

Department of Labour
TE TARI MAHI



EMPLOYMENT CASES SUMMARY

March 2007

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

Employment Cases Summary

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

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

This publication is available in electronic format only from the Department of Labour's employment relations website at:

www.ers.dol.govt.nz/publications/ecs.html

If you'd like an e-mail reminder to be sent to you when a new issue is published on the web, go to <http://dol.govt.nz/subscribe.asp> and register your details.

You may also be interested in another service on our website. Go to www.ers.govt.nz and click on "Ask a Question" at the top of the screen to find answers on range of topics related to employment legislation. If the answer to your question isn't already on our knowledgebase you can send it to our information team for a personal response.

CONTENTS

Significant Judgments/Decisions

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

Brief Summaries

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

FULL-TEXT OF DETERMINATIONS

The Workplace Information and Promotion Group Knowledge Management Team is a business group of the Department of Labour. Full-text copies of Authority determinations may be obtained by contacting:

Ph: 04-9154125 or 04-9154076 or 04-9154476

Fax: 04-9154727

Email: library@dol.govt.nz

Crown Copyright

All rights reserved. No part may be reproduced or copied in any form or by any means without the prior permission of the copyright owner except in accordance with the provisions of the Copyright Act 1962. All requests for reproduction of any material in the Employment Cases Summary should be addressed to: Information Advisers, Workplace Information and Promotion – Knowledge Management Team, PO Box 3705, Wellington.

WARNING: The doing of any unauthorised act in relation to a copyright work may result in both a civil claim for damages and criminal prosecution.

ISSN: 1171-8560

ERRATUM

The January/February issue of the Employment Cases Summary contained an error in the Court of Appeal decisions relating to the following parties:

Waitemata District Health Board v New Zealand Public Service Association
(CA 118/05, 4 Oct 2005, Hammond, Chambers, Robertson JJ) , Unrep

Waitemata District Health Board v New Zealand Public Service Association
(CA 118/05, 1 Dec 2006, Glazebrook, Chambers, Ellen France JJ) ,
To be reported

We have re- included both headnotes of these decisions in the Full headnotes section of this issue – please note the judgment dates are different and that the substantive decision is to be reported.

We apologise for any confusion caused by this error.

Contents

Contents	4
Table of Cases Noted in This Issue.....	5
Full Summaries of Significant Cases.....	10
Brief Summaries of Court Judgments, Authority Determinations —.....	
• Arrears.....	37
Holiday Pay.....	39
• Breach of Contract.....	40
• Compliance Order.....	41
• Costs.....	43
• Dispute.....	47
• Injunction.....	48
• Jurisdiction.....	49
• Penalty.....	50
• Personal Grievance	
Dismissal	52
Dismissal - Misconduct.....	55
Dismissal - Poor Performance.....	56
Raising of Personal Grievance	57
Unjustified Disadvantage	59
• Practice & Procedure	61
Consent Orders	64

Cases Noted in this issue

Case Name	Page
<i>ANZ National Ltd v Cortright & Anor</i> (WC 27/06, 18 Dec 2006, Shaw J) , To be reported	26
<i>Bayliss Sharr & Hansen v McDonald</i> (CC 12/06, 7 Dec 2006, Couch J) , To be reported	16
<i>Booker (Labour Inspector) v Storey t/a The Alteration Shop</i> (AA 260/06, 10 Aug 2006, R Arthur) , unrep	41
<i>Booker (Labour Inspector) v Storey t/a The Alteration Shop</i> (AA 261/06, 10 Aug 2006, R Arthur) , unrep	41
<i>Busby v Talent Base Ltd</i> (AA 247/06, 20 Jul 2006, RA Monaghan) , unrep	50,61
<i>The Chief Executive of the Bay of Plenty District Health Board v New Zealand Public Service Association</i> (AC 73/06, 13 Dec 2006, Travis J) , Unrep	43
<i>Cotes v PR Driving Services and Lahore Transport Contractors Ltd</i> (AA 172A/06, 17 Jul 2006, J Wilson) , Unrep	43
<i>Davis v Canwest Radioworks Ltd</i> (AA 263/06, 10 Aug 2006, RA Monaghan)	49
<i>de Boer v EC Credit Control Ltd</i> (WA 5/07, 19 Jan 2007, GJ Wood) , Unrep	64
<i>DV Ryboproduct Ltd v The 49 Crew of the MFV "Aleksandr Ksenofonotov"</i> (CA 10/07, 30 Jan 2007, J Crichton)	37,43
<i>Eruera-Morrison v New Zealand Post</i> (AC 75/06, 21 Dec 2006, Travis J)	61

<i>Farmers Transport Ltd v Kitchen</i> (WC 26/06, 14 Dec 2006, Shaw J) , Unrep	24
<i>Fisher v Fisher & Anor</i> (AC 2/07, 1 Feb 2007, Perkins J) , Unrep	61
<i>Fletcher v ATL Systems Ltd</i> (AA 17/07, 24 Jan 2007, R Arthur) , Unrep	62
<i>Fuiava v Air New Zealand Ltd</i> (AC 51A/06, 21 Dec 2006, Travis J) , Unrep	44
<i>Geen v The Commissioner of Police</i> (AA 241/06, 17 Jul 2006, A Dumbleton) , Unrep	39,52,59
<i>Grant v Nelson Heights Ltd</i> (CA 105/06, 19 Jul 2006, J Crichton) , Unrep	55
<i>Grieg v Samson Good Enterprises Ltd t/a New World Foxton</i> (WA 2/07, 11 Jan 2007, D Asher) , Unrep	64
<i>Hand v McCrostie Builders</i> (CA 109/06, 25 Jul 2006, P Montgomery) , unrep	52
<i>Harlick v Tournament Parking Ltd</i> (AA 246/06, 19 Jul 2006, YS Oldfield) , Unrep	37,40
<i>Hawea v The Attorney General in respect of The Chief Executive Officer of the Child youth and family Services of Wellington</i> (AA 270/06, 22 Aug 2006, D King) , Unrep	57
<i>Hodges v Total Distribution Ltd</i> (AA 250/06, 24 Jul 2006, D King) , Unrep	52
<i>Holley v Leading Edge Communications Ltd</i> (AA 385/06, 22 Dec 2006, K Raureti) , Unrep	48
<i>Houston v Oldco PTI Ltd</i> (AA 414/05, 13 Oct 2005, M Urlich) , unrep	62

<i>Hubber v Air New Zealand Ltd</i> (CA 108/06, 25 Jul 2006, P Montgomery) , unrep	59
<i>Katipo v New Era Plastics Ltd</i> (AA 163A/06, 17 Jul 2006, A Dumbleton) , Unrep	44
<i>Keys v Flight Centre (NZ) Ltd & Anor</i> (CC 14/06, 13 Dec 2006, Full Court)	44
<i>Kumar v New Zealand Automobile Association Inc.</i> (AA 13/07, 22 Jan 2007, R Arthur) , Unrep	57
<i>Michael Percy Investments Ltd v Miller</i> (CC 1A/07, 24 Jan 2007, Couch J) , Unrep	33
<i>Miller v Michael Percy Investments Ltd</i> (CC 1/07, 18 Jan 2007, Couch J) , Unrep	62
<i>Nathan v Ports of Auckland Ltd</i> (AA 251/06, 26 Jul 2006, M Urlich) , unrep	55
<i>New Zealand Air Line Pilots Association Inc v Mount Cook Airline Ltd</i> (CA 121/06, 11 Aug 2006, P Montgomery) , unrep	41,47,50
<i>New Zealand Fire Service Commission v New Zealand Professional Firefighters Union</i> (CA 270/05, 21 Dec 2006, William Young P, Chambers and O'Regan JJ) , To be reported	28
<i>Nicholas v Byrne Investments Ltd t/a Cottage Brick and Blocklayers</i> (AA 10/07, 18 Jan 2007, K Raureti) , Unrep	64
<i>Nicholls v Fox Manufacturing Ltd</i> (CA 104/06, 18 Jul 2006, J Crichton) , Unrep	53,59
<i>O'Kelly-Barnes v Tillermans (2003) Ltd</i> (CA 2/07, 11 Jan 2007, H Doyle) , Unrep	53
<i>OCS Ltd v Service & Food Workers Union Nga Ringa Tota Inc and Anor</i> (WC 15A/06, 15 Dec 2006, Shaw J) , Unrep	45

<i>Olsson v Keith Matheson Ltd</i> (AA 107A/06, 19 Jul 2006, M Urlich) , Unrep	45
<i>Rarere v Electrotech Controls Ltd</i> (WA 108/06, 21 Jul 2006, GJ Wood) , unrep	57
<i>Rowe v Groganic Fertilisers Ltd</i> (AA 14/07, 22 Jan 2007, R Arthur) , Unrep	64
<i>Sandifer v Plumbers Gasfitters & Drainlayers Board NZ</i> (AC 74/06, 18 Dec 2006, Travis J) , Unrep	45
<i>Service and Food Workers Union Nga Ringa Tota Inc v Auckland District Health Board and 19 Ors</i> (WA 16/07, 1 Feb 2007, D Asher) , Unrep	63
<i>Smith v Sovereign Ltd</i> (AC 71/06, 12 Dec 2006, Travis J)	46
<i>Strait Freight Ltd v Shackleton and Ors</i> (CA 107/06, 24 Jul 2006, P Montgomery) , Unrep	41
<i>Sullivan v Maxwell Marine Ltd</i> (AA 249/06, 24 Jul 2006, R Arthur) , Unrep	56,60
<i>Tairi v Bay of Plenty District Health Board</i> (AA 252/06, 27 Jul 2006, J Scott) , unrep	63
<i>Waitemata District Health Board v New Zealand Public Service Association</i> (CA 118/05, 4 Oct 2005, Hammond, Chambers, Robertson JJ) , Unrep	10
<i>Waitemata District Health Board v New Zealand Public Service Association</i> (CA 118/05, 1 Dec 2006, Glazebrook, Chambers, Ellen France JJ) , To be reported	12
<i>Weston v Fraser</i> (WC 24/06, 13 Dec 2006, Shaw J) , Unrep	23
<i>Wilford v Aden Electrical Ltd</i> (AA 12/07, 19 Jan 2007, J Wilson) , Unrep	38,51,54,60

Significant Judgments/Decisions added to the Employment Law Database 1 February 2007 - 28 February 2007

Waitemata District Health Board v New Zealand Public Service Association

CA 118/05

Heard: 20 Sep 2005, Wellington

Judgment Date: 4 Oct 2005

Court/Authority/Tribunal: Hammond, Chambers, Robertson JJ

Appearances: H Fulton ; BJ Banks, TJ Kennedy

COURT OF APPEAL – Application for leave to appeal decision of the Employment Court Whether applicant breached terms of collective agreement by failing to provide staff with a uniform – Alleged failure to provide uniforms removed staff’s ability to “elect” to wear civilian clothing – Alleged that removal of election to wear civilian clothes amounted to a direction to civilian clothing – If that was the case, staff would be entitled to civilian clothing allowance – Employment Court held that unavailability and inaccessibility of uniforms were tantamount to a direction to wear civilian clothes – Alleged Employment Court made two errors of law – Firstly whether there could be any liability at all under the collective agreement without specific direction to wear civilian clothes by the applicant – Secondly whether the clothing allowance was payable on the facts as found – HELD – Both questions were questions of law – “Uniform issue” had been ongoing one in more than one institution – Issue was one of real and ongoing significance – Application granted

This was a successful application for leave to appeal a decision of the Employment Court (see: AC 26/05) which found that the applicant was in breach of the collective agreement, and made a declaration to that effect.

The original proceedings were brought by the respondent union on behalf of its members, who were employed by the applicant, when they experienced difficulty acquiring uniforms or parts of it. As a result, most staff wore civilian clothing, or a mixture of clothing. Only a few wore a full uniform. A question was raised whether the applicant had breached the terms of employment of staff by failing to provide them with a uniform. The respondent alleged that this removed their ability to “elect” to wear civilian clothing. The respondent said that the removal of this election in effect amounted to a direction that they should wear civilian clothing. If that was the case, staff would have been entitled to a civilian clothing allowance. The respondent sought a declaration from the Employment Court to that effect.

The Employment Court found that while there was no explicit direction for staff to wear civilian clothing, there was “virtually no choice” for them. The Court concluded that the “unavailability and inaccessibility of uniforms [was] tantamount to a direction”. The Court held that the applicant was in breach of a specific clause of the collective agreement until complete uniforms were made available to all staff, and made a declaration to that effect.

In its application for leave to appeal, the applicant submitted two questions of law: (i) Whether

the Employment Court was correct to find that liability for payment of a clothing allowance under the collective agreement arose in default of a specific direction given for the purposes of the contract, and (ii) Whether the Employment Court was wrong in law to hold there was liability in the absence of therapeutic requirements or patient needs.

The respondent submitted that the approach taken by the Employment Court in interpreting the collective agreement followed proper and established practice by focusing on the wording of the clause, in its context, and in the factual setting where the issue arose. It was not one of the rare cases where the Employment Court erred in principle in its approach to the construction of the collective. In any event the proposed appeal involved no issue of general public importance and there was no other reason why the appeal ought to proceed. The proposed appeal fell wholly outside the scope of possible appeals, and accordingly the present application for leave should be refused. In the alternative, the respondent alleged that the questions were not “significant” questions of law, but that the dispute was essentially inter partes.

