

Department of Labour
TE TARI MAHI



EMPLOYMENT CASES SUMMARY

MARCH 2006



Employment Cases Summary

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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.

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Editorial

NB: The editorial comment included in this publication should not be read as representative of the view of the Court, , Authority, Employment Relations Service or the Department of Labour. Rather, any view expressed is in the nature of editorial comment only.

WORKPLACE STRESS: SOME ISSUES FOR EMPLOYERS AND EMPLOYEES TO CONSIDER

I INTRODUCTION

Stress occurs when a person is not in control of a situation and is part of normal everyday life, and it is not necessarily a problem. However, stress, which is harmful, is a problem. When harmful stress occurs in the workplace, it becomes an employment issue, which the employer and employee need to deal with.

If an employer fails to adequately address workplace stress, they could find themselves faced with a claim in the District Court for a breach of obligations under the Health and Safety in Employment Act 1992.¹ Alternatively, an employee could bring a claim in the Employment Relations Authority for a breach of contract,² for an unjustified disadvantage³, or for an unjustified constructive dismissal (if they resign because of the employer's failure to deal with the workplace stress).⁴

This editorial covers some of the main issues which will be looked at in a case involving a stress claim in the Employment Relations Authority and the Employment Court. However, it should be noted that this editorial does not set out all elements which will need to be satisfied in order to amount to a successful claim. Rather, this editorial summarises some main issues covered in stress cases in order to illustrate the types of issues employees and employers should think about on a day to day basis regarding how to deal with stress in the workplace.⁵

This editorial considers firstly, the issue of what has caused an employee's stress, secondly, whether the risk of stress was reasonably foreseeable, and finally, whether the employer took reasonable / practicable steps to deal with the stress.⁶

II THE CAUSE OF THE STRESS

A Has the stress been caused by the work?

If an employee alleges a claim based on stress in the workplace, the Authority and Court will look at the work the employee performs or performed and assess whether the job itself has caused the employee stress.

¹ The Health and Safety in Employment Act 1992 is not discussed in this editorial. For an example of workplace stress under the Health and Safety in Employment Act see *Department of Labour v Nalder & Biddle (Nelson) Ltd* unreported, McKegg J, 13 April 2005, CRN 04042500.

² See, for example, *Whelan v The Attorney-General in respect of the Chief Executive of the Children & Young Persons Service* [2004] 2 ERNZ 554.

³ See, for example, *A v The Attorney-General in respect of the Chief Executive Officer of the Child Youth & Family Services* unreported, P Stapp, 22 December 2005, WA 196/05.

⁴ See, for example, *Kingston v Gen-I Limited* unreported, Y S Oldfield, 12 May 2005, CA 67/05.

⁵ For more information on stress in the workplace see:

<http://www.osh.dol.govt.nz/order/catalogue/stress/index.shtml>

⁶ See *Kingston v Gen-I Limited* unreported, Y Oldfield, 12 May 2005

Some work performed is inherently stressful. Examples of inherently stressful occupations include a probation officer (as in *Gilbert v the Attorney-General*) and a social worker (as in *A v The Attorney-General in respect of the Chief Executive Officer of the Child Youth & Family Services*⁷ and *Whelan v The Attorney-General in respect of the Chief Executive of the Children & Young Persons Service*⁸ [2004] 2 ERNZ 554).

One factor to be looked at in order to assess whether the work is causing the employee stress is the employee's workload. For example, is the workload excessive? In the case of *Whelan v The Attorney-General*, the Court found that:

The plaintiff's workload was excessive, the pressure unremitting, and, because of the inadequacies in the staff provided to the plaintiff, unduly burdensome. These failures required her, while still acting as a supervisor, to carry the day to day caseloads of those members of her team who fell over for a variety of very compelling reasons.

The Court found that the manager knew or ought to have known that the workload and other pressures placed on the plaintiff were unreasonable. It was reasonably foreseeable that the plaintiff was likely to suffer from stress.

Other factors which may indicate a risk of stress in the workplace include resources available to the employee and whether there is adequate staffing.

B Other factors which could be the cause of stress

If an employee is stressed at work, it may be that their work is the cause of the stress, that personal problems are the cause of the stress, or more often, that it is a combination of both. As the Court in *Brickell v Attorney General*,⁹ said: "When a person is stressed, small things — particularly in accumulation — can aggravate. They can even be a last straw."¹⁰

The employee in *A v The Attorney-General in respect of the Chief Executive of the Child Youth & Family Services*¹¹ had a number of personal issues which were also causing her stress. These included marital difficulties and taking on responsibility for caring for grandchildren. The Authority found that the cause of the employee's illness related to the various personal factors in the employee's life. The Authority further found that the employee "...was probably not suited to employment as a front line social worker in the first place."¹²

In the case of *Nilson-Reid v Attorney-General in respect of the Director-General of the Department of Conservation*¹³, the Court also found that there were a number of personal stressors:

- A rumour that a co-worker and the employee's husband were having an affair.
- Financial concerns stemming from the employee's husband leaving his job and starting a tour business venture.

⁷ *A v The Attorney-General in respect of The chief Executive Officer of The Child Youth & Family Services* unreported, P Stapp, 22 December 2005, WA 196/05.

⁸ *Whelan v The Attorney-General in respect of the Chief Executive of the Children & Young Persons Service* [2004] 2 ERNZ 554.

⁹ *Brickell v Attorney General* [2000] 2 ERNZ 529.

¹⁰ *Brickell v Attorney General* [2000] 2 ERNZ 529, 548.

¹¹ *A v The Attorney-General in respect of The chief Executive Officer of The Child Youth & Family Services* unreported, P Stapp, 22 December 2005, WA 196/05.

¹² *A v The Attorney-General in respect of The chief Executive Officer of The Child Youth & Family Services* unreported, P Stapp, 22 December 2005, WA 196/05, 9.

¹³ *Nilson-Reid v Attorney-General in respect of the Director-General of the Department of Conservation* unreported, Travis J, 7 March 2005, CC 4/05.

- Concern over whether her husband would be able to obtain a concession to operate on DoC land as was necessary for his business.
- The employee was undertaking university studies during this time.

The Court further found that the plaintiff's personal concerns were "compounded by issues that had arisen at work."¹⁴

C Evidence in the Authority or the Court by doctors

The Authority and the Court have highlighted issues with evidence given by an employee's doctor or specialist. If a doctor's evidence is based on self-reporting by the employee, the persuasiveness of this evidence will be considered limited. The Authority in *Kingston Gen-I Limited* stated that: "A patient's own assessment of the causes of his own illness serves diagnostic and therapeutic purposes but this does not make it conclusive proof of what he or she alleges."¹⁵

In the case of *Gilbert v The Attorney General in respect of the Chief Executive of the Department of Corrections (Employment Court)*,¹⁶ the Court held that: "Both generally and in this case, expert medical assessments of the psychiatric conditions of people are better carried out, and of greater value, if they are based, at least in part, upon observation and examination and not merely upon evaluation of the written accounts of others."¹⁷

III WAS THE RISK OF STRESS REASONABLY FORESEEABLE BY THE EMPLOYER?

In order to determine whether a risk of stress was reasonably foreseeable to an employer, the Authority and Court will look at the nature of the employee's job (see the discussion above) and whether the employee told the employer that they were suffering from stress.

In determining whether the risk is reasonably foreseeable, the Court has noted that factors which, with the benefit of hindsight, could be seen as indicating stress that was causing an employee harm, did not assist an employee trying to prove that his or her stress was reasonably foreseeable to the employer.¹⁸

It is clear that different people, and personality types, react differently to potentially stressful situations. For that reason, a "risk may not be apparent without specific information about the vulnerability of a particular employee."¹⁹ However, the Court of Appeal further said that:²⁰

If the risk is one which applies generally, then knowledge of specific vulnerability may be irrelevant. If the employer unreasonably fails to take all steps practicable to remove or manage the risk and it is reasonably foreseeable that any employee may suffer harm as a result, then the employer will be in breach of the term of the contract to maintain safe working conditions. It was not necessary in the circumstances for there to be "direct warning of imminent breakdown on the part of the respondent", as suggested on behalf of the appellant.

¹⁴ *Nilson-Reid v Attorney-General in respect of the Director-General of the Department of Conservation* unreported, Travis J, 7 March 2005, CC 4/05, 33.

¹⁵ *Kingston v Gen-I Limited* unreported, Y S Oldfield, 12 May 2005, CA 67/05, 4.

¹⁶ *Gilbert v The Attorney General in respect of the Chief Executive of the Department of Corrections (Employment Court)* [2000] 1 ERNZ 332.

¹⁷ *Gilbert v The Attorney General in respect of the Chief Executive of the Department of Corrections (Employment Court)* [2000] 1 ERNZ 332 369

¹⁸ *Nilson-Reid v Attorney-General in respect of the Director-General of the Department of Conservation* unreported, Travis J, 7 March 2005, CC 4/05, 34.

¹⁹ *Attorney-General v Gilbert* [2002] 1 ERNZ 32, 52.

²⁰ *Attorney-General v Gilbert* [2002] 1 ERNZ 32, 52.

A Did the employee tell the employer about the stress?

If an employee is suffering from stress in the workplace, they should notify their employer immediately. This will enable the employer to respond as soon as possible and address the workplace stress.

In the case of *Kingston v Gen-I Limited*, the employee alleged that he notified the employer on three occasions:

1. In 1997, to his then manager over a drink one night.
2. In 1999, by making arguments against a new structure.
3. In 2000, by formally requesting additional sales support.

The Authority rejected that the “passing remark at the pub put his employer formally on notice that [the employee] believed his work was unsafe and was affecting his health.” The Authority further rejected that the applicant’s arguments about the new structure amounted to putting his employer on notice that his workload was excessive: “What he said was part of a general discussion process about what was best for the business and gave no indication that he was having any personal difficulties.” The Authority further found that requesting additional sales support was not suggested as a way of reducing his workload. Nor did he say that he was not coping. Again, this was insufficient to amount to putting the employer on notice that he believed he was at risk.

In 2002 the employee suffered a breakdown and went on sick leave. The Authority found that the advice of the breakdown on its own was sufficient to put the employer on notice of the applicant’s general vulnerability to stress.²¹

In the case of *A v The Attorney-General in respect of The Chief Executive Officer of The Child Youth & Family Services*, the employer was sent a medical certificate after the employee had been on sick leave. The certificate stated that the employee would initially be able to work part time only, and should not be put on critical front line work. The following month, the doctor sent a letter to the employer indicating the existence of stress related issues for the first time. The Authority held that:²²

a fair and reasonable employer would be expected to pick up that the [employee] was not suited to front line social work. In this respect CYFS had a responsibility to deal with the [employee] as it found her, and if the supervision sessions had been more thorough, maybe this would have been picked up and able to be dealt with. On the other hand CYFS had no reason to act, in the absence of the [employee] taking some responsibility, before it was advised of the deteriorating and seriousness of the [employee’s] situation reasonably from October 2003 [when the medical certificate was sent].

In the case of *Buis v Silverdene Farms (2001) Ltd*,²³ there were a number of issues between the parties, including performance issues, and the employee’s relationship with the employer and other workers. The Authority accepted that in the lead up to the applicant’s resignation, the employee was getting upset, and it also accepted that there had been a discussion between the parties about the stress that they were causing each other. However, the Authority found that the employee did not raise his stress “sufficiently clearly for the matter to be foreseen that he would resign...the medical certificate provided as an

²¹ *Kingston v Gen-I Limited*, unreported, Y Oldfield, 21 May 2005, CA 67/05, 6.

²² *A v The Attorney-General in respect of the Chief Executive Officer of the Child Youth & Family Services* unreported, P Stapp, 22 December 2005, WA 196/05, 9.

²³ *Buis v Silverdene Farms (2001) Ltd* unreported, P Stapp, 2 September 2004, WA 118/04.

attachment to the resignation letter gave no reasons why [the employee] was not fit for work and was given to the employer simultaneously upon resigning.’²⁴

The case of *Nilson-Reid v Attorney-General in respect of the Director General of the Department of Conservation*,²⁵ provides another example of an employee not raising their stress with their employer. In this case:

The evidence established that the plaintiff was stoic throughout and endeavoured to put a brave face on things and to conceal from the others the stress she may have been suffering. ... [S]he did not tell DoC’s management that she was suffering from stress as a result of work related matters and instead indicated that there were personal issues in her life with which she had to deal.

The Court found, in this case, that it was not reasonably foreseeable that any of the employer’s work related activities could have led to the stress related illness that the employee experienced.

The case of *Henare v After Hours Moorhouse Medical Limited*²⁶ provides a further example of an employee not notifying workplace stress to the employer. In this case, the Authority found that:²⁷ “The difficulty is that there is scant evidence that [the employee] ever advised the employer of her distress in the workplace. She admitted that herself in evidence. She said that she did her job and would appear unaffected and would then collapse at home.” The employer said it was not aware of the employee allegedly suffering from workplace stress until a letter which was sent shortly before termination of her employment. The Authority held:²⁸ “it is difficult to see how, assuming that workplace stress was in evidence, and ...there [was] doubt about that for a start, the employer can be held to account for circumstances that it simply did not know about soon enough in order to be able to deal with.”

IV DID THE EMPLOYER TAKE REASONABLE/PRACTICABLE STEPS TO DEAL WITH THE RISK OF STRESS?

A What are reasonable steps to take?

The Court of Appeal in *Gilbert v Attorney-General* explained what “reasonably practicable” meant as follows:²⁹

What is “reasonably practicable” requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s 19 [of the Health and Safety in Employment Act] the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligation will vary

²⁴ *Buis v Silverdene Farms (2001) Limited* unreported, P Stapp, 2 September 2004, WA 118/04, 7.

²⁵ *Nilson-Reid v Attorney-General in respect of the Director General of the Department of Conservation* unreported, Travis J, & March 2005, CC 4/05.

²⁶ *Henare v After Hours Moorhouse Medical Limited* unreported, J Crichton, 23 February 2006, CA 27/06.

²⁷ *Henare v After Hours Moorhouse Medical Limited* unreported, J Crichton, 23 February 2006, CA 27/06, 9.

²⁸ *Henare v After Hours Moorhouse Medical Limited* unreported, J Crichton, 23 February 2006, CA 27/06, 10.

