable again with more staff complaints - Manager asked personnel officer to look into matter - Colleague told applicant she was believed to be source of odour and applicant contacted personnel officer - Applicant did not believe personnel officer took matter seriously, but Authority accepted discussion between applicant and personnel officer only preliminary - Mere fact that applicant denied being source of odour did not mean personnel officer obliged to immediately accept denial - Applicant became upset and went on sick leave - Applicant's doctor's letter recorded applicant had no medical problems which would be associated with any odour or lack of personal hygiene - Applicant resigned after mediation - Authority did not accept that respondent proceeded as if allegations about applicant correct, or that management was determined to support applicant's supervisor at all costs - Authority did not accept that respondent failed to take reasonable steps to address complaints about odour - Not realistic to expect that colleagues would not discuss odour or their perception of odour - Labelling of chairs by supervisor was inappropriate contribution to problem but should not be elevated to point that legal redress available in respect of it - Complaints motivated by genuine concerns - Circumstances difficult and embarrassing for applicant but respondent obliged to take into account interests of all staff - No personal grievance - Dispatch officer worker

Result: Application dismissed ; Costs reserved

Thamer v Massey University

25 Jan 2006, GJ Wood, WA 7/06, (10 pages)

UNJUSTIFIED DISADVANTAGE - Parties agreed to consent order in March 2005 - Events before then not able to be taken into account - Applicant's concerns re-emerged after first settlement - Were a number of allegations - In the interests of justice, and since was ongoing employment relationship, Authority decided to investigate and determine all matters before it in evidence rather than restrict it to matters prior to filing of employment relationship problem - Applicant alleged was effectively required to do 2-3 others jobs - Was a staff vacancy but not appropriate to lay blame on any party - Manager decided to deal with issue by prioritisation, delegation and contracting out of work if necessary - Decision entirely within his prerogative - Review of IT instituted - Applicant declined to be involved - Not accepted that was an exercise designed to make applicant's job even more intolerable - Respondent entitled to undertake such reviews - No legal grounds to challenge it - Applicant declined assistance by contractors because he had past difficulties dealing with contractors - Applicant voluntarily worked significant amount of overtime - Did not have overtime approved as required - Accepted health

and safety concerns of respondent should that amount of hours allowed to be continued unchecked - Applicant unwilling or unable to accept direction from manager in any area he disagreed with - Insisted on taking full responsibility for overall functioning of his part of the IT operation despite his manager making it clear that he was not so responsible - No threatening or unreasonable behaviour by manager - Manager's occasional tardy response to communication not disadvantage - Authority could not intervene in yet to be completed performance assessment process - Racial harassment - Alleged comment about applicant's birth country not being a safe place to visit not racial harassment - Made in conversational context and others present could not recall such comments - Concern that applicant the only one who had been treated in the way he was too general to ever be sustained as racial harassment - No unjustified disadvantage - COSTS - Process made more difficult because of generalities of claims and lack of specific details - Costs in favour of respondent \$3,000 - Manager

Result: Application dismissed ; Costs in favour of respondent (\$3,000)

Practice & Procedure - Employment Relations Act 2000

The Commissioner of Police v Harland

20 Mar 2006, GJ Wood, WA 41/06, (3 pages)

PRACTICE AND PROCEDURE - Application for removal to Employment Court – Important question of law alleged to be whether respondent, a former police officer, remained a police officer notwithstanding notice of compulsory disengagement served on him pursuant to s28C Police Act 1958 – Not accepted that was such urgency in present case such that it be removed to Court – However, accepted that was an important question of law likely to arise other than incidentally relating to the effect of a notice of compulsory disengagement on a police officer's employment – Matter removed to Court

Result: Application granted ; No order for costs

Green v Marexim Export-Import Ltd

13 Jan 2006, RA Monaghan, AA 6/06, (2 pages)

PRACTICE AND PROCEDURE - Authority previously determined costs against applicant - Mistakenly believed both parties had made submissions on costs issue - In interests of justice that part of investigation relating to costs be reopened for purpose of considering applicant's submissions - COSTS - Unsuccessful unjustified dismissal claim and application to raise unjustified disadvantage claim out of time - Length of investigation meeting not specified - Applicant alleged costs should lie where they fall - Allegations about respondent's evidence at investigation meeting - Nothing to indicate that any matters complained of added to applicant's costs in sense they should be reflected in order for costs - Applicant alleged he had made a Calderbank offer - Calderbank letters province of respondents, not applicants, and applicant was losing party - Conclusion on costs had not changed from original determination - Costs in favour of respondent

Result: Orders accordingly ; Costs in favour of respondent (\$2,200)

Kostic v Dodd and Milligan (partnership) t/a Allan Milligan Cars and/or Motoworld Systems Ltd t/a Allan Milligan Cars