Held

(1) Leave to appeal was granted because (i) the central issue raised by the first question was akin to a jurisdictional question: could there be any liability at all under the agreement, without a specific direction by the applicant? That was a question of law. And (ii) the second question posed was also one of law. It went to “whether the allowance is payable [at all] on the facts as found”. (paras 24-26)

(2) The Court did not accept the respondent’s allegation that the applicant’s questions were not “significant” questions of law. The total sum at issue was understood to be around \$350,000. Another District Health Board had been found (by a Judge) to have “deliberately” avoided its obligations, and had been impugned thereby. The so-called “uniform” issue had been an ongoing one, in more than one institution. Whether a quite specific “directive” was required to trigger liability under a clause of the present kind was one of real and ongoing significance. (para 28)

Comment

(1) The Court observed that what must be posed on a leave application of the present kind, were specific questions of law - which was not necessarily the same thing as giving (often generalised) “grounds of appeal”. (para 16)

(2) As noted by the Supreme Court of New Zealand in the recent decision in *Bryson v Three Foot Six Ltd* (cited below), s 214 of the Employment Relations Act 2000 limited appeals to the Court of Appeal to “significant questions of law”. The Supreme Court noted that “the construction of a document was a question of law”. (paras 18-20)

(3) The grant of leave was not determinative of the important issue of whether the first question was a matter of construction of an agreement of a kind which was precluded by the Employment Relations Act 2000 for review in the Court of Appeal. The hearing of the substantive appeal would have to consider whether, although there was a significant question of law raised, it was nevertheless of a kind which was not appealable. The Court heard only limited argument on that point, and it was not appropriate that that issue was determined at the present time. (para 29)

Result: Application for leave to appeal allowed ; Costs reserved

Statutes considered:

ERA s214

Cases referred to in judgment:

Bryson v Three Foot Six Limited [2005] 1 ERNZ 372 ; [2005] NZSC 34

Pages: 3

[972815]

Waitemata District Health Board v New Zealand Public Service Association

CA 118/05

Heard: 9 Nov 2006, Wellington

Judgment Date: 1 Dec 2006

Court/Authority/Tribunal: Glazebrook, Chambers, Ellen France JJ

Appearances: H Fulton, A Russell ; BJ Banks, AR Dallas

COURT OF APPEAL – Appeal against Employment Court decision – Collective employment agreement provided clothing allowance where employee directed to wear civilian clothing because of therapeutic requirements or in the interests of patient care/rehabilitation – Allowance not payable if employee elected to wear civilian clothing – Whether Employment Court erred in principle in finding clothing allowance payable in absence of express direction – Whether Employment Court wrong in law to hold allowance payable in absence of evidence of therapeutic requirements or interests of patient care/rehabilitation as reason for implied direction – HELD – Section 214 Employment Relations Act 2000 precluded appeals on construction of employment agreements – Employment Court interpreted collective agreement using orthodox contractual interpretation techniques to the facts as it found them – In the absence of evidence from the appellant that the direction was given for an improper purpose, as a matter of contractual interpretation, the direction must be assumed to have been given for the reasons set out in the contract – Consideration of justice of situation was undertaken as check on contractual interpretation and given equity and good conscience jurisdiction of Employment Court could no be criticised – Appeal dismissed for want of jurisdiction – Registered nurses / Enrolled nurses / Psychiatric assistants

This was an unsuccessful appeal of an Employment Court decision which held that the appellant was liable to pay a clothing allowance to certain employees under the relevant collective employment agreement.

Members of the respondent union were employed by the appellant as registered nurses, enrolled nurses, or psychiatric assistants. The relevant collective employment agreement (“cea”) provided that a daily allowance was payable “for each working day on which, because of therapeutic requirements or in the interests of patient care/rehabilitation, an employee [was] directed by the employer to wear civilian clothing instead of the normal uniform.” The allowance was not payable if an employee “[elected] to wear civilian clothing” (“the proviso”).

Uniforms became very difficult for staff to access. A dispute developed as to whether the appellant had breached the parties’ collective employment agreement (“cea”) by not paying a clothing allowance to employees.

The Employment Court held (see: [2005] 1 ERNZ 253) that an “election” to wear civilian clothing could only be made where there were real alternatives available. Because uniforms were

not available, the employees who wore civilian clothing had no real alternative. They therefore had not elected to wear civilian clothing under the cea.

As to whether the appellant had “directed” the employees to wear civilian clothing, the Employment Court held that, although there had been no express direction to staff to wear civilian clothing, the combination of the appellant’s clothing policy (which defined acceptable clothing without any reference to uniforms) and the unavailability and inaccessibility of uniforms were tantamount to a “direction”. Therefore, the appellant was liable to pay the clothing allowance.

The Court of appeal granted leave to appeal on the basis that the Court had not determined whether one aspect of the appeal related to a decision on the construction of a cea, which s214 of the Employment Relations Act 2000 (“ERA”) precluded from review in the Court of Appeal.

The issues for determination in the present appeal were: (i) Did the Employment Court err in principle in finding liability for payment of the clothing allowance in default of an express direction to wear civilian clothing, and (ii) Was the Employment Court wrong in law to hold the appellant liable, in the absence of evidence of therapeutic requirements or patient care/rehabilitation?

As to the first issue, the appellant submitted that the Employment Court erred by (i) allowing the proviso to dominate the interpretation of the clothing allowance clause; (ii) holding that the only way to avoid paying the allowance was to provide uniforms, in the absence of an express term to that effect and without implying such a term into the cea; (iii) imposing the Judge’s own view of liability (based on it being unjust to allow employees no effective choice) rather than construing the cea; (iv) finding an implied direction to wear civilian clothing but, at the same time, finding there was no intention to give a direction; (v) incorrectly applying the cea; and (vi) making a finding of deliberate avoidance of payment of the allowance, in the absence of evidence and in the absence of any such allegation having been made by the respondent.

As to the second issue, the appellant submitted that there was no evidence before the Court that there were any therapeutic or care or rehabilitation needs that required civilian clothing to be worn.

The respondents submitted that no evidence was needed on the part of the respondent. If the appellant wished to assert that the direction had been given for another purpose then it should have provided evidence to that effect.

Held: (Glazebrook and Ellen France JJ) (1) Whether the Employment Court’s approach to contractual interpretation led to a correct interpretation depended on the wording of the particular contract. Even if it led to an incorrect interpretation, that would be an error of construction, precluded from review by s214 ERA. In any event, the Employment Court did not utilise the proviso to interpret the clothing allowance clause. (paras 14-15)

(2) The Employment Court’s view was that the cea was predicated on the assumption that there was an obligation to supply uniforms. There was no principle of contractual interpretation that precluded a finding that a matter was implicit in the wording of a contract. Any error in that regard therefore was an error of construction and not one of principle. In any event, the Employment Court was clearly right to hold that the clothing allowance clause was predicated on there being a designated uniform. It was difficult otherwise to see how there could be a direction to wear civilian clothing “instead of the normal uniform”. In addition, the requirement on the appellant to supply uniforms was explicit at the beginning of the clothing allowance clause. (para 16)

(3) The structure of the cea was that the appellant could for any reason require an employee to wear a uniform. Under the clothing allowance clause an employee could be directed by the employer to wear civilian clothing instead of the normal uniform, because of therapeutic requirements or in the interests of patient care or rehabilitation.

In the absence of either being directed to wear a uniform or civilian clothing, the employee had a choice as to whether or not to wear a uniform. If there was a direction to wear civilian clothing, then the civilian clothing allowance was payable. Uniforms must be supplied by the appellant free of charge to those directed to wear them and to those who chose to wear them. Although the requirement to provide uniforms free of charge was in the part of the clause that related to the appellant's ability to direct employees to wear a uniform, it was not tied to that requirement. Although not determinative of the interpretation of the cea, that interpretation appeared to be one that both parties subscribed to, at least at some point. (paras 17- 18)

(4) It was true that the Employment Court said that it would be unjust to allow the appellant on the one hand to give its staff virtually no choice but to wear civilian clothing but then avoid any financial responsibility under the collective agreement by deliberately not directing them to wear civilian clothing. However, that comment came after it had already held that the appellant's clothing policy and the provision of no choice was tantamount to a direction and therefore came within the wording of the clothing allowance clause. The justice of the situation was undertaken as a check on its interpretation. Particularly in the context of employment agreements (with the good faith requirement between employer and employee) and the equity and good conscience jurisdiction of the Employment Court, there could be no criticism of that approach. (para 19)

(5) On the Employment Court's findings, it was a conscious decision on the part of the appellant not to provide a uniform and therefore a conscious decision to provide no choice to the employees. That meant that there was a conscious decision to give a direction in the sense the Employment Court interpreted the term. Any error there must have been an error of construction and not an error of principle. (para 20)

(6) Even if it was the case that the Employment Court had incorrectly applied the cea, the Court of appeal had no jurisdiction on factual matters. (para 21)

(7) Given the history of the matter, the Employment Court's finding that the appellant deliberately avoided payment of the allowance might be seen as taking the matter too far. The question of allowance and uniforms appeared to have been one that was addressed by the appellant and staff sporadically but was not at the forefront of concerns on either side. What the Employment Court meant was that it was a conscious decision of the appellant not to give an express direction and that there could be no moral opprobrium attached to that finding. Even if that was not the case, any error in that regard was not essential to the Employment Court's decision and therefore could not provide any basis for an appeal. (para 22)

(8) None of the appellant's criticisms identified any error of principle. The Court could discern nothing in the Employment Court's decision to suggest that it used other than orthodox contractual interpretation techniques. The Employment Court, having come to its interpretation of the cea on orthodox principles of contractual interpretation then, in orthodox fashion, applied that interpretation to the facts as it found them. The Court had no jurisdiction in relation the Employment Court's factual findings. (para 23)

(9) As to the second issue, the Court accepted the respondent's submissions. While a direction to wear a suitable uniform could be given for any purpose, the only reason a direction to wear civilian clothing could be given under the clothing allowance clause was because of therapeutic requirements or in the interest of patient care/rehabilitation. In the absence

of any evidence on the part of the appellant that the direction was given for an improper purpose, as a matter of contractual interpretation, the direction must be assumed to have been given for the reasons set out in the contract. (para 25)

(10) The way the Employment Court dealt with the matter was: it asked the question whether the staff were directed to wear civilian clothing because of patient needs, referring therapeutic requirements or to the interests of care and rehabilitation in terms of the clothing allowance clause. It answered that question in the affirmative. It must therefore have been assuming that the direction had been properly given under the cea for the purposes set out in that contract. The employment Court was entitled to do that absent evidence to the contrary. (para 26)

(11) The appeal was dismissed for want of jurisdiction. (para 27) (Chambers J)

(12) Section 214(1) ERA said that parties could not appeal from a decision of the Employment Court “on the construction of an individual employment agreement or a [cea]” (“the construction privative provision”). The meaning to be attributed to that provision was rather unclear; no employment lawyer could be confident whether an appeal was barred by the construction privative provision. (para 30)

(13) It was necessary to analyse the Employment Court’s construction of the cea, even though an appeal on the construction of a cea was not permitted. It was, however, only by undertaking the construction exercise oneself that one could really analyse accurately whether the appellant’s attack was in substance (albeit not in form) an attack on construction. (para 34)

(14) The Employment Court’s construction of the clothing allowance clause was wrong. The appellant did not “direct” the wearing of civilian clothing in terms of that clause. Rather, it failed to provide a uniform which was a breach of a different clause that provided that “protective, gymnasium and uniform clothing is to be supplied free of charge by the employer”. It followed that the Employment Court was wrong to find that an allowance was payable under the clothing allowance clause. (paras 35- 39)

(15) It was the natural tendency of any appellate court, where it discerned error, to correct that error. But, after careful consideration and despite the appellant’s attempt to dress up the Employment Court’s error as errors of law not amounting to an error in the construction of the document, the Employment Court’s error was a construction error, no more, no less. It was an error which the Court of Appeal had no jurisdiction to correct and the appeal must be dismissed for want of jurisdiction. (paras 39-40)

(16) It was unfortunate that an appellate judge set out why he considered the employment Court to be wrong, only then to say “but there’s nothing we can do about it”. But it was only upon construing the cea that it became apparent that the error in it was a pure construction error, not one of the errors advanced by the appellant. (para 41)

(17) All the appellant’s alleged errors of law were a consequence of the Employment Court’s misconstruction of the cea. Only by setting out his honour’s construction of the cea was it possible to provide the answer to the appellant’s complaints. In short, his honour had to venture into forbidden territory in order to demonstrate why in essence the appellant’s complaint was, as it turned out, no more than a complaint about the Employment Court’s construction of the cea. (para 43)

Comment: (Chambers J)

(1) At some point in the near future, either the Court of Appeal or the Supreme Court needed to

review the jurisprudence surrounding s214 ERA. In some cases, the Court of Appeal might have exceeded its jurisdiction. It could not resist the temptation to correct legal error when it perceived it. It could not be ruled out that the “equity and good conscience” jurisdiction might provide an answer in some way to the conclusion to which orthodox contractual construction lead. It might be that the review was better undertaken in the Supreme Court, where that court would not be constrained by earlier Court of Appeal authority. (paras 44-48)

Result: Appeal dismissed ; Costs in favour of respondent (\$6,000 plus disbursements for appeal) ; (\$1,500 plus disbursements for leave application)

Statutes considered:

ECA s104(3)
ECA s135
ECA s137
ERA s3
ERA s4
ERA s143
ERA s189(1)
ERA s214
ERA s214(1)
ERA s216
ERA s216(c)

Cases referred to in judgment:

New Zealand Public Service Association v Waitemata District Health Board [2005] 1 ERNZ 253
Sears v Attorney-General [1995] 2 ERNZ 121 (CA)
Secretary for Education v Yates [2004] 2 ERNZ 313 (CA)
Tisco Ltd v Communication & Energy Workers Union [1993] 2 ERNZ 779 (CA)
TLNZ Auckland Ltd v Neenee unreported, William Young P, Robertson and Arnold JJ, 22 August 2006, CA 67/06
Wellington College of Education v Scott [1999] 1 ERNZ 98 (CA)

Pages: 6
[973239]

Bayliss Sharr & Hansen v McDonald

CC 12/06

Heard: 19 May 2006, Christchurch

Judgment Date: 7 Dec 2006

Court/Authority/Tribunal: Couch J

Appearances: K Owen ; TJ Twomey

NON DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Constructive dismissal – Plaintiff employer made “off the record” exit package offer during disciplinary meeting – Defendant believed binding agreement reached – Authority relied on “off the record” evidence to consider whether agreement reached – Also relied on “off the record” evidence to determine whether defendant constructively dismissed – Plaintiff alleged Authority erred by having regard to “off the record” evidence – Plaintiff alleged Authority erred

by concluding that defendant was constructively dismissed – Plaintiff alleged Authority erred by failing to consider whether there had been contributory conduct by defendant – HELD – “Without prejudice” rule did not apply in present case – Authority did not err having regard to “off the record” evidence – Authority did not err in reaching conclusion that defendant was constructively dismissed – Authority erred in failing to consider contributory conduct by defendant – Challenge granted in part – COMMENT – Although plaintiff succeeded on latter issue, remedies awarded by Authority remained unaffected due to non de novo nature of challenge – Office junior

This was a partially successful non de novo challenge to a determination of the employment Relations Authority which held that the defendant was constructively dismissed but failed to address the issue of contribution.