²⁹ *Attorney-General v Gilbert* [2002] 1 ERNZ 32, 51.

according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

In the case of *Kingston v Geni-I Limited* the Authority found that after the employer was on notice of the employee's vulnerability to stress, it went to "considerable effort to assist and protect him." The following steps amounted to reasonably practicable steps:³⁰

- it liaised with [the employee's] medical adviser, ...regarding his return to work plans;
- it permitted a part-time return to work after the first period of leave;
- it gave additional and generous paid sick leave;
- it employed an additional sales person to take responsibility for pursuing new business;
- it repeatedly offered the opportunity to consider alternative, lower stress roles within the organisation, which were declined.

In the case of *A v The Attorney-General in respect of the Chief Executive Officer of the Child Youth & Family Services* the employer did not take reasonable steps. In this case the employee's doctor sent a medical certificate stating the employee should not be on front-line duties, and a further letter indicating she was suffering from stress. The practice manager did not follow up on the employee's illness when she returned to work, nor did he communicate with her doctor. There was a 10 day delay in the employer responding to the doctor's advice and the applicant was never removed from front-line social work. The Authority held: "A fair and reasonable employer could be expected to take up the matter immediately given the doctor's letter. This is because there were options open to the employer that a fair and reasonable employer would be expected to take to ensure the wellbeing of the applicant."³¹ Because of this, it was found that the applicant was unjustifiably disadvantaged.

In the case of *Koia v the Attorney-General in respect of the Chief Executive of the Ministry of Justice*,³² the Court found that providing work support as part of its employee assistance programme was a proactive step taken by the employer.³³

B Did the employee take advantage of available avenues of assistance?

An employee should generally take advantage of avenues of assistance offered by an employer.

In the case of *Koia v the Attorney-General in respect of the Chief Executive of the Ministry of Justice* the employee did not take advantage of regular visits by workplace support people. In addition, he did not take up a suggestion that he go on a stress management course. The Court found that by failing to take up these avenues, the employee "lost valuable opportunities to learn to manage the stress he was undoubtedly feeling." Since the employee did not take advantage of the avenues of assistance offered to him, it was held that the employee had to take some responsibility for the state he got into and which contributed to his resignation.

V CONCLUSION

If an employee suffers from stress in the workplace, it is in both the employee and his or her employer's interests to deal with the stress effectively and as soon as possible. Any

³⁰ *Kingston v Gen-I Limited* unreported, Y Oldfield, 12 May 2005, CA 67/05, 10-11.

³¹ *A v The Attorney-General in respect of the Chief Executive Officer of the Child Youth & Family Services* unreported, P Stapp, 22 December 2005, WA 196/05, 9.

³² *Koia v the Attorney-General in respect of the Chief Executive of the Ministry of Justice* [2004] 2 ERNZ 213.

³³ *Koia v the Attorney-General in respect of the Chief Executive of the Ministry of Justice* [2004] 2 ERNZ 213, 235.

employee who suffers from stress in the workplace should notify his or her employer as soon as possible.

Before an employer can take any steps to address stress, they need to identify stressed employees, or employees who have a vulnerability to stress. This could involve looking at the following:

- The employee's work and types of task they perform.
- What the employee's workload is like. For example, are they working excessive hours?
- Whether the employee has said anything to their manager about being stressed out, finding it hard to cope etc.

Once an employer has been notified of/identifies stress in the workplace, the sorts of steps they should take, to reasonably address the employee's stress, include actions such as the following:

- Liaising with the employee and the employee's doctor or medical specialist.
- Allowing the employee time off work to recuperate/recover.
- After the employee has been on leave, allowing them to ease back into work (maybe part-time, or reduced hours).
- Providing support (eg an employee assistance programme).
- Providing additional resources (eg assistance).
- Discussing and adjusting the mix of duties
- Suggesting alternative roles for the employee, which would be less stressful.

Significant Judgments/Decisions added to the Employment Law Database

1 February 2006 - 28 February 2006

Under the Employment Relations Act 2000

Service and Food Workers Union Inc v OCS Ltd

WC 20A/05

Heard: 5 Sep 2005, Wellington

Judgment Date: 8 Sep 2005

Court/Authority/Tribunal: Colgan J

Appearances: P Cranney, A Hughes ; P McBride

INTERIM INJUNCTION – Reasons for interlocutory judgment – Essential service – Defendant issued three lockout notices – Plaintiff alleged first notice breached s83(a), 86(1)(f) and 91(1)(b)(i) Employment Relations Act 2000 – Alleged notices unlawful because demands unclear, uncertain and ambiguous – Alleged demands were incapable of acceptance and unlawful because sought to exclude supervisors from coverage of collective agreement – Whether arguable case – Arguable that first lockout notice not given at least 14 days before the intended lockout – Nature, extent, and timing of lockout was to be clear – Plaintiff had only weak arguable case that notices did not meet tests of clarity – In respect of second and third lockout notices, no strongly arguable case – Balance of convenience and overall justice favoured plaintiff in respect of first lockout notice but not in respect of second and third lockout notices – Domestic employees

This decision recorded the reasons for a decision granting an interim injunction prohibiting an intended lockout by the defendant but declining relief regarding two subsequent intended lockouts.

Members of the plaintiff union were domestic employees at Wellington hospitals. During bargaining for a collective employment agreement (“cea”), the defendant gave the plaintiff three “options” relating to wages and noted its claim to exclude supervisors from the coverage (“the offer”). After considering and rejecting the offer, the plaintiff gave notice of a series of strikes. In response, the defendant issued three lockout notices, the first of which was to commence 15 days later, at 6am. Notice of this intended lockout was transmitted by facsimile to the plaintiff’s Wellington office in the evening, after the office had closed. The notice was also placed in a sealed envelop and pushed under the closed door of the plaintiff’s Auckland office. The notice was not received by the plaintiff’s relevant official until 8.30am the following day. The notices specified that acceptance of the offer would result in the notices being withdrawn.

The plaintiff submitted that notice of the first lockout was unlawful because it breached ss83(a), 86(1)(f) and 91(1)(b)(i) Employment Relations Act 2000 (“ERA”) relating to time. The plaintiff also submitted that each lockout would be unlawful because the defendant’s demands were unclear, uncertain and ambiguous. The plaintiff submitted that the defendant’s demands were incapable of acceptance because no “offer” had been advanced capable of “acceptance”. Finally, it submitted that the defendant’s demand to exclude supervisors from coverage of the cea was unlawful. No timeliness issues were raised for the second and third notices.

The defendant submitted that the ERA did not require that lockout notice demands be absolutely clear and specific.

HELD: (1) Parliament had required certain minimum content of notices of lockout in essential industries and services and, as was illustrated by cases decided over more than 20 years dealing with strike and lockout notices, strict compliance was expected with those statutory requirements of content and timeliness. However, the Court should take a pragmatic, rather than a pedantic, approach to interpreting such notices

and attempt to put itself in the shoes, not of a lawyer minutely scrutinising legal documents for error after the event, but, rather, and to the extent possible, from the perspective of the parties to the bargaining. (para 18)

(2) The Court followed the approach to documents taken in *NZ Fire Service v Ivamy* (cited below). That approach was apposite where, as cases such as the present, interpretations and ambiguities might occur in light of prospective proceedings, in the preparation of affidavits for them, or, even occasionally, inspirationally in the course of submissions. The Court was to be careful to guard against the possibility of such *ex post facto* reconstruction of earlier events. (paras 18, 19)

(3) The plaintiff had a very strong arguable case that the first lockout notice had not been brought to its attention within the required 14 day period before the intended commencement of the lockout. As all the cases showed, strict compliance with that requirement was necessary. The defendant's attempts to legitimise its service of the first notice failed. The challenge to the lawfulness of the first notice was effectively irrefutable. (para 30)

(4) There was no statutory requirement to specify the "terms of employment" or the "demands" referred to in s82 ERA which were the factors that the employer had in its "view to" compel the employees to accept or comply with. The precision and clarity required for strike and lockout notices might extend to other communications if those were likely to give rise to uncertainty about the date or the nature of the proposed industrial action. So although it was correct that precision might be required other than in the requisite notice, that was in connection with communications affecting certainty of those details that were required by the ERA to be contained in the notice. Uncertainty in such communications may mean that the giver of the notice failed to achieve the clarity essential under the legislation. The nature, extent, and timing of a strike or lockout in an essential industry or service was to be clear in all the circumstances. (para 41)

(5) Even if the law required notices to make abundantly plain precisely what the plaintiff was to do to avoid imposition of the lockout, it was very strongly arguable for the defendant that the lockout notices met that test. The plaintiff had only a weak arguable case that the notices (incorporating the offer) did not meet those tests of clarity and detail. It was not strongly arguable that the offer was ambiguous or confusing as the plaintiff contended. The term of the proposed agreement was specified in the lockout notices and both documents could and had to be met together. (paras 44-45)

(6) The plaintiff's argument that the defendant's demands were incapable of acceptance was not strong. It was, conversely, strongly arguable for the defendant that the employer's demand was for acceptance of an offer consisting in part of alternative options and therefore capable of acceptance. It was unrealistic to assert, as the plaintiff did, that it was uncertain whether only one of the three options could be agreed to, or whether two or all may have been acceptable. (para 47)

(7) The offer expressed a wish to continue to make the claim of excluding supervisor's from coverage, that was, in other words, to negotiate about it. If, however, it was an ultimatum, it was strongly arguable for the defendant that cea coverage was a bargainable element in cea negotiations: *Association of University Staff v Vice-Chancellor of the University of Auckland* (cited below). It was significant that s42(2)(c) ERA included the identification of what was described as the "intended" coverage of the cea. In other words, a union initiating bargaining specified what it intended to be the agreement's coverage. It did not determine that. Coverage was one element for negotiation. (paras 48, 49)

(8) Regarding the second and third lockout notices, the plaintiff did not have a strongly arguable case. The plaintiff's argument that the definition, in s5 ERA, of a coverage clause assisted its interpretation of the unlawfulness to exclude supervisors from coverage was an arguably flawed interpretation: s5 also referred to "intended" coverage. Next, it was difficult to understand how the new s33 ERA affected the question, let alone to the plaintiff's advantage. Finally, the new s100C and Schedule 1B to the ERA provided for a public health sector code of good faith and while encouraging collectivity, was otherwise tenuously connected with the question whether supervisors in the present case should not be covered by the cea. (para 50)

(9) Regarding the first lockout notice, inadequacies of notice meant that there had, in law, been no notice and that was generally the end of the matter. The balance of convenience was strongly in the plaintiff's favour in such circumstances, as was the overall justice of the case. (para 52)

(10) Regarding the second and third notice, the strength of the plaintiff's case was an important element of where the balance of convenience lay and it therefore favoured the defendant. Even if the plaintiff could have been said to have had sufficiently arguable cases, the balance of convenience would not have favoured the plaintiff. (paras 53, 54)

(11) The overall justice of the case followed the balance of convenience. There had been opportunities taken for mediation in an attempt to settle the bargaining as the legislation intended before strikes or lockouts in essential services took place, but to the present date those had been to no avail. The most just course in those circumstances was to permit the law to take its course and for lockout action that was strongly arguably legal to take place. (para 55)

Result: Reasons given for judgment WC 20/05 ; Interim injunction ordered in respect of first lockout ; Interim injunction declined in respect of second and third lockout ; Costs reserved

Statutes considered:

ECA s70
ERA s5
ERA s33
ERA s42(2)(c)
ERA s80(c)
ERA s82
ERA s82(1)(b)
ERA s83(a)
ERA s83(b)
ERA s86
ERA s86(1)(f)
ERA s91
ERA s91(1)
ERA s91(1)(b)(i)
ERA s91(2)
ERA s91(3)
ERA s91(3)(a)
ERA s91(3)(b)
ERA s91(3)(c)
ERA s91(3)(d)
ERA s91(3)(e)
ERA s92
ERA s100C
ERA Part 8
ERA First Schedule Part A
ERA Schedule 1B
Employment Relations Amendment Act (No 2) 2004

Cases referred to in judgment:

Association of University Staff Inc v Vice-Chancellor of the University of Auckland [2005] 1 ERNZ 224
Chapman v Waitemata Stevedoring Services Ltd (No 2) [1992] 3 ERNZ 756
Eagle Airways v New Zealand Air Line Pilots Assn IUOW Inc [1998] 2 ERNZ 649
Fogelberg, Vice-Chancellor of the University of Otago v Association of University Staff [2003] 2 ERNZ 112
NZ Fire Service Commission v Ivamy [1996] 1 ERNZ 85
NZ Rail Ltd v NZ Combined Union of Railway Employees [1995] 1 ERNZ 84
Prendergast v Associated Stevedores (No 3) [1991] 2 ERNZ 728
Secretary for Justice v NZ Public Service Assn Inc [1990] 1 NZILR 347
Service and Food Workers Union Inc v Spotless Services NZ Ltd [2005] 1 ERNZ 210
Service and Food Workers Union Inc v OCS Ltd unreported, Colgan J, 5 September 2005, WC 20/05

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[971835]

Purcell and Anor v Chief Executive of Ministry of Justice, formerly the Department for Courts and Anor

AC 15A/05
Heard: 9 May 2005, Auckland
Judgment Date: 15 Sep 2005
Court/Authority/Tribunal: Travis J
Appearances: A Sherriff ; P Pa'u

PRACTICE AND PROCEDURE - Interlocutory application to strike out evidence as inadmissible - Plaintiff signed confidential mediated settlement agreement concerning previous grievance - Plaintiff filed draft briefs of evidence in present challenge outlining events prior to settlement and referring to settlement - Defendant alleged settlement agreement constituted binding accord and satisfaction - Alleged plaintiff estopped from leading evidence - Alleged plaintiff's evidence constituted "information" under ss148(1) and (3) Employment Relations Act 2000 ("ERA") - Also relied on s149(3) ERA - Evidence did not transgress provisions of ss148, 149 ERA and did not breach terms of mediated settlement - Witnesses able to give evidence of matters canvassed in mediation which existed independently of mediation process - Plaintiff had not challenged final and binding nature of mediation process - Application dismissed

This was an unsuccessful interlocutory application by the defendant to strike out certain evidence as inadmissible in a challenge to a determination of the Employment Relations Authority.

The plaintiff was employed by the defendant's predecessor, the Department of Courts. At the end of 2000, the plaintiff resigned and brought proceedings for unjustified dismissal. The grievance was settled in mediation, the details of which were set out in a confidential settlement agreement which was explained and certified by the mediator pursuant to s149(3) of the Employment Relations Act 2000 ("ERA"). The plaintiff returned to work early in 2002, but was dismissed. The plaintiff brought the present grievance.