30 Jan 2006, H Doyle, CA 12/06, (9 pages)

PRACTICE AND PROCEDURE - Identity of employer - Agreed by parties that not required to determine identity of respondent but any orders could be made jointly or severally against both respondents - UNJUSTIFIED DISADVANTAGE - Alleged failure to provide applicant with assistance in establishing good relationships with colleagues and failure to warn him about perceived behavioural problems - Respondent tolerated applicant's behaviour but this did not disadvantage him - Alleged racial harassment and discrimination - Applicant alleged one director ("D") would make weekly comments referring to applicant's ethnicity - Not satisfied that D made racial comments or harassed applicant - No unjustified disadvantage - UNJUSTIFIED DISMISSAL - Whether dismissed or resigned - Angry exchange - Authority found that D was upset and annoyed that other director ("M") had undertaken appraisal of trade-in vehicle contrary to earlier conversation with applicant and wanted an explanation from applicant - Not unreasonable for D to question applicant about this - Applicant quickly became very angry - D did not dismiss or intend to dismiss applicant during exchange - Applicant indicated that he wanted his final pay check - Not rational when he made statements indicative of resignation - Respondent should have attempted to verify situation when all parties were calm - Case where applicant was, against his will, treated by respondent as

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Result: Application granted ; Costs reserved

New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc and Ors v Auckland District Health Board and Ors

23 Mar 2006, RA Monaghan, AA 83/06, (3 pages)

PRACTICE AND PROCEDURE - Application for removal to Employment Court - Dispute about application of Code of Good Faith in the Public Health Sector (as in Schedule 1B Employment Relations Act 2000) – Applicants sought determination that Code applied to certain work to be carried out by first respondent – Associated application for interim orders restraining respondents from recruiting other people to fill positions currently held at first respondent by employees of Spotless Services – First respondent and Spotless were parties to outsourcing arrangement involving a facilities maintenance contract – Contract put out to tender and was awarded to Transfield – Whether Code applied to work in question so that affected employees are entitled to be employed by the successful party to tender on the same terms and conditions as applied immediately before the commencement of the contract – Were eight questions applicant believed the Court needed to consider (regarding whether the Code applied) - Matter accorded urgency – Matter removed to Court

Result: Application granted ; Matter removed to Employment Court ; No order for costs

NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Air New Zealand Ltd

21 Mar 2006, A Dumbleton, AA 80/06, (4 pages)

PRACTICE AND PROCEDURE - Application for removal to Employment Court – Problem was concerned with (a) an apparent (but undisclosed) strategy by respondent to contract out “non core” or “peripheral” areas of business and (b) the strategy’s practical effect on the respondent’s proposal to contract out cleaning services and the work of 106 employees – Applicant alleged respondent failed to correctly understand its obligations under Collective Employment Agreement (“CEA”) provisions relating to contracting out the respondent’s work – Also alleged respondent failed to comply with those obligations and there was an anticipated failure to comply with the process further downstream – Also at issue was the existence of a “business strategy” devised by respondent and intended by it to be implemented in blanket or wholesale fashion so as to achieve the contracting out of other work and services as well as that of aircraft cleaning – Applicant sought declarations that respondent breached good faith requirements and failed to comply with obligations under CEA – In all the circumstances Court should determine the matter – If not the ground itself, there were elements of s178(2)(a) Employment Relations Act 2000 present to such a degree that when considered with the nature of the case and its relative urgency left Authority with opinion that Court should determine matter – Matter removed to Court – Non publication order of certain parts of statement in reply and certain documents attached to statement in reply

Result: Application granted ; Matter removed to Employment Court ; Non-publication order ; Costs reserved

Practice & Procedure - Consent Orders - Employment Relations Act 2000

Davy v Pullan t/a Bronwyn's Place

27 Jan 2006, D Asher, WA 12/06, (2 pages)

CONSENT ORDER - Parties reached settlement at investigation meeting - Parties asked that settlement be recorded by way of consent determination - Order prohibiting publication of terms of settlement

Result: Consent order granted ; Orders accordingly ; No order for costs

Milner v Barnados New Zealand Inc

26 Jan 2006, D Asher, WA 8/06, (2 pages)

CONSENT ORDER - Parties reached settlement at investigation meeting - Terms of settlement recorded by way of consent determination - Order prohibiting publication of terms of settlement with exception of record of applicant's resignation

Result: Consent order granted ; Orders accordingly ; No order for costs

Pakuranga Park Village v Pullan and Anor

26 Oct 2005, Travis J, AC 62/05, (1 pages)

PRACTICE AND PROCEDURE – Consent order – Challenge withdrawn by consent – Consent order granted

Result: Consent order granted ; No order for costs

Steer v Gazley & Tulloch Motors Ltd

19 Jan 2006, GJ Wood, WA 5/06, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Order prohibiting publication of all the contents of the terms of settlement

Result: Consent order granted ; Orders accordingly ; No order for costs

Tuckwell v Joyce

24 Jan 2006, PR Stapp, WA 6/06, (1 pages)

CONSENT ORDER - Employment relationship problem involved payment of sum of money for work plus interest and costs - By consent sum of \$147 paid to applicant settled claim and respondent agreed to pay \$70 filing fee to applicant within seven days - Parties' agreement became order of Authority

Result: Orders according ; No order for costs

Department of Labour
TE TARI MAHI