The defendant was employed by the plaintiff as an office junior as part of the defendant’s Polytechnic study. There were difficulties in the employment relationship and a disciplinary meeting (“the meeting”) took place. Shortly after the meeting began, the plaintiff’s representative suggested to the defendant’s representative that they have a private discussion “off the record”. During that discussion the plaintiff’s representative put forward a proposal that the plaintiff would pay the defendant a sum of money in consideration of her resigning her employment. The defendant was receptive to such a proposal and the two representatives negotiated what the terms of such an agreement might be.

Over the two days following the meeting, it became apparent to the parties’ representatives that they and their clients had differing views about the outcome of the meeting. The defendant believed that final agreement had been reached and regarded her employment as at an end. The plaintiff, however, believed that no agreement had been reached and that the defendant was going away to think about an offer made by it.

The plaintiff was willing to sign an agreement on certain terms but those were not the terms that the defendant understood had been agreed in the discussion between the two representatives. Both parties held their ground. The plaintiff then asked the defendant to return to work. She refused.

The defendant brought proceedings in the Employment Relations Authority alleging a binding agreement had been reached or that she had been unjustifiably constructively dismissed (see: CA 98/05). Evidence was tendered which related to the “off the record” discussion and the subsequent correspondence between them (“the evidence”). The Authority declined to make a finding concerning the alleged agreement. However, the Authority referred to and relied on the evidence to reach its conclusion that the defendant was constructively dismissed. It awarded the defendant remedies but did not mention whether contributory conduct by the defendant had been considered.

The plaintiff submitted that the Authority had made three errors of law in its determination by: (i) having regard to evidence of “without prejudice” discussions between the representatives of the parties; (ii) concluding on the facts as found that the defendant had been constructively dismissed; and (iii) failing to consider whether there had been contributory conduct by the defendant. As to the second alleged error of law, the plaintiff alleged that the Authority could not have found that there had been a constructive dismissal if it had not regarded what was said in the “without prejudice” discussion. Also, as a matter of law, it was not open to the Authority to find that the defendant had been constructively dismissed after she had refused the plaintiff’s request that she return to work.

The defendant submitted that before a finding of contribution could be made, there must be a causal connection between an employee's conduct and an employer's conduct giving rise to the personal grievance. On the findings of facts recorded by the Authority in its determination, it was not possible to find such a connection and that sufficiently explained the Authority's failure to advert to the issue of contribution in its determination.

Held (1) The "without prejudice" rule could not apply in the absence of an existing dispute between parties. For a dispute to exist there must be a significant difference between the expressed views of the parties about a matter concerning them both. (paras 34, 46)

(2) There was nothing in the present case to suggest that there was an actual dispute between the parties at the time the plaintiff's representative invited the defendant's representative to speak privately with him. Accordingly, the "without prejudice" rule could not apply to what they said to each other that day or to their subsequent correspondence as being for the purpose of compromising a dispute. (paras 47-48)

(3) Even if there was a dispute in existence prior to plaintiff's representative approaching the defendant's representative at the meeting the "without prejudice" rule could not apply. There remained a residual jurisdiction to consider evidence of "without prejudice" communications where the effect of excluding it would be more prejudicial than admitting it. Exercising that jurisdiction, the Court would have adopted the proposition that if the making of a statement itself constituted a cause of action, or was an ingredient of one, the statement was not privileged because it could not be regarded as incidental to "without prejudice" discussions aimed at settling a pre-existing litigation or dispute. (para 49)

(4) The Authority found that the initiation by the plaintiff of an "exit strategy" in the course of a disciplinary inquiry was destructive of its employment relationship with the defendant and was implicitly a significant breach of its duty to her as an employee. It was therefore a key ingredient of her claim to have been unjustifiably constructively dismissed and ought not to be protected by "without prejudice" privilege. Therefore, the Authority did not err in law in having regard to evidence about the communication between the two representatives. (paras 50-51)

(5) In reaching the conclusion that the defendant was constructively dismissed, the Authority seemed to apply the principles enunciated by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* (cited below). In doing so, the Authority properly instructed itself and did not err in law. (paras 21-23, 52, 65)

(6) In light of the conclusion that the evidence was not subject to privilege, the Authority was entitled to hear the evidence and to take that evidence into account. (paras 53, 65)

(7) As to the defendant's refusal of the plaintiff's request to return to work, the fact that an employer might not wish an employee to leave did not preclude the employee's leaving being regarded as a constructive dismissal. (para 54)

(8) The facts as found by the Authority did not preclude a conclusion that the defendant's conduct which gave rise to the plaintiff's concerns about her performance prompted its decision to initiate an exit strategy and thereby contributed to the situation that gave rise to her personal grievance. (para 62)

(9) Having found that the defendant had a valid personal grievance, the Authority was bound by s124 Employment Relations Act 2000 ("ERA") to consider whether, as a matter of fact, there was contribution by the defendant. Equally, s174 ERA imposed a duty on the Authority to record the findings of fact it made on that issue. Even if the Authority found as a fact that there was no

contributory conduct, it was obliged to record that finding of fact. The Authority's silence on that issue in the present case meant that it had either failed to consider contribution and make the necessary findings of fact or that it had failed in its duty under s174 ERA to record the findings of fact it did make. In either event, the Authority had erred in law in the sense that it had not discharged its statutory duty. (paras 63-64, 65)

Comment: (1) Given the non de novo nature of the present challenge, the Court heard no evidence and the Authority made no findings of fact which would enable it to reach a conclusion about the extent, if any, to which the defendant might have contributed to the situation giving rise to her unjustifiable constructive dismissal. The Court therefore reached no conclusion about whether there was any contribution. (para 66)

(2) The result of the case was very largely dependent on the findings of fact made by the Authority. In particular, the conclusion that there was no dispute between the parties at the time negotiations commenced and the consequent finding that the "without prejudice" rule did not apply to those negotiations was the result of the limited nature of the findings of fact made by the Authority. (para 67)

(3) Although the plaintiff succeeded on the third alleged error of law in relation to contribution, the remedies awarded by the Authority remained unaffected by the Court's decision. Therefore the plaintiff's victory was small at best and might in fact be pyrrhic. (para 68)

Result: Challenge granted in part ; Remedies awarded by Employment Relations Authority unaffected ; Costs reserved

Statutes considered:

ECA s40
ECA s41
ERA s123(1)(c)(i)
ERA s124
ERA s174
ERA s174(a)(i)

Cases referred to in judgment:

Auckland Electric Power Board v Auckland Provincial District Local Authorities
Officers IUOW Inc [1994] 1 ERNZ 168
Beazley v Department of Justice [1995] 2 ERNZ 465
Butler v Countrywide Finance Ltd (1992) 5 PRNZ 447
City Realities (Rural) Ltd v Wilson Neill Ltd (1996) 9 PRNZ 164
Cutts v Head [1984] Ch 290
D F Hammond Land Holdings Ltd v Elders Pastoral Ltd (1989) 2 PRNZ 232
Jackson v Enterprise Motor Group (North Shore) Ltd [2004] 2 ERNZ 424
Paykel Ltd v Ahlfeld [1993] 1 ERNZ 334
Re Daintrey ex p Holt [1893] 2 QB 116
Review Publishing Company Ltd v Walker [1996] 2 ERNZ 407
The Prudential Assurance Company Ltd v The Prudential Insurance Company of America [2002] EWHC 2809 (Ch)
Waitakere City Council v Ioane [2004] 2 ERNZ 194 (CA)
Waitakere City Council v Ioane [2005] 1 ERNZ 1043 (CA)

Pages: 4
[973263]

Williams v Kimberleys Fashions Ltd

AC 72/06

Heard: 30 Oct 2006, Auckland

Judgment Date: 12 Dec 2006

Court/Authority/Tribunal: Perkins J

Appearances: E Telle ; P Shaw

AUTHORITY – Constructive dismissal – Unjustified disadvantage – Discrimination on grounds of sex and disability – Plaintiff had health difficulties and other personal difficulties which resulted in absenteeism and lateness – Relationships between staff (including plaintiff) and store manager deteriorated – Store owner instructed store manager to conduct disciplinary meeting with plaintiff – At meeting store manager read plaintiff note written by store owner regarding personal appearance issues including not wearing makeup – Plaintiff resigned – HELD – Several factors which led to plaintiff resigning her employment in combination met causation standard required for constructive dismissal – Was failure to deal with clear personality difficulties between plaintiff and store manager – Plaintiff's health difficulties and poor relationship with store manager well known to store owner – Plaintiff's objection to makeup well known – Despite this, store manager conducted disciplinary meeting and personal appearance issues raised when plaintiff was distressed – Store manager inexperienced in dealing with disciplinary matters – Wearing makeup not contractual condition – No evidence plaintiff breached accepted standards of personal appearance – Plaintiff awarded six months' lost salary and \$12,000 compensation for humiliation etc – Loss of parental leave entitlement too remote – Challenge granted – Assistant manager

This was a successful de novo challenge to a determination of the Employment relations Authority which had held that the plaintiff was not constructively dismissed or discriminated against.

The plaintiff was employed as an assistant manager at the defendant's retail store. The plaintiff had health and personal difficulties. At the same time there were relationship difficulties between the store manager and staff including the plaintiff, some of which the store owner was aware. These difficulties resulted in the plaintiff's absenteeism and lateness. The plaintiff was called to a disciplinary meeting, aimed at addressing her absenteeism and lateness. The meeting was originally to be conducted by the human relations manager or the national store manager. However, the store manager conducted the meeting with another. The store manager was inexperienced at conducting disciplinary meetings, and the meeting did not go well. At the end of the meeting the plaintiff was read a note from the store owner which directed the store manager to send the plaintiff home if she arrived at work "unclean, not wearing makeup or untidy look/dress". There had been moves by the defendant to require employees to wear makeup, however, the defendant was aware that the plaintiff did not wish to do so. Following the meeting the plaintiff resigned in June 2004.

The plaintiff raised a personal grievance on the grounds of constructive dismissal, discrimination on the grounds of disability and sex, and unjustified disadvantage.

The Employment Relations Authority determined that whilst the disciplinary procedure was unfair it was not repudiary conduct sufficient to justify a finding of constructive dismissal. The Authority determined there was neither victimisation nor discrimination.

The plaintiff brought the present challenge seeking reimbursement of lost salary for a period of 15 months and one week; compensation for humiliation etc of \$30,000; interest on lost income; and costs. Because the plaintiff became pregnant in December 2004 the plaintiff sought loss of parental leave payments in addition to other damages.

Held (1) In *Auckland Shop Employees* the Court of Appeal enunciated three situations where a constructive dismissal might occur. It was the last of these three situations, where a breach of duty by the employer leads a worker to resign, that applied in the present case. The employer may not breach the implied duty not to act in a manner calculated to destroy or seriously damage the employment relationship. In other words, to destroy the trust and confidence between employer and employee, which must exist in every employment relationship. (paras 36-38)

(2) There were a number of factors or actions by the defendant which led to the plaintiff resigning her employment. In combination their effect sufficiently met the standard of causation required. It would be disingenuous to allege that it was not reasonably foreseeable that, when faced with them, the plaintiff would resign. (para 40)

(3) First, there was the failure to adequately, promptly and proactively deal with the clear personality difficulties between the plaintiff and the store manager. It was an insufficient response to require them both to try and sort it out between themselves. (para 41)

(4) Secondly, there was the inadequate communication to other staff that some flexibility in hours was being afforded to the store manager. (para 42)

(5) Thirdly, regarding the disciplinary meeting, there were a number of factors surrounding the preparation for that meeting, which should have alerted the employer that difficulties would arise. The managers knew of the plaintiff's illness. Some tact and sensitivity was needed. The store owners knew she had personality difficulties with the store manager and yet deputised the latter to conduct the meeting. They knew the store manager was inexperienced in such matters. The human resources manager with experience should have been there. (para 43)

(6) Fourthly, the meeting was to deal with absenteeism and lateness and yet serious issues of facial makeup and personal cleanliness were raised without the plaintiff being previously officially notified of those concerns and at a time in the meeting when the plaintiff was showing considerable distress. Even if it was contemplated that these were to be raised the day before the meeting, the fact that the issues would be raised and the meeting held in such close succession should have alerted the employer to potential difficulties. (para 44)

(7) It was not a condition of the plaintiff's employment contract to wear facial makeup during working hours. Some attempt appears to have been made later to introduce the wearing of makeup as a condition of employment or house rules. There was no evidence that that was ever properly communicated to the plaintiff or that she agreed to it as a variation of her employment contract. There was no basis to require it and the fact that it was required and introduced as a disciplinary matter, must in itself simply amount to a breach of the contract. Knowing of the plaintiff's aversion to wearing makeup the direction must have been conduct repudiatory of the conditions of the employment contract. Certainly it was a breach of the employer's duty not to act in a manner calculated to destroy or seriously damage the employment relationship, for that was exactly what it did. (para 45)