In an attempt to explain the conduct for which she was dismissed the plaintiff and one of her supporting witnesses filed draft briefs of evidence which referred to the settlement and aspects of her employment prior to her 2000 resignation ("the evidence").

The defendant sought to strike out, or rule as inadmissible, the evidence. It submitted that the settlement amounted to an accord and satisfaction and argued that the plaintiff should be estopped from leading the evidence. It submitted that the evidence, constituted "information" pursuant to s148 ERA and as a result was to be kept confidential, citing *Shepherd v Glenview Electrical* (cited below). The defendant further submitted that s149(3)(b) ERA prevented the plaintiff from discussing the terms of settlement agreement in her evidence, and that the Court had no jurisdiction to hear those matters because they were settled and no enforcement/compliance action had been commenced. The defendant further submitted that it was entitled to rely upon the settlement being final as was explained at the time of the settlement. Finally, the defendant submitted the terms of the settlement agreement prevented reference to the evidence. In the present matter the Court was provided with a copy of the settlement agreement.

HELD: (1) The mediated settlement constituted an accord and satisfaction and the statutory provisions relied upon by the defendant limited the parties from referring to what was discussed in the mediation and the terms that were then agreed upon, except for the purposes of enforcement. (para 15)

(2) The evidence did not transgress the provisions of ss148 and 149 ERA and did not breach the terms of the mediated settlement. The evidence sought to be led did not refer to the matters dealt with in mediation and the situation was therefore distinguishable from that dealt with in *Shepherd v Glenview Electrical* (cited below). (para 24)

(3) The evidence dealt with the plaintiff's perception of what happened to her in her employment and the alleged consequences upon her. It did not rely on any statement, admission or documents made for the purposes of the mediation, or anything disclosed orally in the course of the mediation. The provisions of s148(6)(a) ERA meant that nothing in s148 ERA affected the admissibility of any evidence which existed independently of the mediation process, merely because it was presented in the course of the provision of the mediation services. No doubt some of the matters referred to in the evidence would have been canvassed in the mediation process, but the evidence the witnesses were able to give from their own personal perspective and observations existed independently of the mediation process. (para 25)

(4) There was no breach of s149 ERA because the plaintiff was in no way challenging the final and binding nature of the mediated settlement. The defendant was not at risk of any claim arising out of the events prior to the settlement. Those matters had been referred to by the plaintiff only by way of background and in support of the explanation she offered at the time of the disciplinary process. The defendant's concerns that claims may be brought in relation to those events disposed of by the mediation were unfounded. (para 26)

(5) The only issue which might have arisen from the terms of the mediated settlement in breach of s149(3) ERA were the allegations of the breach of the term requiring morning tea and an official welcome. The position of the defendant on that was not entirely clear and there might have been consent to those matters

being brought before the Court. The Court reserved for further determination any ruling on those particular aspects but noted that on one view of the matter it might be said that the plaintiff was bringing those terms of the settlement before the Court for “enforcement purposes” under the exception in s150(3)(b) ERA. (para 27)

COMMENT: (1) The Court was not persuaded that “enforcement purposes” were limited to the enforcement means provided by s151 ERA. Where a breach of a mediated settlement was relevant to an ongoing grievance situation, as in the present case where there had been re-employment pursuant to the terms of such a settlement, enforcement could be by means of a personal grievance. If, for example the breach of a term of a mediated settlement caused consequential loss, that would not be able to be addressed simply by way of a compliance order or by using the enforcement procedure under s141 ERA through the District Court, there was no express statutory provision preventing it being enforced by way of a personal grievance remedy. (para 27)

(2) The Court’s judge tended to the view that he would recuse himself from dealing with the substantive challenge, but would await further submissions on the matter. (para 29)

Result: Application dismissed ; Evidence admissible ; Costs reserved

Statutes considered:

- ERA s141
- ERA s148
- ERA s148(3)
- ERA s148(6)(a)
- ERA s149
- ERA s149(3)
- ERA s149(3)(b)
- ERA s150(3)(b)
- ERA s151

Cases referred to in judgment:

- Bank of Credit & Commerce International SA v Ali [2002] 1 AC 251; [2001] 1 All ER 961
- Marlow v Yorkshire NZ Ltd [2000] 1 ERNZ 206
- Rickards v Ruapehu District Council [2003] 1 ERNZ 400
- Shepherd v Glenview Electrical Services Limited (2004) 7 NZELC 97,600
- United Food & Chemical Workers Union of NZ v Talley [1992] 3 ERNZ 423

Other workers/site names etc: Chief Executive of Ministry of Justice, formerly the Department for Courts, Purcell

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[971872]

NUPE v ASURE New Zealand Ltd

CC 13/05

Heard: Christchurch

Judgment Date: 16 Sep 2005

Court/Authority/Tribunal: Shaw J

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Challenge to costs determination – Authority had awarded costs against plaintiff on basis that proceeding not a test case – On substantive challenge Court viewed proceeding as a test case – Test case status of proceeding not re-argued – Presumption of nil award in test case not displaced – Challenge granted

This was a successful de novo challenge to a costs determination of the Employment Relations Authority.

The plaintiff union challenged the legality of the defendant’s actions during negotiations for collective agreements. The Authority in its substantive determination concluded that the defendant had not acted

unlawfully. The Authority, in a separate determination awarded the defendant costs, rejecting the plaintiff's argument that it had heard a test case.

The plaintiff unsuccessfully challenged the Authority's substantive determination in the Employment Court. However the full Court declined to award costs in the Court because it viewed the proceeding as a test case.

The plaintiff challenged the Authority's costs determination.

The defendant submitted that whether a case was considered a test case was not of itself determinative of a costs application, citing *Vaughan v Canterbury Spinners* (cited below).

HELD: (1) There were no matters between the parties which displaced the presumption of a nil costs award in a test case. A sizeable costs award against the plaintiff would unduly penalise it, as it was a relatively small trade union. There was potential for costs awards in test cases to act as a disincentive to parties to progress employment relationship problems to the Authority for resolution. The substantive proceeding involved a question of law that needed to be resolved and the plaintiff should not be penalised for bringing the matter. (para 13)

(2) As the present matter was a test case a nil award should have been made by the Authority. The challenge was allowed. The award of costs by the Authority was set aside. (para 14)

COMMENT: (1) A careful reading of the decision in *Vaughan v Canterbury Spinners* (cited below) showed that the Chief Judge concluded the proceeding heard by the Authority and the full Court was not only a test case, but also that the costs lay where they had fallen. A subsequent case justified an award of costs because by that stage the test case element was removed. (para 11)

Result: Challenge granted ; Authority's costs order set aside ; No order for costs

Cases referred to in judgment:

Asure New Zealand Ltd v National Union of Public Employees unreported, P Cheyne, 24 May 2005, CA 77/05

National Union of Public Employees Inc v Asure NZ Ltd [2004] 2 ERNZ 487

National Union of Public Employees Inc v Asure NZ Ltd, unreported, Travis, Shaw JJ, Colgan CJ, 15 June 2005, CC 8/05

Vaughan v Canterbury Spinners Ltd, unreported, Goddard CJ, 29 October 2003, CC 18A/03

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[971883]

Smith v Attorney-General for & on behalf of Commissioner of Police and Anor

WC 11A/05

Heard: 22 Jul 2005, Wellington

Judgment Date: 23 Sep 2005

Court/Authority/Tribunal: Shaw J

Appearances: NJ Sainsbury ; J Holden, no appearance

PRACTICE AND PROCEDURE – Application to strike out application for review of decision by Police Commissioner and Police Disciplinary Tribunal – Jurisdiction – Competing provisions of s96(2)(b) Police Act 1958 and s194(2) Employment Relations Act 2000 – Statutory interpretation – Employment Court had no jurisdiction to review applications under Police Act other than those under Part IV – Application granted – Police constable

This was a successful application to strike out the plaintiff's application for review of a decision by the Police Commissioner and the Police Disciplinary Tribunal on the ground that the Employment Court lacked jurisdiction.

The plaintiff was a sworn member and constable with the New Zealand Police. Following an internal investigation, the plaintiff was charged with disgraceful conduct. The Commissioner of Police appointed

the New Zealand Police Disciplinary Tribunal (“the defendants”) to hear the charges, after which the Commissioner removed the plaintiff as a police officer. This was done in accordance with the Commissioner’s statutory powers under ss 5A and 12 of the Police Act 1958. The Commissioner was also required under s7 of the Police Act and s56 of the State Sector Act 1988 to act as a “good employer”.

The plaintiff alleged that the investigation and removal was flawed and sought judicial review in the Employment Court under its jurisdiction in s194 of the Employment Relations Act 2000 (“ERA”). The plaintiff submitted that s7 of the Police Act was also a statutory power.

The defendants appeared under protest, alleging that the Employment Court had no jurisdiction, relying on s96(2)(b) of the Police Act. The Commissioner alleged that only the exercise of powers under Part IV of the Police Act were reviewable and that those were limited to remuneration and conditions of employment. The sections of the Police Act relied on by the plaintiff were all in Part I of the Police Act.

HELD: (1) The Employment Court only had the jurisdiction to determine the issues if any or all of the allegedly unlawful acts were done in the course of the exercise of a statutory power of decision-making, and that these powers of decision-making were those which were not subject to the privative provisions of s96(2) of the Police Act 1958. (para 10)

(2) The good employer obligations of s56 State Sector Act 1988 were mandatory considerations in the exercise of the Police Commissioner’s discretion under the Police Act. Thus, the question to be decided was whether decisions under s5A of the Police Act (powers to dismiss) or s12 (powers to set up police disciplinary tribunal) were reviewable in the Employment Court in the light of s96 of the Police Act. (paras 24-25)

(3) The powers which were reviewable under s96 of the Police Act were those under “this part of this Act” i.e. Part IV of the Police Act. That part covered disputes, personal grievances, designations of senior appointments, etc. If the decision which was sought to be reviewed did not relate to an exercise of power under Part IV, on the face of s96 it was not reviewable in the Employment Court. (paras 26-27)

(4) In the face of the two competing superficially irreconcilable provisions in s96 of the Police Act and s194 ERA, the Court turned to the principles of statutory interpretation. Section 96 of the Police Act had a long legislative history in which the words “under this Part of this Act” had limited the application of the ERA and its predecessors by way of amendments to s96 by the relevant Acts each time the primary employment legislation was changed. For that reason one could infer that Parliament intended to read the two sections together. In that light, Parliament intended that whenever it altered the scope of judicial review in the Employment Court it maintained the privative provision of the Police Act which limited those express powers. (paras 34-35)

(5) The doctrine that general provisions did not derogate from specific ones applied. That doctrine treated an earlier “special” Act as if it were an exception to a later “general” Act. By applying that doctrine, it was clear that s96(1) of the Police Act absolutely excluded the application of the ERA by stating that, except as otherwise expressly provided in the Police Act, nothing in the ERA applied to any persons employed as members of the police. That provision limited the coverage of the ERA from members of the police except in very specific situations. In contrast, s194(2) of the ERA was very general. It stated the general rule that the Employment Court had full and exclusive jurisdiction despite any other rule of law. That general jurisdiction was nullified by the specific provision in s96 of the Police Act. (paras 36-39)

(6) Section 194(2) ERA was about the exclusive jurisdiction of the Employment Court to hear and review proceedings by specified persons. That was in contrast to the otherwise unfettered jurisdiction of the High Court to hear all applications for review under the Judicature Amendment Act 1908. The appropriate approach to the jurisdiction of the Employment Court was to recognise the generality of the Court’s jurisdiction and then, secondly, to require a clear expression of legislative intent in recognising any subtraction from the specialist jurisdiction (*Attorney-General v Benge*, and *New Zealand Police Association v Commissioner of Police* (cited below) applied). (paras 40-42)

(7) Section 96 of the Police Act prevailed over s194 of the ERA. The jurisdiction of the Employment Court to hear applications for judicial review up to 1 December 2004 did not include the power to consider applications for review under the Police Act other than for decisions under Part IV of that Act. (The amendment in subsection s194(2), made on 1 December 2004 by Employment Relations Amendment Act (No 2) 2004, did not apply in the present case.) Neither the decision of the Commissioner to remove the plaintiff nor its decision to appoint a disciplinary tribunal was subject to review in the Employment Court. (paras, 13, 43)

Result: Application granted ; Plaintiff’s application for judicial review struck out ; No order for costs

Statutes considered:

- ERA s194
- ERA s194(2)
- ERA s240
- ERA Part 11
- Employment Relations Amendment Act (No 2) 2004
- Judicature Amendment Act 1908
- Police Act 1958 s5A
- Police Act 1958 s7
- Police Act 1958 s12
- Police Act 1958 s96
- Police Act 1958 s96(1)
- Police Act 1958 s96(2)(a)
- Police Act 1958 s96(2)(b)
- Police Act 1958 s96(2)(c)
- Police Act 1958 Part I
- Police Act 1958 Part III
- Police Act 1958 Part IV
- State Sector Act 1988 s56
- State Sector Act 1988 Part IV
- State Sector Act 1988 Part V
- State Sector Act 1988 Part VI
- State Sector Act 1988 Part VII
- State Sector Act 1988 Part VIIA

Cases referred to in judgment:

- Allison v Kealy [1968] NZLR 958
- Attorney-General v Bengie [1997] ERNZ 109
- McDonald v Australian Guarantee Corporation (NZ) Ltd [1990] 1 NZLR 227
- NZ Police Association v Commissioner of Police [1998] 3 ERNZ 823
- Commissioner of Police v NZ Police Association [1999] 1 ERNZ 625
- PSA v Board of Electricity Corp of NZ Ltd [1987] NZILR 706
- Rennie v Attorney-General [1998] 1 ERNZ 58
- Victoria University of Wellington v Haddon [1996] 1 ERNZ 139

Other workers/site names etc: Attorney-General for & on behalf of New Zealand Police Disciplinary Tribunal

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[971901]

Asure New Zealand Ltd v New Zealand Public Service Association and Ors

AC 58A/05

Heard: 14 Oct 2005, Auckland

Judgment Date: 19 Oct 2005

Court/Authority/Tribunal: Colgan J

Appearances: J Appleyard, J Pearson ; B Banks

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Reasons for oral judgment – Defendants claimed meat inspectors had existing contractual right to separate facilities at meat works – First defendant also claimed right to separate facilities in bargaining for new collective employment agreement (“cea”) – Whether Authority had jurisdiction to hear first claim – Interpretation of s161(2) Employment Relations Act 2000 (“ERA”) – Authority saw problem as one relating to bargaining or fixing of new terms and conditions of employment – Existing cea continued to apply – Could not have been Parliament’s intention that one party could, by putting question in issue in bargaining, stymie right of other party’s claim under existing cea – Interpreting existing terms and conditions not the same as determining or fixing new terms and conditions even if subject matters related – Authority wrongly concluded it had no jurisdiction – Court

should remain seized of matter – Although not a removal under s178 ERA, criteria relevant and met – Meat inspectors

These were the reasons given for oral judgment AC 58/05; a de novo challenge to a determination of the Employment Relations Authority which held that it had no jurisdiction to determine an employment relationship problem brought by the plaintiff.

