

Department of Labour  
TE TARI MAHI



**EMPLOYMENT CASES  
SUMMARY**

**August 2007**

**INFORMATION AND PROMOTION GROUP –  
KNOWLEDGE MANAGEMENT TEAM**

# Employment Cases Summary

The *Employment Cases Summary* summarises judgments/decisions of the Employment Court and determinations of the Employment Relations Authority that have been added to the Department of Labour Workplace Information and Promotion Group – Knowledge Management Team database. Employment Court headnotes are provided by the Legal Research Counsel of the Ministry of Justice. Employment Authority headnotes are provided by the Legal Researchers of the Department of Labour.

*Headnotes of the Court of Appeal and High Court headnotes are added only if they are about employment law matters.*

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### Significant Judgments/Decisions

This section includes full **headnotes** for those considered to be significant, including important landmark cases, cases with significant points of law, and those attracting high public interest.

### Brief Summaries

This section provides brief headnote summaries of all other cases for the specified period.

## FULL-TEXT OF DETERMINATIONS

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# Significant Judgments/Decisions added to the Employment Law Database 1 July 2007 - 31 July 2007

## Under the Employment Relations Act 2000

*New Zealand Tramways and Public Transport Employees Union Inc & Anor v Transportation Auckland Corporation Ltd & Anor*

CA 287/06

**Heard:** 12 Mar 2007, Wellington

**Judgment Date:** 3 Apr 2007

**Court/Authority/Tribunal:** Hammond, Arnold and Wilson JJ

**Appearances:** P Cranney ; PA Caisley

COURT OF APPEAL – Practice and procedure – Application for leave to appeal Employment Court decision – ss 6, 41 Holidays Act 2003 – Collective employment agreement provided three weeks annual holiday plus further holiday of one week – Minimum statutory entitlement was to increase from three weeks to four weeks per annum – Employment Court held extra week was an enhancement of minimum entitlement rather than separate entitlement – Collective employment agreement met obligations under s41 Holidays Act 2003 – HELD – Whether additional holiday absorbed by or additional to minimum entitlement an important question of law – Application granted – Bus drivers

This was a successful application for leave to appeal an Employment Court decision (see: 27 November 2006, AC 61A/06).

The proceedings concerned the annual leave entitlements of bus drivers who were members of the applicant unions. The collective employment agreement (“cea”) provided each employee with the minimum statutory entitlement of three weeks annual holiday plus “a further holiday of one week per annum in recognition of the nature of the work making a total of four weeks leave per year”.

From 1 April 2007 s41 of the Holidays Act 2003 increased the minimum statutory entitlement to annual holidays from three weeks to four weeks. The issue was whether the cea allowed for the extra week of holiday to continue from 1 April 2007 over and above the minimum statutory entitlement. In other words, whether the present four weeks provided in the cea became five weeks.

The Employment Court held that the extra week was an enhancement of the minimum entitlement rather than a separate entitlement. From 1 April 2007 the cea would still provide four weeks annual leave, which would accord with the minimum statutory entitlement.

The applicants submitted that whether additional holidays agreed to be in recognition of the

nature of work were absorbed by or in addition to minimum annual leave conferred by the Holidays Act 2003, when such leave moved to four weeks was a question of law of general or public importance.

The respondent submitted the question was one of fact and not one of public importance.

Held

(1) Leave to appeal was granted on the question of “whether additional holidays which are agreed to be in recognition of the nature of work are absorbed by or in addition to minimum annual leave conferred by Subpart 1 of Part 2 of the Holidays Act 2003, when such leave moves to four weeks from 1 April 2007?” Central to the Employment Court’s decision was the interpretation of the Holidays Act 2003, in particular s6. The appeal raised a question of law concerning the proper interpretation and application of the Act. The issue was an important one. It would affect other employers and employees. Its importance was reflected in the fact that the Employment Court sat as a Full Court to hear the case. (para 6)

**Result:** Application granted (leave to appeal) ; Costs in favour of first and second applicants (\$750 each plus disbursements)

**Statutes considered:**

ERA s214(1)  
ERA s214(3)  
Holidays Act 2003 s6  
Holidays Act 2003 Part 2 Subpart 1

**Cases referred to in judgment:**

New Zealand Tramways and Public Transport Employees Union Inc & Anor v Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd unreported, Judges Travis, Shaw and Perkins, 27 November 2006, AC 61A/06

**Other workers/site names etc:** National Distribution Union Inc ; Cityline (New Zealand) Ltd

**Pages:** 2  
[973565]

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***Kingi v Responsive Maintenance 2000 Ltd***

AC 18/07

**Heard:** 19 Apr 2007, Auckland

**Judgment Date:** 19 Apr 2007

**Court/Authority/Tribunal:** Perkins J

**Appearances:** O Kingi (in person) ; M Rush

PRACTICE AND PROCEDURE – Application to strike out challenge to Employment Relations Authority determination – First hearing unable to proceed because of bereavement in plaintiff’s family – Matter adjourned – Parties agreed to mediation held at marae – Mediation did not occur – Defendant brought strike out application – First hearing of application adjourned because plaintiff was having difficulties with his advocate regarding instruction and representation – Defendant submitted it had suffered prejudice from delay – HELD – Defendant must show

plaintiff guilty of inordinate delay, that delay inexcusable, and that it had suffered serious prejudice as result of delay – Court must ultimately consider interests of justice – Proceedings should not be struck out lightly – Plaintiff had rights of challenge and pursued matter within set timeframes – Delay unfortunate and unacceptable, but not inordinate – Balance of overall justice in plaintiff’s favour – Plaintiff should not be deprived of day in Court – Any further delay on plaintiff’s part would be fatal – Application dismissed

This was an unsuccessful application by the defendant to strike out the plaintiff’s challenge to an Employment Relations Authority determination.

The plaintiff was employed by the defendant. An incident took place at the premises of a local hardware store. The defendant subsequently terminated the plaintiff’s employment.

The Employment Relations Authority determined that the plaintiff was unjustifiably dismissed, but because of his own conduct he was not entitled to any remedies.

The plaintiff brought a challenge against that determination.

The proceedings were set down for hearing before the Employment Court. At the last minute the hearing was adjourned due to a family bereavement suffered by the plaintiff. There was a suggestion that the parties may be able to mediate the problem by using the facilities of a local marae. No further action was taken.

The defendant applied to strike out the proceedings. The first hearing of the application, although commenced, was adjourned because the plaintiff was having difficulties instructing his advocate.

When the hearing recommenced, the plaintiff informed the Court that he had been unsuccessful in his attempts to find alternative representation.

The defendant submitted that the delay was inexcusable, that it had suffered prejudice, and that it was unreasonable and unfair that the matter be prolonged without good cause. In the interests of justice it was time for the proceedings to be dismissed.

Held

(1) The principles to be applied in strike out applications are well-established. The applicant for the strike out must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, that there has been serious prejudice to the defendant applicant as a result of the delay, and that even though these factors may be established, ultimately the Court must have regard to the interests of justice in determining whether proceedings should be struck out. (para 7)

(2) An important consideration was that the Court should not strike out proceedings lightly because that would then deprive a party, who was wanting to proceed, from having their day in Court. (para 15)

(3) The plaintiff had rights of challenge to the determination of the Authority and he had pursued that matter within the timeframes, which were set under the Employment Relations Act 2000. (para 15)

(4) It was clear there had been a delay which was unfortunate and unacceptable, but the delay had not been inordinate. From the time of a submission or referral of a grievance a grievant has 3

years in which to commence proceedings. The plaintiff commenced proceedings within a very short time of submitting the grievance but the fact of the matter was that having submitted the grievance, the 3 year period which he would have had to have commenced the proceedings was still running. That was a material matter to be taken into account, not only in regard to whether the delay was inordinate but also the overall justice of the matter. (para 16)

(5) There was always prejudice suffered by delay. There would always be an argument that such delay would result in the dimming of memory of witnesses. The witnesses may not be available and that would have been the same circumstance if the plaintiff had not commenced his proceedings immediately, but had chosen to wait until near the end of the 3 year period before commencing the proceedings. (para 18)

(6) The plaintiff, as a result of difficulties, which he had experienced with his advocate, and as a result of the bereavement, which was not his fault and which led to the first hearing being adjourned and despite being a layman and not understanding that he must be proactive about trying to get a fixture from the Court, nevertheless tipped the balance of overall justice in his favour. However, the matter had been finely balanced and the plaintiff needed to understand that the present was the last opportunity to get the matter resolved because a further application, which arose from any further delay on his part, would surely lead to the proceedings being struck out at that point. (para 19)

(7) The matter was to be heard in Auckland. The registrar was to allocate a hearing and there were to be no adjournments of that hearing. The matter was also referred to mediation, which was to take place before the date allocated for trial. (paras 20, 21)

**Result:** Application dismissed; Orders accordingly ; Costs reserved

**Statutes considered:**

ERA

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***Air New Zealand Ltd v McAlister***

CA 278/06

**Heard:** 16 Apr 2007, Wellington

**Judgment Date:** 20 Apr 2007

**Court/Authority/Tribunal:** O'Regan, Robertson and Wilson JJ

**Appearances:** AH Waalkens QC, KM Thompson ; RE Harrison QC

COURT OF APPEAL – Application for leave to appeal Employment Court decision – Applicant employed respondent as pilot in command and flight instructor – When respondent turned 60 he was removed from flight instructor position and under protest was made first officer – Reason given by applicant was that international regulations prohibited pilots aged 60 or over from acting as captain or pilot in command – Employment Court held applicant discriminated against respondent by reason of age in breach of s104(1)(b) Employment Relations Act 2000 (“ERA”) and had acted unjustifiably to his disadvantage – Leave sought on six questions of law – HELD – Interpretation of s104 ERA and in particular the phrase “by reason directly or indirectly of” was a question of law of general importance – Three subsidiary

questions included to ensure all relevant issues considered – Leave to appeal also granted regarding effects of alleged errors on Employment Court’s finding that applicant’s actions were unjustified – Application granted – Pilot/flight instructor

This was a successful application for leave to appeal an Employment Court decision (see: (2007) 8 NZELC 98,591).

The applicant employed the respondent as a pilot and flight instructor. For most of his work the respondent was required to be a pilot in command. When the respondent attained the age of 60 he was moved by the applicant from his position as flight instructor, ceased to hold the rank of captain and under protest was made first officer. The explanation provided by the applicant was that international regulations prohibited pilots aged 60 or over from acting as a captain or pilot in command.

The respondent brought a successful personal grievance in the Employment Court. The Court held that in removing the respondent from his former position because of his age the applicant had discriminated against him to his detriment. Furthermore, that the applicant had acted unjustifiably towards the respondent by applying a fixed policy to him that was discriminatory and affected his employment to his disadvantage.

The applicant sought leave to appeal the Employment Court decision on six questions of law.

Held

(1) The matter was basically one general issue: the proper interpretation of s104 Employment Relations Act 2000 (“ERA”). (para 3)

(2) The interpretation of s104 ERA and in particular the phrase “by reason directly or indirectly of” was a question of law of general importance. The first two questions raised could be appropriately framed in one question: Did the Employment Court err in law in concluding that the demotion of the respondent from his flight instructor position occurred by reason directly or indirectly of a prohibited ground of discrimination, namely his age, in terms of s104(1) ERA? (para 12)

(3) Three subsidiary questions were included by agreement of counsel to ensure all relevant issues were considered. Those were: (a) Was there any evidence to support the Employment Court’s finding that it was unacceptable to compare the characteristics of the respondent which he had after the alleged discriminatory act with those of unaffected employees – the appropriate comparison being between the conditions of work of the employee after the changes made by reason of his age and other employees who were not affected by age restriction? (b) Did the Employment Court err in law in defining as the relevant comparator group for the purposes of ss104(1)(a) and (b) ERA those flight instructors who were under 60 but were doing work of the same description that the respondent was doing before reaching that age?

(c) Did the Employment Court err in law in concluding that being of a particular age (here, under the age of 60) was not a genuine occupational qualification for the respondent’s position of or employment as a flight instructor, in terms of s30(1) Human Rights Act 1993? (paras 13, 14)

(4) Leave was also granted as to the effects of the alleged errors on the Employment Court’s finding that the applicant’s actions were unjustified. (para 14)

**Result:** Application granted (leave to appeal); No order for costs

**Statutes considered:**

ERA s104  
ERA s104(1)  
ERA s104(1)(a)  
ERA s104(1)(b)  
ERA s214  
ERA s214(3)  
Human Rights Act 1993 s30(1)  
Court of Appeal (Civil) Rules 2005 R38  
Court of Appeal (Civil) Rules 2005 R40

**Cases referred to in judgment:**

McAlister v Air New Zealand (2007) 8 NZELC 98,591

**Pages:** 2

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***Woud v Department of Corrections***

AC 25/07

**Heard:** 5 Feb 2007, Auckland

**Judgment Date:** 15 May 2007

**Court/Authority/Tribunal:** Travis, J

**Appearances:** R Harrison ; R Chan

PRACTICE AND PROCEDURE – Application to strike out plaintiff’s application for compliance and declarations – Plaintiff successfully challenged Employment Relations Authority determination – Court awarded increased remedies and reinstatement – Defendant paid remedies awarded less amounts already paid under Authority determination – Plaintiff sought Court remedies in full and declaration as to continuing annual leave entitlements – Defendant submitted application was abuse of process – Estoppel – Res judicata – Against interests of justice – Plaintiff dismissed prior to Employment Relations Amendment Act (No 2) 2004 coming into force but Court decision delivered after its commencement – Effect of section 183(2) Employment Relations Act 2000 (“ERA”) – HELD – Arguable that insertion of s183(2) ERA was purely procedural and would apply in present case – Implicit in unamended s183 ERA that Court decision set aside Authority determination – Court’s substantive decision not intended to provide reimbursement in addition to Authority’s award – Matter of accrued leave was res judicata – Defendant’s application to strike out granted – Prison Officer

This was a successful application to strike out the plaintiff’s application for a compliance order and declaration.

The plaintiff was employed by the defendant as a prison officer. He was dismissed for an alleged failure to carry out patrols and inmate muster checks to required standards and for failing to discover a prison inmate's suicide earlier.

The plaintiff brought a partially successful personal grievance. The Employment Relations Authority found that whilst there had been serious misconduct the dismissal was vitiated by disparity of treatment and awarded remedies. The defendant paid the remedies owing in full.

The plaintiff successfully challenged that determination ([2005] 1 ERNZ 314). The Court found that the plaintiff's conduct was not serious misconduct warranting dismissal and that there was disparity of treatment. The Court awarded increased remedies and reinstatement.

The defendant paid the sums awarded by the Court less the sums already paid pursuant to the Authority's award.

The plaintiff applied for a compliance order requiring payment of the Court award in full. He submitted that the amounts ordered by the Court were intended to be in addition to the amounts awarded by the Authority. He also sought a declaration that accrued annual leave be added to his annual leave entitlement for the period from his summary dismissal to the date of his reinstatement.

The defendant sought to strike out the proceedings as an abuse of the process. It submitted the Court's remedies were intended to be in substitution of the Authority's award. Further, that the doctrine of res judicata applied to the question of annual leave entitlements. The Court was functus officio and could not re-determine the remedies contained in the original judgment. Moreover, annual leave was for service provided and the plaintiff had not been working for the defendant during the period for which annual leave was being claimed. The defendant also submitted the Court had a residual discretion to decline the application if the justice of the case required.

The plaintiff had been dismissed prior to the coming into force of the Employment Relations Amendment Act (No 2) 2004 ("the amendment") which inserted s183(2) of the Employment Relations Act 2000 ("ERA"). However, the Court's substantive hearing and decision was delivered after the amendment was in force.

Held

(1) The plaintiff in his challenge had sought a complete review of the remedies and in particular that of reinstatement, which had been declined by the Authority. The plaintiff's amended statement of claim, although it sought to defend the Authority's determination in part, stated it was "now a full challenge de novo". (para 24)

(2) The substantive judgment was governed by s183 ERA. It was arguable that the insertion of s183(2) ERA was purely procedural to clarify the effect of a decision of the Court and would apply because the substantive judgment was issued after the amendment came into force. The insertion of s183(2) was therefore not retrospective as it did not affect the rights of the parties, but only clarified the effect of decisions of the Court. (paras 25-27)

(3) As amended s183(2) ERA made it clear that once the Court had made a decision on "the matter", which must refer to those parts of the Authority's determination which were the subject of the challenge if a full de novo hearing was not sought, the determination of the Authority was set aside and the Court's determination stood in its place. In the present case remedies were one of the subjects of challenge. The section as amended therefore effectively disposed of the plaintiff's contention that the Court's judgment was to be read as additional to the Authority's determination. (para 28)

(4) If the Court was wrong on the matter of the transitional provisions then the un-amended s183 ERA clearly carried the implicit position that once the Court had made a decision, the determination of the Authority in the matter was to be set aside and the decision of the Court was to stand in its place. (para 29)

(5) The substantive decision was not intended to provide a reimbursement order in addition to that awarded by the Authority. The Court's order was intended to be in substitution for the Authority's award and therefore the defendant was entitled to claim credit for the payment already made. The substantive judgment dealt comprehensively with the compensation award on the findings of fact that had been made, some of which were at great variance to those found by the Authority. The Authority's compensation award was set aside and its only effect was that, because it was paid, the defendant was entitled to claim credit for that amount against the new award. (paras 30-32)

(6) The matter of accrued leave was res judicata and the plaintiff was estopped from now raising that issue which he had not raised in the original hearing. To allow the present application to go forward would be to re-litigate a matter that had already been before the Court and should have been determined there, had it been raised. For the reasons advanced by the defendant that cause of action must also be struck out. (para 41)

(7) The defendant's application to strike out the plaintiff's proceeding succeeded and the plaintiff's claims were struck out. (para 42)

**Result:** Application granted (strike out) ; Costs reserved

**Statutes considered:**

Employment Court Regulations 2000 r6  
High Court Rules R12  
High Court Rules R186  
ERA s179  
ERA s183

**Cases referred to in judgment:**

Attorney-General v Prince and Gardner [1998] 1 NZLR 262  
Brickell v Attorney-General (2002) 16 PRNZ 557 (HC)  
Gilbert v Attorney-General in respect of the Chief Executive of the Department of Corrections (No 1) [2006] 1 ERNZ 1  
Goulding v Chief Executive, Ministry of Fisheries [2004] 3 NZLR 173 (CA)  
Gurleyen v Riyad unreported, Couch J, 10 November 2005, WC 14A/05  
Hoystead v Commissioner of Taxation [1926] AC 155  
McMenamin v Attorney-General [1985] 2 NZLR 274 (CA)  
New Brunswick Rail Co v British and French Trust Corporation Ltd [1939] AC 1  
NZ (with exceptions) Shipwrights etc Union v NZ Amalgamated Engineering etc  
IUOW and Steiner and Spartan Engineering [1989] 3 NZILR 284  
Ruddlesden v Unisys New Zealand Ltd unreported, Shaw J, 18 February 2005, WC  
5/05  
Woud v Department of Corrections [2005] 1 ERNZ 314

**Pages:** 3  
[973686]

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*Andrew Yong t/a Yong & Co Chartered Accountants v Chin*

AC 37/07

**Heard:** 18 Apr 2007, 20 Apr 2007, 7 May 2007, Auckland

**Judgment Date:** 20 Jun 2007

**Court/Authority/Tribunal:** Perkins, J

**Appearances:** E Orlov ; M Nutsford

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Unjustified dismissal – Constructive dismissal – Plaintiff loaned money to defendant’s husband – Loan not repaid – Defendant interviewed about debt – Pressure put on defendant to pay debt – Plaintiff submitted had a right to investigate and discuss alleged or suspected breaches of employment agreement – Submitted, if there was repudiatory conduct, defendant had affirmed employment agreement – HELD – Employer must be initially justified in setting up inquiry into alleged breaches – Suspicion not strong – Delay – Necessary to look at whether plaintiff’s conduct as a whole, judged reasonably and sensibly, was such that defendant should not have been expected to put up with it – Breach of implied term of trust and confidence – Breach of good faith – Resignation foreseeable – Defendant did not affirm contract – Constructive dismissal finding meant no need for further consideration of threshold test prescribed by s103A Employment Relations Act 2000 – Nevertheless, plaintiff’s behaviour was clearly not what a fair and reasonable employer would or could have done in all the circumstances – Challenge dismissed – Compensation for humiliation etc increased – Accountant

This was an unsuccessful de NOVO challenge to a determination of the Employment Relations Authority. The Court held that the defendant was constructively dismissed and awarded increased remedies.