(8) The plaintiff was constructively dismissed. If the plaintiff had simply resigned in the face of being disciplined by senior management for absenteeism or timekeeping, then that would have been an over-reaction. However, the entire matter was procedurally mishandled and in addition,

the defendant required a form of appearance for the plaintiff for which it had no contractual entitlement. It insulted her by insinuating she was unclean. (para 46)

(9) There must be an entitlement for an employer to insist on standards of dress, cleanliness and tidiness for employees in a retail clothing shop. The problem for the defendant was that there was no evidence that the plaintiff had breached those standards. (para 48)

(10) To deal with the makeup issue more specifically as discrimination or breach of wider rights issues was fraught with difficulties. There might well be workplaces where the nature of the work required the wearing of facial makeup. It might be argued that the requirement to wear makeup was no different from a requirement to wear the employer's clothes or uniform during working hours. Whether such a contractual condition would breach wider human rights and discrimination principles was a matter for argument on another occasion. There was no requirement in the present case. Accordingly, the matter could be dealt with by application of usual contractual principles. So far as the disability argument was concerned, connecting the makeup requirement to the health difficulties and the resulting deterioration in appearance of the plaintiff was a weak argument. (para 49)

(11) The Court declined to deal with the above ancillary causes as discrete claims giving rise to separate damages. The Court was satisfied that the damages claimed overlapped. The plaintiff was to be given remedies for the constructive dismissal, there was, therefore, no need to go on to consider the other causes separately. (para 50)

(12) The plaintiff would not have been capable of resuming work for the remainder of the year from the termination of employment. However, the claim for parental leave was far too remote. It was reasonable, however, that the plaintiff should receive reimbursement for the period she was unable to work primarily caused by the actions of the defendant. She was awarded six months reimbursement of salary. The Court allowed the period to mid-January as she would be highly unlikely to obtain alternative employment commencing right on the Christmas break. (para 52)

(13) The humiliation, loss of dignity and injury to feelings suffered by the plaintiff were substantial. A certain stigma attached as a result of the allegations made against her. There were factors outside the workplace influencing the plaintiff's state of health. In exercising the Court's discretion it considered those factors in the overall assessment of compensation. That was not to say there were any actions of the plaintiff contributing towards the situation giving rise to the personal grievance. The Court did not reduce the remedy on that ground and assessed compensation at \$12,000. (para 53)

Result: Challenge granted (constructive dismissal) ; Reimbursement of lost wages (6 months plus interest) ; Compensation for humiliation etc (\$12,000) ; Costs reserved

Statutes considered:

High Court Rules

Cases referred to in judgment:

Auckland Electric Power Board v Auckland Provincial District Local Authorities
Officers IUOW Inc [1994] 1 ERNZ 168

Auckland Shop Employees Union v Woolworths (NZ) Ltd [1985] 2 NZLR 372

Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich (t/a
Greenwich and Associates Employment Agency and Complete Fitness Centre) [1983]

ACJ 965 ; ERNZ Sel Cas 95

Pages: 4

[973283]

Weston v Fraser

WC 24/06

Heard: 11 Dec 2006, Wellington

Judgment Date: 13 Dec 2006

Court/Authority/Tribunal: Shaw J

Appearances: N Harding ; M Nutsford

PRACTICE AND PROCEDURE – De novo challenge to determination of Employment Relations Authority – Application for stay of proceedings – Unjustified dismissal – Authority awarded remedies against plaintiff personally following defendant’s successful personal grievance – Plaintiff did not pay as ordered but challenged Authority’s determination – Alleged plaintiff used delaying tactics – Defendant obtained charging order over plaintiff’s property – Plaintiff applied for stay of proceedings to prevent execution of charging order – Defendant submitted plaintiff was conman and sum should be held on trust pending the challenge – HELD – Given plaintiff’s past behaviour, defendant’s concerns justified – Only equitable solution was for order for plaintiff to pay the money into Court – Proceedings stayed until Court’s orders complied with – Non compliance might result in plaintiff’s proceedings being struck out – Case management directions given – Car salesman

This was a partially successful application for a stay of proceedings to prevent execution of a charging order pending a de novo challenge to a determination of the Employment Relations Authority, which held that the defendant was unjustifiably dismissed and awarded remedies against the plaintiff personally.

The defendant successfully brought a personal grievance for unjustified dismissal in the Employment Relations Authority. The Authority determined that the defendant was an employee of the plaintiff personally rather than of the company of which the plaintiff was sole director. The Authority made monetary awards against the plaintiff (who did not appear and was not represented at the investigation meeting) totalling \$27,550. The plaintiff challenged that determination but there had been several delays. The plaintiff applied for a stay of proceedings to prevent execution of a charging order that the defendant had obtained over a property owned jointly by the plaintiff and his partner.

The plaintiff alleged he was impecunious, had no assets that could be disposed of without paying out his partners, and would have to borrow money to pay the defendant. The plaintiff submitted that the defendant’s charging order ensured the integrity of the asset until the challenge was concluded.

The defendant alleged that the plaintiff had undisclosed business interests in Australia. He also referred to District Court notes when the plaintiff was sentenced for charges including trading and incurring credit whilst bankrupt. The District Court Judge referred to the plaintiff as a “devious, underhand conman”. The defendant did not have any confidence that the plaintiff would not manipulate his affairs to avoid payment of the judgment sum. He submitted that the sum should be held on trust pending the hearing of the challenge.

Held (1) As to the bona fides of the plaintiff as to prosecution of the appeal, the defendant was justified in his concerns that given the plaintiff’s past behaviour delaying tactics could still be

used by him. (paras 16-17)

(2) There were no novel or important questions involved and nor was there any public interest in the proceedings which would influence the application for a stay of proceedings. (para 18)

(3) On balance and because of the concerns raised by the evidence submitted by the defendant and the delay in pursuing the challenge, the only equitable solution was for an order for the plaintiff to pay the money into Court. (para 23)

(4) The Authority's costs order of \$2,500 was to be paid directly to the defendant by a certain date. The balance of the Authority's order was to be paid into Court by the same date where it was to be held on trust and in an interest bearing account until the determination of the challenge. That amount comprised \$15,300 lost wages, \$1,755 unpaid holiday pay, \$8,000 compensation, plus interest. (paras 24-25)

(5) The proceedings were stayed until the Court's orders were complied with. Non-compliance might result in the plaintiff's proceedings being struck out. If the orders were complied with, the Court's further case management directions applied. (paras 26-29)

Comment: (1) Because the plaintiff provided a reason for not defending the Authority investigation which was based on legal advice at the time, the Court decided not to call for a good faith report from the Authority which would have only served to delay the hearing of the challenge further. (para 22)

Result: Orders accordingly ; No order for costs

Statutes considered:

Companies Act 1993 s382(1)(a)

Insolvency Act 1967

Pages: 2

[973281]

Farmers Transport Ltd v Kitchen

WC 26/06

Heard: 27 Oct 2006, Wellington

Judgment Date: 14 Dec 2006

Court/Authority/Tribunal: Shaw J

Appearances: A Gallie ; G Manktelow

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Defendant with 42 years of service was told at meeting that he was redundant as of following week – Did not have prior warning or representation – Employment Relations Authority held redundancy was substantially and procedurally unjustified – Awarded compensation of loss of income and compensation for humiliation etc – HELD – Redundancy was substantially and procedurally unjustified – Insufficient evidence to support award for loss of chance or reimbursement of income – Authority's award for loss of income reduced to nil – Defendant entitled to compensation for humiliation etc in the full amount sought – Challenge granted in part – Assistant branch manager

This was a partially successful de novo challenge to a determination of the Employment Relations Authority which held that the defendant was unjustifiably dismissed and awarded the remedies of reimbursement of lost wages and compensation for humiliation etc.

The defendant was employed by the plaintiff as a branch manager. He had been with the plaintiff and its predecessors for 42 years.

The plaintiff undertook a business review of the defendant's branch which revealed a significant downturn in its efficiency and profitability. The plaintiff made a decision to appoint a new branch manager and presented the defendant with that decision as a *fait accompli*. The defendant agreed to take on a newly created role of assistant branch manager.

The performance of the branch did not improve. The defendant was called to attend a meeting ("the meeting") but was not told the purpose of the meeting. There was some dispute about what was said before and during the meeting. The meeting finished with the plaintiff allegedly advising the defendant that he was redundant as of the following week. He was paid three months' salary as redundancy compensation, and was not required to return to the workplace.

At about the same time as the meeting, the new branch manager indicated he wished to transfer. Shortly after the defendant's redundancy another employee was appointed to the position.

The Employment Relations Authority found that the defendant had been unjustifiably dismissed on both substantive and procedural grounds (see: WA 44/06). It awarded reimbursement of lost wages and compensation for humiliation etc.

Held: (1) There was no proper opportunity given to the defendant to take advice or obtain representation before he was told that he was being made redundant. (para 15)

(2) One of the important aspects of procedural fairness in redundancy was notice. Proper notice of a redundancy was particularly desirable in cases of an older and longstanding employee. It gave the opportunity to negotiate a more dignified exit such as a retirement and to hold appropriate farewell ceremonies. The denial of adequate notice was in breach of the employer's obligations of fair dealing and good faith. (paras 21-22)

(3) The present was a blatant attempt to disguise a dismissal for performance as redundancy. It was inarguable that the plaintiff had concerns about the defendant's performance when he was effectively demoted to assistant branch manager. There was obviously a genuine need to improve the performance of the branch and if the defendant's performance was not satisfactory that should have been dealt with in an open way. (para 23)

(4) The present was not a genuine redundancy because the position of assistant branch manager which the defendant held was not disestablished. The defendant's dismissal was substantively unjustified because his position was not surplus to his employer's needs. (paras 24-25)

(5) In considering the question of procedural fairness, the Court took into account the size and resources of the employer. The plaintiff was one of a large group of companies. It had a number of branches and many staff and its executive officer had the advice of Human Resource advisers. In those circumstances it was not unreasonable to expect that either the defendant's alleged performance problems would have been addressed appropriately or, if this were a genuine redundancy, that proper notice should have been given to him. (para 26)

(6) The failure to advise the defendant of the reason for what turned out to be the dismissal

meeting was very unfair and caused significant anxiety to him. The failure to give him an opportunity to have a representative at the meeting was also very unfair. (para 27)

(7) The procedure adopted was grossly unfair particularly in the light of the defendant's length of service and for that reason alone would be regarded as unjustified. (para 28)

(8) Quantification of compensation for loss of income was problematic. There was virtually no evidence led by the defendant about that other than his gross income for the 19-month period of self-employment after his employment ended. There was insufficient evidence to support any award for loss of chance or reimbursement of income and therefore there was no award for loss of income. (para 36)

(9) The defendant presented as a proud man whose pride had been significantly dented by the treatment he received. In all the circumstances, including his 42 years of service, the peremptory termination of his employment, the inability to be farewelled with dignity by his colleagues, and the evidence of his loss of self-esteem, the defendant was entitled to compensation in the full amount that he sought of \$12,000.

Result: Challenge granted in part ; Compensation for loss of income reduced to nil ;
Compensation for humiliation etc (\$12,000) ; Costs reserved

Cases referred to in judgment:

Aoraki Corporation Ltd v McGavin [1998] 1 ERNZ 601 (CA)
G N Hale & Sons Ltd v Wellington Caretakers IUOW [1990] 2 NZILR 1079 (CA)
Rolls v Wellington Gas Co Ltd [1998] 3 ERNZ 116
Unkovich v Air New Zealand Ltd [1993] 1 ERNZ 526

Pages: 3
[973278]

ANZ National Ltd v Cortright & Anor

WC 27/06

Heard: 25 Sep 2006, Wellington

Judgment Date: 18 Dec 2006

Court/Authority/Tribunal: Shaw J

Appearances: H Kynaston ; K Jeffries

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Interpretation of collective employment agreement (“cea”) – Whether first defendant covered by cea and therefore entitled to benefits conferred under it – Or whether he was precluded from coverage because of his salary and/or his position – HELD – First defendant was employed and treated as if he were a manager and therefore expressly excluded from coverage – First defendant’s salary well above maximum pay scale set by cea – Challenge granted – Senior analyst programmer

This was a successful de novo challenge to a determination of the Employment Relations Authority which had held that the first defendant was entitled to coverage under the collective employment agreement.

The first defendant was employed by the plaintiff as senior analyst programmer. The plaintiff had three standard forms of employment agreements: (i) the collective employment agreement (“cea”); (ii) individual employment agreements based on the cea; and (iii) employment terms and conditions for managers and executives (“the managers’ booklet”). The first defendant’s terms of employment were based on the managers’ booklet and he was paid accordingly. The coverage clause in the cea expressly excluded managers but included employees in “specialist roles”.

The first defendant joined the second defendant union and asked the plaintiff that he would go on the cea. The plaintiff refused because it took the view that the first defendant was in a management role and therefore excluded from coverage. It took that view because the first defendant’s salary exceeded the maximum amounts specified in the salary scale in the cea. The first defendant alleged he held a specialist role and was therefore covered.

The Employment Relations Authority held that the first defendant held a specialist role as described in the cea and was entitled to coverage under the cea. It held that the bank’s method of determining coverage by salary rather than under the coverage clause was incorrect.

The plaintiff submitted that the cea provided for a maximum salary rate. It would be inconsistent with the cea and therefore contrary to s61(1)(b) Employment Relations Act 2000 (“ERA”) to pay an employee covered by the cea in excess of the scale. The first defendant’s salary was nearly \$30,000 more than the highest salary payable to employees under the cea. The plaintiff submitted that if the first defendant was covered by the cea the consequence would be that he could reap the benefit of a substantial pay rise each time an increment was agreed in collective bargaining regardless of his performance. He would also be entitled to overtime when his salary was not structured that way. The cost of his overtime would be prohibitive.