The plaintiff was a state owned enterprise that provided meat inspector services to meat processing plants. Meat inspectors were provided with separate facilities at the plants. When the AFFCO meat works at Horotiu was refurbishing its plant, it intended to provide common facilities for both its meatworker employees and the plaintiff's meat inspectors. With the meat processing season about to commence and the refurbishing almost complete, an employment relationship problem developed between the plaintiff and the defendants regarding whether the meat inspectors were entitled to separate facilities. The first defendant alleged that it was an implied and/or customary term and condition of the meat inspectors' employment that separate facilities were to be provided. Incidentally, the existing collective employment agreement ("cea") between the plaintiff and the first defendant had expired. As an alternative to its primary position, the first defendant was bargaining for an express provision for separate facilities in the new cea. However, negotiations for a new cea were stalemated.

Without any input from the parties, the Authority decided that it had no jurisdiction to determine the problem and dismissed the plaintiff's claims without considering the merits. The Authority relied on s161(2) of the Employment Relations Act 2000 ("ERA"), viewing the problem as one relating to bargaining or the fixing of new terms and conditions of employment.

HELD: (1) The Authority's unilateral decision was unusual, and extremely unusual without prior indication to the parties, with an invitation to them to comment upon the propriety of that intention. Sections 143(g), 157(2)(a), 160(1) and 173(1) of the ERA all pointed to the desirability, if not the necessity, of doing that. Jurisdiction or legal entitlement to enter into the consideration of a case was fundamental, so that even if both parties had agreed that the Authority had jurisdiction, it would not thereby have been necessary for it to have accepted that position and proceed to decide the case on its merits. But party involvement in the draconian act of dismissing a case, otherwise than on its merits, was essential, especially where the Authority's primary task was problem solving. (para 10)

(2) Read literally and in isolation, s161(2) ERA might apparently mean what the Authority found it to mean. But individual broad subsections were to be read in the context of the whole of the enactment. Section 5 of the Interpretation Act 1999 required that, as did longstanding fundamental tenets of statutory interpretation, no less in the field of employment law than in any other. The scheme and purpose of the ERA was to be considered and individual words and phrases interpreted in accordance with that. (paras 11-13)

(3) There was another fundamental consideration that the Authority apparently overlooked. That was authoritative judgments on the interpretation and meaning of identical or materially similar words or phrases. There was a judgment of the Court of Appeal that addressed the questions of the present case directly: *Canterbury Spinners Ltd v Vaughan* (cited below). Although the Authority's determination mentioned and indeed quoted from that, it did not appear to have followed it. (para 14)

(4) The first defendant's claim for an express provision for separate facilities in its bargaining for the new cea was not the end of the matter. There was no probability, let alone certainty, that by the time the refurbishments were complete, a new cea would have been settled, ratified and in force. In those circumstances, the existing terms and conditions of employment of the affected meat inspectors would have continued to be governed by the expired cea. Those provisions, together with the additional individual terms and conditions of employment of the meat inspectors, would have determined the issue put before the Authority. (para 17)

(5) The plaintiff's claim to the Authority sought to establish a negative outcome, which was that there was no requirement at law for the plaintiff to insist upon separate facilities for its employees at the meat processing company's plant. It was important that the claims and counterclaims involved not merely an interpretation of the collective rights and obligations of the employer and employees, but also rights and obligations under the employees' individual contracts of service with the plaintiff that existed alongside the express provisions of the cea. It was trite to say that such individual incidents of the employment relationship were not at issue in the bargaining between the plaintiff and the defendant and were not, or were not related to the fixing of, new terms and conditions of employment. (paras 18-19)

(6) It could not have been Parliament's intention that, during or immediately prior to bargaining, one party could, by putting the question in issue in bargaining as it would be entitled to do, stymie the right of another

party to have the question determined by the Authority by reference to existing terms and conditions of employment. Although that tactic was not suggested here, it was the logical consequence of the Authority's decision and could not have been the law. (para 21)

(7) The amendments in the Employment Relations Amendment Act (No 2) 2004 ("the 2004 amendments") showed clearly Parliament's intention that s161(2) ERA was meant to preclude the Authority or the Court from setting or fixing terms and conditions of employment in the place of parties to employment relationships doing so themselves. But what the existing or previous position might be had always been the legitimate scope of a dispute about the interpretation, operation or application of a cea. Interpreting, applying or operating current terms and conditions was not the same as determining or fixing what should be new terms and conditions, even if the subject matters were related in the broadest sense. It was the nature and consequence of what the Authority or the Court was asked to do, rather than the subject matter alone of the application, that was for close scrutiny, and would enable the Authority or the Court to determine whether what was asked of it offended against s161(2) or not. The plaintiff's employment relationship problem did not infringe upon the prohibition established by s161(2) and as Parliament intended should be the distinction in that important area of practice. The Authority concluded wrongly that it was without jurisdiction to investigate and determine the parties' employment relationship problem. (paras 22-23)

(8) The election made by plaintiff for a hearing de novo, together with the nature of the "matter" under s179 ERA, the subject of the election, indicated that the Court was seized of the matter rather than the Authority. (para 26)

(9) It was notable that even after the 2004 amendments, including to s179 ERA, Parliament had not enacted any mechanism for remission of cases or parts of cases to the Authority where an election to challenge had been upheld. That, tended to indicate a legislative intention that the Court should remain seized of such matters. (para 26)

(10) There were compelling practical reasons why the present case should remain with the Court. The question was so important to the parties and meat companies that appeals were inevitable and an answer was required promptly. Although the present case was not a removal to the Court under s178, those criteria would appear to be relevant and met. That, too, indicated that decision of the substantive issue by the Court was appropriate. (para 27)

Result: Challenge granted ; Case to remain with Court for substantive hearing ; No order for costs

Statutes considered:

ERA s3(a)(iii)
ERA s3(a)(vi)
ERA s53
ERA s101(d)
ERA s143(c)
ERA s143(f)
ERA s143(g)
ERA s157(2)(a)
ERA s160(1)
ERA s161(1)
ERA s161(1)(ca)
ERA s161(1)(cb)
ERA s161(1)(d)
ERA s161(1)(da)
ERA s161(1)(f)
ERA s161(2)
ERA s173(1)
ERA s178
ERA s179
ERA s179(3)
Employment Relations Amendment Act (No 2) 2004
Interpretation Act 1999 s5

Cases referred to in judgment:

Canterbury Spinners Ltd v Vaughan [2002] 1 ERNZ 255

Other workers/site names etc: Sanderson

Pages: 7
[971999]

Challenges to the Employment Court - Employment Relations Act 2000

Asure New Zealand Ltd v New Zealand Public Service Association Inc and Ors

14 Oct 2005, Colgan J, AC 58/05, (2 pages)

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Oral judgment – Authority wrongly concluded it had no power or jurisdiction to investigate and determine employment relationship problem put before it by the plaintiff – Challenge granted – Consequence of Court’s decision was that Court was to hear and decide issues including merits of problem not yet decided – Case management directions given – Reasons to follow in subsequent judgment AC 58A/05

Result: Challenge granted ; Reasons to follow in subsequent judgment AC 58A/05 ; Costs reserved

Arrears - Employment Relations Act 2000

Irving v Heslip

21 Dec 2005, H Doyle, CA 168/05, (5 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Failure to pay wages - Respondent disputed that he was applicant's employer for whole period of employment - Respondent was applicant's employer for full nine weeks in question - Respondent disputed that applicant worked full eight hour days - Applicant credible witness - Monies due and owing - Holiday pay due and owing - Interest 8.5 percent - Builder's apprentice

Result: Arrears of wages (\$1,311.50) ; Arrears of holiday pay (\$131.49) ; Interest (8.5 percent) ; Disbursements (\$70)(Filing fee)

Arrears - Holiday Pay - Employment Relations Act 2000

Irving v Heslip

21 Dec 2005, H Doyle, CA 168/05, (5 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Failure to pay wages - Respondent disputed that he was applicant's employer for whole period of employment - Respondent was applicant's employer for full nine weeks in question - Respondent disputed that applicant worked full eight hour days - Applicant credible witness - Monies due and owing - Holiday pay due and owing - Interest 8.5 percent - Builder's apprentice

Result: Arrears of wages (\$1,311.50) ; Arrears of holiday pay (\$131.49) ; Interest (8.5 percent) ; Disbursements (\$70)(Filing fee)

Bargaining - Employment Relations Act 2000

Epic Packaging Ltd v New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc

8 Feb 2006, YS Oldfield, AA 25/06, (8 pages)

BARGAINING - Parties disagreed about whether respondent could initiate bargaining (in terms of s42 Employment Relations Act 2000) in relation to possible joinder of applicant as subsequent party to multi employer collective agreement ("MECA") – Whether notice clearly identified intended coverage of agreement – Reference to “employer in the Plastics Industry” - Term “plastics industry” needed to be defined or identified in some other way before it could be said that proposed coverage had been identified and whether flexible packaging fell within it – Notice did not clearly identify proposed coverage – Applicant alleged that the terms of the MECA were already set and in such circumstances there could be no bargaining between the parties – Respondent relied on variations clause in CEA – Whether were matters to be bargained in relation to proposed joinder – Whether the bargaining notice or any similar notice in the future served or might serve to initiate bargaining in terms of s42 – Applicant alleged that it could not be coerced or compelled to enter into MECA as a subsequent party since in such circumstances it could have no influence over terms and conditions – Were terms over which to bargain – Not accepted that applicant simply being asked to join existing MECA on take it or leave it basis – The bargaining process proposed to be initiated was genuine and in good faith as the terms of the bargaining between the parties had yet to be set – The activity initiated by the respondent was in fact negotiations of terms and conditions of a transaction (bargaining) and in the absence of specific provisions for bargaining in joinder situations, was accepted that the bargaining provisions set out in s32-59 applied – Nothing inherently wrong in law or contrary to common sense about applying the bargaining provisions of the ERA to present situation – Noted that conclusions on this point were derived from particular circumstances of present case – Had there been no mechanism for negotiation of site specific schedule of variations, or had the agreement of the respondent not been required for joinder of a subsequent employer party a different conclusion may have resulted – Notice may serve to initiate bargaining in relation to the joinder of the applicant company to MECA

Result: Question answered in favour of respondent ; Costs reserved

Breach of Contract - Employment Relations Act 2000

Faithful v Morris and Morris Ltd

5 Jan 2006, RA Monaghan, AA 1/06, (6 pages)

UNJUSTIFIED DISMISSAL - JURISDICTION - Applicant wished to purchase respondent's funeral director business - Parties agreed that applicant would work in business for four month period prior to purchase so she could learn about business and both parties could assess whether their business relationship would be satisfactory - Agreed that arrangement would be treated as employment agreement - Parties agreed to extension of one more month - Within a few days of agreeing to extension respondent decided not to proceed - Applicant given letter terminating agreement and paid up until end date of extension - Respondent alleged applicant was independent contractor - No dispute parties agreed relationship would be one of employment - Way relationship operated in practice did not make relationship one of principal and contractor - Unusual freedom from control applicant was given was deliberate - Applicant was employee - Applicant alleged her employment was probationary - Applicant's position supernumerary - Possibility of ongoing employment relationship outside contemplation of parties - True nature of relationship was fixed term - Authority satisfied both parties agreed employment relationship would end on specified date, and that respondent had genuine reasons based on reasonable grounds for fixed term - Employment terminated summarily rather than on agreed date - Applicant should have been given opportunity to respond to concerns before decision made about continuing employment - Unjustified dismissal - Remedies - Applicant paid until agreed date of termination so no further lost remuneration payable - Applicant's costs of moving to respondent's location were not losses that flowed from personal grievance - Could only be compensated for effect of sudden, unexplained early termination and not injury which flowed from fact that transaction did not proceed - COUNTERCLAIM - BREACH OF CONTRACT - Applicant kicked door as she left and damaged it - Payment of damages appropriate for repair of door - Funeral director

Result: Application granted ; Compensation for humiliation (\$3,000) ; Counterclaim granted ; Damages in favour of respondent (\$1,133.64) ; Costs reserved

Strachan v Northern Car Services Ltd

22 Dec 2005, R Arthur, AA 493/05, (4 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Genuine redundancy - Process followed in advising applicant of redundancy not inadequate given size and very limited resources of respondent - No realistic prospects for redeployment - No unjustified dismissal - BREACH OF CONTRACT - Whether parties agreed on payment of two weeks' notice - Was an agreement - Acknowledged that applicant's acceptance might not have been as clear as could have been because she also said it was unfair and she deserved more - However, deal met basic legal requirements of offer and acceptance - Respondent failed to honour agreement to pay two weeks' notice on making position redundant - Respondent to pay \$1,280 to applicant - PENALTY- Breach of applicant's agreement - Breach of statutory requirement to provide written employment agreement - Penalty of \$300 in favour of applicant appropriate - COSTS - ½ day investigation meeting - Entitled to reasonable contribution plus reimbursement of filing fee

Result: Damages (\$1,280)(Two week's notice) ; Penalty (\$300) ; Costs in favour of applicant (\$500) ; Disbursements (\$70)(Filing fee)

Costs - Employment Relations Act 2000

Begg v South Auckland Hydraulics Ltd

23 Dec 2005, YS Oldfield, AA 326A/05, (1 pages)

COSTS - Successful personal grievance - Investigation meeting completed in well under one day - Applicant sought full costs of \$1,700 - Nothing about case required award of full costs - Award of approximately two thirds of actual costs was reasonable contribution

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

Harwood v First Aluminium Dunstan Ltd

22 Dec 2005, P Cheyne, CA 152A/05, (1 pages)

COSTS - Successful personal grievance - Applicant sought costs award to cover lodgement fee of \$70 - No reason not to award costs to cover lodgement fee

Result: Costs in favour of applicant (\$70)(Lodgement fee)