The plaintiff employed the defendant in his accountancy practice in 2002. The defendant resigned in October 2003 but recommenced employment in May 2004. She did not have a written contract of employment. During her first period of employment the plaintiff lent the defendant’s husband (“the husband”) \$50,000 (“the first loan”).

The plaintiff and the husband agreed not to tell the defendant about the loan.

Following a successful transaction for a client of the plaintiff the defendant and her husband visited the client’s home for dinner. That invitation was reciprocated and the client attended dinner at the defendant’s home. Following that dinner the client lent the husband \$60,000 (“the second loan”). The second loan occurred when the defendant was not employed by the plaintiff. The husband was adjudicated bankrupt and neither loan was repaid. However, due to a matrimonial property agreement the defendant’s assets were largely protected. The plaintiff learned of the second loan when the client alleged breach of fiduciary duty against the plaintiff and the defendant.

Following the husband’s bankruptcy, the plaintiff began suggesting the defendant honour the first loan. The plaintiff alleged the defendant was aware of both loans but initially accepted the defendant was not involved. The plaintiff next received the help of a business consultant aligned with scientology. The consultant interviewed the defendant about her integrity and loyalty and traversed personal matters including how she or her husband was to repay the first loan. The defendant complained about the content of the interview and received a reply requesting a

solution as to loan repayment. Further correspondence between the parties began to indicate that the plaintiff desired the defendant's resignation if a solution was not forthcoming. In that correspondence the issue of the lack of written employment agreement was discussed and the defendant was requested to finalise a written agreement sent to her. The defendant requested time to take legal advice before signing. The plaintiff and the consultant then visited the husband at the defendant's home unannounced while the defendant was on leave. The defendant directed them to leave and when they refused the police were called. In response, the defendant resigned and brought proceedings for constructive dismissal.

The Employment Relations Authority found the defendant had been constructively dismissed and awarded remedies including \$5,000 compensation for humiliation etc.

The plaintiff submitted he had a right to investigate and discuss alleged or suspected breaches of the employment agreement citing *Auckland Electric Power Board v Auckland Provincial etc Officers IUOW* (cited below). The plaintiff alleged the matrimonial property agreement and the client dinners were part of a conspiracy between the defendant and her husband. The plaintiff submitted that those were among the matters which provided the basis for the plaintiff and the consultant to question the defendant. The plaintiff submitted that even if the contract had been repudiated, the defendant had affirmed the contract.

The defendant submitted she had been unjustifiably constructively dismissed.

The present case was the first constructive dismissal personal grievance to be decided by the Court following the enactment of s103A and s4(1A) Employment Relations Act 2000 ("ERA").

Held

(1) There were three situations where a constructive dismissal might occur: (i) where the employee was given a choice of resignation or dismissal; (ii) where the employer had followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and, (iii) where a breach of duty by the employer led a worker to resign. It was the last of those three situations that applied in the present case. (parkas 34, 35)

(2) An employer must be initially justified in setting up an inquiry. In *Auckland Electric Power Board v Auckland Provincial etc Officers IUOW* (cited below) suspicions were strong and the employer embarking on an inquiry was reasonable, whereas in the present case that was not so. In addition the inquiry was conducted without delay whereas in the present case that was not the position. (parkas 37, 45)

(3) In considering whether there was a breach of the implied mutual obligations of trust and confidence or the overall obligation of good faith, it was necessary to look at whether the employer's conduct as a whole, judged reasonably and sensibly, was such that the defendant should not have been expected to have put up with it. (parka 40)

(4) There was no conspiracy between the defendant and her husband. There was no impropriety in the defendant accepting the invitations to dinner or reciprocating. There was no principle of employment law forbidding such contact between an employee and employer's client. Those matters did not provide the basis for the investigation of the defendant's integrity and loyalty. It was debatable whether the plaintiff or the consultant knew about the matrimonial property agreement or the dinner invitations at the time of the questioning of the defendant. (parka 41)

(5) The plaintiff had, over a year earlier, accepted that the defendant was not a party to the loan transaction. He did not need any further assurance from the defendant on that score in any event

because he had agreed with her husband at the time that he made the first loan that she should not be informed. (parka 42)

(6) The submission that the defendant affirmed the contract was only relevant in the context of constructive dismissal arising from repudiatory conduct followed by the election to cancel the contract. The Court's inquiry was to be wider than that. Nevertheless, the defendant did not affirm the contract of employment or, more correctly, waive previous conduct towards her by her employer. Even if she had signed the written agreement, so that there was retrospective technical compliance with the law, that would not amount to waiver or affirmation. Secondly, the act of going to the defendant's home must have been likely to have created an altercation as it did. A foreseeable outcome of that action, against the previous background and correspondence, must have been the defendant's resignation from employment. (parka 43)

(7) The actions of the consultant and the plaintiff justified the defendant's resignation and thereby amounted to a constructive dismissal. There was no reasonable justification for the interview without notice which then proceeded to delve into personal matters. The consultant undermined the defendant's position. He attacked her integrity. In later correspondence he made statements tantamount to threatening her continued employment. The plaintiff stood by and encouraged those actions. (parka 45)

(8) Whether or not the actions of the plaintiff in the present proceedings were couched in terms of conduct repudiatory of the contract, breach of implied terms to maintain trust and confidence, or breach of the obligation of good faith the effect was the same. The actions were causative of the defendant's resignation. Her resignation must have been a reasonably foreseeable outcome of their behaviour, which was unjustified. (parka 47)

(9) In a case involving facts such as the present it was clear that the finding that there had been a constructive dismissal resulting from the behaviour and breach of duty or obligation of the employer meant that there did not really need to be a further consideration of the threshold prescribed by s103A ERA. Nevertheless, the behaviour of the plaintiff was clearly not what a fair and reasonable employer would, or for that matter could, have done in all the circumstances. (parka 48)

(10) The Authority's remedies awards were affirmed, except as to compensation for humiliation. The effect of the actions of the plaintiff was considerable. The defendant suffered headaches, difficulty in sleeping and other symptoms of stress. As the challenge sought a hearing de NOVO against the whole of the determination, it was open to the Court to increase the defendant's awards. A more appropriate level of compensation for humiliation was \$8,000. There was no evidence of contribution.  
(parkas 2, 46, 49-52)

#### COMMENT:

(1) Constructive dismissal might not fall to be determined just in the context of common law repudiation of contract with an election to cancel. Rather the conduct of the parties and its cumulative impact on the employment relationship was to be considered. In New Zealand these issues might now be academic with the statutory overlay of the Employment Relations Act 2000 ("ERA"). Section 4(1)(a) ERA required the parties to an employment relationship to deal with each other in good faith. Section 4(1A)(a) stated that such duty "[was] wider in scope than the implied mutual obligations of trust and confidence". (parkas 38, 39)

**Result:** Challenge dismissed ; Reimbursement of lost wages (\$3,653.85) ; Compensation for humiliation etc (\$8,000) ; Arrears of holiday pay (\$2,192.31 plus interest) ; Costs

reserved

**Statutes considered:**

ERA s4(1)(a)  
ERA s4(1A)(a)  
ERA s103A

**Cases referred to in judgment:**

Officers IUOW Inc [1994] 1 ERNZ 168  
Auckland Shop Employees Union v Woolworths (NZ) Ltd [1985] 2 NZLR 372  
Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich (t/a  
Greenwich and Associates Employment Agency and Complete Fitness Centre) [1983]  
ACJ 965 ; (1983) ERNZ Sel Cas 95  
Western Excavating (EEC) Ltd v Sharp [1978] QB 761  
Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 (EAT)  
Woods v WM Car Services (Peterborough) Ltd [1982] ICR 693 (CA)

**Pages:** 4  
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## Arrears - Employment Relations Act 2000

### *Alloy Yachts International Ltd v Ewins*

4 Dec 2006, R Arthur, AA 366/06, (2 pages)

RECOVERY OF MONIES - Applicant sought order for repayment of money lent to respondent to purchase tools - No appearance for respondent - Applicant subsidised purchase of tools by staff - If left within one year, portion of subsidy to be repaid - Respondent was dismissed and took tools before year completed - Part of subsidy recovered from respondent's final pay - Respondent twice undertook to make repayments by instalments and failed to do so without explanation - Entitled to order for payment with interest until debt paid - Interest 8 percent - Interest applied from last date respondent agreed to begin repayments - Monies due and owing

**Result:** Application granted ; Orders accordingly ; Recovery of monies (\$998.82) ; Interest owing (\$32.88) ; Interest (8.65%) ; Disbursements in favour of applicant (\$70)(Filing fee)

### *Engineering, Printing and Manufacturing Union & Ors v Borg Industries Ltd*

7 Dec 2006, Y Oldfield, AA 370/06, (2 pages)

PRACTICE AND PROCEDURE - Risk of liquidation meant Authority opted for investigation meeting without sending parties to mediation - No appearance by two applicants, MM and PL - Authority took no further action in respect of their claims - However, as investigation meeting set down at very short notice claims not dismissed - MM and PL to advise Authority if wanted to resume claim - ARREARS OF WAGES AND HOLIDAY PAY - Applicant employees laid off without notice - Sought payment in lieu of notice and outstanding holiday pay - Respondent did not dispute WF and IS not paid entitlements - MS owed pay in lieu of notice only - Applicants had not received pay slips and unable to tell Authority gross weekly wage - Respondent to provide wage and time records to applicants' representative - RECOVERY OF MONIES - Applicant union sought remittance of union fees deducted from members wages by respondent - Respondent did not dispute fees owed and stressed unable, rather than unwilling to pay - Parties reminded could attend mediation to discuss arrangements for payment

**Result:** Application granted ; Arrears of wages (Notice)(4 weeks)(Payable to WF, IS and MS) ; Arrears of holiday pay (2 weeks)(Payable to WF and IS) ; Other monies (\$3,955.20)(Union fees)(Payable to union) ; Orders accordingly ; No order for costs

### *Garas-Endrawis v Albany Food Warehouse Ltd*

23 Nov 2006, R Monaghan, AA 354/06, (9 pages)

UNJUSTIFIED DISMISSAL - Alleged actual or constructive dismissal - Applicant injured back at work - Matter referred to ACC - Medical certificate stated applicant not fit for heavy lifting - No light duties available - Applicant sent home - No dismissal at this time, open ended nature of absence not unknown in employment law and respondent should have been advised of progress - However ACC concluded employment had ended - Applicant found out employee number assigned to someone else and concluded employment terminated - Respondent to clarify matter - Received indication that employment terminated - Should have contacted employer, not ACC - Acquiescence by applicant considered by respondent that employment abandoned - Authority concluded circumstances amounted to combination of misunderstanding and miscommunication, but no dismissal - Matter transferred to business services manager ("KP") - Applicant informed that still a staff member and still on payroll - Applicant indicated would not be able to do checkout job - Applicant would not accept alternative employment at position of lower level than what she was qualified for - Applicant failed to distinguish between wider vacancies that ACC recommended and work respondent might offer in interests of continuing her employment - Applicant not entitled to

expect kind of work that was being explored by ACC - Applicant told if could not work as checkout operator then should resign - Letter sent to applicant requesting confirmation of termination - Applicant confirmed position should be terminated - Overall, circumstances amounted to termination by consensus - No dismissal - UNJUSTIFIED DISADVANTAGE - Changes to hours made by agreement - No unjustified disadvantage - ARREARS OF WAGES AND HOLIDAY PAY - Claim for unpaid holidays dismissed - No need for notice since termination by consensus - Length of service 15 months - Checkout assistant  
**Result:** Application dismissed ; Costs reserved

### ***Hormann v Virtual Warehouse Ltd***

*31 Oct 2006, R Arthur, AA 164A/06, (7 pages)*

PRACTICE AND PROCEDURE - Quantum of remedies - Earlier determination found leave payments to be deducted from salary entitlements accrued after 2003 - Calculation of entitlements left to parties - Leave reserved for them apply for further determination - Parties unable to agree - Authority now determined entitlements - Earlier determination found applicant's entitlement to full salary and accumulated leave up to 2003 forgone as part of agreement to purchase shares in respondent's business - Respondent claimed entitled to make deductions from entitlements - Not entitled to deduct accrued holiday pay - Applicant exceeded leave entitlement by three days - Since applicant already received leave, respondent entitled to deduct from salary entitlements - No basis for argument days worked while receiving parental leave payment ("PPL") should be considered paid leave from respondent - Applicant did not work on those days, and accepted obliged to account to IRD if paid while receiving PPL - Applicant continued to receive salary while on period of "stress leave" - No basis for respondent to recoup this period from salary entitlements - Applicant also claimed entitled to additional year annual leave entitlements - Applicant not in "continuous employment" for period claimed - Not just to require payment of interest in period applicant and director agreed to draw only part of salary - Applicant entitled to interest on amounts owing for specified period - Respondent could not pay salary owing in lump sum - Ordered to pay sums in 12 monthly instalments - Financial controller  
**Result:** Application granted ; Orders accordingly ; Interest (90-day bill rate plus a%) Costs reserved

### ***Iles v Dry Run Holdings Ltd***

*27 Oct 2006, GJ Wood, WA 147/06, (4 pages)*

UNJUSTIFIED DISADVANTAGE - UNJUSTIFIED DISMISSAL - Respondent registered in New Zealand but run in Australia - Signed employment agreement stated relationship between applicant and franchise trading name PH - Respondent employer at time of termination - Clearly breach of good faith and likely to be misleading if employer failed to describe actual name of employer - PH sold to D - Representatives of D arrived at applicant's store and told staff store closing in two days, and could apply for jobs with D - PH did not contact staff to explain what would happen or give notice - Respondent's director claimed sale and purchase agreement had condition D would take over responsibility for employees on sale, and sale confidential - No evidence provided of agreement - Trite law employer could not transfer employees to new employer without specific approval - Such approval not sought or gained in this case - Would not have been productive to direct mediation - Applicant's dismissal was effect of sale of franchise - Positions offered by D all significant distance away store - Applicant acted reasonably in declining to apply for position - Failed to consult in redundancy situation and pay notice - Unjustified disadvantage - Genuine redundancy as whole business sold - Dismissal justified - Remedies - Compensated for failure to consult and give notice - ARREARS OF WAGES - Applicant not paid final week's wages or payment in lieu of notice - Should have been given two weeks notice - Wages due and owing - COSTS - Applicant assisted by community law centre - Length of investigation meeting not specified - Filing fee only expense incurred - Respondent to reimburse filing fee - Length of service five years four months - Fast food

worker

**Result:** Application granted (Unjustified disadvantage, arrears of wages) ; Application dismissed (Unjustified dismissal) ; Arrears of wages (\$840) ; Compensation for humiliation etc (\$3,500) ; Disbursements in favour of applicant (\$70)(Filing fee)

### ***Kirk v Barrett***

8 Dec 2006, J Crichton, CA 171/06, (3 pages)

ARREARS OF WAGES - Applicant sought first week's ACC earnings related compensation - Sustained work injury precluding continued employment - Respondent indicated did not pay compensation because applicant able to use ankle allegedly could not walk on - Now understood obligation to make payment - Wages due and owing - ARREARS OF HOLIDAY PAY - Also sought payment for public holidays and annual holidays - Respondent argued applicant seasonal casual employee not entitled to receive holiday pay separately from hourly rate - Instant case different from Alliance Group Ltd v New Zealand Meat Workers Union Inc (cited below) because here worker's entitlement to annual and public holiday leave fell to be determined within particular season - Satisfied applicant worked as and when required - Factually seemed to be seasonal employment relationship on casual principles rather than permanent relationship - Nothing turned on employment status - Fundamental issue whether public holidays fell on otherwise working days - Applicant habitually worked Mondays and Fridays - Entitled to time and half and alternative holiday for public holidays worked on those days - Given no written employment agreement existed impossible to maintain applicant agreed wage rate included annual holiday pay - Holiday pay due and owing - Respondent to pay instalments

**Result:** Application granted ; Arrears of wages (\$250) ; Arrears of holiday pay (\$504.99) ; Disbursements in favour of applicant (\$70)(Filing fee)

### ***Purcell v Wired Communications NZ Ltd***

29 Jun 2007, P Cheyne, CA 71/07, (4 pages)

UNJUSTIFIED DISMISSAL – Redundancy - No appearance by respondent – Applicant's evidence accepted - Dismissed without notice or warning when told by payroll no further work – Applicant attempted to contact director but he did not return calls – Appeared business had not traded since applicant dismissed, although apparently some staff working for another business run by director – Even (perhaps especially) in case of apparent business failure, employees entitled to fair and reasonable treatment – Dismissal unjustified - Remedies - No written employment agreement specifying notice - Reasonable notice fixed at four weeks - ARREARS OF WAGES AND HOLIDAY PAY - Applicant not paid at agreed rate - Also not paid last week's wages or holiday pay - Monies due and owing - COSTS - Length of investigation meeting not specified - Length of service 14 weeks

**Result:** Application granted ; Compensation for humiliation etc (\$10,000) ; Wages in lieu of notice (\$1,300)(Four weeks) ; Arrears of wages (\$1,300) ; Arrears of holiday pay (\$273) ; Costs in favour of applicant (\$1,500)

### ***Robinson (Labour Inspector) v Hine***

25 Oct 2006, M Urlich, AA 326/06, (2 pages)

ARREARS OF WAGES - Applicant Labour Inspector sought to recover two days sick leave entitlement on behalf of employee - Medical certificate provided at request of respondent - Sick leave not paid and matter referred to Labour Inspectorate - No appearance by respondent - No written employment agreement - Authority accepted applicant's unchallenged evidence - Applicant entitled to sick leave - Interest 7 percent - PENALTY - Respondent's failure to pay sick leave deliberate - Penalty appropriate - Applicant also sought penalty for failure to provide written agreement - Penalty declined as respondent not put on notice of claim - COSTS - Respondent to reimburse applicant for filing fee -

Reasonable to recover full costs incurred in engaging service agent - Authority directed applicant to arrange personal service of investigation meeting notice on respondent - Legal secretary