The first defendant submitted that there were no salary caps in the cea and the only prohibition on being covered by it was when an employee was in a management role. There was nothing that prevented coverage where an employee was paid more by arrangement under individual terms. Section 61 ERA meant that the parties might agree to additional terms and conditions of employment.

Held (1) According to the natural ordinary meaning of the cea, only those specialist roles which had a salary scale attached to the cea were covered by the cea. As the first defendant’s employment was not covered by a salary scale in the cea, his position was not a specialist position and therefore was not covered by the cea. (paras 45-49, 65)

(2) The first defendant’s original terms of employment expressly incorporated the managers’ booklet. It was obviously in the contemplation of the parties at the time he entered the agreement that he was covered by the management terms and he had continued to be employed under those terms. The first defendant by his conduct accepted those terms and conditions of employment. Whether he was actually a manager or not, in the plaintiff’s employment environment such a distinction on the basis of the work performed in any position was illusory. The important factor was that when he was employed he accepted the terms and conditions which applied to managers whether he was actually employed as a manager or not. Although his role was not managerial, he was employed as a manager and treated as if he were a manager for the purposes of his terms and conditions of employment. That was mutually agreed to and could only be altered by mutual agreement. (paras 52-55, 65)

(3) Although the salary scales in the cea did not expressly refer to maximum or minimum salaries, they effectively did set them. Apart from discretionary bonuses and variable overtime payments, the cea did not provide for payments of salary other than in accordance with the scale and increments as negotiated collectively each year. (paras 62-63)

(4) The first defendant's salary was well in excess of the highest scale in the cea and therefore was inconsistent with the cea. In addition, the employer and the employee under s61 ERA had to mutually agree to additional terms and conditions beyond those of the cea and that had certainly not happened. (para 64)

(5) The salary scales in the cea defined the minimum and maximum base salaries of specified roles. The first defendant's salary was not aligned to any of those scales and was inconsistent with them. (para 65)

Result: Challenge granted ; No order for costs

Statutes considered:

ERA s61

ERA s61(1)(b)

Other workers/site names etc: Finsec Incorporated

Pages: 3

[973288]

New Zealand Fire Service Commission v New Zealand Professional Firefighters Union

CA 270/05

Heard: 24 Jul 2006, Wellington

Judgment Date: 21 Dec 2006

Court/Authority/Tribunal: William Young P, Chambers and O'Regan JJ

Appearances: WM Wilson QC, GD Davenport ; P Cranney, AJ Hughes, TD Cleary, RMH Searle

COURT OF APPEAL – Appeal against decision of Employment Court (see: [2005] 1 ERNZ 645) – 24-hour, 7-day a week service – Collective employment agreement (“cea”) provided rostered leave period comprising mixture of annual leave and public holidays in lieu – Parties agreed cea complied with Holidays Act 1981 – Whether cea complied with s57 Holidays Act 2003 – In particular, firstly, whether cea met requirement of subs (1)(a) that an alternative holiday be taken on a day that was agreed between the employer and employee – Secondly, whether cea met requirement of subs (1)(b) that the alternative holiday be a day that would otherwise be a working day for the employee – Employment Court found that cea did not comply with Holidays Act 2003 because it did not provide alternative holidays on days otherwise working days – HELD – Whether day was otherwise a working day was intensely practical question – Alternative holidays agreed in advance were no different from those negotiated on ad hoc basis – Rostered leave period were days that would otherwise have been working days – Cea complied with s57 Holidays Act 2003 – Did not matter that cea did not expressly state which day during rostered leave period was the specific alternative for specific public holiday worked – Appeal allowed – O'Regan J dissented – Firefighters

This was a successful appeal from a Employment Court decision (see: [2005] 1 ERNZ 645) which had held that the collective employment agreement between the parties did not comply with s57 Holidays Act 2003.

The appellant conducted a 24 hour/365 days a year firefighting service. To accommodate that, the collective employment agreement (“cea”) provided for its firefighter employees to work on a rostered basis. Firefighters were assigned to one of four “watches”. Each watch worked on a 160 day roster. Each 160 day period comprised 18 cycles of eight days, followed by 14 days’ leave, followed by two days which were “rostered days off which were not leave”. Each eight day work cycle involved working the day shift on days 1 and 2 and the night shift on days 3 and 4. The night shift on day 4 spilled over into the morning of day 5. Days 6 to 8 were then rostered days off. The 16 day slot at the end of each 160 day period comprised a mixture of annual leave and public holidays in lieu.

The roster required that, from time to time, firefighters were to work on public holidays. However, no firefighter ever had to work on every public holiday in any given year. When they worked on public holidays, they were paid double time, and received a day off in lieu. The leave provision at the end of a 160 day period was long enough to accommodate not only annual leave entitlements but also lieu days for public holidays. Most firefighters ended up getting extra leave because more lieu days were built in than would ever be needed.

The parties, by a provision in their cea, expressly agreed the cea complied with the Holidays Act 1981. A dispute arose whether the cea continued to comply with the new Holidays Act 2003, in particular whether it met (i) the requirement in s57(1)(a) that an alternative holiday be taken on a day that was agreed between the employer and the employee, and (ii) the requirement in s57(1)(b) that the alternative holiday “be a day that would otherwise be a working day for the employee”.

The Employment Court held that the cea did not comply with the Holidays Act 2003 because the lieu days (the alternative holidays) were not days “that would otherwise be [working days] for the employee”. The heart of the case was whether the days in the 16 day slot, or some of them, were days which would otherwise be working days for the employee.

The appellant submitted that each of the 14 days of leave at the end of each 160 day cycle should be classified as a day that would otherwise be a working day for a firefighter. It submitted that the history of the cea and its predecessors supported its position. After the enactment of the Holidays Amendment Act 1991, the parties agreed that a firefighter’s entitlement to annual holidays would be reduced so that days in lieu of public holidays would be provided as part of the 14 day period of leave in each 160 day rotation. Those days were therefore “otherwise working days” because they could not have been classified as days of annual holiday unless they would otherwise have been days of work for the firefighter. The appellant also submitted that, as it was a 365 day per year operation, every day was a working day. Also, it was suggested that the Employment Court’s ruling could have a number of outcomes that allowed the firefighters to have their cake and eating it too. Finally, it submitted that the cea constituted an agreement between the parties as to when the alternative holidays would be provided, and therefore met the requirement of s57(1)(a) Holidays Act 2003.

The respondent union submitted that none of the days in the 16 day slot were working days for the purposes of s57 Holidays Act 2003. It also submitted that even if the cea complied with s 57(1)(b), it did not comply with s 57(1)(a) in that the specific alternative day could not be identified from the available days.

Held (William Young P and Chambers J, majority)

(1) It was important to note that, while the attributes of an alternative holiday might be prescribed in a cea, they did not necessarily needed to be found there, provided that the employer did

provide an alternative holiday which had those attributes. The focus therefore was not exclusively on the relevant clause in the cea; one needed to look at how the relationship worked in practice. Section 57 Holidays Act 2003 provided for considerable flexibility. (para 9)

(2) Whether a day would otherwise be a working day was an intensely practical question. In the first instance, employers and employees had to try to agree on the answer: s12(2) Holidays Act 2003. The factors they were bound to take into account were very open-ended and flexible: s12(3). If they could not agree, then a Labour Inspector could determine the matter for them: s13. The Labour Inspector's decision was binding (s79), except to the extent that, in any proceedings before the Employment Relations Authority, the Authority "[made] its own determination on the matter". (para 12)

(3) The above route to determination did not appear to have been followed in the present case. Whether it was mandatory was not clear at first blush, but since the Court heard no submissions on that it assumed to have jurisdiction to determine that question. (paras 6, 12)

(4) It made no difference under the Holidays Act 2003 whether periods of annual leave were pre-determined in the employment contract or in an ad hoc way during the year. A like regime governed public holidays. (paras 15-16)

(5) The case of the firefighters fell within the same rubric as Monday to Friday workers, save that, instead of the time from the start of one working cycle to the next being seven days, the period was eight days. The timing of annual leave and alternative days had been agreed in advance, but that placed the firefighter in no different position from an employee who negotiated those holidays on an ad hoc basis. (paras 18-19)

(6) The parties' agreement that the cea complied with the Holidays Amendment Act 1991 necessarily carried an implication that the lieu days were days 1 to 5 and 9 to 13 of the 16 day slot. The other "working days" (i.e., those not so required) and the "non-working days" within the 16 day slot then counted towards the minimum three weeks' annual leave. (para 22)

(7) If the Employment Court was right that none of the days in the 16 day slot would have been a working day for the purposes of s57 Holidays Act 2003, none of those days would have been working days under the 1991 Act either. The cea would not have complied with the 1991 Act so far as lieu days for public holidays were concerned, a state of affairs contrary to the cea and to the Employment Court's finding in *Small v New Zealand Fire Service Commission* (cited below). (para 23)

(8) The Employment Court in the present case failed to appreciate that the concept of the lieu (alternative) day having to be a day that would otherwise have been a working day for the employee was not new. It was explicit now, but it was inherent under the 1991 Act as well. It went back to the fundamental nature of holidays. (para 23)

(9) The cea did comply with s57(1)(b) Holidays Act 2003, in that the alternative days were days that would otherwise have been working days for the firefighter concerned. (para 24)

(10) The cea did not expressly state which of the "working days" in the 16 day slot was the specific alternative day for any public holiday which has been worked in the previous 144 days. But that did not matter. All that mattered was that the employer had provided in the 16 day slot sufficient alternative days to compensate for any public holidays worked. Which of the "working days" was allocated as the alternative day was a completely immaterial matter from the appellant's point of view. What the parties had agreed is the time slot within which any alternative day must be taken. In the circumstances of the present case, that represented

compliance with s 57(1)(a) Holidays Act 2003. Effectively, what the appellant had agreed was that the firefighters might take their alternative holidays on any “working day” of the 16 day slot, as suited the firefighters. If it was important to a firefighter to pinpoint the exact day, then he or she could utilise rights conferred by s 57(2) or (3). (para 26)

(11) The appeal was allowed and a declaration made that the current employment arrangements between the parties complied with the Holidays Act 2003. (para 27) (O’Regan J, dissenting)

(12) The rigid nature of the roster was an unusual aspect of the present case and was an important factor in applying the legislative provisions to the facts. (para 29)

(13) What was required by s57(1)(b) Holidays Act 2003 was that the alternative day be a day that would otherwise be a working day for the employee. That could not sensibly be interpreted otherwise than as meaning that the employee would be at work but for the fact that he or she is taking the alternative holiday provided as required by s56. In the present case, the effect of the rostering system was that the employee would, during the 14 days, be on holiday. (para 43)

(14) Even if the appellant’s account of the cea’s history was accepted, that did not lead to a conclusion that the 14 days were days on which an employee would otherwise be working. To the contrary, it confirmed that the 14 days had always been provided under the cea as days on which a firefighter would not be working, because he or she would be on one form of leave or another. The roster now provided for those 14 days to be days on which a firefighter was not required to be at work, and that was the case even before the 1991 Amendment Act came into force. In any event, annual holiday entitlements accrued in weeks rather than days: s 16(1) of the 2003 Act. During any given week of annual holidays, there might well be days on which the employee would not have been working if he or she had not been on holiday. (para 45)

(15) It was true that every day was a working day for the appellant but the statutory requirement focused on what would be a working day for the employee, not for the employer. (para 46)

(16) The majority felt able to construe s57(1)(b) Holidays Act 2003 as if the words “but for the leave provision in the employment agreement between the employer and the employee” appeared after the words which actually did appear in that paragraph. There was no reason to add to the words used by Parliament: if that qualification had been intended, the drafter would no doubt have said so. And if one disregarded the leave provision, there was a void. So to make the majority’s approach work, an assumption must be made that firefighters would work five days on, three days off during the 14 days at the end of the eighteenth cycle, and the two days of “rostered days off which are not leave” that followed those 14 days. Even the appellant did not contend for that position. (para 47)

(17) The Employment Court was correct to find that an alternative day must be a day on which a firefighter would be working if he or she were not taking the alternative day’s holiday. It was clear enough to make it unnecessary to have to resort to the factors set out in s 12(3) Holidays Act 2003. But even if those factors were considered, they clearly supported that conclusion because the cea, the terms of the roster and the way in which firefighters actually worked under that roster all confirmed that the 14 days were not days on which a firefighter was working, and were not therefore available to be allocated as alternative holidays under s56. (para 48)

(18) Section 57(1)(a) Holidays Act 2003 focused on an individual day and on actual agreement. Section 57(2) provided for the default position where agreement could not be reached. The wording of these provisions focused on a particular day or a particular date, rather than on an identified day in a pool of days provided for the purpose. (para 51)

(19) If an alternative holiday was required to be a day on which the employee would otherwise be working, there was limited scope for any form of pooling arrangement. The wording of s57 required agreement on a particular working day as the alternative holiday. That was not to say that there could not be a cea about a regime for the taking of alternative days, to avoid the need for individual negotiations with each employee in respect of each public holiday worked. (para 52)

(20) The majority concluded that pooling was permitted, even though, on their analysis, the 16 days in the pool were comprised of some “otherwise working days” (days 1-5 and 9-13) and some days that would not otherwise be working days. While that seemed a sensible regime, it was not what Parliament required when it enacted the 2003 Act. It did not comply with either s57(1)(b) (because it contemplated that the alternative day would not be a day on which the employee would otherwise be working), or s57(1)(a) (because the actual day on which the alternative holiday was to be taken had not been agreed by the employer and the employee). (para 53)

(21) It was inappropriate to interpret the Holidays Act 2003 by taking as a starting point the position said to apply under the Holidays Act 1981. Rather, one should begin with the words of the statute and, in the event of any lack of clarity, resort to matters such as the legislative history and the pre-existing law. Not only was that orthodox statutory interpretation, but it also reflected the intention of Parliament that holiday entitlements should be decided by reference to the statute, obviating the need for extensive reference to pre-existing case law. That intention was expressed in clear terms in the Explanatory Note to the Bill which became the 2003 Act. (para 57)