King v Harvey t/a Flowers by Trish

2 Feb 2006, J Scott, AA 18/06, (7 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Respondent offered applicant first option to buy business and parties began to negotiate - Respondent called meeting and summarily dismissed applicant for general reasons of failing to comply with instructions and undermining business by informing suppliers of respondent's financial situation - When applicant asked for specifics was told she had refused to incorporate sunflowers in corporate arrangements that morning - Respondent later gave other reasons - Section 103A Employment Relations Act 2000 applied - Authority had to make objective assessment of respondent's actions and weigh those actions against those of fair and reasonable employer in all the circumstances at the time - Convenient to consider whether respondent had good reasons for actions it took in respect of applicant's employment and whether she was treated fairly in process - Demonstrating that following steps were followed essential to showing that dismissal for serious misconduct justified: full, fair and thorough investigation; giving employee opportunity to be heard; reasons had to be given to employee before dismissal - Employer could only defend dismissal relying on reasons giving at time - Majority of concerns in question historical and could not give rise to justifiable grounds to dismiss applicant - Manner of dismissal completely inconsistent with rules of natural justice - Real reason behind dismissal was respondent's belief applicant had informed suppliers of financial position of respondent in order give her an advantage in negotiations on purchase of business - Unjustified dismissal - Remedies - No contributory conduct as applicant did nothing to deliberately damage or undermine respondent's business - COSTS - Length of investigation meeting not specified - Respondent directed to pay applicant reasonable contribution to costs - Head florist

Result: Application granted ; Reimbursement of lost wages (\$7,871)(6 months) ; Compensation for humiliation etc (\$10,000) ; Costs in favour of applicant (\$1,500)

Lewis v Welding Engineers (NZ) Ltd

12 Jan 2006, RA Monaghan, AA 4/06, (1 pages)

COSTS - Unsuccessful personal grievance but successful arrears claim - Both parties sought contribution of \$1,500 to costs, leading to applicant's submission that costs lie where they fall - Authority regarded this as sensible approach having weighed degree of success of each party as well as claimable costs likely to have

been incurred

Result: Costs to lie where they fall

MacDonald and Anor v Q-Med (Sweden) Australia Pty Ltd and Anor

21 Dec 2005, L Robinson, AA 141B/05, (2 pages)

COSTS - Successful application by respondent to remove matter to Employment Court - Less than ½ day investigation meeting - Respondent sought contribution of \$1,500 to total costs of \$3,215 - Applicant had opposed application for removal - Alleged costs should lie where they fall - Applicant's consent or otherwise to application irrelevant - Parties could not oust Authority's jurisdiction by agreement - Grounds for removal prescribed by statute - Grounds made out but costs incurred in making application not directly attributable to applicant - Neither party should have costs against the other

Result: Costs to lie where they fall

Saipe v Waitakere Enterprise Trust Board

22 Dec 2005, V Campbell, AA 381A/05, (3 pages)

COSTS - Successful unjustified dismissal claim and unsuccessful unjustified disadvantage claim - In substantive determination Authority indicated that as applicant was unrepresented no legal costs would be awarded and encouraged parties to resolve the matter of costs - Applicant advised Authority he was in receipt of legal advice prior to investigation meeting and sought costs - Respondent alleged matter was finally determined in substantive determination - Submission not accepted - Applicant entitled to receive reasonable contribution towards costs and disbursements - Costs associated with mediation not available to be included in calculation for contribution to costs - Whilst parties were in mediation, investigation proceedings in Authority were suspended - Mediations confidential and Authority prohibited from making enquiries into mediation - On that basis not possible for Authority to enquire as to appropriateness or otherwise of costs associated with mediation services - Applicant not reimbursed for own time for attendance at investigation meeting - Not inclined to order any reimbursement for costs incurred in travel but entitled to recover parking costs

Result: Costs in favour of applicant (\$2,500) ; Disbursements (\$1,488.56)

Strachan v Northern Car Services Ltd

22 Dec 2005, R Arthur, AA 493/05, (4 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Genuine redundancy - Process followed in advising applicant of redundancy not inadequate given size and very limited resources of respondent - No realistic prospects for redeployment - No unjustified dismissal - BREACH OF CONTRACT - Whether parties agreed on payment of two weeks' notice - Was an agreement - Acknowledged that applicant's acceptance might not have been as clear as could have been because she also said it was unfair and she deserved more - However, deal met basic legal requirements of offer and acceptance - Respondent failed to honour agreement to pay two weeks' notice on making position redundant - Respondent to pay \$1,280 to applicant - PENALTY- Breach of applicant's agreement - Breach of statutory requirement to provide written employment agreement - Penalty of \$300 in favour of applicant appropriate - COSTS - ½ day investigation meeting - Entitled to reasonable contribution plus reimbursement of filing fee

Result: Damages (\$1,280)(Two week's notice) ; Penalty (\$300) ; Costs in favour of applicant (\$500) ; Disbursements (\$70)(Filing fee)

Westpac Banking Corporation v Smythe

30 Sep 2005, Travis J, AC 54/05, (3 pages)

PRACTICE AND PROCEDURE – Interlocutory application by defendant for leave to amend statement of defence - Sought to include new alternative plea that defendant was unjustifiably dismissed - Application based on answer given by plaintiff to defendant's request for further particulars - Application withdrawn after Court gave leave to amend plaintiff's answer to request for particulars - **COSTS** - Costs in favour of defendant

Result: Application withdrawn ; Costs in favour of defendant (\$750)

Dispute - Employment Relations Act 2000

Antram v AFFCO New Zealand Ltd

22 Dec 2005, K Anderson, AA 492/05, (8 pages)

DISPUTE - Alleged owed unpaid redundancy compensation since respondent failed to take into account his total years of continuous service - Applicant was employed by respondent from 1970 until 1993 - In 1994 applicant was independent contractor providing consultancy services to respondent until 2001 when he again became an employee until his redundancy in 2004 - Applicant alleged independent contractor contracts were a sham and he was, in reality, an employee for the whole time - Not accepted contracts were shams - Applicant formed registered company - Financial records indicated contractor relationship - Applicant's company was registered for GST - Applicant free to contract his services to other businesses - Applicant never received or claimed statutory entitlements such as holiday payments - Also took into account factors that could point to employment relationship such as use of title "General Manager" and some integration into businesses - Employment not continuous - UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - No evidence or submissions about unjustified dismissal and unjustified disadvantage claims - Authority gained impression applicant not seriously pursuing those claims - If mistaken about that however, no evidence that would support either of those claims - Claims dismissed - Applicant close to having entitlement to payment for 25 years service but did not qualify - In any event, applicant barred from pursuing claims from 1970-1993 period by s4 Limitation Act 1950

Result: Question answered in favour of respondent ; Applications dismissed (Unjustified dismissal and disadvantage) ; Costs reserved

Carter v PAE (New Zealand) Ltd

9 Jan 2006, D Asher, WA 1/06, (8 pages)

DISPUTE - Interpretation of employment agreement - Agreement provided that applicant would receive one-off bonus on successful retention by respondent of certain existing contracts at retender in 2005 - This subject to achieving minimum five percent profit margin - Agreement also provided that if applicant was made redundant before a certain date, he would still be entitled to payment provided criteria for bonus were met - Respondent successfully retendered for contracts and tender provided for minimum five percent profit margin - Applicant later made redundant - Alleged he was entitled to bonus - Parties' intention was not that payment would be made on date of successful retender and by way of predictive profit - Intention to pay bonus subject to meeting specified criteria - This made clear by wording that payment "subject to" achieving five percent profit margin - Parties clearly intended that period of time required by which to measure actuality, rather than predictive outcome - Applicant not entitled to bonus on date of retender - Parties had committed themselves, on good faith basis, to measure actual profit at time it was possible to measure actual profit

Result: Application dismissed ; Costs reserved

Denbee and Anor v United Group Rail (NZ) Ltd (formerly Alstom Transport New Zealand Ltd)

7 Feb 2006, D Asher, WA 14/06, (10 pages)

DISPUTE - First applicant sought finding that she was covered by terms of relevant collective employment agreement - Alleged respondent's refusal to apply CEA breached s56 and s62(2) Employment Relations Act 2000 - Alternatively argued she was being unlawfully discriminated against on basis of union membership - Applicant employed in position of "Contract Support" - CEA stated that it applied to all employees except certain positions, including executive support functions -

When applicant tried to join union, was told her position was not covered by CEA (for reasons of confidentiality and the inherent nature of the support provided to management) – Whether applicant entitled to CEA coverage – Applicant alleged that notwithstanding her position profile, she had never been asked to undertake executive support functions – Respondent did not challenge applicant’s claim that she did not and had never been asked to perform executive support functions – Respondent instead relied on position description ”to keep [applicant] on the reserves’ bench, on a just in case basis, in the event it might require her to perform that work” – Not a fair and reasonable position – Not good faith for respondent to rely on potential that applicant might some day undertake executive support functions – Applicant entitled to CEA coverage – From commencement of employment, applicant was denied statutory benefits of ss62 & 63 – No evidence of discrimination against applicant – Parties to address and resolve damages – Preliminary view made that penalty not appropriate in this instance
Result: Question answered in favour of applicant ; Orders accordingly ; Costs reserved

Meat and Related Trades Workers Union of Aotearoa Inc v Progressive Meats Ltd

22 Dec 2005, PR Stapp, WA 197/05, (8 pages)

DISPUTE - Employees’ entitlements on public holiday - Respondent decided that because of seasonality of their work, certain employees were not entitled to relevant daily pay for Queen’s Birthday holiday since would not otherwise have worked on that day - Employees in question paid non production rate for that day - Interpretation of Holidays Act and collective employment agreement - Criteria under s12(3) Employment Relations Act 2000 needed to be taken into account - Only necessary to establish that day of week would normally be working day for provision under ERA to apply - Employment agreement provided days of work were Monday to Friday - No provision enabling employer not to provide work on a Monday even if stock was unavailable - Employees generally required to work Mondays or at very least opt to work - Reasonable to conclude that work would have been generally provided on the Monday where the employee was entitled to receive benefit of a public holiday and receive their relevant daily pay - Clause in CEA which provided public holidays would be paid at \$10 per hour ineffective - Queen’s Birthday Monday would have been an otherwise working day for relevant employees and they were entitled to payment at their relevant daily pay which may not have necessarily been production rate as different circumstances applied to different workers - Parties to discuss calculations for any entitlements of affected employees

Result: Question answered in favour of applicant ; Orders accordingly ; Costs reserved

Service & Food Workers Union Nga Ringa Toa Inc v Spotless Services (NZ) Ltd

3 Mar 2006, A Dumbleton, AA 60/06, (5 pages)

DISPUTE - Interpretation of collective employment agreement – Pay entitlements for work performed at weekends, on public holidays and sick leave taken under CEA in excess of Holidays Act 2003 entitlements – CEA provided for penal payment for weekend and night work – CEA also provided for penal rates for working on public holidays – Applicant correctly interpreted CEA to mean that where work was performed on, say a Sunday, that was also a public holiday, in addition to ordinary time, worker is to receive aggregation of penal payments for working on weekend day and public holiday (amounting to triple time) - CEA provided for accumulating of sick leave up to 260 days – Although clause of CEA provided for sick leave on ordinary pay, by operation of Holidays Act when its provisions came into force, that part of clause was modified to require payment at “relevant daily pay” rate as defined – Applicant contended that statutory modification applied to all sick leave up to 260 days whereas respondent contended it applied to statutory minimum of five days which may be taken or accumulated up

to 20 days – Respondent correctly interpreted provision to mean relevant daily rate applied only up to five days taken in 12 months and untaken sick leave up to maximum of 20 days current entitlement in any year – If employee had accrued more than 20 days in any year, additional leave taken was to be paid at ordinary time
Result: First question answered in favour of applicant ; Second question answered in favour of respondent ; No order for costs

TLNZ Auckland Ltd v Allen & Ors

22 Dec 2005, V Campbell, AA 494/05, (5 pages)

DISPUTE - Whether open to applicant to identify and declare redundancies of its permanent staff including its Guaranteed Work Employees (employees guaranteed at least three eight hour shifts each week) - Sole purpose of determination to consider whether redundancies fell within scope of the redundancy clause of collective employment agreement - Applicant was forecasting a loss for year ended June 2006 - Applicant proposed to make nine employees redundant (a combination of both permanent and Guaranteed Work Employees) - Two employees opted for voluntary redundancy - The seven lowest scoring employees were respondents in present matter - Respondents alleged that work would not disappear but rather applicant would employ casual labour to carry out the extra work - Satisfied redundancies came within scope of redundancy clause in CEA - Applicant was downsizing its manpower as step towards cost savings - That fell squarely within the ambit of the employer's right to make the business more efficient

Result: Question answered in favour of applicant ; No order for costs

Good Faith - Employment Relations Act 2000

Paulin and Anor v Southland District Health Board

22 Dec 2005, P Montgomery, CA 169/05, (4 pages)

UNJUSTIFIED DISADVANTAGE - GOOD FAITH - First applicant sought order that her status was that of a permanent employee - Second applicant claimed respondent breached contractual obligations and sought a penalty - First applicant employed as casual administrative employee - Since that time, applicant's work pattern had been regular and consistent - Such that, first applicant alleged she was permanent employee - Clause of collective agreement specified when could use temporary employment agreements - Second applicant alleged clause imposed obligation to consult with it prior to advertising a fixed term temporary position - No such obligation imposed by section - Fairly long bow to draw to allege respondent was guilty of breaching s4(1)(a) Employment Relations Act 2000 - Three fixed term arrangements - First applicant in no doubt that her employment reverted to an as and when needed basis when each assignment ceased - Valid reasons for fixed term arrangements - Section 66 ERA complied with - No breach of contractual obligations - No breach of good faith - No unjustified disadvantage - No amount of hours worked for an employer when employed on an as and when required basis automatically converted to permanent tenure - Casual administrator
Result: Application dismissed ; Costs reserved

Jurisdiction - Employment Relations Act 2000

Brott v Green Contracting & Hire Ltd

21 Dec 2005, P Cheyne, CA 167/05, (3 pages)

JURISDICTION - Initially no employment agreement - Applicant fully integrated into business - Respondent provided most machinery though applicant provided various handtools - Work done controlled by respondent - Applicant paid hourly or piece rate - Filled out daily time sheet - Applicant on several occasions made himself unavailable without objection from respondent - Applicant claimed expenses on tax return as if own business - Applicant applied for certificate of exemption from withholding tax from IRD but declined since applicant undischarged bankrupt - Applicant had to apply to High Court and in doing so deposed he was establishing business as self-employed contractor to respondent - When written agreement entered into stated relationship was one of principal and contractor - Not employment relationship - No jurisdiction