**Result:** Application granted ; Arrears of wages (\$250)(Sick leave) ; Penalty (\$250)(Payable to Crown) ; Interest (7%) Costs in favour of applicant (\$108.17) ; Disbursements in favour of applicant (\$70)(filing fee)

***Semmens (Labour Inspector) v SDP Call Centres Ltd***

*27 Oct 2006, D Asher, WA 145/06, (9 pages)*

JURISDICTION - Applicant Labour Inspector sought determination R an employee - No appearance for respondent - Director claimed unable to prepare and attend investigation meeting due to ill health - Respondent had witness statements and elected not to respond to allegations - Age of R's claims, absence of medical records about director's health, and advice regarding respondent's poor trading position defeated its implied request matters be "held off" - Not unfair to proceed with investigation meeting - Whether employee or independent contractor - No written employment agreement - Two other ex-employees of respondent pursued similar claims - Claims settled by way of a Authority consent determination - Applicant relied on express terms in consent determination to support claim R an employee - R worked from respondent's premises with set regular work patterns - Remuneration commission based - Not required to invoice for services - Respondent's level of control significant - Evidence showed R, along with other operators, integral part of respondent's business - No evidence in business on own account - Overall picture clearly one of R being full-time employee - No evidence of industry practice telephone operators/telemarketers typically employed on contract for services - No reason to doubt R's evidence, to extent she turned her mind to it, she intended to enter employment relationship - Employee - ARREARS OF WAGES AND HOLIDAY PAY - Applicant entitled to recover minimum wages, annual holiday pay, public holiday pay, and interest - Minimal wage and time records provided despite requests made to respondent - Applicant's estimation of arrears accepted - Holiday pay and wages due and owing - Interest 6 percent - COSTS - Respondent to reimburse filing fee

**Result:** Application granted ; Arrears of wages (\$30,422.52) ; Arrears of holiday pay (\$3,264)(Public holiday pay), (\$5,461.20)(Annual holiday pay) ; Interest (6%) ; Disbursements in favour of applicant (\$70)(Filing fee)

***Taylor v eCom New Zealand***

*10 Oct 2006, D King, AA 29A/06, (6 pages)*

ARREARS OF WAGES - Applicant claimed owed unpaid commissions - Performance incentive to be paid on "all new business closed from new or existing clients" - Earlier determination held bonus to be paid on new business arising from applicant's efforts, not on new business simply concluded whilst employed - "New" business meant something not a continuation or retention of existing business - Interpretation of "new" business as something other than business company would get on day to day normal running sensible - Applicant also had to be instrumental in obtaining business and it had to be "closed" by him - Company policy did not consider new business closed until contract signed - Authority considered several transactions and found no commission owing - COUNTERCLAIM - PENALTY - Respondent claimed applicant breached confidentiality of mediation by telling Authority Support Officer no offer made - Unfortunate comment made, but Authority did not consider breach deliberate - Declined to award penalty - DAMAGES - Application to enforce undertaking as to damages - Applicant obtained interim reinstatement on garden leave - Dismissal justified - Applicant to reimburse wages paid by respondent plus interest - Business Development Manager

**Result:** Application dismissed ; Counterclaim dismissed (Penalty) ; Counterclaim granted (Damages) ; Damages (\$8,836.94) ; Interest (14.5%) ; Costs reserved

***Viegas v The Flower House (2005) Ltd***

*27 Jun 2007, Y Oldfield, AA 193/07, (4 pages)*

UNJUSTIFIED DISMISSAL – Redundancy – No appearance by respondent – Applicant redundant when shop stopped trading – No notice shop to be closed or discussion regarding redeployment – Authority could not safely conclude redundancy genuine – Dismissal unjustified – Remedies - Authority accepted four week notice period applied - Applicant also alleged respondent's director spread malicious gossip about her – Evidence on point hearsay and Authority not satisfied assertion well founded - ARREARS OF WAGES AND HOLIDAY PAY – Arrears of overtime and holiday pay due and owing - Applicant unable to provide gross wages and IRD had not received PAYE for her from respondent - Amounts calculated in net terms - Respondent reminded of obligation to pay PAYE - PARENTAL LEAVE – At time of redundancy applicant 4½ months pregnant – Formal parental leave application not completed but had told respondent wished to take parental leave – Applicant's difficulty finding work after dismissal compounded by understanding no longer eligible for statutory parental leave payment – Sought compensation for loss of benefit – While express statutory provision ensured employees whose employment ended during parental leave retained entitlement to payment, similar provision did not appear to have been made for those whose employment terminated before commencement of leave – Question of eligibility for payment in such cases not tested - Payment a statutory entitlement not obligation of employer - Could not be described as benefit of employment relationship – Authority could make no further order for compensation for loss of parental leave payment – Length of service one year - Florist

**Result:** Application granted ; Reimbursement of lost wages (\$7,150 net)(13 weeks) ; (\$2,200 net)(Notice) ; Compensation for humiliation etc (\$5,000) ; Arrears of wages (\$690 net)(Overtime) ; Arrears of holiday pay (\$949.79 net) ; Disbursements in favour of applicant (\$70)(Filing fee)

# Arrears - Holiday Pay - Employment Relations Act 2000

## ***Dams v Powerbeat International Ltd***

22 Nov 2006, A Dumbleton, AA 352/06, (5 pages)

RAISING PERSONAL GRIEVANCE - Whether grievance raised within 90 days - Time ran from date applicant formed belief dismissed, not last day of work - After dismissal applicant approached lawyer, who posted grievance letter - When no response for several weeks, applicant contacted lawyer and letter sent again - Authority accepted first letter sent well inside 90 day period - However, not satisfied respondent received it - Grievance could not be said to have been communicated to employer - Second letter received three days out of time - Whether exceptional circumstances permitted granting of leave to raise grievance out of time - Respondent had over two weeks notice leave would be sought - Delay small in relation to overall 90 day period - No evidence delay prejudiced respondent - Grievance arguable and not totally without merit - Applicant made reasonable arrangements to have grievance raised on his behalf and, when heard nothing more, made enquiries - Circumstances did not fit s115(b) Employment Relations Act 2000 as lawyer did not fail to write or post letter in time - Applicant could not reasonably be held to blame for whatever caused non receipt of posted letter - Delay occasioned by exceptional circumstances - Just to grant leave to raise grievance out of time - Result would be same if lawyer were to blame for delay - ARREARS OF HOLIDAY PAY - Respondent undertook to see applicant received holiday pay owing - Engineer

**Result:** Application granted ; Parties directed to mediation ; Costs reserved

## ***Engineering, Printing and Manufacturing Union & Ors v Borg Industries Ltd***

7 Dec 2006, Y Oldfield, AA 370/06, (2 pages)

PRACTICE AND PROCEDURE - Risk of liquidation meant Authority opted for investigation meeting without sending parties to mediation - No appearance by two applicants, MM and PL - Authority took no further action in respect of their claims - However, as investigation meeting set down at very short notice claims not dismissed - MM and PL to advise Authority if wanted to resume claim - ARREARS OF WAGES AND HOLIDAY PAY - Applicant employees laid off without notice - Sought payment in lieu of notice and outstanding holiday pay - Respondent did not dispute WF and IS not paid entitlements - MS owed pay in lieu of notice only - Applicants had not received pay slips and unable to tell Authority gross weekly wage - Respondent to provide wage and time records to applicants' representative - RECOVERY OF MONIES - Applicant union sought remittance of union fees deducted from members wages by respondent - Respondent did not dispute fees owed and stressed unable, rather than unwilling to pay - Parties reminded could attend mediation to discuss arrangements for payment

**Result:** Application granted ; Arrears of wages (Notice)(4 weeks)(Payable to WF, IS and MS) ; Arrears of holiday pay (2 weeks)(Payable to WF and IS) ; Other monies (\$3,955.20)(Union fees)(Payable to union) ; Orders accordingly ; No order for costs

## ***Garas-Endrawis v Albany Food Warehouse Ltd***

23 Nov 2006, R Monaghan, AA 354/06, (9 pages)

UNJUSTIFIED DISMISSAL - Alleged actual or constructive dismissal - Applicant injured back at work - Matter referred to ACC - Medical certificate stated applicant not fit for heavy lifting - No light duties available - Applicant sent home - No dismissal at this time, open ended nature of absence not unknown in employment law and respondent should have been advised of progress - However ACC concluded employment had ended - Applicant found out employee number assigned to someone else and concluded employment terminated - Respondent to clarify matter - Received indication that employment terminated - Should have contacted employer, not ACC - Acquiescence by applicant considered by respondent

that employment abandoned - Authority concluded circumstances amounted to combination of misunderstanding and miscommunication, but no dismissal - Matter transferred to business services manager ("KP") - Applicant informed that still a staff member and still on payroll - Applicant indicated would not be able to do checkout job - Applicant would not accept alternative employment at position of lower level than what she was qualified for - Applicant failed to distinguish between wider vacancies that ACC recommended and work respondent might offer in interests of continuing her employment - Applicant not entitled to expect kind of work that was being explored by ACC - Applicant told if could not work as checkout operator then should resign - Letter sent to applicant requesting confirmation of termination - Applicant confirmed position should be terminated - Overall, circumstances amounted to termination by consensus - No dismissal - UNJUSTIFIED DISADVANTAGE - Changes to hours made by agreement - No unjustified disadvantage - ARREARS OF WAGES AND HOLIDAY PAY - Claim for unpaid holidays dismissed - No need for notice since termination by consensus - Length of service 15 months - Checkout assistant  
**Result:** Application dismissed ; Costs reserved

***Kirk v Barrett***

*8 Dec 2006, J Crichton, CA 171/06, (3 pages)*

ARREARS OF WAGES - Applicant sought first week's ACC earnings related compensation - Sustained work injury precluding continued employment - Respondent indicated did not pay compensation because applicant able to use ankle allegedly could not walk on - Now understood obligation to make payment - Wages due and owing - ARREARS OF HOLIDAY PAY - Also sought payment for public holidays and annual holidays - Respondent argued applicant seasonal casual employee not entitled to receive holiday pay separately from hourly rate - Instant case different from Alliance Group Ltd v New Zealand Meat Workers Union Inc (cited below) because here worker's entitlement to annual and public holiday leave fell to be determined within particular season - Satisfied applicant worked as and when required - Factually seemed to be seasonal employment relationship on casual principles rather than permanent relationship - Nothing turned on employment status - Fundamental issue whether public holidays fell on otherwise working days - Applicant habitually worked Mondays and Fridays - Entitled to time and half and alternative holiday for public holidays worked on those days - Given no written employment agreement existed impossible to maintain applicant agreed wage rate included annual holiday pay - Holiday pay due and owing - Respondent to pay instalments  
**Result:** Application granted ; Arrears of wages (\$250) ; Arrears of holiday pay (\$504.99) ; Disbursements in favour of applicant (\$70)(Filing fee)

***Pellow-Jarman v CMI Fasteners Ltd***

*20 Dec 2006, M Urlich, AA 384/06, (3 pages)*

ARREARS OF HOLIDAY PAY – Applicant argued calculation of holiday pay should have included bonus payments – Respondent submitted bonus expressly excluded from calculation under terms of employment agreement – Agreement excluded allowances and reimbursement payments - Respondent relied on payroll coding system which coded payments as allowance – No suggestion payroll system part of applicant's terms of employment, or that wording used agreed with him – Coding of payroll system had no bearing on terms of employment – No suggestion bonus payments were reimbursement payments – Respondent never had occasion not to approve applicant's bonus – Bonus part of employment agreement - No discretionary element to payment – Bonus payments part of gross earnings for purposes of calculating holiday pay – Authority advised would refer issue of quantum to Labour Inspectorate  
**Result:** Application granted ; Arrears of holiday pay (Quantum to be determined) ; Orders accordingly ; Disbursements in favour of applicant (\$70)(Filing fee)

***Purcell v Wired Communications NZ Ltd***

29 Jun 2007, P Cheyne, CA 71/07, (4 pages)

UNJUSTIFIED DISMISSAL – Redundancy - No appearance by respondent – Applicant's evidence accepted - Dismissed without notice or warning when told by payroll no further work – Applicant attempted to contact director but he did not return calls – Appeared business had not traded since applicant dismissed, although apparently some staff working for another business run by director – Even (perhaps especially) in case of apparent business failure, employees entitled to fair and reasonable treatment – Dismissal unjustified - Remedies - No written employment agreement specifying notice - Reasonable notice fixed at four weeks - ARREARS OF WAGES AND HOLIDAY PAY - Applicant not paid at agreed rate - Also not paid last week's wages or holiday pay - Monies due and owing - COSTS - Length of investigation meeting not specified - Length of service 14 weeks

**Result:** Application granted ; Compensation for humiliation etc (\$10,000) ; Wages in lieu of notice (\$1,300)(Four weeks) ; Arrears of wages (\$1,300) ; Arrears of holiday pay (\$273) ; Costs in favour of applicant (\$1,500)

***Semmens (Labour Inspector) v SDP Call Centres Ltd***

27 Oct 2006, D Asher, WA 145/06, (9 pages)

JURISDICTION - Applicant Labour Inspector sought determination R an employee - No appearance for respondent - Director claimed unable to prepare and attend investigation meeting due to ill health - Respondent had witness statements and elected not to respond to allegations - Age of R's claims, absence of medical records about director's health, and advice regarding respondent's poor trading position defeated its implied request matters be "held off" - Not unfair to proceed with investigation meeting - Whether employee or independent contractor - No written employment agreement - Two other ex-employees of respondent pursued similar claims - Claims settled by way of a Authority consent determination - Applicant relied on express terms in consent determination to support claim R an employee - R worked from respondent's premises with set regular work patterns - Remuneration commission based - Not required to invoice for services - Respondent's level of control significant - Evidence showed R, along with other operators, integral part of respondent's business - No evidence in business on own account - Overall picture clearly one of R being full-time employee - No evidence of industry practice telephone operators/telemarketers typically employed on contract for services - No reason to doubt R's evidence, to extent she turned her mind to it, she intended to enter employment relationship - Employee - ARREARS OF WAGES AND HOLIDAY PAY - Applicant entitled to recover minimum wages, annual holiday pay, public holiday pay, and interest - Minimal wage and time records provided despite requests made to respondent - Applicant's estimation of arrears accepted - Holiday pay and wages due and owing - Interest 6 percent - COSTS - Respondent to reimburse filing fee

**Result:** Application granted ; Arrears of wages (\$30,422.52) ; Arrears of holiday pay (\$3,264)(Public holiday pay), (\$5,461.20)(Annual holiday pay) ; Interest (6%) ; Disbursements in favour of applicant (\$70)(Filing fee)

***Viegas v The Flower House (2005) Ltd***

27 Jun 2007, Y Oldfield, AA 193/07, (4 pages)

UNJUSTIFIED DISMISSAL – Redundancy – No appearance by respondent – Applicant redundant when shop stopped trading – No notice shop to be closed or discussion regarding redeployment – Authority could not safely conclude redundancy genuine – Dismissal unjustified – Remedies - Authority accepted four week notice period applied - Applicant also alleged respondent's director spread malicious gossip about her – Evidence on point hearsay and Authority not satisfied assertion well founded - ARREARS OF WAGES AND

HOLIDAY PAY – Arrears of overtime and holiday pay due and owing - Applicant unable to provide gross wages and IRD had not received PAYE for her from respondent - Amounts calculated in net terms - Respondent reminded of obligation to pay PAYE - PARENTAL LEAVE – At time of redundancy applicant 4½ months pregnant – Formal parental leave application not completed but had told respondent wished to take parental leave – Applicant’s difficulty finding work after dismissal compounded by understanding no longer eligible for statutory parental leave payment – Sought compensation for loss of benefit – While express statutory provision ensured employees whose employment ended during parental leave retained entitlement to payment, similar provision did not appear to have been made for those whose employment terminated before commencement of leave – Question of eligibility for payment in such cases not tested - Payment a statutory entitlement not obligation of employer - Could not be described as benefit of employment relationship – Authority could make no further order for compensation for loss of parental leave payment – Length of service one year - Florist

**Result:** Application granted ; Reimbursement of lost wages (\$7,150 net)(13 weeks) ; (\$2,200 net)(Notice) ; Compensation for humiliation etc (\$5,000) ; Arrears of wages (\$690 net)(Overtime) ; Arrears of holiday pay (\$949.79 net) ; Disbursements in favour of applicant (\$70)(Filing fee)

## Bargaining - Employment Relations Act 2000

### *Tuari & Anor v Sims Pacific Metals Ltd & Ors*

23 Mar 2007, P Cheyne, CA 27/07, (14 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal - First applicant (“J”) wife of second applicant (“T”) - Both employed by respondent - Respondents concerned about T’s performance – T suffered stress-related breakdown – T given two options, disciplinary process or exit package – T agreed he and J would resign in exchange for money – T confirmed had spoken to J and she agreed to resign – T signed settlement agreement - Next morning applicants returned to work, where J deleted computer files and T broke memory stick – J disputed resignation, claiming T could not make decision on her behalf – Respondents stood J down but later said could return to work – J subsequently resigned – Whether constructively dismissed - Only possibility of coercion was dealings over J’s later resignation – Respondents could be criticised for initiating arrangements through T – However, J knew and implicitly consented to arrangements – No course of conduct with deliberate and dominant purpose of coercing resignation – No sufficiently serious breach of duty making resignation reasonably foreseeable - No constructive dismissal – BREACH OF CONTRACT - Counterclaim - Respondents claimed breach of contract and sought damages - Implied duty of trust and confidence extended to prohibit intentionally damaging company property – J breached implied obligations by deleting computer files and assisting T in breaking memory stick – No evidence of actual loss aside from memory stick – J ordered to pay damages for memory stick only - PENALTY – Respondents claimed applicants breached implied terms and/or aided and abetted each other in breaching employment agreements – No reason to distinguish between levels of culpability – Penalty imposed against applicants for breach of implied terms of trust and confidence – BARGAINING – T counterclaimed settlement agreement result of unfair bargaining under s68 Employment Relations Act 2000 (“ERA”) – Authority found settlement agreement term of employment agreement and unfair bargaining claim considered - While T unwell, no evidence could not understand implications of settlement agreement – Evidence T went into meeting intending to resign – Could not succeed under s68(2)(a) ERA – Whether T induced to enter settlement agreement by oppressive means, undue influence or duress – Although pressured by options put to him at meeting, could not succeed in face of evidence intended to resign – Valid full and final agreement meant T could not succeed in personal grievance – Could not circumvent effect of settlement with penalty actions against respondents - J's length of service seven months, T's not specified - Office assistant and yard manager

**Result:** Application dismissed (Unjustified dismissal, bargaining) ; Application granted (Breach of contract, penalty) ; Damages (\$50)(Payable to Respondents) ; Penalty (\$1,000 each applicant)(Payable to Crown) ; Costs reserved

# Compliance Order - Employment Relations Act 2000

## *Association of Staff in Tertiary Education: Te Hau Takitini o Aotearoa v Webster (Chief Executive of Unitec Institute of Technology)*

30 Oct 2006, R Arthur, AA 330/06, (10

pages)