(22) Although the appellant did not press its issue estoppel argument, in the light of the conclusion about the correct interpretation of the 2003 Act, that argument would fail. (para 58)

(23) The requirement of s57(2)(a) Holidays Act 2003 that an employee take into account an employer’s view as to when it was convenient to take an alternative holiday meant that none of the perverse outcomes suggested by the appellant could arise in practice. (para 59)

(24) The Court could not interpret a statute other than by reference to the normal principles of interpretation. If that lead to an inconvenient or unfair contractual outcome, the parties would need to work out an appropriate response to that when the contract was renegotiated. (para 60)

(25) The dissenting judge dismissed the appeal. (para 61)

Result: Appeal granted ; Declarations accordingly ; Costs in favour of the appellant (\$6,000 plus disbursements)

Statutes considered:

Holidays Act 1981 s7A
Holidays Act 1981 s7A(2)
Holidays Act 1981 s11
Holidays Act 2003 s3
Holidays Act 2003 s12
Holidays Act 2003 s12(2)
Holidays Act 2003 s12(3)
Holidays Act 2003 s13
Holidays Act 2003 s16
Holidays Act 2003 s16(1)
Holidays Act 2003 s17(1)
Holidays Act 2003 s18

Holidays Act 2003 s40(1)
Holidays Act 2003 s46(1)
Holidays Act 2003 s48(2)(b)
Holidays Act 2003 s50
Holidays Act 2003 s56
Holidays Act 2003 s56(1)
Holidays Act 2003 s56(2)
Holidays Act 2003 s57
Holidays Act 2003 s57(1)
Holidays Act 2003 s57(1)(a)
Holidays Act 2003 s57(1)(b)
Holidays Act 2003 s57(2)
Holidays Act 2003 s57(3)
Holidays Act 2003 s58
Holidays Act 2003 s59
Holidays Act 2003 s60
Holidays Act 2003 s61
Holidays Act 2003 s79
Holidays Act 2003 part 2 subpart 3
Holidays Amendment Act 1991

Words and phrases: Otherwise a working day

Cases referred to in judgment:

Air New Zealand Ltd v The New Zealand Airline Pilots' Association Industrial Union of Workers Inc unreported, William Young P, Chambers and O'Regan JJ, 13 November 2006, CA 113/05
Labour Inspector v Telecom Networks and Operations Ltd [1993] 1 ERNZ 492 (CA)
New Zealand Professional Firefighters Union Inc v Chief Executive of the New Zealand Fire Service [2005] 1 ERNZ 645
New Zealand Fire Service Commission v New Zealand Professional Firefighters Union Inc unreported, Hammond, William Young and Panckhurst JJ, 18 November 2005, CA 194/05
Small v New Zealand Fire Service Commission unreported, Travis J, 17 May 1996, AEC 21/96
Small v New Zealand Fire Service Commission [1997] ERNZ 248 (CA)

Pages: 7
[973300]

Michael Percy Investments Ltd v Miller

CC 1A/07

Heard: 11 May 2006, Christchurch

Judgment Date: 24 Jan 2007

Court/Authority/Tribunal: Couch J

Appearances: J S Fairclough ; P Butler & J Lucas

DE NOVO CHALLENGE TO A DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Whether employee or independent contractor – Defendant had worked for plaintiff as independent contractor for several periods over

number of years – Parties negotiated for defendant to become permanent employee and discussed terms – Defendant commenced work – Plaintiff alleged no offer and acceptance, therefore defendant remained independent contractor – Defendant alleged employment agreement had been concluded and confirmed by her – HELD – Both parties had imperfect recollections of events – Plaintiff’s allegations inconsistent with contemporary documents – Key documents referred to “offer and acceptance” and described defendant as employee – Invoices sent by defendant not indicative of nature of employment – Conduct of parties more consistent with employment relationship – Defendant was employee – Sales person

This was an unsuccessful de novo challenge to a preliminary determination of the Employment Relations Authority (see: CA 78/05) which held that the defendant was an employee.

Until November 2002, the defendant provided sales work to the plaintiff under a contract for services. In September 2003 the parties agreed to a further eight week contract during October and November. The defendant’s services were provided through her husband’s company. The plaintiff then told the defendant that it wished to employ her as a sales person from February 2004 on a contract of service. They discussed the terms of employment, and the defendant commenced work from February 2004.

The relationship was terminated early in 2005, and the defendant raised a personal grievance. The plaintiff alleged that the defendant was not an employee but an independent contractor.

In a preliminary determination (see: CA 78/05) the Employment Relations Authority held that the defendant was an employee from February 2004. That determination was challenged by the plaintiff in the present case. The Authority dismissed an application for the removal to the Employment Court of the substantive personal grievance (see: CA 78A/05). The substantive matter was to be heard in the Authority once the present decision became available.

The plaintiff alleged that the defendant was not an employee because she had not accepted the employment offered. It alleged that the defendant made her acceptance conditional upon discussing the matter first with her husband, but that she never confirmed her employment. Its position was that, although the parties discussed entering into an employment relationship, they never reached a binding agreement and that the defendant’s services continued to be provided as an independent contractor. The plaintiff submitted that the conduct of the parties after February 2004 was inconsistent with an employment relationship and that that should be taken into account in determining whether such a relationship had ever been concluded. The defendant alleged that an employment agreement was concluded in her discussion with the plaintiff, the terms of which were set out in a memorandum from the defendant to the plaintiff dated October 2003. The defendant claimed that from February 2004 she had become an employee.

The parties also disagreed as to certain terms of the employment. In addition to the agreed base package, the defendant alleged that 5 percent commission would be paid on all sales made by her regardless of the amount of those sales. The plaintiff alleged that that commission was to apply only once an initial threshold of sales of \$350,000 had been reached.

Held: (1) Both parties had imperfect recollections of events. With respect to most of the disputed events the evidence of the defendant was preferred. (paras 38- 40, 43-44, 48)

(2) The plaintiff’s allegation that the defendant accepted employment with the plaintiff only on a conditional basis was inconsistent with all of the contemporary documents. Given the detailed and relatively extensive correspondence that passed between the parties during the latter half of 2004, it was not credible that the plaintiff would not have referred to the defendant’s agreement

to become an employee being conditional if that was indeed the case. (para 41)

(3) In a key document the plaintiff described the defendant as an employee of the plaintiff without qualification. Similarly, in another letter the plaintiff twice referred to there having been “offer and acceptance” between the parties without any suggestion that that was conditional on the defendant’s part. The significance of those unequivocal statements by the plaintiff was increased by the fact that they were made in the course of correspondence in which the defendant had repeatedly stated her position that she was an employee of the plaintiff. If the plaintiff disputed that proposition at the time, it would have said so. (para 42)

(4) The defendant’s invoices for expenses incurred during her sales trips did not evidence that the defendant’s services were being provided to the plaintiff through a third party. The invoice was simply a means of dealing with a practical problem (the plaintiff’s failure to provide her with a promised credit card to meet her expenses), and not an indication of the relationship between the parties. In that regard, it was significant that the invoice related solely to the expenses incurred by the defendant, and not to payment for the defendant’s services. (para 46)

(5) Little weight could be put on an invoice for commissions said to be owed for sales made by the defendant between September 2003 and September 2004. That invoice was provided to the plaintiff in November 2004. That was well after it had received a letter from the defendant in which she had made it clear that she regarded herself as an employee of the plaintiff. Also, it was common ground that that invoice was withdrawn and replaced with one relating solely to the period prior to the defendant returning to work for the plaintiff in February 2004. That invoice was more a matter of administrative error than an indication of how the defendant regarded her status with respect to the plaintiff. (para 47)

(6) The plaintiff’s evidence that at the initial meeting it had said that it considered the defendant to be an independent contractor was not particularly significant. The defendant also gave evidence that the parties were advancing differing positions at that meeting and it was common ground that no agreement was reached. At best, therefore, that statement could be seen as a bargaining position adopted by the plaintiff. It must also be seen in light of the unequivocal statement made by the plaintiff in its letter of December 2004 that the defendant was an employee of the plaintiff. (para 49)

(7) Other aspects of the working relationship between the parties not relied on by the plaintiff were positively indicative of an employment relationship. The plaintiff made fortnightly payments directly to the defendant of an amount equal to the agreed annual base remuneration less PAYE tax. That arrangement was signed off by the plaintiff. The defendant worked out of the plaintiff’s premises. She used vehicles and other business tools provided by the plaintiff. She was eventually provided by the plaintiff with a credit card. She was an integral part of the plaintiff’s business to the extent that it relied substantially on her to generate its sales. (para 50)

(8) Overall, the conduct of the parties after February 2004 did not detract at all from the nature of the relationship they had entered into. On the contrary, it was more consistent with an employment relationship than with the defendant’s services being provided through a third party as suggested by the plaintiff. The defendant was employed by the plaintiff from February 2004. (paras 51, 55)

(9) The Court had its reservations about the defendant’s claim that it was a term of her employment that she be paid commission at the rate of 5 percent on all sales made by her for the plaintiff. On that issue, the Court preferred the plaintiff’s position that the agreement was for 5 percent commission on sales but only once an initial threshold had been reached. A threshold of \$350,000 was not only discussed but also agreed as the basis for commission payments. (paras

52-54, 56)

Result: Challenge dismissed ; Costs reserved

Pages: 14

[973351]

Arrears

DV Ryboproduct Ltd v The 49 Crew of the MFV "Aleksandr Ksenofonotov"

30 Jan 2007, J Crichton, CA 10/07, (11 pages)

ARREARS OF WAGES – Matter came before Authority last year when applicant alleged respondent crew refused to leave vessel at end of contract of employment, preventing applicant from re-crewing vessel – Crew refused to leave ship because disputed wages calculation - Presence of crew on vessel resolved at mediation – Issues before Authority concerned what contract and terms of employment governed employment relationship and whether deductions from pay were lawful – Authority satisfied it had jurisdiction to hear Wages Protection Act 1983 ("WPA") claim under s103(5) Fisheries Act 1996 – Jurisdiction to hear claim about whether could look at employment agreement (to extent required to deal with wages issues) considered – Crew authorised captain to sign collective employment agreement ("CEA") on their behalf – Dispute over what happened at meeting when CEA discussed – Crew alleged were told deductions would not be taken from wages (unless wrongdoing) - Whether deduction for accommodation and airfares lawful – CEA sought to provide ship owner with option to deduct expenses for travel, daily allowances, food and lodging – Submission that by entering into CEA crew consented in writing to deductions not accepted – Explicit informed consent required, opposed to consent by default as in present case – Authority impelled to that view by informal way CEA executed and by its wording, which only conveyed option on employer – Form of execution of CEA (crew being asked to execute schedule the effect of which authorised captain to enter CEA on their behalf) amounted to remote control – Even less likely arrangements could be seen as complying with s5 WPA – Arrangement not saved by s16 WPA since not a CEA in terms of Employment Relations Act 2000 – Deductions unlawful and must be returned to crew – Position different in respect of some wage advances where separate documentation of consent - Orders made confirming agreements parties reached provisionally about wages due and owing to crew – Crew's entitlement to share of catch did not factor into wages calculation for particular voyage – Tax issue outside of Authority's ambit – Whether applicant had right to recover cost of housing two crew members in Wellington while they waited for Authority's decision not within Authority's jurisdiction – Parties' representatives encouraged to resolve application of determination – COSTS – Applicant alleged crew's behaviour put it to additional costs of \$100,000 – Also alleged made \$600,000 loss on voyage – Application primarily favoured crew – Costs to lie where they fall
Result: Arrears of wages ; Orders accordingly ; Costs to lie where they fall

Harlick v Tournament Parking Ltd

19 Jul 2006, YS Oldfield, AA 246/06, (6 pages)

ARREARS OF WAGES - Triangular employment relationship - Respondent's contract with third party ("MCL") expired and MCL took over operation - Claim for payment in accordance with redundancy arrangement - Respondent did not dispute amount owing but sought to have arrears offset against counterclaim - COUNTERCLAIM - BREACH OF CONTRACT - Restraint of trade - Applicant started at MCL day after termination - Employment agreement with respondent contained six month restraint of trade - Received no remuneration for six months then paid "sign on fee" - Applicant employed by MCL, albeit payment deferred, and breached restraint of trade provision - However, restraint not enforceable as no proprietary interest to protect and no consideration given - Authority not satisfied on balance that breach of confidentiality clause made out - Evidence not sufficient to establish on balance of probabilities applicant acted against respondent's interests - No question of damages being owed to respondent so nothing to offset against arrears claim - Counterclaim dismissed - Car Park Manager

Result: Application granted ; Arrears of wages (\$3,230.77) ; Counterclaim dismissed ; Costs reserved

Wilford v Aden Electrical Ltd

19 Jan 2007, J Wilson, AA 12/07, (11 pages)

UNJUSTIFIED DISADVANTAGE - Applicant claimed subjected to bullying - Asked that he not work with bullying employees - Dispute whether bullying occurred - Applicant obviously distressed - Fair and reasonable employer would and should have undertaken full investigation - Not investigating complaints constituted unjustified action - Unjustified disadvantage - UNJUSTIFIED DISMISSAL - Constructive dismissal - Manager made aware of situation and asked for time to investigate complaints - Applicant on stress leave when resigned - Not at work when resigned, so not at risk - Chose to resign before investigation completed because received offer of employment - Resignation not caused by breach of duty - No constructive dismissal - PENALTY - Applicant requested s4A Employment Relations Act 2000 ("ERA") penalty for breach of duty of good faith - Respondent accepted resignation with immediate effect - Applicant claimed by not being allowed to work notice was discriminated against on grounds had lodged grievance - If respondent did breach duty, breach not deliberate or sustained - No penalty warranted - ARREARS OF WAGES - Money deducted from final pay and due and owing - Length of service one year two months - Electrical apprentice