Result: Application dismissed ; Costs reserved

Carter v The Treasury

11 Jan 2006, GJ Wood, WA 2/06, (4 pages)

PRACTICE AND PROCEDURE - JURISDICTION - Applicant sought to have problem between him and respondent referred to mediation - In 1994 High Court had found applicant was wrongfully dismissed in 1984 from position with Post Office but did not order reinstatement - Accordingly no employment relationship between applicant and respondent (which took over responsibilities of Post Office) existed - Respondent believed it had come to agreement with applicant about remedies, involving an apology, but applicant did not agree with respondent's assessment and sought mediation - Employment relationship problems must relate to employment relationships that existed after 2 October 2000 - No jurisdiction to investigate and determine application - Applicant had implicitly acknowledged this but had declined to withdraw application - Given lack of jurisdiction would not be in interest of justice to refer application to mediation - Authority had previously declined applicant's application that Crown Law pay his legal expenses for current proceedings and applicant had applied for that determination to be reopened - Applicant alleged that determination now without jurisdiction and invalid, and sought refund of application fee for reopening investigation - Authority had jurisdiction to determine applications of ancillary nature to application already before it and therefore no grounds to hold that previous determination without jurisdiction or invalid - No jurisdiction to make order of refund

Result: Application dismissed ; Costs reserved

Faithful v Morris and Morris Ltd

5 Jan 2006, RA Monaghan, AA 1/06, (6 pages)

UNJUSTIFIED DISMISSAL - JURISDICTION - Applicant wished to purchase respondent's funeral director business - Parties agreed that applicant would work in business for four month period prior to purchase so she could learn about business and both parties could assess whether their business relationship would be satisfactory - Agreed that arrangement would be treated as employment agreement - Parties agreed to extension of one more month - Within a few days of agreeing to extension respondent decided not to proceed - Applicant given letter terminating agreement and paid up until end date of extension - Respondent alleged applicant was independent contractor - No dispute parties agreed relationship would be one of employment - Way relationship operated in practice did not make relationship one of principal and contractor - Unusual freedom from control applicant was given was

deliberate - Applicant was employee - Applicant alleged her employment was probationary - Applicant's position supernumerary - Possibility of ongoing employment relationship outside contemplation of parties - True nature of relationship was fixed term - Authority satisfied both parties agreed employment relationship would end on specified date, and that respondent had genuine reasons based on reasonable grounds for fixed term - Employment terminated summarily rather than on agreed date - Applicant should have been given opportunity to respond to concerns before decision made about continuing employment - Unjustified dismissal - Remedies - Applicant paid until agreed date of termination so no further lost remuneration payable - Applicant's costs of moving to respondent's location were not losses that flowed from personal grievance - Could only be compensated for effect of sudden, unexplained early termination and not injury which flowed from fact that transaction did not proceed - COUNTERCLAIM - BREACH OF CONTRACT - Applicant kicked door as she left and damaged it - Payment of damages appropriate for repair of door - Funeral director
Result: Application granted ; Compensation for humiliation (\$3,000) ; Counterclaim granted ; Damages in favour of respondent (\$1,133.64) ; Costs reserved

Hansen v Case Boreham Associates Ltd

23 Dec 2005, RA Monaghan, AA 499/05, (5 pages)

JURISDICTION - Whether employee or independent contractor - Parties signed two agreements - First headed "individual employment agreement" but referred throughout to "the contractor" - Second headed "independent contractor agreement (individual)" and required contractor to perform duties through limited liability company and submit invoice for fees - Respondent facilitated applicant's registration of company - Mutual intention of parties was to enter into independent contractor arrangement - Applicant alleged in reality relationship conducted as if it were one of employment particularly with respect to degree of control exercised over way he did his work - Commencement of applicant's engagement corresponded with period immediately prior to commencement of new set of courses - Reasonable in circumstances of extra work that applicant needed full-time - Serious problem of low enrolments arose - Addressing this problem probably accounted for great deal of time commitment by applicant and attempt at supervision of applicant by respondent that followed - In less than six weeks parties called end of relationship due to acrimony - Relationship did not last long enough to enable proper assessment - Not appropriate to assess true nature of relationship on basis of how parties dealt with particular problem since circumstances out of the ordinary - Parties' relationship one of principal and contractor - Course manager
Result: Application dismissed ; Costs reserved

Khan v Uno Design Ltd

23 Dec 2005, L Robinson, AA 501/05, (4 pages)

JURISDICTION - Whether employment relationship - Applicant sought arrears of wages - Agreement between applicant and respondent's directors that in exchange for applicant working one year without remuneration, they would each transfer to applicant five percent of shares in respondent and applicant would become director - Applicant worked for one year without remuneration but shares were never transferred - Agreement to transfer shares was not made with respondent but with directors acting personally - Agreement to transfer shares was private commercial contract - Timesheets endorsed "wages" were not decisive in themselves as evidencing employment but were evidence of applicant's continued contribution to business - No agreement to pay wages in event share transfer did not proceed - Directors could not lawfully bind respondent to agree to employ applicant without remunerating her for her service as this contrary to minimum wage legislation - Real nature of relationship during that period not one of employment - Applicant's

remedies lay elsewhere

Result: Application dismissed ; Costs reserved

Penalty - Employment Relations Act 2000

Strachan v Northern Car Services Ltd

22 Dec 2005, R Aithur, AA 493/05, (4 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Genuine redundancy - Process followed in advising applicant of redundancy not inadequate given size and very limited resources of respondent - No realistic prospects for redeployment - No unjustified dismissal - BREACH OF CONTRACT - Whether parties agreed on payment of two weeks' notice - Was an agreement - Acknowledged that applicant's acceptance might not have been as clear as could have been because she also said it was unfair and she deserved more - However, deal met basic legal requirements of offer and acceptance - Respondent failed to honour agreement to pay two weeks' notice on making position redundant - Respondent to pay \$1,280 to applicant - PENALTY- Breach of applicant's agreement - Breach of statutory requirement to provide written employment agreement - Penalty of \$300 in favour of applicant appropriate - COSTS - ½ day investigation meeting - Entitled to reasonable contribution plus reimbursement of filing fee

Result: Damages (\$1,280)(Two week's notice) ; Penalty (\$300) ; Costs in favour of applicant (\$500) ; Disbursements (\$70)(Filing fee)

Timmins v Aratuna Freighters Ltd

21 Feb 2006, H Doyle, CA 26/06, (7 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - At interview, applicant disclosed was on parole from term of imprisonment for assault – No deliberate concealment of nature of assault – Applicant off work on sick leave – One morning, sent text message saying “ 2 sick” - Was sent text message from respondent telling him to do offal run - Applicant responded that he was too sick to do so – Alleged was sent further message indicating he was fired – Meeting to see if resolution of problem could be achieved – Discussion about applicant’s flatmate’s allegations about applicant– Applicant denied first allegation but admitted he used cannabis – Applicant offered employment part time only if he could provide clean drug test – Applicant declined offer – Letter sent to applicant detailing various reasons for dismissal – No conduct by applicant capable of amounting to serious misconduct that could justify dismissal – Procedurally unfair - Unjustified dismissal – Effect of offer of re-employment on remedies – Offer was for five hours per day rather than 11 hours applicant had previously been working – Not unreasonable, given the job was driving and applicant admitted smoking cannabis, that applicant be required to undergo test for cannabis levels – Viewed overall and given hours offered were more than halved, could not conclude applicant acted unreasonably in turning down offer – No contributory conduct – Seemed to be plenty of opportunities for truck drivers – Almost inevitable that respondent would have required applicant to undertake drug test such that may have impacted on continued employment beyond three months – No good reason to extend reimbursement beyond three months - PENALTY - Respondent should be aware that was required to provide written employment agreement - However, not minded to order penalty in present case – Recovery of wages claim allowed - Driver/drivers assistant

Result: Application granted ; Reimbursement of lost wages (\$9,795.50)(13 weeks) ; Compensation for humiliation etc (\$5,000) ; Recovery of wages (\$425) ; Interest on unpaid wages (8.5 percent) ; Costs reserved

Personal Grievance - Dismissal - Employment Relations Act 2000

Antram v AFFCO New Zealand Ltd

22 Dec 2005, K Anderson, AA 492/05, (8 pages)

DISPUTE - Alleged owed unpaid redundancy compensation since respondent failed to take into account his total years of continuous service - Applicant was employed by respondent from 1970 until 1993 - In 1994 applicant was independent contractor providing consultancy services to respondent until 2001 when he again became an employee until his redundancy in 2004 - Applicant alleged independent contractor contracts were a sham and he was, in reality, an employee for the whole time - Not accepted contracts were shams - Applicant formed registered company - Financial records indicated contractor relationship - Applicant's company was registered for GST - Applicant free to contract his services to other businesses - Applicant never received or claimed statutory entitlements such as holiday payments - Also took into account factors that could point to employment relationship such as use of title "General Manager" and some integration into businesses - Employment not continuous - UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - No evidence or submissions about unjustified dismissal and unjustified disadvantage claims - Authority gained impression applicant not seriously pursuing those claims - If mistaken about that however, no evidence that would support either of those claims - Claims dismissed - Applicant close to having entitlement to payment for 25 years service but did not qualify - In any event, applicant barred from pursuing claims from 1970-1993 period by s4 Limitation Act 1950

Result: Question answered in favour of respondent ; Applications dismissed (Unjustified dismissal and disadvantage) ; Costs reserved

Biddick v Mangonui Computers 2004 Ltd

16 Jan 2006, J Scott, AA 8/06, (7 pages)

UNJUSTIFIED DISMISSAL - Applicant walked into respondent's business and asked if there were any jobs available for computer technician - Engaged immediately and started work that afternoon allegedly on trial basis - During first week of employment respondent began to have concerns about applicant's competency, customer service, standard of dress and attitude - At end of second week respondent told applicant things weren't working out and she wanted him to leave - Summary dismissal - Credibility issues - Authority not satisfied applicant engaged on basis of two week trial period - At best respondent thought she could try applicant out but this not communicated to applicant for his agreement - Permanent employee - Respondent counselled applicant as to her expectations but no formal discussions where performance concerns unequivocally spelt out together with warning that position would be in jeopardy if no improvement - Dismissal conceived and carried out in manner completely inconsistent with rules of natural justice - Unjustified dismissal - Remedies - No contributory conduct as respondent's steps to address concerns were so deficient - Compensation for humiliation took into account that period of employment extremely short - Computer technician

Result: Application granted ; Reimbursement of lost wages (\$6,340)(3 months) ; Compensation for humiliation etc (\$2,000) ; Costs reserved

Faithful v Morris and Morris Ltd

5 Jan 2006, RA Monaghan, AA 1/06, (6 pages)

UNJUSTIFIED DISMISSAL - JURISDICTION - Applicant wished to purchase respondent's funeral director business - Parties agreed that applicant would work in business for four month period prior to purchase so she could learn about business

and both parties could assess whether their business relationship would be satisfactory - Agreed that arrangement would be treated as employment agreement - Parties agreed to extension of one more month - Within a few days of agreeing to extension respondent decided not to proceed - Applicant given letter terminating agreement and paid up until end date of extension - Respondent alleged applicant was independent contractor - No dispute parties agreed relationship would be one of employment - Way relationship operated in practice did not make relationship one of principal and contractor - Unusual freedom from control applicant was given was deliberate - Applicant was employee - Applicant alleged her employment was probationary - Applicant's position supernumerary - Possibility of ongoing employment relationship outside contemplation of parties - True nature of relationship was fixed term - Authority satisfied both parties agreed employment relationship would end on specified date, and that respondent had genuine reasons based on reasonable grounds for fixed term - Employment terminated summarily rather than on agreed date - Applicant should have been given opportunity to respond to concerns before decision made about continuing employment - Unjustified dismissal - Remedies - Applicant paid until agreed date of termination so no further lost remuneration payable - Applicant's costs of moving to respondent's location were not losses that flowed from personal grievance - Could only be compensated for effect of sudden, unexplained early termination and not injury which flowed from fact that transaction did not proceed - COUNTERCLAIM - BREACH OF CONTRACT - Applicant kicked door as she left and damaged it - Payment of damages appropriate for repair of door - Funeral director
Result: Application granted ; Compensation for humiliation (\$3,000) ; Counterclaim granted ; Damages in favour of respondent (\$1,133.64) ; Costs reserved

Fox v General Distributors Ltd

10 Jan 2006, A Dumbleton, AA 2/06, (9 pages)

UNJUSTIFIED DISADVANTAGE - UNJUSTIFIED DISMISSAL - Constructive dismissal - Applicant resigned after two formal warnings - First warning issued following applicant's failure to ensure that butchery stock removed from display cabinet prior to "best before" date - Matter dealt with by respondent in accordance with best procedural practice and grounds for issuing disciplinary warning existed - First warning justified - Second and final warning issued because on particular day at 10am display cabinet was found to have poor coverage of meat - Thorough and fair investigation - Obligation in respect of displaying meat was key accountability of job and particular standards to be achieved had been made clear to applicant a few months earlier at performance appraisal - Respondent entitled to have regard to earlier warning when deciding upon disciplinary action to be taken - Applicant alleged warning was "final" because of situation regarding applicant's non-use of computers - Previously applicant had delegated computer tasks to assistant but respondent told him he could no longer delegate - Applicant produced medical certificate confirming he suffered "anxiety complex" relating to computers - Once medical diagnosis revealed, applicant relieved of any requirement to use computer while problem remained under investigation - Respondent was still deciding what to do about computer problem when second and final warning issued - Applicant subsequently resigned - Reasonable for respondent to expect applicant as manager to perform all functions and duties of position including computer use - Applicant could have resorted to disputes procedure in employment agreement about computer problem rather than resigning - Personal grievance claims could not be upheld - Butchery manager

Result: Application dismissed ; Costs reserved

Hutchinson v Impex Personnel Ltd

23 Dec 2005, L Robison, AA 500/05, (4 pages)

UNJUSTIFIED DISMISSAL - Applicant gave notice of resignation from employment with respondent - Discussed with manager possibility of establishing new role for her in form of a transport and logistics industry training course - Later parties discussed that new training programme required approval and irrespective of that approval, applicant's employment would end when notice period expired - New training programme not approved - Applicant not paid after date notice period expired - Whether dismissed or resigned - Applicant resigned - Resignation required to be in writing under parties' employment agreement but parties impliedly waived that requirement - No dismissal - Recruitment consultant