COMPLIANCE ORDER - Applicant sought compliance with consultation provisions in collective employment agreement ("CEA") - Alleged decision to withdraw diploma course outside terms of staffing review and respondent failed to honour CEA - Applicant also claimed should have been consulted on decision to relocate computer classes - Respondent claimed staffing review conducted in accordance with CEA and relocation not a review of type contemplated by CEA, but applicant had input anyway - Whether review "may" result in "significant" changes and invoke operation of CEA to be assessed objectively by effect on staff - Effect need only be possibility, not as high as likelihood - Respondent did not meet requirements of statutory duty of good faith, CEA or its own policies when decided to withdraw course - Position on Diploma's future beyond scope of terms of reference - Only few days allowed for submissions before proposal adopted on misleading basis adequate consultation had occurred - Diploma proposal a significant change and within circumstances contemplated by CEA - Respondent also failed to comply with CEA before decided to relocate classes - Proposal of type that triggered CEA consultation requirements - Consultation requirements not met simply because staff told of proposal were union members - Respondent also failed to appreciate distinction between employee's who were union members giving feedback as managers, and union feedback - CEA required respondent to do more than rely on employees to notify important issues to applicant's national office - Applicant's evidence on practices of other parties to same CEA not relevant - Respondent ordered to comply with CEA - GOOD FAITH - Counterclaim - Authority made no findings on respondent's complaint applicant did not act in good faith during staffing review - However, commented that delaying responses or seeking ever more detailed information may be inconsistent with good faith

**Result:** Application granted ; Compliance ordered ; Counterclaim dismissed ; Costs reserved

## *McCarthy v Centurion GSM Ltd & Anor*

31 Oct 2006, R Arthur, AA 334/06, (3 pages)

PRACTICE AND PROCEDURE - Application by respondents for return of particular document - Applicant made copy of document while employed by first respondent - Sought to use document in support claim for unjustified dismissal and compensation for loss of shareholding rights - Document reported first respondent's revenue stream and valued its business - Applicant claimed contents relevant to values of shares in compensation claim - Respondents disputed that shareholding rights capable of compensation, and claimed shares not part of employment relationship - Although shareholding issues to be determined, Authority satisfied applicant not entitled to take copy, particularly given did not inform either of respondent's directors - Making copy and keeping it following dismissal breached implied duties of trust, confidence and fidelity in employment agreement - Also had ongoing duties of confidentiality in respect of truly confidential information - Applicant submitted former employees/directors had copies of document and wrongfully disclosed it to third parties - Did not change or diminish applicant's duties - In any event, applicant provided no real evidence of such disclosures - Compliance order appropriate in circumstances - Copy of document to remain sealed on file at Authority and not opened or disclosed without reference to Authority Member - Document to be referred to if necessary and relevant to substantive determination - Order would not disadvantage applicant at Authority, or if pursued claims in Employment Court or civil courts - Each forum enabled parties to obtain relevant documents - If needed applicant should obtain copy through proper procedures - Respondents protected if document released through proper process for that purpose,

meaning document may only be used for that proceeding and no other improper collateral purpose - Order requiring applicant return document, not to make further copies, and not to disclose contents of document to third parties

**Result:** Order in favour of respondent ; Compliance ordered ; Costs reserved

***McRae v The \$2 Shop Ltd***

*2 Jul 2007, L Robinson, AA 132A/07, (2 pages)*

COMPLIANCE ORDER – Applicant sought compliance with mediated record of settlement – Respondent asked Authority to make enquiries directed at exposing criminal conduct by applicant – Submitted conduct would have precluded any settlement that awarded compensation – Also submitted matters relevant to exercise of discretion to grant compliance, and Authority’s equity and good conscience jurisdiction enabled it to temper s149(3) Employment Relations Act 2000 ("ERA") – Authority declined to make enquiries sought – Considered s149(3) ERA clear record of settlement could not be cancelled – Provision founded on clear policy to give greater certainty of outcome in mediated settlements – Section 149(3) uncompromising not only to discourage aggrieved party from seeking perceived better resolution on enforcement but also because prospect of cancellation would render such settlements largely redundant – Declined to enquire into inchoate allegations, therefore no foundation to take allegations of improper conduct into account in exercising discretion to grant compliance – Authority concluded must act to uphold and recognise integrity of record of settlement – Declined to adjourn matter – Compliance ordered

**Result:** Compliance ordered ; No order for costs

## Costs - Employment Relations Act 2007

### ***Bell v Board of Trustees, Cambridge High School***

23 May 2007, V Campbell, AA 70A/07, (2 pages)

COSTS - Successful personal grievance - Length of investigation meeting not specified - Applicant not represented at Authority but sought \$1,994 for legal costs incurred prior to investigation meeting - Costs related to mediation undertaken prior to matter being properly before Authority - Unable to order contribution to those costs - However, applicant entitled to reimbursement of filing fee

**Result:** Disbursements in favour of applicant (\$70)(Filing fee)

### ***Cunneen v Shore Foods Ltd***

4 Apr 2007, RA Monaghan, AA 34A/07, (2 pages)

COSTS - Unsuccessful personal grievance - Half day investigation meeting - Respondent sought costs of \$4,522 - Successful party entitled to contribution to costs - No need to depart from usual range of costs for half day investigation meeting - Applicant to pay contribution to costs incurred by respondent

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

### ***Edwards v Regent Training Centre Ltd***

3 Jul 2007, R A Monaghan, AA 154A/07, (2 pages)

COSTS - Partially successful personal grievance - Less than one day investigation meeting - Applicant sought \$3,000 contribution to costs - Relied on concerns about respondent's willingness to settle - Respondent submitted costs should lie where they fall - Calderbank offer did not assist Authority as unlikely to have left applicant in better position - Submissions from parties on whether respondent took unrealistic stance when attempting to negotiate settlement - Arguments of that kind could only be pursued to very limited extent and tended to focus on evidence of bad faith - In most cases, only very limited evidence available as to content of negotiations - On limited evidence available Authority considered it likely both parties' stances affected by views of merits - Entitled to take those views and assume any resulting litigation risk - Authority could not take matter further - Matter relatively uncomplicated - Modest award in applicant's favour

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

### ***Greenwood v Vodaphone New Zealand***

29 Mar 2007, YS Oldfield, AA 22A/07, (2 pages)

COSTS - Partially successful personal grievance - Two day investigation meeting - Applicant submitted total costs of \$10,876 plus disbursements reasonable for matter - Respondent argued applicant only successful in small part of case, with most of investigation focusing on bullying allegation that was entirely rejected - Respondent claimed disadvantaged in responding to allegations as basis for unjustified disadvantage not specifically referenced in pleadings - Respondent submitted its costs were \$12,000 and suggested costs lie where they fall - Applicant's case clearly presented and respondent on notice of all concerns and evidence - Authority not aware respondent suffered additional costs due to way case conducted - Respondent should not be made to contribute to costs applicant incurred pursuing losing argument - Authority weighed both parties costs and levels of success - Fair contribution to applicant's costs \$5,000 - Authority aware net result for applicant effectively nil, but satisfied outcome fair given partial success of respondent and monies it had to pay

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

***Gulf Rubber NZ Ltd & Anor v NZ Amalgamated Engineering, Printing & Manufacturing Union***

*24 Jul 2007, M Urlich, AA 217/07, (4 pages)*

COSTS – Applicants sought costs associated with withdrawn application – Original application alleged breaches of good faith – Applicants withdrew application when respondent withdrew bargaining notices and sought contribution to total costs of \$6,555 – Submitted put to unnecessary expense by respondent as it had opportunity to resolve matter at very early stage – Alleged prepared for mediation that was subsequently abandoned – Respondent submitted withdrawal of bargaining notices not acceptance of wrongdoing – Argued until Authority inquired into and determined issues in statement of problem no basis for costs award – Parties not directed to mediation by Authority – Situation not akin to “11th hour” withdrawal – No witness statements or supporting documents filed – No evidence any costs unnecessarily incurred for purposes of scheduled investigation meeting – If matter had been determined any award of costs against respondent would have flowed from finding of unlawful conduct – No findings made as to conduct – No basis upon which Authority could award costs – Application dismissed

**Result:** Application dismissed

***Gutsell v Koru Blue Ltd t/a Airport Lodge Motel***

*11 Dec 2006, J Crichton, CA 146A/06, (3 pages)*

COSTS – Successful personal grievance – Less than one day investigation meeting – Applicant sought contribution to total costs of \$6,500 plus disbursements – Alleged application required significant legal research into vulnerable employment – Authority Member who investigated claim different from Member deciding costs – Substantive determination dealt with matter in under four pages – Decision turned on applicant's legal status – Claim of legal complexity not made out – Respondent considered \$750 costs appropriate and argued applicant's costs unreasonably inflated by unnecessary work – Respondent referred to previous Member's decision to give preliminary view of matter and encourage parties to settle – Claimed negotiations conducted on open basis and included actual amounts discussed in costs submission – Applicant objected and claimed discussion without prejudice – Asked costs be referred to another Member – Authority support staff had provided Member with copy of submissions with appropriate numbers blanked out – Nothing turned on issue as Member had no way of knowing whether discussion without prejudice and not influenced by numbers to which he had no access – Appropriate to award applicant \$1,000 costs

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

***Haugh v Wired Communications Ltd***

*8 Dec 2006, J Crichton, CA 172/06, (2 pages)*

COMPLIANCE ORDER – Applicant sought compliance with mediated Record of Settlement – No appearance for respondent – No reasonable excuse for respondent to avoid filing statement in reply and its obligation to participate in Authority's process – Settlement required respondent to pay \$4,000 in eight instalments to applicant – Respondent failed to make final four scheduled payments – Authority satisfied respondent had not complied with settlement and sum of \$2,000 owing – Compliance ordered within 14 days of determination – Interest 7 percent on outstanding balance – PENALTY – Applicant sought penalty in terms of s149(4) Employment Relations Act 2000 – Appropriate case to award penalty in respect of breach of mediated settlement – Penalty ordered – COSTS – Applicant entitled to contribution to costs of \$750, plus filing fee

**Result:** Application granted ; Compliance ordered ; Interest (7%) ; Penalty (\$500)(Payable to applicant) ; Costs in favour of applicant (\$750) ; Disbursements (\$70)(Filing fee)

***Iles v Dry Run Holdings Ltd***

27 Oct 2006, GJ Wood, WA 147/06, (4 pages)

UNJUSTIFIED DISADVANTAGE - UNJUSTIFIED DISMISSAL - Respondent registered in New Zealand but run in Australia - Signed employment agreement stated relationship between applicant and franchise trading name PH - Respondent employer at time of termination - Clearly breach of good faith and likely to be misleading if employer failed to describe actual name of employer - PH sold to D - Representatives of D arrived at applicant's store and told staff store closing in two days, and could apply for jobs with D - PH did not contact staff to explain what would happen or give notice - Respondent's director claimed sale and purchase agreement had condition D would take over responsibility for employees on sale, and sale confidential - No evidence provided of agreement - Trite law employer could not transfer employees to new employer without specific approval - Such approval not sought or gained in this case - Would not have been productive to direct mediation - Applicant's dismissal was effect of sale of franchise - Positions offered by D all significant distance away store - Applicant acted reasonably in declining to apply for position - Failed to consult in redundancy situation and pay notice - Unjustified disadvantage - Genuine redundancy as whole business sold - Dismissal justified - Remedies - Compensated for failure to consult and give notice - ARREARS OF WAGES - Applicant not paid final week's wages or payment in lieu of notice - Should have been given two weeks notice - Wages due and owing - COSTS - Applicant assisted by community law centre - Length of investigation meeting not specified - Filing fee only expense incurred - Respondent to reimburse filing fee - Length of service five years four months - Fast food worker

**Result:** Application granted (Unjustified disadvantage, arrears of wages) ; Application dismissed (Unjustified dismissal) ; Arrears of wages (\$840) ; Compensation for humiliation etc (\$3,500) ; Disbursements in favour of applicant (\$70)(Filing fee)

***Jeong v Hanyang Corporation Ltd***

15 Mar 2007, J Scott, AA 77/07, (2 pages)

COSTS - Partially successful personal grievance - Less than one day investigation meeting - While applicant unsuccessful in number of claims, did succeed with one significant claim - Calderbank offer made to applicant for exactly same amount as awarded as compensation by Authority - However, applicant succeeded to greater extent than total amount of Calderbank offer as also received lost remuneration, albeit modest amount - Calderbank offer disregarded - Some account had to fact respondent's costs unreasonably added to as had to defend itself against patently meritless claims - In particular Authority noted claim no written employment agreement - Applicant complicit in breach and claim should not have been brought - Low level costs in favour of applicant appropriate

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

***Kiely v Air New Zealand Ltd***

24 May 2007, L Robinson, AA 113A/07, (2 pages)

COSTS - Successful personal grievance - One day investigation meeting - Costs to applicants union were \$4,860 plus disbursements - Applicant submitted respondent did not adopt constructive approach to resolving problem - Respondent submitted case provided benefit for both applicant, union and respondent in form of guidance on reimbursement for lost personal effects - Also submitted applicant was non compliant with Authority's directions discourteous to respondent - Authority agreed determination provided some guidance and timetables not closely followed - Respondent and Authority had prepared for witness that did not attend - Lower daily tariff appropriate

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

***Miller v Auckland Cat Practice Ltd***

27 Mar 2007, L Robinson, AA 51A/07, (2 pages)

COSTS - Successful personal grievance - Less than one day investigation meeting - Applicant sought contribution to costs of \$2,945 plus filing fee - Respondent argued applicant's case largely inefficient and distracting - Submitted willing to contribute \$1,500 to costs - Authority derived much assistance from applicant's presentation of case - No reason to depart from rule costs follow event - Respondent to pay applicant contribution to costs

**Result:** Costs in favour of applicant (\$2,070)

***Mr I v Mr C***

18 Jun 2007, L Robinson, AA 138A/07, (2 pages)

COSTS – Successful personal grievance – One day investigation meeting – Applicant sought total costs of \$8,560 – Respondent submitted any award of costs ought to be minimal and substantially reduced for contribution – Further submitted award at lower end of Authority’s daily tariff appropriate but reduced by contribution – Applicant to be regarded as successful party in obtaining resolution of problem in his favour and should have contribution to costs – Section 124 Employment Relations Act 2000 permitted reduction in “remedies” for personal grievances - Award of costs not a remedy as described in s124 – Authority declined to reduce costs award for contribution - Not persuaded to depart from daily tariff approach – Applicant entitled to contribution to costs of \$3,000

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

***Mudge v Botany Plastics Ltd***

18 May 2007, L Robinson, AA 109A/07, (2 pages)

COSTS - Successful personal grievance - One day investigation meeting - Applicant sought contribution of \$3,000 to total costs of \$6,034 - Respondent requested \$1,137 be deducted for costs incurred for mediation that did not proceed - Only applicant's costs relevant - No reason to depart from conventional tariff

**Result:** Costs in favour of applicant (\$2,000)

***Perry v Tom Ryan Cartage Ltd***

22 Jun 2007, J Crichton, CA 53A/07, (3 pages)

COSTS - Successful personal grievance - 1½ day investigation meeting - Applicant sought contribution of \$5,500 to total costs of \$6,053 including disbursements - Respondent sought to limit contribution to \$500 and made observations about unhelpful approach adopted by applicant's advocate - Both advocates had obligation to engage with each other on professional basis and must bear part of blame for inability to develop relationship - Appropriate award of costs to applicant in circumstances \$3,000

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

***Purcell v Wired Communications NZ Ltd***

29 Jun 2007, P Cheyne, CA 71/07, (4 pages)

UNJUSTIFIED DISMISSAL – Redundancy - No appearance by respondent – Applicant's evidence accepted - Dismissed without notice or warning when told by payroll no further

work – Applicant attempted to contact director but he did not return calls – Appeared business had not traded since applicant dismissed, although apparently some staff working for another business run by director – Even (perhaps especially) in case of apparent business failure, employees entitled to fair and reasonable treatment – Dismissal unjustified - Remedies - No written employment agreement specifying notice - Reasonable notice fixed at four weeks - ARREARS OF WAGES AND HOLIDAY PAY - Applicant not paid at agreed rate - Also not paid last week's wages or holiday pay - Monies due and owing - COSTS - Length of investigation meeting not specified - Length of service 14 weeks

**Result:** Application granted ; Compensation for humiliation etc (\$10,000) ; Wages in lieu of notice (\$1,300)(Four weeks) ; Arrears of wages (\$1,300) ; Arrears of holiday pay (\$273) ; Costs in favour of applicant (\$1,500)

### ***Scenario Communications Ltd v Bailey***

*18 Jun 2007, GJ Wood, WA 54A/07, (2 pages)*

COSTS - Successful breach of contract - Length of investigation meeting not specified - Applicant sought contribution to costs of \$5,068 plus disbursements of \$1,374 - Respondent submitted costs should lie where they fall because of Calderbank offer - Submitted applicant's representatives hourly rate excessive, claim only partially successful and no evidence produced of new breaches by respondent - Calderbank offer disregarded because penalties against respondent taken into account - Costs to applicant of \$2,000 - Not appropriate for respondent to pay for travel costs of principal of applicant - Costs of serving witnesses appeared particularly high

**Result:** Costs in favour of applicant (\$2,000) ; Disbursements (\$255)

### ***Semmens (Labour Inspector) v SDP Call Centres Ltd***

*27 Oct 2006, D Asher, WA 145/06, (9 pages)*

JURISDICTION - Applicant Labour Inspector sought determination R an employee - No appearance for respondent - Director claimed unable to prepare and attend investigation meeting due to ill health - Respondent had witness statements and elected not to respond to allegations - Age of R's claims, absence of medical records about director's health, and advice regarding respondent's poor trading position defeated its implied request matters be "held off" - Not unfair to proceed with investigation meeting - Whether employee or independent contractor - No written employment agreement - Two other ex-employees of respondent pursued similar claims - Claims settled by way of a Authority consent determination - Applicant relied on express terms in consent determination to support claim R an employee - R worked from respondent's premises with set regular work patterns - Remuneration commission based - Not required to invoice for services - Respondent's level of control significant - Evidence showed R, along with other operators, integral part of respondent's business - No evidence in business on own account - Overall picture clearly one of R being full-time employee - No evidence of industry practice telephone operators/telemarketers typically employed on contract for services - No reason to doubt R's evidence, to extent she turned her mind to it, she intended to enter employment relationship - Employee - ARREARS OF WAGES AND HOLIDAY PAY - Applicant entitled to recover minimum wages, annual holiday pay, public holiday pay, and interest - Minimal wage and time records provided despite requests made to respondent - Applicant's estimation of arrears accepted - Holiday pay and wages due and owing - Interest 6 percent - COSTS - Respondent to reimburse filing fee

**Result:** Application granted ; Arrears of wages (\$30,422.52) ; Arrears of holiday pay (\$3,264)(Public holiday pay), (\$5,461.20)(Annual holiday pay) ; Interest (6%) ; Disbursements in favour of applicant (\$70)(Filing fee)

***Skeggs v Radius Security Ltd***

8 Jun 2007, L Robinson, AA 149A/07, (2 pages)

COSTS - Successful personal grievance - One day investigation meeting - Applicant sought contribution of \$8,200 to total costs of \$13,646, plus disbursements - Submitted Authority's modest approach to costs should be departed from as he could not have represented himself and no settlement offer made before investigation meeting - Respondent submitted modest costs appropriate - Claimed applicant capable of presenting own brief to Authority, and other issues raised by respondent had little if any effect on meeting length - Applicant not criticised for engaging professional representation - Applicant not given information regarding intended employment agreement - Not right for respondent to now criticise him for engaging representation due substantially in part to its failures - Daily tariff supplemented to recognise this aspect of case