Result: Application dismissed (Unjustified dismissal, penalty) ; Application granted (Unjustified disadvantage) ; Compensation for humiliation etc (\$5,000) ; Arrears of wages (\$110.02) ; No order for costs

Arrears - Holiday Pay

Geen v The Commissioner of Police

17 Jul 2006, A Dumbleton, AA 241/06, (12 pages)

UNJUSTIFIED DISADVANTAGE - Applicant on sick leave - Had developed medical condition preventing keyboard use, which was essential to her position - Respondent sent letter advising sick leave entitlement exhausted - Applicant claimed compelled to return to work - Injured at work in accident - Could have happened to her, or any employee, any time - Not compelled to return to work by letter, and no causal link between this and injury - Letter necessary under collective employment agreement ("CEA") - Applicant not offered alternative position which involved keyboard use - Respondent discharged obligation to consider suitable redeployment opportunities - No unjustified action in any of above - No disadvantage - UNJUSTIFIED DISMISSAL - Medical retirement - CEA had termination clause allowing respondent to cry halt to employment relationship with injured employee - Fair and reasonable employer would not have dismissed without giving access to information relevant to continuation of employment, or without giving opportunity to comment - Breached s4(1A) Employment Relations Act 2000 duty of good faith - Statutory, contractual and judicial principles of procedural fairness breached - Remedies - Likely still would have been medically retired had respondent acted in good faith - No loss as reasonable alternative positions not acceptable to applicant - ARREARS OF HOLIDAY PAY - Claimed should have been paid sick leave while on holiday - Appropriate to deduct annual leave as leave taken for purpose of holiday - No holiday pay owing - Length of service 18 years - Dispatcher

Result: Application dismissed (Unjustified disadvantage, arrears of holiday pay) ;
Application granted (Unjustified dismissal) ; Reimbursement of lost wages (three months) ; Compensation for humiliation etc (\$4,000) ; Costs reserved

Breach of Contract

Harlick v Tournament Parking Ltd

19 Jul 2006, YS Oldfield, AA 246/06, (6 pages)

ARREARS OF WAGES - Triangular employment relationship - Respondent's contract with third party ("MCL") expired and MCL took over operation - Claim for payment in accordance with redundancy arrangement - Respondent did not dispute amount owing but sought to have arrears offset against counterclaim - COUNTERCLAIM - BREACH OF CONTRACT - Restraint of trade - Applicant started at MCL day after termination - Employment agreement with respondent contained six month restraint of trade - Received no remuneration for six months then paid "sign on fee" - Applicant employed by MCL, albeit payment deferred, and breached restraint of trade provision - However, restraint not enforceable as no proprietary interest to protect and no consideration given - Authority not satisfied on balance that breach of confidentiality clause made out - Evidence not sufficient to establish on balance of probabilities applicant acted against respondent's interests - No question of damages being owed to respondent so nothing to offset against arrears claim - Counterclaim dismissed - Car Park Manager

Result: Application granted ; Arrears of wages (\$3,230.77) ; Counterclaim dismissed ; Costs reserved

Compliance Order

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

10 Aug 2006, R Arthur, AA 260/06, (3 pages)

COMPLIANCE ORDER - Applicant Labour Inspector sought compliance with determination of Authority - No appearance by respondent - Respondent directed to comply with original orders to pay arrears of holiday pay, interest, disbursements and penalty - Respondent reminded of consequences of failure to comply with compliance order

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

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

10 Aug 2006, R Arthur, AA 261/06, (3 pages)

COMPLIANCE ORDER - Applicant Labour Inspector sought compliance with determination of Authority - No appearance by respondent - Respondent directed to comply with original orders to pay arrears of holiday pay, interest, disbursements and penalty - Respondent reminded of consequences of failure to comply with compliance order

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

New Zealand Air Line Pilots Association Inc v Mount Cook Airline Ltd

11 Aug 2006, P Montgomery, CA 121/06, (6 pages)

DISPUTE - Applicant sought number of determinations regarding interpretation, application and operation of collective employment agreement ("CEA") - Whether Bangkok Daily Expense Allowance ("DEA") agreed between parties - CEA did not provide DEA for Bangkok - Parties entered temporary arrangement that referred to template used by another airline to set allowances - Issue of good faith raised over template - Respondent may have misrepresented position on possession of template but given applicant had document it said was relevant to issue, scales evenly balanced - Relevance of document over 25 years old exercised Authority's mind considerably - Parties directed to agree to quantum for Bangkok DEA as required by CEA - Respondent entitled to continue to require pilots to depart for and train in Bangkok - Respondent not in breach of CEA in requiring and rostering pilots to depart for Bangkok - Temporary agreement remained in force as no further agreement reached - COMPLIANCE ORDER - Application for order respondent cease requiring and rostering pilots to depart for Bangkok until DEA agreed declined - Application for order requiring respondent to apply agreed process to fix agreed permanent DEA declined - Both parties to resolve quantum issue - PENALTY - Penalties for breach of CEA and good faith obligations declined

Result: Orders accordingly ; Application dismissed (Compliance order and penalty) ; Costs reserved

Strait Freight Ltd v Shackleton and Ors

24 Jul 2006, P Montgomery, CA 107/06, (6 pages)

COMPLIANCE ORDER - Compliance with record of settlement sought - Also sought compensation for losses suffered, or order that respondents account for profits resulting from breaches of restraint of trade - Applicant also sought penalty for breaches - Appeared that having negotiated restraint, respondents sought to "wriggle out" of terms - No evidence to support claim employment agreements signed under duress - Respondents breached record of settlement by carrying freight for applicant's clients - Authority did not accept term "king pin towing" redundant in record of settlement - Respondents to account for profits and pay

applicant profits garnered from unlawful transactions because it lost opportunities as result of breaches - Respondents to desist from undertaking work in breach of record of settlement
Result: Compliance ordered ; Orders accordingly ; Interest (8.5%) ; Costs reserved

Costs

The Chief Executive of the Bay of Plenty District Health Board v New Zealand Public Service Association

13 Dec 2006, Travis J, AC 73/06, (15 pages)

NON DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Costs – Defendant unsuccessfully brought dispute before Employment Relations Authority – Approximately 2 hour hearing – Authority awarded plaintiff \$500 costs – Plaintiff alleged Authority determined costs prior to expiry of time for filing memorandum in reply – Alleged Authority failed to place necessary weight on Calderbank offer – Plaintiff sought up to full indemnity solicitor/client costs of total costs of \$11,827.06 – In alternative sought \$6,000 or \$1,500 – HELD – Procedure was a matter for Authority – Offer to let costs lie where they fell providing other side abandoned a dispute was not strictly Calderbank offer – Authority's failure to consider reply did not cause prejudice – Authority's costs award not improper and therefore not disturbed – Challenge dismissed
Result: Challenge dismissed ; Authority's costs award confirmed ; Costs reserved

Cotes v PR Driving Services and Lahore Transport Contractors Ltd

17 Jul 2006, J Wilson, AA 172A/06, (3 pages)

COSTS - Unsuccessful personal grievance - Half day investigation meeting - Respondents sought \$5,000 contribution to total costs of more than \$8,000 - Respondents argued applicant's claim doomed to failure and as applicant pursued claim against two respondents additional costs were incurred - Applicant argued costs should lie where they fall or costs should be awarded to him - Applicant raised number of issues in support of claim - However, with exception of length of investigation, had not addressed various considerations Authority took into account when considering costs - Little to justify greater or lesser award than usual - Fact counsel acted for both respondents perfectly appropriate and his behaviour entirely professional and appropriate throughout process - Under circumstances, probably necessary for applicant to cite both respondents - Applicant to pay \$1,500 costs - Respondents and their counsel to calculate how amount applied between them
Result: Costs in favour of respondents (\$1,500)

DV Ryboproduct Ltd v The 49 Crew of the MFV "Aleksandr Ksenofonotov"

30 Jan 2007, J Crichton, CA 10/07, (11 pages)

ARREARS OF WAGES – Matter came before Authority last year when applicant alleged respondent crew refused to leave vessel at end of contract of employment, preventing applicant from re-crewing vessel – Crew refused to leave ship because disputed wages calculation - Presence of crew on vessel resolved at mediation – Issues before Authority concerned what contract and terms of employment governed employment relationship and whether deductions from pay were lawful – Authority satisfied it had jurisdiction to hear Wages Protection Act 1983 ("WPA") claim under s103(5) Fisheries Act 1996 – Jurisdiction to hear claim about whether could look at employment agreement (to extent required to deal with wages issues) considered – Crew authorised captain to sign collective employment agreement ("CEA") on their behalf – Dispute over what happened at meeting when CEA discussed – Crew alleged were told deductions would not be taken from wages (unless wrongdoing) - Whether deduction for accommodation and airfares lawful – CEA sought to provide ship owner with option to deduct expenses for travel, daily allowances, food and lodging – Submission that by entering into CEA crew consented in writing to deductions not accepted – Explicit informed consent required, opposed to consent by default as in present case – Authority impelled to that view by informal way CEA executed and by its wording, which only conveyed option on employer – Form of execution of CEA (crew being asked to

execute schedule the effect of which authorised captain to enter CEA on their behalf) amounted to remote control – Even less likely arrangements could be seen as complying with s5 WPA – Arrangement not saved by s16 WPA since not a CEA in terms of Employment Relations Act 2000 – Deductions unlawful and must be returned to crew – Position different in respect of some wage advances where separate documentation of consent - Orders made confirming agreements parties reached provisionally about wages due and owing to crew – Crew’s entitlement to share of catch did not factor into wages calculation for particular voyage – Tax issue outside of Authority’s ambit – Whether applicant had right to recover cost of housing two crew members in Wellington while they waited for Authority’s decision not within Authority’s jurisdiction – Parties’ representatives encouraged to resolve application of determination – COSTS – Applicant alleged crew’s behaviour put it to additional costs of \$100,000 – Also alleged made \$600,000 loss on voyage – Application primarily favoured crew – Costs to lie where they fall
Result: Arrears of wages ; Orders accordingly ; Costs to lie where they fall

Fuiava v Air New Zealand Ltd

21 Dec 2006, Travis J, AC 51A/06, (1 pages)

COSTS – Unsuccessful de novo challenge – Approximately one day hearing (Authority) – One day hearing (Court) – Defendant sought \$4,500 contribution to actual costs of \$12,191 including GST plus \$50 disbursements in Authority – And \$12,000 contribution to actual costs of \$15,725.46 including GST plus disbursements of \$186.40 in Court – HELD – Case presented in both Authority and Court in an efficient and economic manner – Had elements of a test case – There must have been an element of duplication in the submissions made by counsel for defendant in the present and another case where test issue live – Lower starting point than usual adopted – Burden of dealing with new s103A Employment Relations Act 2000 should not fall heavily on plaintiff – Modest award of \$1,500 for Authority investigation appropriate – Court took into account the unfortunate consequences the dismissal had on the plaintiff who was well regarded at work and had a previously impeccable record – Loss of plaintiff’s employment and cargo privileges was serious financial blow to plaintiff’s family – Taking all matters into account including novelty of the issue Court ordered plaintiff to pay \$2,500 towards defendant’s Court costs – Cargo storeman

Result: Costs in favour of defendant (\$1,500)(Authority) ; (\$2,500)(Court)

Katipo v New Era Plastics Ltd

17 Jul 2006, A Dumbleton, AA 163A/06, (2 pages)

COSTS - Unsuccessful personal grievance - Investigation meeting less than one day - Respondent sought order for costs of \$6,874 on full indemnity basis - Claimed applicant did not act in good faith in course of investigation and put it to extra cost by seeking reinstatement - Applicant claimed limited means diminished by loss of employment and requested costs lie where they fall - No proper basis for full indemnity costs in this case - Authority did not understand why reinstatement claim should have caused respondent additional cost - Issues straight forward - Applicant's substantive claim meritorious - Redundancy only borderline genuine and for purposes of fixing costs grievance claim regarded as close call - Costs to lie where they fall

Result: Costs to lie where they fall

Keys v Flight Centre (NZ) Ltd & Anor

13 Dec 2006, Full Court, CC 14/06, (4 pages)

COSTS – Successful interlocutory application by first defendant for order striking out plaintiff’s application for judicial review of Employment Relations Authority determination (see: [2005] 1 ERNZ 471) – Authority had granted Anton Piller order

against plaintiff on first defendant's ex parte application – First defendant sought \$3,500 contribution to actual costs of \$4,434.75 inclusive of GST from plaintiff or her alleged non-party funder – First defendant also sought \$565.25 associated with present costs application – HELD – Court was without power to make order for contribution from non-party under clause 19 Third Schedule Employment Relations Act 2000 – To be liable in costs person must be either original or joined party to a proceeding – Present was in nature of test case – Whether Authority had jurisdiction to issue ex parte Anton Piller order – Whether exercise of such jurisdiction could be challenged by way of judicial review – In view of full Court's decision in *Axiom Rolle* (cited below) challenge of Authority's order would inevitably be successful – Thus both sides would have succeeded – Costs to lie where they fell

OCS Ltd v Service & Food Workers Union Nga Ringa Tota Inc and Anor

15 Dec 2006, Shaw J, WC 15A/06, (1 pages)

COSTS – Unsuccessful application by plaintiff for declarations, injunction, and damages after defendants refused to comply with new timekeeping system involving finger scanning – Three day hearing – Defendants sought 80 percent contribution to actual costs of \$40,040 plus disbursements of \$2,898.0 – Disbursements included \$1,474.44 for lost wages of witnesses – Plaintiff submitted matter in issue was a dispute and costs should lie where they fell – Also submitted that defendants' costs and disbursements not reasonable – HELD – Although present case began as a dispute, plaintiff did not follow statutory procedures for resolving it – Instead, plaintiff sought to enforce its own interpretation of collective employment agreement (“cea”) – In so doing, plaintiff went beyond seeking interpretation of cea – High Court Rules scale of fees would have resulted in award of \$25,000 for similar proceedings – Some factors added to defendants' costs but none warranted significant departure of usual basis of 66 percent of actual costs – Defendants awarded costs of \$26,500 (66 percent of \$40,040) – Lost wages not appropriate claim under disbursements and disallowed – Miscellaneous disbursements not itemised or supported by invoices also disallowed – Defendant awarded disbursements of \$1,173.60