Result: Application dismissed ; Costs reserved

Personal Grievance - Dismissal - Misconduct - Employment Relations Act 2000

King v Harvey t/a Flowers by Trish

2 Feb 2006, J Scott, AA 18/06, (7 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Respondent offered applicant first option to buy business and parties began to negotiate - Respondent called meeting and summarily dismissed applicant for general reasons of failing to comply with instructions and undermining business by informing suppliers of respondent's financial situation - When applicant asked for specifics was told she had refused to incorporate sunflowers in corporate arrangements that morning - Respondent later gave other reasons - Section 103A Employment Relations Act 2000 applied - Authority had to make objective assessment of respondent's actions and weigh those actions against those of fair and reasonable employer in all the circumstances at the time - Convenient to consider whether respondent had good reasons for actions it took in respect of applicant's employment and whether she was treated fairly in process - Demonstrating that following steps were followed essential to showing that dismissal for serious misconduct justified: full, fair and thorough investigation; giving employee opportunity to be heard; reasons had to be given to employee before dismissal - Employer could only defend dismissal relying on reasons giving at time - Majority of concerns in question historical and could not give rise to justifiable grounds to dismiss applicant - Manner of dismissal completely inconsistent with rules of natural justice - Real reason behind dismissal was respondent's belief applicant had informed suppliers of financial position of respondent in order to give her an advantage in negotiations on purchase of business - Unjustified dismissal - Remedies - No contributory conduct as applicant did nothing to deliberately damage or undermine respondent's business - COSTS - Length of investigation meeting not specified - Respondent directed to pay applicant reasonable contribution to costs - Head florist

Result: Application granted ; Reimbursement of lost wages (\$7,871)(6 months) ; Compensation for humiliation etc (\$10,000) ; Costs in favour of applicant (\$1,500)

Te Tomo v Hamilton Taxi Society Ltd

4 Jan 2006, K Anderson, AA 504/05, (6 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Applicant dismissed for allocating or "feeding" work to her mother, who was a contractor taxi driver for respondent - Respondent had strict policy preventing "feeding" of work to drivers - Respondent discovered two phone calls between applicant and her mother about client requiring a taxi - Applicant alleged that another employee ("B"), who logged call from client, suggested she should ring her mother about job - Applicant dismissed for serious misconduct - Decision to dismiss not one which fair and reasonable employer would have taken in particular circumstances - No full and proper investigation - Respondent obliged to interview B before reaching conclusion - Respondent would have discovered allocation of job was largely administered by B - Would have concluded that both applicant and B equally at fault - Reasonable for applicant to take some guidance from more experienced operator - B only received written warning - Some doubt over whether there was intention to "feed" applicant's mother job - Allegedly duplicitous manner in which applicant's mother did job could not reasonably be visited upon applicant but it had major bearing on decision to dismiss - Element of pre-determination - Remedies - Contributory conduct in respect of applicant's highly irregular behaviour - Call centre operator

Result: Application granted ; Reimbursement of lost wages (\$4,936 reduced to \$3,456) ; Compensation for humiliation (\$4,000 reduced to \$2,800) ; Costs reserved

Timmins v Aratuna Freighters Ltd

21 Feb 2006, H Doyle, CA 26/06, (7 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - At interview, applicant disclosed was on parole from term of imprisonment for assault – No deliberate concealment of nature of assault – Applicant off work on sick leave – One morning, sent text message saying “ 2 sick” - Was sent text message from respondent telling him to do offal run - Applicant responded that he was too sick to do so – Alleged was sent further message indicating he was fired – Meeting to see if resolution of problem could be achieved – Discussion about applicant’s flatmate’s allegations about applicant– Applicant denied first allegation but admitted he used cannabis – Applicant offered employment part time only if he could provide clean drug test – Applicant declined offer – Letter sent to applicant detailing various reasons for dismissal – No conduct by applicant capable of amounting to serious misconduct that could justify dismissal – Procedurally unfair - Unjustified dismissal – Effect of offer of re-employment on remedies – Offer was for five hours per day rather than 11 hours applicant had previously been working – Not unreasonable, given the job was driving and applicant admitted smoking cannabis, that applicant be required to undergo test for cannabis levels – Viewed overall and given hours offered were more than halved, could not conclude applicant acted unreasonably in turning down offer – No contributory conduct – Seemed to be plenty of opportunities for truck drivers – Almost inevitable that respondent would have required applicant to undertake drug test such that may have impacted on continued employment beyond three months – No good reason to extend reimbursement beyond three months - PENALTY - Respondent should be aware that was required to provide written employment agreement - However, not minded to order penalty in present case – Recovery of wages claim allowed - Driver/drivers assistant

Result: Application granted ; Reimbursement of lost wages (\$9,795.50)(13 weeks) ; Compensation for humiliation etc (\$5,000) ; Recovery of wages (\$425) ; Interest on unpaid wages (8.5 percent) ; Costs reserved

Williams v The Warehouse Ltd

23 Dec 2005, D King, AA 498/05, (7 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Alleged bullying, derogatory and intimidatory behaviour by applicant - Respondent's Human Resources Account Manager ("HR manager") received complaints about applicant's behaviour - HR manager investigated complaints while applicant on sick leave - Staff said that if applicant returned they would walk off - When applicant returned to work she was suspended after meeting between applicants, HR manager and applicant's manager - No contractual entitlement to suspend - Suspension not predetermined and consultation took place - Preferable for applicant to have been told of purpose of meeting beforehand but difficult situation for respondent - Respondent right to err on side of caution and make decision to suspend in order to protect staff - After further meetings applicant's manager decided to dismiss applicant - Applicant alleged that involvement of her manager biased decision because applicant had previously accused her manager of bullying - Authority did not agree because evidence relating to relationship could not be described as bullying, and investigation involved consultation with number of senior personnel - Respondent entitled to conclude that serious misconduct had taken place and to make decision to dismiss - No personal grievance

Result: Application dismissed ; Costs reserved

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

Bright v Eastern Equities Corporation Ltd t/a Farmers Transport Ltd

21 Dec 2005, YS Oldfield, AA 491/05, (7 pages)

UNJUSTIFIED DISMISSAL - Poor performance - Respondent developed genuine concerns about applicant's performance - Applicant received two pay increases - Meetings amounted to no more than coaching and counselling - Applicant not advised meetings were disciplinary in nature or that his job was in jeopardy if he did not meet certain standards - Respondent did not satisfy Authority that applicant was properly informed of respondent's dissatisfactions or of standard it required - Respondent offered to move applicant to lower Operations Supervisor role - When applicant declined demotion he was dismissed for poor performance - No timeframe for performance to improve - Not given adequate opportunity to respond to respondent's concerns - No chance to try to save his job - Procedurally unfair - Remedies - Applicant found role stressful and moving out of it was not such a bad thing for him - Mid range award of compensation appropriate - Unjustified dismissal - Manager

Result: Application granted ; Reimbursement of lost wages (\$2,000)(3 months) ; Compensation for humiliation etc (\$5,000) ; Costs reserved

Maharaj v Hi-Tech Irrigation Services Ltd

22 Dec 2005, YS Oldfield, AA 496/05, (5 pages)

UNJUSTIFIED DISMISSAL - Poor performance - Over three months respondent had four meetings at which it outlined performance concerns to applicant - Applicant received two formal written warnings - At last meeting told he would receive fortnightly feedback but heard nothing further - Two months later applicant received permission to go home and discuss arrangements with his wife after learning his uncle had passed away - Workshop supervisor told applicant to let respondent know of his plans but applicant made no attempt to contact respondent and did not return to work until three days later - Applicant told his failure to contact respondent was another performance failing - At meeting respondent raised other recent non-performance issues and dismissed applicant effective immediately - Trigger for dismissal was applicant's failure to make contact - Had other performance concerns been of sufficient concern to lead to dismissal they should have been raised according to fortnightly programme - Failure to call was different type of concern - Not reasonable to expect applicant to foresee that it could cause his termination in all circumstances including his bereavement - Unjustified dismissal - Failure to pay notice was further breach by respondent - Remedies - Reinstatement declined - Because respondent told New Zealand Immigration Service that applicant had been dismissed for poor performance, applicant was declined a permit - Unable to mitigate loss because no work permit - Respondent had to bear some responsibility for this but could not be expected to meet applicant's losses indefinitely - Compensation for humiliation would reflect distress from dismissal itself but not ongoing problems associated with loss of work permit

Result: Application granted ; Reimbursement of lost wages (\$7,312.50)(13 weeks) ; Compensation for humiliation etc (\$6,000) ; Costs reserved

Personal Grievance - Dismissal - Redundancy - Employment Relations Act 2000

Strachan v Northern Car Services Ltd

22 Dec 2005, R Aitihur, AA 493/05, (4 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Genuine redundancy - Process followed in advising applicant of redundancy not inadequate given size and very limited resources of respondent - No realistic prospects for redeployment - No unjustified dismissal - BREACH OF CONTRACT - Whether parties agreed on payment of two weeks' notice - Was an agreement - Acknowledged that applicant's acceptance might not have been as clear as could have been because she also said it was unfair and she deserved more - However, deal met basic legal requirements of offer and acceptance - Respondent failed to honour agreement to pay two weeks' notice on making position redundant - Respondent to pay \$1,280 to applicant - PENALTY- Breach of applicant's agreement - Breach of statutory requirement to provide written employment agreement - Penalty of \$300 in favour of applicant appropriate - COSTS - ½ day investigation meeting - Entitled to reasonable contribution plus reimbursement of filing fee

Result: Damages (\$1,280)(Two week's notice) ; Penalty (\$300) ; Costs in favour of applicant (\$500) ; Disbursements (\$70)(Filing fee)

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

Bryson v Three Foot Six

10 Feb 2006, PR Stapp, WA 20/06, (8 pages)

RAISING OF PERSONAL GRIEVANCE - Whether personal grievance raised within 90 day timeframe - Applicant's role disestablished as filming for Lord of the Rings movie wound down - Evidence indicated that applicant had range of issues about relationship with his Head of Department - However, Authority was not satisfied that applicant had taken positive step and put his employer on notice that he was aggrieved about termination of contract to sufficiently enable respondent to remedy problem as soon as possible, including invoking arbitration clause in parties' contract ("crew deal memo") - Applicant's statements that he assumed Head of Department's dislike of him caused him not to be kept on, and that he wanted to stay on but was given no choice were insufficient to constitute raising of a grievance - Whether exceptional circumstances to grant leave to raise personal grievance out of time - No explanation in crew deal memo concerning resolution of employment relationship problems - This because at time crew deal memo was entered into it was signed as contract for services - Courts had since determined that real nature of relationship was contract of service - However, contract could not be deemed to apply retrospectively as employment agreement - Applicant had not established that lack of employment relationship problem clause in contract occasioned delay in filing personal grievance - No evidence he even looked at crew deal memo after he signed it - No exceptional circumstances existed - On-set model technician

Result: Application dismissed ; Costs reserved

A v New Zealand Police

14 Feb 2006, J Crichton, CA 21/06, (5 pages)

RAISING OF PERSONAL GRIEVANCE - Alleged unjustified disadvantage - In 1989 applicant applied to join respondent and she submitted to medical examination by medical practitioner "Dr B" - During 1993 applicant became concerned that medical examination she had had was not consistent with medical examination of other female colleagues - Alleged Chief Medical Officer dismissed her concerns - Applicant spoke to police officer ("Witness C") who had referred her to Dr B and alleged she obtained assurance that no further Police recruits would be sent to Dr B - Witness C alleged he said he would not use Dr B anymore, rather than ensuring that Dr B ceased to be medical practitioner approved for examining Police recruits - In 2003 applicant made criminal complaint to Police about Dr B's conduct and discovered that Dr B was still examining Police recruits - Instructed Police Association to raise personal grievance on her behalf - Respondent alleged grievance not raised within 90 days - That argument begged question of which event triggered grievance and crystallised employment relationship problem - If grievance was realisation that Dr B was still examining Police recruits then notification to respondent could not be said to be out of time - However, email which raised grievance did not give respondent sufficient information about nature of grievance to enable it to address it - Grievance not raised within meaning of the law - Applicant raised in closing submissions that there were exceptional circumstances upon which Authority could grant leave to raise grievance out of time - Authority accepted this as an application to raise grievance out of time - Respondent needed to be provided with proper opportunity to make submissions on this issue - Order prohibiting publication of names of applicant, Dr B, Witness C, and any information that could lead to identification including town/city in which Dr B practiced

Result: Application dismissed ; Orders accordingly ; Costs reserved

Personal Grievance - Unjustified Disadvantage - Employment Relations Act 2000

Antram v AFFCO New Zealand Ltd

22 Dec 2005, K Anderson, AA 492/05, (8 pages)

DISPUTE - Alleged owed unpaid redundancy compensation since respondent failed to take into account his total years of continuous service - Applicant was employed by respondent from 1970 until 1993 - In 1994 applicant was independent contractor providing consultancy services to respondent until 2001 when he again became an employee until his redundancy in 2004 - Applicant alleged independent contractor contracts were a sham and he was, in reality, an employee for the whole time - Not accepted contracts were shams - Applicant formed registered company - Financial records indicated contractor relationship - Applicant's company was registered for GST - Applicant free to contract his services to other businesses - Applicant never received or claimed statutory entitlements such as holiday payments - Also took into account factors that could point to employment relationship such as use of title "General Manager" and some integration into businesses - Employment not continuous - UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - No evidence or submissions about unjustified dismissal and unjustified disadvantage claims - Authority gained impression applicant not seriously pursuing those claims - If mistaken about that however, no evidence that would support either of those claims - Claims dismissed - Applicant close to having entitlement to payment for 25 years service but did not qualify - In any event, applicant barred from pursuing claims from 1970-1993 period by s4 Limitation Act 1950

Result: Question answered in favour of respondent ; Applications dismissed (Unjustified dismissal and disadvantage) ; Costs reserved