**Result:** Costs in favour of applicant (\$5,000) ; Disbursements (\$280)

***Stewart v Century 21 Huntly, Morrinsville & Papakura Ltd***

13 Jun 2007, V Campbell, AA 129A/07, (2 pages)

COSTS - Successful personal grievance - One day investigation meeting - Applicant sought contribution to total costs of \$6,148 - Case not complex and costs incurred reasonable - Respondent to pay reasonable contribution to costs

**Result:** Costs in favour of applicant (\$2,000)

***Talakai v Amco Flexibles Ltd***

26 Mar 2007, Colgan CJ, AC 14/07, (1 pages)

COSTS – Defendant sought solicitor/client indemnity costs of \$3,239.99 plus disbursements of \$80.99 – Plaintiff withdrew application for leave to file challenge out of time on date of hearing – Challenge was filed 43 days late – Defendant submitted it had incurred costs of preparation to oppose leave application, plaintiff's challenge was devoid of merit and delay was gross and not adequately explained – Defendant relied on Reid v New Zealand Fire Service Commission (cited below) which held where losing party had brought unmeritorious claim and persisted despite warnings, further prosecution could involve opposing party in greater additional expense for which it should be compensated – Evidence of written advice from plaintiff's solicitor that plaintiff unlikely to succeed and should settle – Plaintiff submitted costs claimed by defendant “extraordinarily high” and that challenge was only abandoned because plaintiff was denied legal aid – HELD – Defendants legal expenses of approximately \$1,500 were reasonable – Court has considerable discretion in awarding costs, but notional starting point usually two-thirds of costs actually and reasonably incurred – Court not persuaded reduction or uplift required - Costs in favour of defendant (\$1,000)

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

***Talakai v Amcor Flexibles Ltd***

14 Mar 2007, J Scott, AA 72/07, (2 pages)

COSTS - Unsuccessful personal grievance - Length of investigation meeting not specified - Respondent sought contribution of \$2,000 to total costs of \$8,813 - Applicant submitted nothing exceptional about case and award of \$1,000 appropriate - Authority noted applicants not to be discouraged from representing themselves and this did not weigh against applicant - Applicant to contribute to costs

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

***Taylor v Review Publishing Ltd***

*26 Jun 2007, M Ulrich, AA 131A/07, (2 pages)*

COSTS - Successful personal grievance - Less than one day investigation meeting - Applicant sought full costs of \$3285 - Respondent argued no detailed breakdown of work provided and costs incurred by applicant excessive - No grounds for full indemnity costs but applicant entitled to contribution to costs

**Result:** Costs in favour of applicant (\$1,300)

***Thompson v Winger Motors Ltd***

*13 Mar 2007, J Wilson, AA 7A/07, (2 pages)*

COSTS - Unsuccessful personal grievance - Less than one day investigation meeting - Respondent's legal costs amounted to \$8,000 and sought contribution of at least 50 percent - Applicant submitted respondent's costs excessive - Applicant had limited resources and argued in equity and good conscience Authority should not make order for costs - Case relatively straightforward - Applicant to pay contribution to costs

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

## Dispute - Employment Relations Act 2000

### *Postal Workers Association v New Zealand Post Ltd*

23 Jul 2007, R Arthur, AA 215/07, (13 pages)

DISPUTE – Applicant sought declaration whether respondent entitled to withhold pay from workers (“Posties”) in relation to strike – Strike comprised posties delivering some mail and “reposting” rest – Strike surprise to respondent – Parties agreed activity comprised legal strike under s81 Employment Relations Act 2000 (“ERA”) – Posties notified of suspension following day, and did not return until bargaining resolved – Respondent backdated suspension to beginning of day posties undertook partial delivery – Applicant claimed posties entitled to be paid for hours worked and suspension only effective from proper service of notice – Section 87 ERA essentially unchanged for 30 years – Scheme allowing suspension inherently linear and contemplated strike, notice of suspension and no entitlement to wages happening on timeline – Suspension could not be imposed retrospectively – Disentitlement to wages applied on event of suspension rather than from event of strike – Respondent argued surprise strike action denied it proper opportunity to suspend posties – Surprise strikes legal – Employer not entitled to notice of strike – Respondent argued doctrine of abatement available – Abatement appeared inconsistent with principle underlying s85(1)(c)(i) ERA that employee cannot be sued for damages for breach of employment agreement - Abatement inconsistent with integrity of legislative provisions for suspension of employees engaged in lawful strike – If doctrine applied, part of benefit of what is otherwise immunity for striking workers from civil suit lost – Remedies – Declarations respondent not entitled to backdate suspension notices and to pay for hours worked on day – Comment on disciplinary actions open to employer when employees striking

**Result:** Questions answered in favour of applicant

## Good Faith - Employment Relations Act 2000

### *Association of Staff in Tertiary Education: Te Hau Takitini o Aotearoa v Webster (Chief Executive of Unitec Institute of Technology)*

30 Oct 2006, R Arthur, AA 330/06, (10

pages)

COMPLIANCE ORDER - Applicant sought compliance with consultation provisions in collective employment agreement ("CEA") - Alleged decision to withdraw diploma course outside terms of staffing review and respondent failed to honour CEA - Applicant also claimed should have been consulted on decision to relocate computer classes - Respondent claimed staffing review conducted in accordance with CEA and relocation not a review of type contemplated by CEA, but applicant had input anyway - Whether review "may" result in "significant" changes and invoke operation of CEA to be assessed objectively by effect on staff - Effect need only be possibility, not as high as likelihood - Respondent did not meet requirements of statutory duty of good faith, CEA or its own policies when decided to withdraw course - Position on Diploma's future beyond scope of terms of reference - Only few days allowed for submissions before proposal adopted on misleading basis adequate consultation had occurred - Diploma proposal a significant change and within circumstances contemplated by CEA - Respondent also failed to comply with CEA before decided to relocate classes - Proposal of type that triggered CEA consultation requirements - Consultation requirements not met simply because staff told of proposal were union members - Respondent also failed to appreciate distinction between employee's who were union members giving feedback as managers, and union feedback - CEA required respondent to do more than rely on employees to notify important issues to applicant's national office - Applicant's evidence on practices of other parties to same CEA not relevant - Respondent ordered to comply with CEA - GOOD FAITH - Counterclaim - Authority made no findings on respondent's complaint applicant did not act in good faith during staffing review - However, commented that delaying responses or seeking ever more detailed information may be inconsistent with good faith

**Result:** Application granted ; Compliance ordered ; Counterclaim dismissed ; Costs reserved

# Injunction - Employment Relations Act 2000

## *Heath v Auckland City Council*

24 Nov 2006, *L Robinson*, AA 356/06, (8 pages)

INJUNCTION - Interim reinstatement - Applicant summarily dismissed for serious misconduct - Apparent inaccuracies in transcriptions of meeting notes raised issues about respondent's inquiry - Arguable case for unjustified dismissal - Applicant had not secured new employment and claimed financial hardship - Authority accepted applicant entitled to hold himself in readiness for reinstatement - Replacement employee appointed but respondent put on notice almost immediately that applicant intended to seek interim reinstatement - Authority unmoved by concern other employees could resign - Some degree of disruption inevitable with type of application and reinstatement premised upon finding of unlawfulness - Significant that substantive investigation to occur in less than four weeks, but final determination likely to be delayed by end of year vacation period - No alternative remedy for applicant - Balance of convenience favoured applicant - Primacy accorded by Parliament to reinstatement relevant - Overall justice with applicant - Interim reinstatement granted subject to conditions - Authority took into account new appointment made, and short time to substantive investigation - Applicant not required to perform work duties - Respondent not required to allow him to perform duties - Marina manager

**Result:** Application granted ; Interim reinstatement ordered on conditions ; Orders accordingly ; Costs reserved

## *Masinalupe v Formway Furniture (New Zealand) Ltd*

23 Nov 2006, *PR Stapp*, WA 167/06, (6 pages)

INJUNCTION - Interim reinstatement - Applicant attended disciplinary meeting as support person for colleague - During meeting, applicant admitted instructed colleague to dispose of scrap and used cash received for benefit of team - Both employees resigned - Respondent subsequently accepted process relating to applicant flawed and reinstated him on garden leave - New disciplinary meeting held - Applicant dismissed for serious misconduct - Arguable case - Reinstatement very important to applicant's reputation and financial situation - Right to work supported by efforts of Union to obtain information and help from co-workers - Applicant had attempted to mitigate loss - Long service and unblemished record taken into account - Balance of convenience favoured applicant - Position filled on temporary basis - Respondent claimed some division in workplace over matter and applicant's role - Evidence not enough to convince Authority likely to lead to difficulties that could not be managed - Reinstatement not impracticable given size of respondent - Justice of matter favoured applicant - Interim reinstatement ordered - Team leader

**Result:** Application granted ; Interim reinstatement ordered ; Costs reserved

## *Treymane v Canwest Radio NZ Ltd*

15 Dec 2006, *P Montgomery*, CA 176/06, (3 pages)

INJUNCTION – Applicant sought interim reinstatement to role as radio show host – Applicant made redundant when not appointed to new position after respondent restructured – Scope of new position now reduced but applicant's original show reformatted – Respondent firmly of view applicant's presentation style incompatible with new format – Applicant alleged redundancy engineered - Met arguable test case by slender margin – Applicant's desire to return to work in region did not weigh particularly heavy in balance of convenience – Applicant in receipt of income and little said about financial hardship – Balance of convenience favoured respondent – Adequate remedies available if applicant successful – Respondent's decision challenged five months after event – Applicant well treated during termination and respondent gave undertaking not to fill vacancy until substantive determination – On evidence before Authority, likelihood of succeeding not

strong – Interim reinstatement declined - Radio show host  
**Result:** Application dismissed ; No order for costs

# Jurisdiction - Employment Relations Act 2000

## *Daunton v Pacific Pine Chemicals Ltd*

28 Nov 2006, L Robinson, AA 360/06, (7 pages)

PRACTICE AND PROCEDURE - Identity of employer - Applicant accepted position with company to be formed and registered in Fiji, from director of respondent - Entered individual employment agreement ("IEA") with respondent - Worked two months in New Zealand then moved to Fiji - Respondent claimed applicant employed by Fijian company as soon as moved - Fijian company not formed when applicant arrived - Could not have been employed by something that did not exist - Applicant not employed under pre-incorporation contract - Employment agreement with Fijian company not concluded - Respondent maintained time in New Zealand for training and induction only, but IEA not limited in any way - IEA expressly contemplated terms being operative in multiple locations and wording capable of including work in Fiji - IEA not terminated simply by arrival in Fiji or establishment of Fijian company, something more overt required, namely new employment agreement - Applicant remained employed by respondent under terms of IEA - JURISDICTION - Conflict of laws - Whether appropriate jurisdiction for claim New Zealand or Fiji - IEA expressly stated Employment Relations Act 2000 applied - New Zealand law applied to employment relationship problem - Authority had jurisdiction - General manager

**Result:** Questions answered in favour of applicant ; Parties directed to mediation ; Orders accordingly ; Costs reserved

## *Infinity Investment Group Holdings Ltd v Walker & Ors*

19 Dec 2006, P Cheyne, CA 178/06, (2 pages)

PRACTICE AND PROCEDURE – JURISDICTION - Application for removal to Employment Court – Applicant commenced proceedings against respondents in District Court to recover under loan agreement – Respondents claimed matter employment relationship problem within exclusive jurisdiction of Authority - Second respondent alleged loan part of employment agreement with applicant - Both parties submitted important questions of law likely to arise – Authority found questions of law incidental – Matter required inquiry into meaning of written terms in letter of employment, and whether parties agreed to amend terms with loan agreement – Factual inquiry together with dispute as defined in Employment Relations Act 2000 – No important question of law arising other than incidentally – No public interest issues or related proceedings already before Court – Parties submitted large sum in dispute, difficult credibility issues, and tax and accounting issues meant in circumstances Court should determine matter – Joint application most telling factor – However, Authority not persuaded ordinary dispute resolution process provided by Parliament should not be applied – Application for removal declined

**Result:** Application dismissed ; Costs reserved

## *Knight & Ors v Transportation Auckland Corporation Ltd & Anor*

30 Oct 2006, L Robinson, AA 331/06, (4 pages)

JURISDICTION - Application for removal to Employment Court ("EC") - Respondents claimed Authority had no power to investigate matter - Applicants' Union party to Authority investigation about interpretation of annual leave entitlements in collective employment agreement - EC to hear Union's de novo challenge to Authority's determination - Applicants claimed had no knowledge of basis of challenge and application lodged before aware of challenge - Authority concluded investigation determined matters in dispute between Union, other parties and respondents - Live issues or employment relationship problem no longer existed - Could be nothing to transfer to EC - Further, applicants' Union party to challenge - Substantive issue would be heard de novo, therefore substantive issue already before EC -

Most significantly, none of applicants were parties to previous investigation - Authority understood applicants precluded from asking matter be removed or determination challenged given had "no standing" - If applicants sought to be heard independently from Union it would be best heard by EC - Consideration given to whether present application really one for "rehearing" - Discerned no proper grounds for rehearing, however, was not a conclusive determination - Problematic that parties to substantive issue did not know of present application or one for rehearing - De novo challenge process ought to run its course so that substantive matter judicially decided - Authority declined to pursue present application as one for rehearing - If still desirous of rehearing after hearing of challenge, applicants could assess whether to pursue new application with benefit of Court's findings, on notice to affected parties, and with properly specified grounds - Authority declined to investigate matters - No formal orders

**Result:** Application dismissed ; Costs reserved

***Semmens (Labour Inspector) v SDP Call Centres Ltd***

*27 Oct 2006, D Asher, WA 145/06, (9 pages)*

JURISDICTION - Applicant Labour Inspector sought determination R an employee - No appearance for respondent - Director claimed unable to prepare and attend investigation meeting due to ill health - Respondent had witness statements and elected not to respond to allegations - Age of R's claims, absence of medical records about director's health, and advice regarding respondent's poor trading position defeated its implied request matters be "held off" - Not unfair to proceed with investigation meeting - Whether employee or independent contractor - No written employment agreement - Two other ex-employees of respondent pursued similar claims - Claims settled by way of a Authority consent determination - Applicant relied on express terms in consent determination to support claim R an employee - R worked from respondent's premises with set regular work patterns - Remuneration commission based - Not required to invoice for services - Respondent's level of control significant - Evidence showed R, along with other operators, integral part of respondent's business - No evidence in business on own account - Overall picture clearly one of R being full-time employee - No evidence of industry practice telephone operators/telemarketers typically employed on contract for services - No reason to doubt R's evidence, to extent she turned her mind to it, she intended to enter employment relationship - Employee - ARREARS OF WAGES AND HOLIDAY PAY - Applicant entitled to recover minimum wages, annual holiday pay, public holiday pay, and interest - Minimal wage and time records provided despite requests made to respondent - Applicant's estimation of arrears accepted - Holiday pay and wages due and owing - Interest 6 percent - COSTS - Respondent to reimburse filing fee

**Result:** Application granted ; Arrears of wages (\$30,422.52) ; Arrears of holiday pay (\$3,264)(Public holiday pay), (\$5,461.20)(Annual holiday pay) ; Interest (6%) ; Disbursements in favour of applicant (\$70)(Filing fee)

# Parental Leave - Employment Relations Act 2000

## *Viegas v The Flower House (2005) Ltd*

27 Jun 2007, Y Oldfield, AA 193/07, (4 pages)

UNJUSTIFIED DISMISSAL – Redundancy – No appearance by respondent – Applicant redundant when shop stopped trading – No notice shop to be closed or discussion regarding redeployment – Authority could not safely conclude redundancy genuine – Dismissal unjustified – Remedies - Authority accepted four week notice period applied - Applicant also alleged respondent's director spread malicious gossip about her – Evidence on point hearsay and Authority not satisfied assertion well founded - ARREARS OF WAGES AND HOLIDAY PAY – Arrears of overtime and holiday pay due and owing - Applicant unable to provide gross wages and IRD had not received PAYE for her from respondent - Amounts calculated in net terms - Respondent reminded of obligation to pay PAYE - PARENTAL LEAVE – At time of redundancy applicant 4½ months pregnant – Formal parental leave application not completed but had told respondent wished to take parental leave – Applicant's difficulty finding work after dismissal compounded by understanding no longer eligible for statutory parental leave payment – Sought compensation for loss of benefit – While express statutory provision ensured employees whose employment ended during parental leave retained entitlement to payment, similar provision did not appear to have been made for those whose employment terminated before commencement of leave – Question of eligibility for payment in such cases not tested - Payment a statutory entitlement not obligation of employer - Could not be described as benefit of employment relationship – Authority could make no further order for compensation for loss of parental leave payment – Length of service one year - Florist

**Result:** Application granted ; Reimbursement of lost wages (\$7,150 net)(13 weeks) ; (\$2,200 net)(Notice) ; Compensation for humiliation etc (\$5,000) ; Arrears of wages (\$690 net)(Overtime) ; Arrears of holiday pay (\$949.79 net) ; Disbursements in favour of applicant (\$70)(Filing fee)

# Penalty - Employment Relations Act 2000

## ***Robinson (Labour Inspector) v Hine***

25 Oct 2006, M Urlich, AA 326/06, (2 pages)

ARREARS OF WAGES - Applicant Labour Inspector sought to recover two days sick leave entitlement on behalf of employee - Medical certificate provided at request of respondent - Sick leave not paid and matter referred to Labour Inspectorate - No appearance by respondent - No written employment agreement - Authority accepted applicant's unchallenged evidence - Applicant entitled to sick leave - Interest 7 percent - PENALTY - Respondent's failure to pay sick leave deliberate - Penalty appropriate - Applicant also sought penalty for failure to provide written agreement - Penalty declined as respondent not put on notice of claim - COSTS - Respondent to reimburse applicant for filing fee - Reasonable to recover full costs incurred in engaging service agent - Authority directed applicant to arrange personal service of investigation meeting notice on respondent - Legal secretary

**Result:** Application granted ; Arrears of wages (\$250)(Sick leave) ; Penalty (\$250)(Payable to Crown) ; Interest (7%) Costs in favour of applicant (\$108.17) ; Disbursements in favour of applicant (\$70)(filing fee)

## ***Taylor v eCom New Zealand***

10 Oct 2006, D King, AA 29A/06, (6 pages)

ARREARS OF WAGES - Applicant claimed owed unpaid commissions - Performance incentive to be paid on "all new business closed from new or existing clients" - Earlier determination held bonus to be paid on new business arising from applicant's efforts, not on new business simply concluded whilst employed - "New" business meant something not a continuation or retention of existing business - Interpretation of "new" business as something other than business company would get on day to day normal running sensible - Applicant also had to be instrumental in obtaining business and it had to be "closed" by him - Company policy did not consider new business closed until contract signed - Authority considered several transactions and found no commission owing - COUNTERCLAIM - PENALTY - Respondent claimed applicant breached confidentiality of mediation by telling Authority Support Officer no offer made - Unfortunate comment made, but Authority did not consider breach deliberate - Declined to award penalty - DAMAGES - Application to enforce undertaking as to damages - Applicant obtained interim reinstatement on garden leave - Dismissal justified - Applicant to reimburse wages paid by respondent plus interest - Business Development Manager

**Result:** Application dismissed ; Counterclaim dismissed (Penalty) ; Counterclaim granted (Damages) ; Damages (\$8,836.94) ; Interest (14.5%) ; Costs reserved

## ***Tuari & Anor v Sims Pacific Metals Ltd & Ors***

23 Mar 2007, P Cheyne, CA 27/07, (14 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal - First applicant (“J”) wife of second applicant (“T”) - Both employed by respondent - Respondents concerned about T’s performance – T suffered stress-related breakdown – T given two options, disciplinary process or exit package – T agreed he and J would resign in exchange for money – T confirmed had spoken to J and she agreed to resign – T signed settlement agreement - Next morning applicants returned to work, where J deleted computer files and T broke memory stick – J disputed resignation, claiming T could not make decision on her behalf – Respondents stood J down but later said could return to work – J subsequently resigned – Whether constructively dismissed - Only possibility of coercion was dealings over J’s later resignation – Respondents could be criticised for initiating arrangements through T – However, J knew and implicitly consented to arrangements – No course of conduct with

deliberate and dominant purpose of coercing resignation – No sufficiently serious breach of duty making resignation reasonably foreseeable - No constructive dismissal – BREACH OF CONTRACT - Counterclaim - Respondents claimed breach of contract and sought damages - Implied duty of trust and confidence extended to prohibit intentionally damaging company property – J breached implied obligations by deleting computer files and assisting T in breaking memory stick – No evidence of actual loss aside from memory stick – J ordered to pay damages for memory stick only - PENALTY – Respondents claimed applicants breached implied terms and/or aided and abetted each other in breaching employment agreements – No reason to distinguish between levels of culpability – Penalty imposed against applicants for breach of implied terms of trust and confidence – BARGAINING – T counterclaimed settlement agreement result of unfair bargaining under s68 Employment Relations Act 2000 ("ERA") – Authority found settlement agreement term of employment agreement and unfair bargaining claim considered - While T unwell, no evidence could not understand implications of settlement agreement – Evidence T went into meeting intending to resign – Could not succeed under s68(2)(a) ERA – Whether T induced to enter settlement agreement by oppressive means, undue influence or duress – Although pressured by options put to him at meeting, could not succeed in face of evidence intended to resign – Valid full and final agreement meant T could not succeed in personal grievance – Could not circumvent effect of settlement with penalty actions against respondents - J's length of service seven months, T's not specified - Office assistant and yard manager

**Result:** Application dismissed (Unjustified dismissal, bargaining) ; Application granted (Breach of contract, penalty) ; Damages (\$50)(Payable to Respondents) ; Penalty (\$1,000 each applicant)(Payable to Crown) ; Costs reserved

# Personal Grievance - Dismissal - Employment Relations Act 2000

## *Chin v Yong t/a Yong & Co Chartered Accountants*

4 Oct 2006, L Robinson, AA 312/06, (8 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Alleged badly treated by respondent and his business advisor - Respondent loaned applicant's husband ("JC") significant sum and agreed to keep loan secret - JC went bankrupt before loan repaid - Applicant unaware of situation until told by respondent's wife - Respondent met AW, a Scientologist - AW stress tested respondent and considered applicant cause of stress - AW convened meeting and interrogated applicant about JC and loan - Applicant stated husband's business activities not her concern and enquiries should be directed to him - Informed respondent felt uncomfortable, but he did not assist her - Applicant felt obliged to remain because employee - After meeting, applicant wrote to respondent recording discomfort - AW responded by asking her to come up with "written solution" to situation between JC and respondent - Applicant asked respondent to tell AW to stop harassing her - Respondent suggested applicant overreacting and again focused on loan - Applicant took sick leave but respondent and AW visited her residence - Police called when refused to leave - Applicant resigned - Loan to JC did not concern applicant, not fair and reasonable to hold her responsible for it - Respondent also made disparaging comments about applicant to other employees - Breach of duty owed to applicant - Breach so serious substantial risk of resignation reasonably foreseeable - Dismissal unjustified - Length of service seven months - Accounts clerk

**Result:** Application granted ; Reimbursement of lost wages (\$3,653.85)(5 weeks) ; Compensation for humiliation etc (\$5,000) ; Arrears of holiday pay (\$2,192.31) ; Interest (9%) ; Costs reserved

## *Currie v McVicar Timber Group Ltd*

5 Dec 2006, R Arthur, CA 168/06, (8 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - BREACH OF CONTRACT - Redundancy - Applicant claimed redundancy unjustified and unjustifiably disadvantaged - Claimed respondent breached obligation to negotiate terms and conditions of redundancy - Terms and conditions based on collective employment agreement ("CEA") - Individual employment agreement ("IEA") included all relevant terms of CEA - No redundancy compensation provision in IEA - CEA provided four weeks notice and negotiation of terms and conditions of redundancy - Applicant claimed offered new position in Australia - Authority found prospect of new position still inquiry with no definitive elements of offer - Applicant advised position to become redundant - Refused "take it or leave it" cash settlement - Took stress leave - Respondent continued formal consultation process - No real challenge by applicant as to whether respondent genuinely considered restructuring needed - Making applicants position redundant better cost-saver than reducing other positions - Authority found some attention to procedural requirements, however, start of process unfair - Applicant unlikely to have anticipated vulnerability to job and believed future secure, because of job possibility in Australia - Respondent rejected applicants attempts to revive settlement offer, but did little or nothing to discuss how redundancy would be handled - Fair and sensitive employer would have discussed options with applicant - Instead, respondent imposed notice period paid in lieu and termination date one day after dismissal - Disputed clause created contractual right that terms and conditions of redundancy shall be negotiated - Authority could not determine what terms should have been agreed - IEA provided parties to ascertain amount of payment by negotiation - Clause created legally enforceable right to negotiate on range of items or matters - Once settlement offer lapsed, respondent closed its mind to consideration of other terms and conditions of redundancy, which was obliged to at least discuss - Obligation to negotiate breached - Unjustified disadvantage - REMEDIES - Breach denied applicant opportunity to secure more favourable

outcome - Real and substantial chance respondent approaching issue with open mind would have agreed to redundancy on terms better than four weeks notice, but below full measure of compensation in settlement offer - Value of lost opportunity would have at least been extended notice period - 12 weeks notice appropriate - Length of service 30 years - Sawmill manager

**Result:** Application granted (Unjustified disadvantage) ; Loss of benefit (12 weeks notice) ; Compensation for humiliation etc (\$5000) ; Costs reserved

### ***Daske v Tile New Zealand Ltd***

*11 Dec 2006, M Urlich, AA 375/06, (4 pages)*

UNJUSTIFIED DISMISSAL - Whether dismissed or resigned - Applicant employed on fixed term agreement to complete project - Fixed term extended when project not completed - Extension not in writing - No evidence to support respondent's claim parties agreed on new end date - Requirements of s66 Employment Relations Act 2000 not met - Permanent employee - Rumour applicant leaving led respondent to ask applicant to confirm it, which she did - Respondent had reasonable basis for believing applicant resigned - Conflict of evidence over what happened next day - Applicant claimed went to work and respondent sent her away - Respondent claimed applicant there to return uniform and asked about holiday pay - Respondent's evidence preferred - Applicant resigned - No personal grievance - Applicant had limited English skills and daughter had attended workplace as volunteer to translate - Length of service 11 months - Showroom assistant

**Result:** Application dismissed ; Costs reserved

### ***Garas-Endrawis v Albany Food Warehouse Ltd***

*23 Nov 2006, R Monaghan, AA 354/06, (9 pages)*

UNJUSTIFIED DISMISSAL - Alleged actual or constructive dismissal - Applicant injured back at work - Matter referred to ACC - Medical certificate stated applicant not fit for heavy lifting - No light duties available - Applicant sent home - No dismissal at this time, open ended nature of absence not unknown in employment law and respondent should have been advised of progress - However ACC concluded employment had ended - Applicant found out employee number assigned to someone else and concluded employment terminated - Respondent to clarify matter - Received indication that employment terminated - Should have contacted employer, not ACC - Acquiescence by applicant considered by respondent that employment abandoned - Authority concluded circumstances amounted to combination of misunderstanding and miscommunication, but no dismissal - Matter transferred to business services manager ("KP") - Applicant informed that still a staff member and still on payroll - Applicant indicated would not be able to do checkout job - Applicant would not accept alternative employment at position of lower level than what she was qualified for - Applicant failed to distinguish between wider vacancies that ACC recommended and work respondent might offer in interests of continuing her employment - Applicant not entitled to expect kind of work that was being explored by ACC - Applicant told if could not work as checkout operator then should resign - Letter sent to applicant requesting confirmation of termination - Applicant confirmed position should be terminated - Overall, circumstances amounted to termination by consensus - No dismissal - UNJUSTIFIED DISADVANTAGE - Changes to hours made by agreement - No unjustified disadvantage - ARREARS OF WAGES AND HOLIDAY PAY - Claim for unpaid holidays dismissed - No need for notice since termination by consensus - Length of service 15 months - Checkout assistant

**Result:** Application dismissed ; Costs reserved

***Van Leeuwen v Canterbury District Health Board***

*22 Nov 2006, J Crichton, CA 160/06, (9 pages)*

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Constructive dismissal - Alleged respondent failed to act when bullied and harassed by co-worker - Applicant never formally complained about co-worker, despite being asked - HR adviser worked with both employees and viewed problem as personality conflict - Applicant encouraged to take time off because faced external pressures, as well as work difficulties - Went on sick leave and effectively never returned - Authority satisfied respondent did not suggest applicant resign or try to force him out of position - Applicant interested in returning when co-worker resigned - Original position changed, so offered alternative roles - Parties attended mediation on issue of returning but it remained unresolved - Evidence did not support categorisation of events as bullying or meet definition in respondent's policy - Unsatisfactory personal relationship between co-workers could not constitute bullying in a legal sense - Co-worker regarded herself as victim of bullying because of applicant's regular complaints - Refusal to lodge formal complaint went against wish to categorise problem as bullying - Within framework of informal complaint process chosen by applicant, respondent did all reasonably could to address his concerns - Authority's only concern was perhaps respondent did not make consequences of not making formal complaint as abundantly clear as might have been appropriate - Clear reasons, related to natural justice, formal investigation into co-worker's behaviour could not take place without formal complaint - Evidence strongly suggested applicant resigned after reading medical report stating fit to return to work with conditions - Authority of view he acted prematurely and denied respondent opportunity to work with him to resolve issue - Effectively confirmed decision by refusing to meet with respondent - No unjustified disadvantage - No constructive dismissal - Length of service two years five months - Occupational therapy instructor

**Result:** Application dismissed ; Costs reserved

# Personal Grievance - Dismissal - Misconduct - Employment Relations Act 2000

## *Eruera-Morrison v New Zealand Post Ltd*

5 Oct 2006, YS Oldfield, AA 314/06, (5 pages)

PRACTICE AND PROCEDURE - Before investigation, applicant's lawyer advised applicant would not be giving evidence to Authority - Authority Minute advised investigation would not proceed without hearing from applicant - Applicant provided affidavit but refused to take oath or affirmation, give "live voice" evidence, or answer questions from Authority or respondent's representative - UNJUSTIFIED DISMISSAL - Serious misconduct - Dismissed for taking cell phone from business while delivering mail - Applicant claimed picked up phone inadvertently - After preliminary inquiries respondent formed view serious misconduct might have occurred and began formal disciplinary process - Applicant argued preliminary meeting unfair as no notice of meeting or opportunity to seek assistance, and support person told to remain silent - Respondent used information gathered at preliminary meeting to justify commencement of disciplinary proceedings, not make decision about conduct - Process after first meeting fair and competent - Applicant contended respondent breached New Zealand Bill of Rights Act 1990 ("NZBORA") by questioning her when matter could be subject of criminal prosecution - Submitted entitled to rely on right to remain silent, not just to prevent prejudice in any possible criminal proceedings, but also to prevent prejudice to her employment as respondent a state-owned enterprise bound by NZBORA - Argument rejected because although disciplinary proceedings could be stayed where employee invoked right to silence, purpose of stay was to protect against self incrimination in relation to future criminal proceedings, not in relation to employment in general or disciplinary process in particular - In any event, applicant had not invoked right to silence - Authority aware of no authority requiring employers to caution employees - Authority viewed video footage from business and agreed entirely with respondent's assessment - That applicant deliberately took phone established to very high standard - Conclusion and decision to dismiss reasonable - Dismissal justified - Length of service 30 years - Postie

**Result:** Application dismissed ; No order for costs

## *Sidal v Chief of Defence Force*

1 Dec 2006, G Wood, WA 172/06, (10 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Summary dismissal - Applicant dismissed for arriving at work intoxicated, insubordination, threatening and abusive behaviour, and making false accusations - Credibility of parties - Respondent's evidence preferred - At time of dismissal applicant on undisputed final warning for previous misconduct - Applicant arrived at work apparently intoxicated - Told by supervisor to take day as leave - Before left involved in heated exchange with sergeant ("O") - Full investigation carried out resulting in dismissal - Conclusion applicant intoxicated on basis of six witnesses fair and reasonable - Not incumbent on respondent to be completely satisfied by getting breath or blood tests - In any event, could not compel applicant to undergo test - Decision to reject applicant's explanation intended to attend work only to apply for leave and not commence duties fair and reasonable - Rejected argument employee needed to be both intoxicated and violent for behaviour to be serious misconduct in Code of Conduct - In any event, list of what constituted serious misconduct not exhaustive list - Not estopped from taking disciplinary action because allowed applicant to take annual leave rather than suspending on pay - At time leave granted told disciplinary proceedings would take place - No condonation of behaviour, or prejudice to applicant - Continuing pattern of insubordination, threatening abusive behaviour towards, and false accusations against O stood on own merits for summary dismissal - Given applicant's denial intoxicated, despite weight of evidence, respondent more likely to believe O that applicant abused him during

exchange - Conclusion fair and reasonable in circumstances - Respondent's finding over drunkenness justified summary dismissal on its own - In case of abuse, respondent relied on previous incidents resulting in final warning - Dismissal on notice more appropriate - However, given dismissal justified, factor of no relevance - Fair and reasonable to dismiss despite sustained good service - Clear at relevant time considered could no longer have trust and confidence in applicant - Dismissal justified - Length of service 15 years - Army Camp Storeman

**Result:** Application dismissed ; Costs reserved

### ***Tuari & Anor v Sims Pacific Metals Ltd & Ors***

*23 Mar 2007, P Cheyne, CA 27/07, (14 pages)*

UNJUSTIFIED DISMISSAL – Constructive dismissal - First applicant (“J”) wife of second applicant (“T”) - Both employed by respondent - Respondents concerned about T’s performance – T suffered stress-related breakdown – T given two options, disciplinary process or exit package – T agreed he and J would resign in exchange for money – T confirmed had spoken to J and she agreed to resign – T signed settlement agreement - Next morning applicants returned to work, where J deleted computer files and T broke memory stick – J disputed resignation, claiming T could not make decision on her behalf – Respondents stood J down but later said could return to work – J subsequently resigned – Whether constructively dismissed - Only possibility of coercion was dealings over J’s later resignation – Respondents could be criticised for initiating arrangements through T – However, J knew and implicitly consented to arrangements – No course of conduct with deliberate and dominant purpose of coercing resignation – No sufficiently serious breach of duty making resignation reasonably foreseeable - No constructive dismissal – BREACH OF CONTRACT - Counterclaim - Respondents claimed breach of contract and sought damages - Implied duty of trust and confidence extended to prohibit intentionally damaging company property – J breached implied obligations by deleting computer files and assisting T in breaking memory stick – No evidence of actual loss aside from memory stick – J ordered to pay damages for memory stick only - PENALTY – Respondents claimed applicants breached implied terms and/or aided and abetted each other in breaching employment agreements – No reason to distinguish between levels of culpability – Penalty imposed against applicants for breach of implied terms of trust and confidence – BARGAINING – T counterclaimed settlement agreement result of unfair bargaining under s68 Employment Relations Act 2000 (“ERA”) – Authority found settlement agreement term of employment agreement and unfair bargaining claim considered - While T unwell, no evidence could not understand implications of settlement agreement – Evidence T went into meeting intending to resign – Could not succeed under s68(2)(a) ERA – Whether T induced to enter settlement agreement by oppressive means, undue influence or duress – Although pressured by options put to him at meeting, could not succeed in face of evidence intended to resign – Valid full and final agreement meant T could not succeed in personal grievance – Could not circumvent effect of settlement with penalty actions against respondents - J’s length of service seven months, T’s not specified - Office assistant and yard manager

**Result:** Application dismissed (Unjustified dismissal, bargaining) ; Application granted (Breach of contract, penalty) ; Damages (\$50)(Payable to Respondents) ; Penalty (\$1,000 each applicant)(Payable to Crown) ; Costs reserved

### ***Wood v Arthur D Riley & Co Ltd***

*9 Jul 2007, D Asher, WA 96/07, (11 pages)*

UNJUSTIFIED DISMISSAL – Serious misconduct - Summary dismissal – Applicant dismissed for forwarding email from father to others, including work colleagues – Respondent claimed email objectively objectionable/pornographic or offensive, and applicant breached house rules by forwarding it – Email images clearly intended to shock and ridicule – Notwithstanding house rules about offensive or inappropriate material, no disciplinary action taken against colleagues who received, viewed and retained email –

House rules ambiguous whether computer misuse misconduct or serious misconduct - Because application of policy not consistent, did not follow email automatically amounted to serious misconduct - Therefore its application, objectively measured, could not be fair and reasonable - Section 103A Employment Relations Act 2000 ("ERA") required respondent to have regard to policy, whether policy appropriately applied, and other relevant factors – Some of general manager’s conclusions that content of email objectionable/ pornographic or offensive unsustainable - Opinions about what objectionable/pornographic or offensive notoriously subjective - Fair and reasonable employer would have gone beyond personal views, those of colleagues and others, and sought more reliable objective measures - On objective basis, fair and reasonable employer would not have concluded content objectionable/pornographic or offensive – Objective “bar” as to what objectionable and injurious set well above content of applicant’s email – Authority reached conclusion, notwithstanding respondent’s right to determine what constituted offensive or inappropriate, because of requirements of s103A ERA – Objective considerations militating against finding of serious misconduct included where email originated from, and its actual effect – Dismissal unjustified - Remedies - Applicant under current warning for breaching email policy – Needlessly forwarded email and acknowledged should not have - Respondent specifically consented to applicant sending some jokes - Contributory conduct 25 percent - Length of service two years two months – Administrative assistant

**Result:** Application granted ; Reimbursement of lost wages (Quantum to be determined) ; Compensation for humiliation etc (\$12,000 reduced to \$9,000) ; Costs reserved