Butcher v Presbyterian Support Central

22 Dec 2005, D Asher, WA 198/05, (9 pages)

UNJUSTIFIED DISADVANTAGE - Suspension - Also alleged respondent continued to harass by means of a false disciplinary process and a pre-determined outcome - Had been several complaints by staff about applicant - On one evening, following a further complaint from staff member, applicant was suspended - Accompanied to her car - Had since returned to work but in different area - Had medication task taken from her - Perception that medication duty was that of senior staff member of duty - Alleged taking that duty was minimising risk of incidents - Given the environment in which parties were working, and their stated shared commitment to the special needs of the residents, the requirement in the Employment Relations Act 2000 to be active and constructive was particularly important - No predetermination - Not accepted that respondent was seeking to apply unfair disciplinary process and was continuing to actively harass and humiliate her - Any damage from memo about medication was temporary and insubstantial - Difficult to imagine what argument applicant might have made so as to prevent respondent legitimately reaching decision to suspend - Respondent entitled to inquire into incidents - Respondent conceded did not act strictly in accordance with procedures - However, actions reasonable in all circumstances - Authority's obligation to seek to achieve justice between parties according to equity and merits of case - If were to find in applicant's favour would not have awarded any remedies - Authority had no power to grant other remedies sought (apologies and/or memoranda) - No unjustified disadvantage - Caregiver

Result: Application dismissed ; Costs reserved

Fox v General Distributors Ltd

10 Jan 2006, A Dumbleton, AA 2/06, (9 pages)

UNJUSTIFIED DISADVANTAGE - UNJUSTIFIED DISMISSAL - Constructive dismissal - Applicant resigned after two formal warnings - First warning issued following applicant's failure to ensure that butchery stock removed from display cabinet prior to "best before" date - Matter dealt with by respondent in accordance with best procedural practice and grounds for issuing disciplinary warning existed - First warning justified - Second and final warning issued because on particular day at 10am display cabinet was found to have poor coverage of meat - Thorough and fair investigation - Obligation in respect of displaying meat was key accountability of job and particular standards to be achieved had been made clear to applicant a few months earlier at performance appraisal - Respondent entitled to have regard to earlier warning when deciding upon disciplinary action to be taken - Applicant alleged warning was "final" because of situation regarding applicant's non-use of computers - Previously applicant had delegated computer tasks to assistant but respondent told him he could no longer delegate - Applicant produced medical certificate confirming he suffered "anxiety complex" relating to computers - Once medical diagnosis revealed, applicant relieved of any requirement to use computer while problem remained under investigation - Respondent was still deciding what to do about computer problem when second and final warning issued - Applicant subsequently resigned - Reasonable for respondent to expect applicant as manager to perform all functions and duties of position including computer use - Applicant could have resorted to disputes procedure in employment agreement about computer problem rather than resigning - Personal grievance claims could not be upheld - Butchery manager

Result: Application dismissed ; Costs reserved

Paulin and Anor v Southland District Health Board

22 Dec 2005, P Montgomery, CA 169/05, (4 pages)

UNJUSTIFIED DISADVANTAGE - GOOD FAITH - First applicant sought order that her status was that of a permanent employee - Second applicant claimed respondent breached contractual obligations and sought a penalty - First applicant employed as casual administrative employee - Since that time, applicant's work pattern had been regular and consistent - Such that, first applicant alleged she was permanent employee - Clause of collective agreement specified when could use temporary employment agreements - Second applicant alleged clause imposed obligation to consult with it prior to advertising a fixed term temporary position - No such obligation imposed by section - Fairly long bow to draw to allege respondent was guilty of breaching s4(1)(a) Employment Relations Act 2000 - Three fixed term arrangements - First applicant in no doubt that her employment reverted to an as and when needed basis when each assignment ceased - Valid reasons for fixed term arrangements - Section 66 ERA complied with - No breach of contractual obligations - No breach of good faith - No unjustified disadvantage - No amount of hours worked for an employer when employed on an as and when required basis automatically converted to permanent tenure - Casual administrator

Result: Application dismissed ; Costs reserved

A v The Attorney-General in respect of The Chief Executive Officer of The Child Youth & Family Services

22 Dec 2005, PR Stapp, WA 196/05, (10 pages)

UNJUSTIFIED DISADVANTAGE - Stress - Applicant became ill while on study leave - Medical certificates provided to respondent - Stress not initially brought to respondent's attention as reason for illness - 10 day delay before respondent

responded to letter from doctor advising to remove applicant from critical front line work and have hours reduced - Applicant ceased working and was medically retired - Social work inherently stressful - Applicant's diagnosed depression was of unknown cause - Applicant had number of other personal factors relevant to causation of illness - Was supervision given to applicant - Were performance issues - Not satisfied applicant established claim that breaches by respondent as alleged materially caused illness at work - Workload reasonable - Applicant probably not suited to employment as front line social worker - Respondent did not breach obligation to act as good employer and provide safe and healthy workplace as alleged - Applicant never properly asked about stress and safety and no monitoring took place but breach did not give rise to personal grievance - Did not enquire and respond to medical certificate - Failure to respond in reasonable time and pick up on advice of doctor's letter/medical certificate sent following month - Doctor had given advice that applicant should be removed from front line duties and have reduced hours - Inaction had impact on applicant - Fair and reasonable employer would be expected to pick up that applicant not suited to front line social work - Personal grievance - Respondent not liable for future lost earnings in form of damages - Respondent had no responsibility for claim for retraining - Also no liability for claim for medical costs - Applicant's name suppressed - Names of third parties referred to during course of investigation but not named in determination also protected permanently by order suppressing names from publication - Social worker
Result: Application granted ; Compensation for humiliation etc (\$15,000) ; Costs reserved

Practice & Procedure - Employment Relations Act 2000

Carter v The Treasury

11 Jan 2006, GJ Wood, WA 2/06, (4 pages)

PRACTICE AND PROCEDURE - JURISDICTION - Applicant sought to have problem between him and respondent referred to mediation - In 1994 High Court had found applicant was wrongfully dismissed in 1984 from position with Post Office but did not order reinstatement - Accordingly no employment relationship between applicant and respondent (which took over responsibilities of Post Office) existed - Respondent believed it had come to agreement with applicant about remedies, involving an apology, but applicant did not agree with respondent's assessment and sought mediation - Employment relationship problems must relate to employment relationships that existed after 2 October 2000 - No jurisdiction to investigate and determine application - Applicant had implicitly acknowledged this but had declined to withdraw application - Given lack of jurisdiction would not be in interest of justice to refer application to mediation - Authority had previously declined applicant's application that Crown Law pay his legal expenses for current proceedings and applicant had applied for that determination to be reopened - Applicant alleged that determination now without jurisdiction and invalid, and sought refund of application fee for reopening investigation - Authority had jurisdiction to determine applications of ancillary nature to application already before it and therefore no grounds to hold that previous determination without jurisdiction or invalid - No jurisdiction to make order of refund

Result: Application dismissed ; Costs reserved

An employer v A former employee

3 Oct 2005, Colgan J, AC 55/05, (2 pages)

PRACTICE AND PROCEDURE - Interim non-publication order - Order requested by plaintiff with defendant's consent - Order to apply to names in present proceedings on appeal but also to Authority's proceedings - Court had to weigh broader public interest even where parties consented - Plaintiff needed opportunity to consider whether it might challenge Authority's substantive determination - Unusual feature - Conduct of one of plaintiff's owners referred by Authority to Solicitor-General - Publication of the identity of that person at present stage might have been prejudicial if Solicitor-General opted to take further judicial proceedings - Interim non-publication order granted in relation to identities of parties and nature and location of plaintiff's business - Order to expire at end of 28 day appeal period

Result: Non publication order granted ; No order for costs

Gorrie Fuel (SI) Ltd v Marlow

28 Sep 2005, Colgan J, CC 14/05, (5 pages)

PRACTICE AND PROCEDURE - Plaintiff sought directions about evidence of its witness - Witness lived in different town from present proceeding - Alleged witness' circumstances very tragic - Whether witness' brief of evidence could be "taken as read" - Witness' evidence was controversial and went to heart of case, at least on remedies - Unjust for Court to accept evidence without seeing, hearing and cross-examining witness - Injustice to defendant outweighed inconvenience to witness - Plaintiff had to either call witness in person or not rely on witness' written statement alone - Whether witness' viva voce evidence could be taken at different court - Theoretically possible for evidence to be taken in different court but economically doubtful - No time to arrange Court to travel to witness' town for part of hearing - Application to take evidence in witness' town declined - Whether

defendant could be directed not to cross-examine witness on certain personal matters – Not reasonable to confine questions in cross-examination – Conduct of hearing and extent of cross-examination best left to trial Judge – Application to put advance constraints on cross-examination declined

Result: Orders accordingly ; Costs reserved

Hormann v Virtual Warehouse Ltd

22 Dec 2005, R Arthur, AA 497/05, (9 pages)

PRACTICE AND PROCEDURE - Application by respondent to remove matter to Employment Court - Respondent alleged important questions of law likely to arise - Applicant's substantive application raised issues with her return to work after parental leave, and claim for unpaid salary of \$183,404 - \$106,442 of outstanding salary and \$11,596 of holiday pay had been written off respondent's books as part of arrangements which included applicant taking shares in respondent - Applicant as financial controller did paperwork in writing off salary owed but alleged she did not agree that salary was lost forever - Respondent alleged first important question of law was whether journal entries writing off unpaid salary were "deductions" under Wages Protection Act 1983 - Alleged second question was whether to write off unpaid salary was a matter "related to an employment agreement" so as to give Authority jurisdiction to make order granting relief to respondent under Illegal Contracts Act 1970 - First question was clearly question of law - However Authority not satisfied issue arose in this case when issue at heart of matter was what arrangement was made, if any, about terms on which salary was to be written off - Question of law would not be decisive or strongly influential in deciding material part of case - Second question was question of fact not law - Terms of contract were question of fact where intention of parties had to be gathered partly from documents but also from oral exchanges and conduct - Questions of law proposed by respondent did not meet statutory requirements for removal - Removal declined

Result: Application dismissed ; No order for costs

IBT International New Zealand Ltd v Duncan

22 Dec 2005, PR Stapp, WA 195/05, (2 pages)

PRACTICE AND PROCEDURE - Memorandum recording telephone conference raised issue about Authority's jurisdiction on a contract for services - Parties agreed that contract presented to Authority was a contract for services and that respondent was an independent contractor - Arrangements had been put in place for parties to attend mediation services prior to contractor issue being raised - Parties not prevented from using services of Department of Labour mediation on a work-related matter - Also relevant was the matter of any continuance of an undertaking given by the respondent - Those were now matters requiring the parties' voluntary agreement - Application could not be taken any further by the Authority

Result: Application dismissed ; No order for costs

Kirkham v Metro Motors Holdings 2003 Ltd

21 Dec 2005, M Urlich, AA 59A/05, (1 pages)

PRACTICE AND PROCEDURE - Respondent had filed application to reopen two Authority determinations - Respondent had not filed any evidence pursuant to revised timetable - Had fair opportunity to do so - No explanation provided for not meeting second timetable - Appropriate for Authority to move to determine application - Application for reopening declined

Result: Application dismissed ; Costs reserved

A v B

17 Oct 2005, Travis J, AC 60/05, (2 pages)

PRACTICE AND PROCEDURE - Interlocutory judgment - Orders made by consent - Present proceedings adjourned sine die - Previous interim order continued - Plaintiff to remain on paid leave until proceedings disposed of - Plaintiff to apply for judicial review under s194 Employment Relations Act 2000 - Case management directions given

Result: Orders accordingly ; No order for costs

Waikato District Health Board v Draper

12 Oct 2005, Colgan J, AC 56/05, (2 pages)

PRACTICE AND PROCEDURE - Oral interlocutory judgment - Application for stay of Authority proceedings - Reasons to be given later - Authority's reinstatement order stayed on condition that defendant reinstated to another position with plaintiff no less advantageous - Reimbursement of lost wages order stayed on condition sum ordered by Authority, with interest, paid to Registrar of Employment Court - Stay conditional on plaintiff prosecuting expeditiously its challenge - Further condition that if ongoing employment conflict existed that those be directed to mediation assistance - Leave reserved to apply for more detailed orders - Emergency department receptionist

Result: Application granted ; Partial stay of Authority proceedings ordered ; Costs reserved

Westpac Banking Corporation v Smythe

30 Sep 2005, Travis J, AC 54/05, (3 pages)

PRACTICE AND PROCEDURE - Interlocutory application by defendant for leave to amend statement of defence - Sought to include new alternative plea that defendant was unjustifiably dismissed - Application based on answer given by plaintiff to defendant's request for further particulars - Application withdrawn after Court gave leave to amend plaintiff's answer to request for particulars - COSTS - Costs in favour of defendant

Result: Application withdrawn ; Costs in favour of defendant (\$750)

Woodhouse v Bond St 2004 Ltd t/a Bond Street Lodge

11 Jan 2006, R Arthur, AA 3/06, (1 pages)

PRACTICE AND PROCEDURE - Applicant advised Authority that he was having difficulty enforcing determinations in his favour because of error in entitling on certificate of determination - Respondent was identified during investigation and on determinations as "Bond St 2000 Ltd t/a Bond St Lodge" - Correct name for respondent included year 2004 not 2000 - Direction that typographical error be corrected and amended certificate of determination issued - Authority confirmed that determinations remained valid against respondent

Result: Orders accordingly ; No order for costs

X v Auckland District Health Board

15 Sep 2005, Colgan J, AC 52/05, (7 pages)

PRACTICE AND PROCEDURE - Successful interlocutory application - Challenge by plaintiff to defendant's objection to disclosure of documents - Plaintiff brought personal grievance removed from Employment Relations Authority - Alleged unjustified dismissal due to procedural unfairness and disparity of treatment - Statement of claim filed in Court but statement of defence

outstanding – Plaintiff gave notice requiring disclosure of documents relating to disciplinary process and material referring to disciplinary processes and outcomes of other employees with similar misconduct allegations – Defendant objected to disclosure prior to filing statement of defence and closing of pleadings because assessment of relevance could not be made – That ground of opposition abandoned at hearing – Privilege – Plaintiff did not seek disclosure of privileged documents – Alleged disclosure would breach assurances of confidentiality given to interviewees – Defendant accepted it could not resist disclosure on that basis alone – Directions given regarding disclosure to assist formal resolution of any future disclosure disputes – Challenge granted – Orders accordingly
Result: Challenge granted ; Orders accordingly ; Costs reserved

Practice & Procedure - Consent Orders - Employment Relations Act 2000

Kerr v Mid Canterbury Aero Club Inc.

22 Dec 2005, H Doyle, CA 170/05, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Orders specified in determination - Consent order in full and final settlement of all matters between parties

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

O'Rourke v Malcolm Customs and Cargo Ltd

22 Dec 2005, A Dumbleton, AA 495/05, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement in annexure to be orders of Authority - Orders prohibiting publication by any form or medium of annexure and any of its contents

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

Department of Labour
TE TARI MAHI