## Personal Grievance - Dismissal - Poor Performance - Employment Relations Act 2000

### *Waugh v H.B. Holdings Ltd t/a Dive HQ Tauranga*

*4 Dec 2006, V Campbell, AA 365/06, (6 pages)*

UNJUSTIFIED DISMISSAL - Poor performance - Applicant dismissed at end of three month trial period - Received verbal warning following complaint acted unprofessionally when admitted drinking night before to customer - Alleged applicant provided faulty equipment, made errors in stock take and filled out of date dive cylinder - Called into manager's office and advised gave credit to customer when not authorised - Dismissed on notice - Authority accepted safety important aspect of job - Possibly faulty equipment had potential to cause serious harm - No dispute performance concerns discussed on number of occasions - Under employment agreement entitled to receive at least two written warnings on performance before could be dismissed at end of trial period - According to case law also entitled to fair warning employment coming to an end before trial period ended - Neither requirement met - Respondent accepted had not complied with any notion of procedural fairness leading up to dismissal meeting - Actions not those of fair and reasonable employer - Dismissal unjustified - Remedies - Lost remuneration properly attributable to applicant's decision to undertake full-time study rather dismissal - Difficulties arose when process flawed to extent not possible to ascertain degree of performance deficiencies because obscured by failures of process - Applicant denied alleged errors - Not possible to ascertain whether alleged errors sufficiently serious to justify dismissal or constitute contributory conduct - No basis for reducing nature and extent of remedies - Length of service three months - Retail assistant

**Result:** Application granted ; Compensation for humiliation etc (\$2,000) ; Costs reserved

# Personal Grievance - Dismissal - Redundancy - Employment Relations Act 2000

## *Iles v Dry Run Holdings Ltd*

27 Oct 2006, GJ Wood, WA 147/06, (4 pages)

UNJUSTIFIED DISADVANTAGE - UNJUSTIFIED DISMISSAL - Respondent registered in New Zealand but run in Australia - Signed employment agreement stated relationship between applicant and franchise trading name PH - Respondent employer at time of termination - Clearly breach of good faith and likely to be misleading if employer failed to describe actual name of employer - PH sold to D - Representatives of D arrived at applicant's store and told staff store closing in two days, and could apply for jobs with D - PH did not contact staff to explain what would happen or give notice - Respondent's director claimed sale and purchase agreement had condition D would take over responsibility for employees on sale, and sale confidential - No evidence provided of agreement - Trite law employer could not transfer employees to new employer without specific approval - Such approval not sought or gained in this case - Would not have been productive to direct mediation - Applicant's dismissal was effect of sale of franchise - Positions offered by D all significant distance away store - Applicant acted reasonably in declining to apply for position - Failed to consult in redundancy situation and pay notice - Unjustified disadvantage - Genuine redundancy as whole business sold - Dismissal justified - Remedies - Compensated for failure to consult and give notice - ARREARS OF WAGES - Applicant not paid final week's wages or payment in lieu of notice - Should have been given two weeks notice - Wages due and owing - COSTS - Applicant assisted by community law centre - Length of investigation meeting not specified - Filing fee only expense incurred - Respondent to reimburse filing fee - Length of service five years four months - Fast food worker

**Result:** Application granted (Unjustified disadvantage, arrears of wages) ; Application dismissed (Unjustified dismissal) ; Arrears of wages (\$840) ; Compensation for humiliation etc (\$3,500) ; Disbursements in favour of applicant (\$70)(Filing fee)

## *Purcell v Wired Communications NZ Ltd*

29 Jun 2007, P Cheyne, CA 71/07, (4 pages)

UNJUSTIFIED DISMISSAL – Redundancy - No appearance by respondent – Applicant's evidence accepted - Dismissed without notice or warning when told by payroll no further work – Applicant attempted to contact director but he did not return calls – Appeared business had not traded since applicant dismissed, although apparently some staff working for another business run by director – Even (perhaps especially) in case of apparent business failure, employees entitled to fair and reasonable treatment – Dismissal unjustified - Remedies - No written employment agreement specifying notice - Reasonable notice fixed at four weeks - ARREARS OF WAGES AND HOLIDAY PAY - Applicant not paid at agreed rate - Also not paid last week's wages or holiday pay - Monies due and owing - COSTS - Length of investigation meeting not specified - Length of service 14 weeks

**Result:** Application granted ; Compensation for humiliation etc (\$10,000) ; Wages in lieu of notice (\$1,300)(Four weeks) ; Arrears of wages (\$1,300) ; Arrears of holiday pay (\$273) ; Costs in favour of applicant (\$1,500)

## *Viegas v The Flower House (2005) Ltd*

27 Jun 2007, Y Oldfield, AA 193/07, (4 pages)

UNJUSTIFIED DISMISSAL – Redundancy – No appearance by respondent – Applicant redundant when shop stopped trading – No notice shop to be closed or discussion regarding redeployment – Authority could not safely conclude redundancy genuine – Dismissal

unjustified – Remedies - Authority accepted four week notice period applied - Applicant also alleged respondent's director spread malicious gossip about her – Evidence on point hearsay and Authority not satisfied assertion well founded - ARREARS OF WAGES AND HOLIDAY PAY – Arrears of overtime and holiday pay due and owing - Applicant unable to provide gross wages and IRD had not received PAYE for her from respondent - Amounts calculated in net terms - Respondent reminded of obligation to pay PAYE - PARENTAL LEAVE – At time of redundancy applicant 4½ months pregnant – Formal parental leave application not completed but had told respondent wished to take parental leave – Applicant's difficulty finding work after dismissal compounded by understanding no longer eligible for statutory parental leave payment – Sought compensation for loss of benefit – While express statutory provision ensured employees whose employment ended during parental leave retained entitlement to payment, similar provision did not appear to have been made for those whose employment terminated before commencement of leave – Question of eligibility for payment in such cases not tested - Payment a statutory entitlement not obligation of employer - Could not be described as benefit of employment relationship – Authority could make no further order for compensation for loss of parental leave payment – Length of service one year - Florist

**Result:** Application granted ; Reimbursement of lost wages (\$7,150 net)(13 weeks) ; (\$2,200 net)(Notice) ; Compensation for humiliation etc (\$5,000) ; Arrears of wages (\$690 net)(Overtime) ; Arrears of holiday pay (\$949.79 net) ; Disbursements in favour of applicant (\$70)(Filing fee)

### ***Worrall v R Hannah & Co Ltd***

*3 Oct 2006, J Scott, AA 310/06, (6 pages)*

UNJUSTIFIED DISMISSAL - Redundancy - Respondent closed applicant's branch - Applicant declined positions at other branches because of travel involved - Believed respondent should have discussed possibility of role for her at proposed new local store - New branch only an agreement in principle, and dependent on number of requirements being met - Applicant offered position at new store once respondent knew going ahead - Claimed respondent had ulterior motives and only attempting to mitigate exposure to personal grievance claim - Branch closure presented to New Zealand management as fait accompli - No opportunity to consult on closure but proper to consult on alternative positions - Duty to consult did not extend to consulting on position at proposed store when no certainty about role at that location - For consultation to be meaningful must relate to alternatives about which there is certainty or near certainty - If applicant wished to work at proposed store she had duty in good faith to raise issue - Would have enabled respondent to clear up misunderstanding but made no difference to termination of employment - Not a breach of duty that group manager did not personally consult applicant - Authority noted respondent took other reasonable steps in process leading to and following termination, including payments in addition to contractual entitlements, and provision of good reference - Dismissal justified - Length of service 23 years - Manager

**Result:** Application dismissed ; Costs reserved

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

## *Dams v Powerbeat International Ltd*

22 Nov 2006, A Dumbleton, AA 352/06, (5 pages)

RAISING PERSONAL GRIEVANCE - Whether grievance raised within 90 days - Time ran from date applicant formed belief dismissed, not last day of work - After dismissal applicant approached lawyer, who posted grievance letter - When no response for several weeks, applicant contacted lawyer and letter sent again - Authority accepted first letter sent well inside 90 day period - However, not satisfied respondent received it - Grievance could not be said to have been communicated to employer - Second letter received three days out of time - Whether exceptional circumstances permitted granting of leave to raise grievance out of time - Respondent had over two weeks notice leave would be sought - Delay small in relation to overall 90 day period - No evidence delay prejudiced respondent - Grievance arguable and not totally without merit - Applicant made reasonable arrangements to have grievance raised on his behalf and, when heard nothing more, made enquiries - Circumstances did not fit s115(b) Employment Relations Act 2000 as lawyer did not fail to write or post letter in time - Applicant could not reasonably be held to blame for whatever caused non receipt of posted letter - Delay occasioned by exceptional circumstances - Just to grant leave to raise grievance out of time - Result would be same if lawyer were to blame for delay - ARREARS OF HOLIDAY PAY - Respondent undertook to see applicant received holiday pay owing - Engineer

**Result:** Application granted ; Parties directed to mediation ; Costs reserved

## Personal Grievance - Unjustified Disadvantage - Employment Relations Act 2000

### *Currie v McVicar Timber Group Ltd*

5 Dec 2006, R Arthur, CA 168/06, (8 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - BREACH OF CONTRACT - Redundancy - Applicant claimed redundancy unjustified and unjustifiably disadvantaged - Claimed respondent breached obligation to negotiate terms and conditions of redundancy - Terms and conditions based on collective employment agreement ("CEA") - Individual employment agreement ("IEA") included all relevant terms of CEA - No redundancy compensation provision in IEA - CEA provided four weeks notice and negotiation of terms and conditions of redundancy - Applicant claimed offered new position in Australia - Authority found prospect of new position still inquiry with no definitive elements of offer - Applicant advised position to become redundant - Refused "take it or leave it" cash settlement - Took stress leave - Respondent continued formal consultation process - No real challenge by applicant as to whether respondent genuinely considered restructuring needed - Making applicants position redundant better cost-saver than reducing other positions - Authority found some attention to procedural requirements, however, start of process unfair - Applicant unlikely to have anticipated vulnerability to job and believed future secure, because of job possibility in Australia - Respondent rejected applicants attempts to revive settlement offer, but did little or nothing to discuss how redundancy would be handled - Fair and sensitive employer would have discussed options with applicant - Instead, respondent imposed notice period paid in lieu and termination date one day after dismissal - Disputed clause created contractual right that terms and conditions of redundancy shall be negotiated - Authority could not determine what terms should have been agreed - IEA provided parties to ascertain amount of payment by negotiation - Clause created legally enforceable right to negotiate on range of items or matters - Once settlement offer lapsed, respondent closed its mind to consideration of other terms and conditions of redundancy, which was obliged to at least discuss - Obligation to negotiate breached - Unjustified disadvantage - REMEDIES - Breach denied applicant opportunity to secure more favourable outcome - Real and substantial chance respondent approaching issue with open mind would have agreed to redundancy on terms better than four weeks notice, but below full measure of compensation in settlement offer - Value of lost opportunity would have at least been extended notice period - 12 weeks notice appropriate - Length of service 30 years - Sawmill manager

**Result:** Application granted (Unjustified disadvantage) ; Loss of benefit (12 weeks notice) ; Compensation for humiliation etc (\$5000) ; Costs reserved

### *Garas-Endrawis v Albany Food Warehouse Ltd*

23 Nov 2006, R Monaghan, AA 354/06, (9 pages)

UNJUSTIFIED DISMISSAL - Alleged actual or constructive dismissal - Applicant injured back at work - Matter referred to ACC - Medical certificate stated applicant not fit for heavy lifting - No light duties available - Applicant sent home - No dismissal at this time, open ended nature of absence not unknown in employment law and respondent should have been advised of progress - However ACC concluded employment had ended - Applicant found out employee number assigned to someone else and concluded employment terminated - Respondent to clarify matter - Received indication that employment terminated - Should have contacted employer, not ACC - Acquiescence by applicant considered by respondent that employment abandoned - Authority concluded circumstances amounted to combination of misunderstanding and miscommunication, but no dismissal - Matter transferred to business services manager ("KP") - Applicant informed that still a staff member and still on payroll - Applicant indicated would not be able to do checkout job - Applicant would not accept alternative employment at position of lower level than what she was qualified for -

Applicant failed to distinguish between wider vacancies that ACC recommended and work respondent might offer in interests of continuing her employment - Applicant not entitled to expect kind of work that was being explored by ACC - Applicant told if could not work as checkout operator then should resign - Letter sent to applicant requesting confirmation of termination - Applicant confirmed position should be terminated - Overall, circumstances amounted to termination by consensus - No dismissal - UNJUSTIFIED DISADVANTAGE - Changes to hours made by agreement - No unjustified disadvantage - ARREARS OF WAGES AND HOLIDAY PAY - Claim for unpaid holidays dismissed - No need for notice since termination by consensus - Length of service 15 months - Checkout assistant  
**Result:** Application dismissed ; Costs reserved

### ***Iles v Dry Run Holdings Ltd***

*27 Oct 2006, GJ Wood, WA 147/06, (4 pages)*

UNJUSTIFIED DISADVANTAGE - UNJUSTIFIED DISMISSAL - Respondent registered in New Zealand but run in Australia - Signed employment agreement stated relationship between applicant and franchise trading name PH - Respondent employer at time of termination - Clearly breach of good faith and likely to be misleading if employer failed to describe actual name of employer - PH sold to D - Representatives of D arrived at applicant's store and told staff store closing in two days, and could apply for jobs with D - PH did not contact staff to explain what would happen or give notice - Respondent's director claimed sale and purchase agreement had condition D would take over responsibility for employees on sale, and sale confidential - No evidence provided of agreement - Trite law employer could not transfer employees to new employer without specific approval - Such approval not sought or gained in this case - Would not have been productive to direct mediation - Applicant's dismissal was effect of sale of franchise - Positions offered by D all significant distance away store - Applicant acted reasonably in declining to apply for position - Failed to consult in redundancy situation and pay notice - Unjustified disadvantage - Genuine redundancy as whole business sold - Dismissal justified - Remedies - Compensated for failure to consult and give notice - ARREARS OF WAGES - Applicant not paid final week's wages or payment in lieu of notice - Should have been given two weeks notice - Wages due and owing - COSTS - Applicant assisted by community law centre - Length of investigation meeting not specified - Filing fee only expense incurred - Respondent to reimburse filing fee - Length of service five years four months - Fast food worker

**Result:** Application granted (Unjustified disadvantage, arrears of wages) ; Application dismissed (Unjustified dismissal) ; Arrears of wages (\$840) ; Compensation for humiliation etc (\$3,500) ; Disbursements in favour of applicant (\$70)(Filing fee)

### ***Van Leeuwen v Canterbury District Health Board***

*22 Nov 2006, J Crichton, CA 160/06, (9 pages)*

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Constructive dismissal - Alleged respondent failed to act when bullied and harassed by co-worker - Applicant never formally complained about co-worker, despite being asked - HR adviser worked with both employees and viewed problem as personality conflict - Applicant encouraged to take time off because faced external pressures, as well as work difficulties - Went on sick leave and effectively never returned - Authority satisfied respondent did not suggest applicant resign or try to force him out of position - Applicant interested in returning when co-worker resigned - Original position changed, so offered alternative roles - Parties attended mediation on issue of returning but it remained unresolved - Evidence did not support categorisation of events as bullying or meet definition in respondent's policy - Unsatisfactory personal relationship between co-workers could not constitute bullying in a legal sense - Co-worker regarded herself as victim of bullying because of applicant's regular complaints - Refusal to lodge formal complaint went against wish to categorise problem as bullying - Within framework of informal complaint process chosen by applicant, respondent did all reasonably could to

address his concerns - Authority's only concern was perhaps respondent did not make consequences of not making formal complaint as abundantly clear as might have been appropriate - Clear reasons, related to natural justice, formal investigation into co-worker's behaviour could not take place without formal complaint - Evidence strongly suggested applicant resigned after reading medical report stating fit to return to work with conditions - Authority of view he acted prematurely and denied respondent opportunity to work with him to resolve issue - Effectively confirmed decision by refusing to meet with respondent - No unjustified disadvantage - No constructive dismissal - Length of service two years five months - Occupational therapy instructor

**Result:** Application dismissed ; Costs reserved

### ***Wall v Strategic Health Ltd***

*23 Nov 2006, PR Stapp, WA 165/06, (9 pages)*

UNJUSTIFIED DISMISSAL - Applicant had two roles with respondent ("SHL") - Second role on premises controlled by another company ("CCT") - Employment consolidated with SHL - Applicant took time off work due to injury - Cleared to return to work, however, respondent wanted second opinion as to applicant's condition - Applicant dismissed before second opinion obtained - Respondent concerned applicant put CCT at risk under Health and Safety in Employment Act 1992 - Applicant advised that respondent wanted to consult on restructuring proposal regarding roles at SHL and CCT - Respondent raised concerns about applicant's performance and conduct which amounted to final warning - No response from respondent when applicant requested to discuss proposal - No appearance by respondent - Respondent failed to reasonably provide documents required for Authority investigation - Authority found SHL deliberately did not co-operate with Authority investigation - Inactions seen as wilful and contemptuous of Authority - Respondent not proactive in making arrangements for mediation prior to investigation meeting - Directors of both companies acting in concert - Overlap of directors involvement in both companies suggested raising of redundancy was way to get around problem - Restructure not genuine - Dismissal unjustified - ARREARS OF WAGES AND HOLIDAY PAY - Applicant's claim for unauthorised deductions not a personal grievance matter - Claim an enforcement matter - However, claim not established by applicant - Arrears of holiday pay due and owing - COSTS - 85 percent as reasonable contribution by respondent - Appropriate given lack of co-operation by respondent

**Result:** Application granted (Unjustified dismissal) ; Application dismissed (Arrears of wages) Reimbursement of lost wages (\$4,888) ; Compensation for humiliation etc (\$10,000) ; Arrears of holiday pay (\$1,244.48) ; Costs in favour of applicant (\$2,541.50) ; Disbursements (Filing fee)(\$70)

# Practice & Procedure - Employment Relations Act 2000

## ***Booker (Labour Inspector) v Storey (t/a The Alteration Shop)***

4 Apr 2007, Perkins J, AC 16/07, (1 pages)

PRACTICE AND PROCEDURE – Resumed hearing of application for remedies in default of defendant complying with compliance order issued by Authority – HELD – Court informed amount paid in full – Parties had agreed on costs – Application dismissed

**Result:** Application dismissed (compliance) ; No order for costs

## ***Daunton v Pacific Pine Chemicals Ltd***

28 Nov 2006, L Robinson, AA 360/06, (7 pages)

PRACTICE AND PROCEDURE - Identity of employer - Applicant accepted position with company to be formed and registered in Fiji, from director of respondent - Entered individual employment agreement ("IEA") with respondent - Worked two months in New Zealand then moved to Fiji - Respondent claimed applicant employed by Fijian company as soon as moved - Fijian company not formed when applicant arrived - Could not have been employed by something that did not exist - Applicant not employed under pre-incorporation contract - Employment agreement with Fijian company not concluded - Respondent maintained time in New Zealand for training and induction only, but IEA not limited in any way - IEA expressly contemplated terms being operative in multiple locations and wording capable of including work in Fiji - IEA not terminated simply by arrival in Fiji or establishment of Fijian company, something more overt required, namely new employment agreement - Applicant remained employed by respondent under terms of IEA -

JURISDICTION - Conflict of laws - Whether appropriate jurisdiction for claim New Zealand or Fiji - IEA expressly stated Employment Relations Act 2000 applied - New Zealand law applied to employment relationship problem - Authority had jurisdiction - General manager

**Result:** Questions answered in favour of applicant ; Parties directed to mediation ; Orders accordingly ; Costs reserved

## ***Dholakia v Global Peace New Zealand Trust***

20 Dec 2006, M Ulrich, AA 372A/06, (2 pages)

PRACTICE AND PROCEDURE – Applicant sought certificate of determination in relation to awards previously made in his favour – Quantum of remedies to be determined - Authority calculated amounts owing

**Result:** Orders accordingly ; No order for costs

## ***Engineering, Printing and Manufacturing Union & Ors v Borg Industries Ltd***

7 Dec 2006, Y Oldfield, AA 370/06, (2 pages)

PRACTICE AND PROCEDURE - Risk of liquidation meant Authority opted for investigation meeting without sending parties to mediation - No appearance by two applicants, MM and PL - Authority took no further action in respect of their claims - However, as investigation meeting set down at very short notice claims not dismissed - MM and PL to advise Authority if wanted to resume claim - ARREARS OF WAGES AND HOLIDAY PAY - Applicant employees laid off without notice - Sought payment in lieu of notice and outstanding holiday pay - Respondent did not dispute WF and IS not paid entitlements - MS owed pay in lieu of notice only - Applicants had not received pay slips and unable to tell Authority gross weekly wage - Respondent to provide wage and time records to applicants' representative - RECOVERY OF MONIES - Applicant union sought remittance of union fees deducted from members wages by respondent - Respondent did not

dispute fees owed and stressed unable, rather than unwilling to pay - Parties reminded could attend mediation to discuss arrangements for payment

**Result:** Application granted ; Arrears of wages (Notice)(4 weeks)(Payable to WF, IS and MS) ; Arrears of holiday pay (2 weeks)(Payable to WF and IS) ; Other monies (\$3,955.20)(Union fees)(Payable to union) ; Orders accordingly ; No order for costs

### ***Field v AB Equipment Ltd***

*19 Dec 2006, P R Stapp, WA 178A/06, (2 pages)*

PRACTICE AND PROCEDURE – Application to amend error in Authority costs determination – Authority had deducted \$2,000 from reasonable costs for costs associated with mediation - Applicant now produced information showing costs for mediation were \$1,000 - Entirely consistent with earlier determination to discount amount deducted for mediation costs – Would increase amount respondent required to contribute to applicant's costs from \$4,000 to \$5,000 – Substitution ordered

**Result:** Application granted ; Orders accordingly ; No order for costs

### ***Gates v Air New Zealand***

*27 Mar 2007, Travis J, AC 15/07, (2 pages)*

PRACTICE AND PROCEDURE – Application for security for costs and stay of challenge until security paid – Alternatively, defendant sought stay until plaintiff had paid costs ordered in Authority either to defendant or the Court – Defendant submitted there was reason to believe plaintiff would be unable to meet defendant's costs if unsuccessful – Further, that plaintiff's conduct had caused significant delays and challenge was unmeritorious – HELD – Delays not relevant to application for security – Difficult to make clear assessment of merit, but strike out application would be unsuccessful at present stage – Plaintiff may be prevented from pursuing claim if unable to pay security – Orders for security based solely on impecuniosity likely to be rare, especially where arguable that impecuniosity resulted from dismissal – Statutory rights of grievants, who are often impecunious, to pursue challenges should not be lightly put aside – Arguable that defendant's actions in dismissal affected plaintiff's financial situation – No security for costs ordered – Plaintiff prepared to pay costs ordered in Authority into Court – Proceedings stayed until amount paid – Application for security for costs dismissed – Application for order staying proceedings until costs order paid granted

**Result:** Application dismissed (security for costs) ; Application granted (stay of proceedings until costs order paid) ; Orders accordingly ; Costs reserved

### ***Hardy v Scoopy's Ice Cream Parlour Ltd & Anor***

*12 Oct 2006, RA Monaghan, AA 319/06, (4 pages)*

PRACTICE AND PROCEDURE - Application for joinder - Applicant applied to have proposed second respondent ("SHL") joined as party to grievance proceedings - Whether corporate veil should be lifted - First Respondent ("SICPWL") operating employer - Applicant aware directors ("Aitkens") of SICPWL looking to sell - SICWPL ceased trading, assets and business sold to SHL - Aitkens shareholders in SHL along with ("B") - B sole director and majority shareholder in SHL - SHL not in existence during applicant's employment - Applicant argued SHL and SICPWL one economic unit, that SICPWL controlled by SHL and carrying out business as subsidiary of SHL - Authority found no evidence of ongoing association in nature of corporate group between SICPWL and SHL - SHL not parent of SICPWL, merely purchased assets and business leaving SICPWL an inoperative shell - No evidence SHL incorporated to avoid obligation SICPWL might have to applicant - Accounts supported proposition genuine reason for sale - Joinder refused - Merits of grievance to be investigated

**Result:** Application dismissed ; Costs reserved

***Infinity Investment Group Holdings Ltd v Walker & Ors***

*19 Dec 2006, P Cheyne, CA 178/06, (2 pages)*

PRACTICE AND PROCEDURE – JURISDICTION - Application for removal to Employment Court – Applicant commenced proceedings against respondents in District Court to recover under loan agreement – Respondents claimed matter employment relationship problem within exclusive jurisdiction of Authority - Second respondent alleged loan part of employment agreement with applicant - Both parties submitted important questions of law likely to arise – Authority found questions of law incidental – Matter required inquiry into meaning of written terms in letter of employment, and whether parties agreed to amend terms with loan agreement – Factual inquiry together with dispute as defined in Employment Relations Act 2000 – No important question of law arising other than incidentally – No public interest issues or related proceedings already before Court – Parties submitted large sum in dispute, difficult credibility issues, and tax and accounting issues meant in circumstances Court should determine matter – Joint application most telling factor – However, Authority not persuaded ordinary dispute resolution process provided by Parliament should not be applied – Application for removal declined

**Result:** Application dismissed ; Costs reserved

***Kinley, The Registrar of Unions v M.E.U. Society Incorporated & Ors***

*27/10/2006, PR Stapp, WA 146/06, (3 pages)*

PRACTICE AND PROCEDURE - Application for cancellation of union registration under s17 Employment Relations Act 2000 - Registrar of Unions applied for order cancelling registration of 14 unions no longer registered under Incorporated Societies Act 1908 ("ISA") - Given nature of application and outcome of attempts to serve notice of application, Authority did not direct mediation - Applicant agreed not to cancel registration of one union who replied to service - Four unions consented to removal - Five unions did not reply upon being served - Authority satisfied unions served with notice and given opportunity to reply - By not replying, Authority satisfied unions did not object to order being made - Authority attempted to serve application on remaining unions but documents returned - Without applicant being provided with alternative arrangements for address for service, Authority satisfied unions no longer incorporated - No knowledge of objection from them - Satisfied unions did not meet requirements of s14(1)(b) ISA - Cancellation of 13 unions ordered

**Result:** Application granted ; Orders accordingly ; No order for costs

***Manning & 29 Ors v Hewlett Packard NZ Ltd***

*13 Jun 2007, R Arthur, AA 175/07, (6 pages)*

PRACTICE AND PROCEDURE – Application for removal to Employment Court – Respondent opposed application - Matter concerned dispute and personal grievance applications - Whether respondent could stop paying superannuation contributions and withdraw Retirement Plan (“Plan”) without compensating applicant employees for loss of contributions – At issue was whether parties arrangements regarding Plan and contributions amounted to condition of employment and, if so, extent of obligation created where such condition not express contractual term – Also at issue was what phrase “change and modify”, used in documentation about Plan, allowed respondent to do – Both questions not simply of fact but law, and did not need to be novel or complex – Rather, statutory test of importance required answers to questions to be decisive or strongly influential of matter, as they plainly were in present case - Authority satisfied questions of law more than incidental to case – Questions really what case all about – Answers important not only on outcome for parties, but also for employment law generally – Also, issue of making changes to employer-provided superannuation schemes had heightened interest beyond immediate parties – Introduction of KiwiSaver scheme likely to result in many workers and employers looking at

changes, modification or closure of existing arrangements – With so much at stake would inevitably be disputes – Whatever guidance Court could give on how to approach provisions for change or modification would be of keen interest – No good and sufficient reasons to exercise discretion not to order removal – Removal ordered

**Result:** Application granted ; Removal ordered ; No order for costs

***The New Zealand Airline Pilots Association Industrial Union of Workers Incorporated v Air New Zealand Ltd***

*7 Mar 2007, Elias CJ, Blanchard JJ, Tipping JJ, SC 91/2006, (1 pages)*

SUPREME COURT – Practice and procedure – Application for leave to appeal Court of Appeal decision (see: (2007) 8 NZELC 98,568) – Court of Appeal held that public holiday entitlement could be observed on another day by agreement (“exchange day”), exchange day must be specific day capable of identification and collective employment agreement had not validly transferred entitlements – HELD – Approved grounds of appeal were: (i) whether an employee’s entitlements to a public holiday could be transferred by agreement to exchange day; (ii) whether exchange day had to be identified or capable of identification with certainty in employment agreement; and (iii) whether collective employment agreement validly transferred entitlements – Application granted

**Result:** Application granted (leave to appeal) ; No award for costs

***New Zealand Professional Firefighters Union v New Zealand Fire Service Commission***

*17 Apr 2007, Blanchard, Tipping and McGrath JJ, SC 13/2007, (1 pages)*

SUPREME COURT – Practice and procedure – Application for leave to appeal Court of Appeal decision (see: [2007] 2 NZLR 356) – Firefighters worked on 160-day roster – 16 days leave, comprised of annual leave and public holidays in lieu (“alternative holidays”), provided at end of each roster period – Court of Appeal held that alternative holidays would have otherwise been working days and that it was unnecessary for alternative holiday to be specifically identified – HELD – Approved grounds of appeal were (a) whether Court of Appeal correctly construed the phrase “a day that would otherwise be a working day for the employee” in s57(1)(b) Holidays Act 2003; and (b) whether Court of Appeal was right to conclude that s57(1)(a) Holidays Act 2003 does not require specific agreement between the employer and employee as to a specific day for the taking of an alternative holiday – Application granted – Firefighters

**Result:** Application granted (leave to appeal) ; No order for costs

***Nola & Anor v Harvey***

*7 Mar 2007, Shaw J, WC 10/07, (2 pages)*

PRACTICE AND PROCEDURE – Application for leave to challenge Authority determination out of time – Statement of claim filed one day late without copy of Authority determination attached – Determination sent promptly when requested by Registrar – Respondent opposed leave on grounds that applicants were fully aware of filing requirements, documents filed were incomplete (completed documents approx one week out of time) and applicants had not acted in good faith during Authority process by not attending investigation meeting – HELD – Filing of form 1 statement of claim had effect of commencing proceedings – Even though determination was not attached accompanying letter referred to determination – Substance of challenge was before the Court – In accordance with Rule 5 of High Court Rules, Court treated failure to attach determination as an irregularity which was cured – Application was therefore one day out of time – Applicants posted challenge three days prior to due date and appeared to have good reason

to believe would be received on time – One day delay minimal – Apart from costs of defending application, no prejudice to respondent – Number of live issues which could only be determined if both sides heard – Important factor against granting leave was failure of applicants to attend investigation meeting – Applicants unfamiliar with employment institutions processes – Unjust not to allow application – Application granted conditional on applicants paying costs order – COSTS – Although opposition to application was unsuccessful it was not without merit – Respondent awarded \$1,500 contribution to approximate reasonable costs of \$2,000 – Driver

**Result:** Application granted (leave to file challenge out of time) ; Orders accordingly ;  
Costs  
in favour of respondent (\$1,500)

### ***Royal v Petri & Anor***

*14 Dec 2006, P Stapp, WA 175/06, (1 pages)*

PRACTICE AND PROCEDURE – No appearance by either party – Applicant required to give evidence to support her claim – Without attendance matter could not progress – No good cause for failure to attend – Applicant’s representative had not received further instructions – Application dismissed – Investigation closed

**Result:** Application dismissed ; Orders accordingly ; No order for costs

### ***Smith v Nga Kairauhii Trust***

*9 Mar 2007, Colgan CJ, WC 11/07, (2 pages)*

PRACTICE AND PROCEDURE – Application for leave to challenge out of time – 40 days late – Applicant submitted delay due to difficulties contacting lawyer – Respondent submitted delay not minimal – Challenge not meritorious – Respondent’s beneficiaries might suffer prejudice and hardship if money reallocated to defend challenge – Applicant had submitted personal grievance 442 days after date she was allegedly unjustifiably dismissed – Employment agreement had not explained process for resolution of employment relationship problems as required by s65(2)(vi) Employment Relations Act 2000 – Authority had determined subject matter of challenge (90 day issue) on the papers – Authority found failure to explain process for resolution of employment relationship problems was an exceptional circumstance, but not causative of failure to raise grievance – Authority found applicant must have been aware of 90 day limit – HELD – Authority’s conclusions were speculative and contrary to applicant’s evidence – Authority failed to comply with principles of natural justice by making credibility findings in person’s absence and on assumptions rather than evidence – Challenge had merit – Against interests of justice that employer should breach s65(2)(vi) obligation and then oppose present application on grounds that relied on that breach – 40 day delay explained – Length of delay more gross than minor but reasonably explicable – Respondent would have suffered same prejudice and hardship if challenge had been brought within time – Injustice to applicant of not having challenge considered outweighed effects on respondent – Application granted

**Result:** Application granted (leave to file challenge out of time) ; Orders accordingly ;  
Costs reserved

### ***Southern Local Government Officers Union Inc v Christchurch City Council***

*16 Jul 2007, H Doyle, CA 80/07, (8 pages)*

PRACTICE AND PROCEDURE - Application by respondent for removal to Employment Court – Applicant opposed application – Employment relationship problem involved partial lockout by respondent of applicant union’s members – Applicant sought orders lockout unlawful under s86 Employment Relations Act 2000 ("ERA"), wages and compensation - Respondent counterclaimed members unlawfully on strike, and were no health and safety concerns sufficient to justify strike on health and safety grounds - Definition of “lockout” in

s62 Employment Contracts Act 1991 included an act of an employer “wholly or partially” discontinuing employment of employees - No case law to date about effect of removing words “wholly or partially” from s82 ERA definition of lockout - Authority found important question of law arose about lawfulness of a lockout under ERA, where partial reduction in work and pay occurred – Not appropriate for Authority to determine matter, then refer question of law to Court - Although matter not of extreme urgency, in public interest question be removed – No reasons not to exercise discretion to order removal – Entire matter removed to Court

**Result:** Application granted ; Orders accordingly ; Costs reserved

***W v Auckland District Health Board***

*21 Mar 2007, William Young P, Glazebrook, O'Regan JJ, CA 102/07, (1 pages)*

COURT OF APPEAL – Practice and procedure – Application for interim name suppression – Reasons for decision of 21 March 2007 – Appellant had applied for leave to appeal Employment Court decision (see: (2007) 8 NZELC 98,749) – Proposed appeal, among other matters, related to Employment Court’s refusal to grant appellant permanent name suppression – Respondent submitted proposed appeal without merit and in public interest that name suppression not continue – HELD – Appellant had received interim name suppression since May 2005 – Extra time of little significance – Undesirable for merits of application for leave to be argued in present application – Appeal would be rendered nugatory if name suppression refused – Application granted

**Result:** Application granted (interim name suppression) ; Orders accordingly ; No order for costs

***Weatherly v Pulp and Paper Industry Council of the Manufacturing and Workers Union & Anor***

*18 Dec 2006, V Campbell, Aa 379A/06, (1 pages)*

PRACTICE AND PROCEDURE - Authority issued earlier determination without dealing with costs – Authority directed costs reserved

**Result:** Orders accordingly ; No order for costs

# Practice & Procedure - Consent Orders - Employment Relations Act 2000

## ***Apex General Ltd v Beckett***

20 Apr 2007, YS Oldfield, AA 115/07, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Dispute involved enforceability of restraint of trade - Parties agreed to modify employment agreement - During specified time frame, respondent to notify applicant if contacted by client seeking quote or tender - Restrained from soliciting current employees of applicant for 12 months - Terms of settlement to be order of Authority

**Result:** Consent order granted ; Orders accordingly ; Costs to lie where they fall

## ***Beuker v WDHBHAE Ltd t/a Wals Holes***

11 Jul 2007, K Raureti, AA 208/07, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement at investigation meeting - Terms of settlement to be orders of Authority - Order prohibiting publication of terms of settlement

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

## ***Evans v Corrosion Control (NZ) Ltd***

21 Jun 2007, K Raureti, AA 186/07, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement at investigation meeting - Terms of settlement to be orders of Authority - Order prohibiting publication of terms of settlement

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

## ***Howett v Ace Training Ltd***

9 May 2007, L Robinson, AA 142/07, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement at investigation meeting - Terms of settlement to be orders of Authority - Terms of settlement to be full, final and binding - Order prohibiting publication of terms of settlement

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

## ***Innes v Dazone Ltd***

26 Jun 2007, K Raureti, AA 191/07, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement at investigation meeting - Terms of settlement to be orders of Authority

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

## ***Johnson v Haines Suzuki Marine Pty Ltd***

15 May 2007, RA Monaghan, AA 146/07, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Order prohibiting publication of terms of settlement, save that this order shall not be applied in a manner that compromises the settlement

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

***Li v Auckland College of Natural Medicine***

*25 Jun 2007, M Urlich, AA 189/07, (1 pages)*

CONSENT ORDER - Parties reached agreement on terms of settlement at investigation meeting - Terms of settlement to be orders of Authority - Terms of settlement final and binding, and made without admission of liability - Order prohibiting publication of terms of settlement

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

***National Union of Public Employees Inc v Capital & Coast District Health Board***

*20 Jun 2007, D Asher, WA 94/07, (2 pages)*

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Parties agreed collective employment agreement enabled all psychologists bound by agreement to apply for study assistance - Costs to lie where they fall

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

***Turner v Victory Supermarkets Ltd***

*8 May 2007, GJ Wood, WA 72/07, (1 pages)*

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Order prohibiting publication of terms of settlement except for one clause

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

***Winter v Trustworks Ltd***

*24 May 2007, GJ Wood, WA 82/07, (1 pages)*

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Respondent to pay applicant specified sum within seven days in full and final settlement

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

# Restraint of Trade - Employment Relations Act 2000

## *I C Frith (NZ) Ltd v Young*

24 Oct 2006, Y Oldfield, AA 325/06, (5 pages)

DISPUTE - Restraint of trade - Application for declaration restraint of trade enforceable - Alternatively, asked Authority to modify restraint as deemed fair and reasonable - Respondent worked for company ("T") when T sold to applicant's parent company - No written employment agreement with T - Respondent agreed to start work with applicant in expectation previous oral terms with T would continue - Applicant began paying respondent's wages before sale and purchase completed - Respondent received draft agreement containing restraint of trade clause - Agreement stated restraint was for period specified in "Schedule" to agreement, but no period specified in Schedule - Parties agreed restraints common in brokerage industry - Respondent claimed aware of clause but ignored it thinking did not apply as not in Schedule nor part of oral terms - Although parties' discussed other issues, did not discuss restraint - Clause not specifically drafted for employment agreement - Rather, clause appeared to have been included almost by default - No increase in respondent's remuneration, and employed almost four months when clause introduced - Not satisfied parties turned their minds to restraint at time agreement entered - Applicant claimed agreement contained express or implied restraint - Authority did not accept absence of specified period meant restraint of indefinite duration - Nothing specified, so period specified must be nil and restraint of nil duration - Agreement did not contain express restraint provision - Cases in which restraints implied distinguished - In present case negotiation and consideration for restraint absent - Unconvinced restraint could be implied - Whether Authority should modify duration of restraint did not fall to be determined - Insurance broker

**Result:** Application dismissed ; Costs reserved

Department of Labour  
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