Result: Costs in favour of defendants (\$26,500) ; Disbursements (1,173.60)

Olsson v Keith Matheson Ltd

19 Jul 2006, M Urlich, AA 107A/06, (1 pages)

COSTS - Successful personal grievance - Length of investigation meeting not specified - Respondent never filed costs memorandum - Applicant sought contribution of \$2,500 to total costs of \$2,812 - Applicant argued matter was capable of settlement, grounds for personal grievance were obvious, no Calderbank offer made and respondent failed to attend investigation meeting without explanation - Straightforward application - Costs incurred by applicant were reasonable - Applicant entitled to fair contribution to costs reasonably incurred - Indemnity costs unusual in jurisdiction - Not satisfied grounds for such award made out

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

Sandifer v Plumbers Gasfitters & Drainlayers Board NZ

18 Dec 2006, Travis J, AC 74/06, (1 pages)

COSTS – Unsuccessful de novo challenge – One day hearing – Defendant sought 60 percent contribution to actual costs of \$8,505 and disbursements concerning witness expenses totalling \$2,363 – Alleged counsel's rate modest – Defendant offered Calderbank type settlement by offering costs to lay where they fell and not to enforce \$4,000 costs award against plaintiff in Authority – Plaintiff alleged impecunious – HELD – Costs sought not excessive – However Court not satisfied that plaintiff should bear whole of disbursements incurred, especially those relating to payments made to Chair of defendant's board –

Plaintiff's financial situation mitigating factor – Award sought by defendant reduced in response to plaintiff's impecuniosity – Plaintiff ordered to pay \$4,000 by instalments of \$100 per month – Leave reserve for either party to address Court further if plaintiff's circumstances changed – Drainlayer and gasfitter

Result: Costs in favour of defendant (\$4,000) ; Orders accordingly

Smith v Sovereign Ltd

12 Dec 2006, Travis J, AC 71/06, (10 pages)

COSTS – Successful de novo challenge (see: [2005] 1 ERNZ 832) – Numerous interlocutory applications, briefing and calling of numerous witnesses and application for recall of judgment – Two and a half day Authority hearing – Four day Court hearing – Plaintiff sought solicitor/client, indemnity costs of actual costs of \$31,809.37 plus disbursements of \$1,574.70 in Authority – And \$109,462.50 plus disbursements of \$4,819.92 in Court – In alternative sought 80% contribution – HELD – Not appropriate case for solicitor client costs – Court considered Authority's costs award, daily tariff, plaintiff's unsuccessful application for removal, preparation, and way plaintiff brought matter – Plaintiff awarded \$6,000 towards Authority costs and \$761.70 disbursements – Reasonableness of Court costs tested as though was a proceeding in High Court – \$43,300 contribution to actual and reasonable costs would have been appropriate – Plaintiff's attack on genuineness of redundancy which failed in both Authority and Court unnecessarily lengthened trial and was depreciating factor – Plaintiff awarded \$38,500 towards Court costs plus \$2,995.95 disbursements

Result: Costs in favour of plaintiff (\$6,761.70) (Authority) ; (\$41,495.95) (Court) ; Costs to lie where they fall (present application)

Dispute

New Zealand Air Line Pilots Association Inc v Mount Cook Airline Ltd

11 Aug 2006, P Montgomery, CA 121/06, (6 pages)

DISPUTE - Applicant sought number of determinations regarding interpretation, application and operation of collective employment agreement ("CEA") - Whether Bangkok Daily Expense Allowance ("DEA") agreed between parties - CEA did not provide DEA for Bangkok - Parties entered temporary arrangement that referred to template used by another airline to set allowances - Issue of good faith raised over template - Respondent may have misrepresented position on possession of template but given applicant had document it said was relevant to issue, scales evenly balanced - Relevance of document over 25 years old exercised Authority's mind considerably - Parties directed to agree to quantum for Bangkok DEA as required by CEA - Respondent entitled to continue to require pilots to depart for and train in Bangkok - Respondent not in breach of CEA in requiring and rostering pilots to depart for Bangkok - Temporary agreement remained in force as no further agreement reached - COMPLIANCE ORDER - Application for order respondent cease requiring and rostering pilots to depart for Bangkok until DEA agreed declined - Application for order requiring respondent to apply agreed process to fix agreed permanent DEA declined - Both parties to resolve quantum issue - PENALTY - Penalties for breach of CEA and good faith obligations declined

Result: Orders accordingly ; Application dismissed (Compliance order and penalty) ; Costs reserved

Injunction

Holley v Leading Edge Communications Ltd

22 Dec 2006, K Raureti, AA 385/06, (5 pages)

INJUNCTION - Interim reinstatement - Applicant sent allegedly offensive email to colleague - Respondent concerned about interests of female staff if applicant reinstated - Formal complaint made against applicant - When notified of complaint, applicant allegedly asked colleague to delete email and repeatedly phoned her - Dismissed after disciplinary meeting - Arguable case on procedural fairness principles - Balance of convenience favoured non-reinstatement to normal work - Satisfied remedies under Employment Relations Act 2000 appropriate if reinstatement not ordered – Overall justice of case leaned toward partially successful interim reinstatement – Immediate reinstatement required on certain conditions - Applicant to be put on paid garden leave - Not required to perform any work and not to visit workplace - Corporate accounts manager

Result: Application granted in part ; Costs reserved

Jurisdiction

Davis v Canwest Radioworks Ltd

10 Aug 2006, RA Monaghan, AA 263/06, (5 pages)

JURISDICTION - Whether employee or independent contractor - Written agreement relevant - Stated contract for services between respondent and Large Productions Ltd ("LP") - Applicant a party to contract as employee of LP - Applicant also LP's sole director and majority shareholder - Applicant engaged to provide cover for radio hosts on casual basis - Invoicing, tax, indemnity, hours and exclusivity provisions consistent with true nature of relationship being principal and contractor - Most remaining provisions neutral as to nature of relationship - At most provisions relating to termination for misconduct might arguably suggest degree of control more usually associated with employment relationship - Applicant accepted initially relationship one of principal and contractor - Claimed nature of relationship changed began full time work with respondent - Authority did not accept that, without more, applicant's accumulation of slots to point where arguably achieved full time hours meant became employee - Way in which applicant accumulated slots consistent with position as casual host, although obtained increased amount of work - Applicant knew drive time slot temporary but did not believe it made difference as there was ongoing work at station - Programme director denied offering full time work to applicant - Cumulatively slots did not have characteristics of full time permanent arrangement - Authority did not accept sufficient to change essential nature of agreement with respondent - No indication control by respondent changed in material way when applicant gave up other work - Authority did not believe radio station's wish to exercise some quality control over broadcasts necessarily indicated employment relationship - Did not accept that encouraging host to associate name with network or station or encouraging participation in marketing necessarily meant host integrated into station's business - Business of LP maintained during and after 2005 - Indicated applicant integrated into business of LP not respondent - Independent contractor - No jurisdiction - Radio host

Penalty

Busby v Talent Base Ltd

20 Jul 2006, RA Monaghan, AA 247/06, (6 pages)

PRACTICE AND PROCEDURE - Application to reopen investigation - Respondent claimed out of country and unaware employment relationship problem filed - Disputed amounts awarded to applicant - Background did not make for compelling application to reopen - However, apparent original orders should be amended - Unpaid wages and holiday pay to be recalculated - Qualifying billings for commission reduced by agreement - Written agreement silent about commission for billings in excess of \$28,000 - Applying usual approach to interpretation Authority might have accepted no commission payable on those billings - However, commission supposed to provide incentive and lack of further commission was disincentive - Authority did not accept that was parties' intention and no evidence to suggest intended to cap commission - Commission payable on billings over \$28,000 at top rate of sliding scale - \$7,185 commission payable - Given applicant's acknowledgment of overpayment, parties urged to take pragmatic approach to resolving issue of deductions - Leave reserved if unable to resolve matter - PENALTY - Authority allowed reintroduction of penalty application withdrawn at original investigation, but declined to address additional application for penalties against director personally - Failure to attend to final payment breached employment agreement - Subsequent payment attempt to remedy breach and weighed in respondent's favour - Reason for not paying commission not very compelling - Timely payment of wages too important to allow failure to address matter to go unpenalised - Director inexcusably lax - \$2,000 penalty for breach of employment agreement - Authority did not believe actions reached level of deliberate, serious, or sustained breaches of duty of good faith set out in s4A Employment Relations Act 2000 - Declined to order further penalty for breach of good faith - Talent manager

Result: Orders accordingly ; Penalty (\$2,000)(Payable to Crown) ; Interest (7.5%) ; Costs reserved

New Zealand Air Line Pilots Association Inc v Mount Cook Airline Ltd

11 Aug 2006, P Montgomery, CA 121/06, (6 pages)

DISPUTE - Applicant sought number of determinations regarding interpretation, application and operation of collective employment agreement ("CEA") - Whether Bangkok Daily Expense Allowance ("DEA") agreed between parties - CEA did not provide DEA for Bangkok - Parties entered temporary arrangement that referred to template used by another airline to set allowances - Issue of good faith raised over template - Respondent may have misrepresented position on possession of template but given applicant had document it said was relevant to issue, scales evenly balanced - Relevance of document over 25 years old exercised Authority's mind considerably - Parties directed to agree to quantum for Bangkok DEA as required by CEA - Respondent entitled to continue to require pilots to depart for and train in Bangkok - Respondent not in breach of CEA in requiring and rostering pilots to depart for Bangkok - Temporary agreement remained in force as no further agreement reached - COMPLIANCE ORDER - Application for order respondent cease requiring and rostering pilots to depart for Bangkok until DEA agreed declined - Application for order requiring respondent to apply agreed process to fix agreed permanent DEA declined - Both parties to resolve quantum issue - PENALTY - Penalties for breach of CEA and good faith obligations declined

Result: Orders accordingly ; Application dismissed (Compliance order and penalty) ; Costs reserved

Wilford v Aden Electrical Ltd

19 Jan 2007, J Wilson, AA 12/07, (11 pages)

UNJUSTIFIED DISADVANTAGE - Applicant claimed subjected to bullying - Asked that he not work with bullying employees - Dispute whether bullying occurred - Applicant obviously distressed - Fair and reasonable employer would and should have undertaken full investigation - Not investigating complaints constituted unjustified action - Unjustified disadvantage - UNJUSTIFIED DISMISSAL - Constructive dismissal - Manager made aware of situation and asked for time to investigate complaints - Applicant on stress leave when resigned - Not at work when resigned, so not at risk - Chose to resign before investigation completed because received offer of employment - Resignation not caused by breach of duty - No constructive dismissal - PENALTY - Applicant requested s4A Employment Relations Act 2000 ("ERA") penalty for breach of duty of good faith - Respondent accepted resignation with immediate effect - Applicant claimed by not being allowed to work notice was discriminated against on grounds had lodged grievance - If respondent did breach duty, breach not deliberate or sustained - No penalty warranted - ARREARS OF WAGES - Money deducted from final pay and due and owing - Length of service one year two months - Electrical apprentice

Result: Application dismissed (Unjustified dismissal, penalty) ; Application granted (Unjustified disadvantage) ; Compensation for humiliation etc (\$5,000) ; Arrears of wages (\$110.02) ; No order for costs

Personal Grievance - Dismissal

Geen v The Commissioner of Police

17 Jul 2006, A Dumbleton, AA 241/06, (12 pages)

UNJUSTIFIED DISADVANTAGE - Applicant on sick leave - Had developed medical condition preventing keyboard use, which was essential to her position - Respondent sent letter advising sick leave entitlement exhausted - Applicant claimed compelled to return to work - Injured at work in accident - Could have happened to her, or any employee, any time - Not compelled to return to work by letter, and no causal link between this and injury - Letter necessary under collective employment agreement ("CEA") - Applicant not offered alternative position which involved keyboard use - Respondent discharged obligation to consider suitable redeployment opportunities - No unjustified action in any of above - No disadvantage - UNJUSTIFIED DISMISSAL - Medical retirement - CEA had termination clause allowing respondent to cry halt to employment relationship with injured employee - Fair and reasonable employer would not have dismissed without giving access to information relevant to continuation of employment, or without giving opportunity to comment - Breached s4(1A) Employment Relations Act 2000 duty of good faith - Statutory, contractual and judicial principles of procedural fairness breached - Remedies - Likely still would have been medically retired had respondent acted in good faith - No loss as reasonable alternative positions not acceptable to applicant - ARREARS OF HOLIDAY PAY - Claimed should have been paid sick leave while on holiday - Appropriate to deduct annual leave as leave taken for purpose of holiday - No holiday pay owing - Length of service 18 years - Dispatcher

Result: Application dismissed (Unjustified disadvantage, arrears of holiday pay) ; Application granted (Unjustified dismissal) ; Reimbursement of lost wages (three months) ; Compensation for humiliation etc (\$4,000) ; Costs reserved

Hand v McCrostie Builders

25 Jul 2006, P Montgomery, CA 109/06, (7 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Sexual harassment - Applicant resigned as believed respondent not dealing with complaints - Alleged sexually harassed by another employee, SH - Respondent claimed complaints investigated and after first incident SH warned would be dismissed if behaviour continued - Second incident involved SH staring at applicant - SH verbally warned - SH later complained about applicant and both were suspended - Failure of employer to perceive actions were of sexual nature simply extraordinary - Treating staring as discrete from primary incidents serious error of judgement, it fell squarely under s118 Employment Relations Act 2000 - SH's behaviour sexual harassment - Respondent's investigation process not full and sufficiently robust to uncover relevant facts - Reliance solely on corroborated observations and refusal to accord credence to applicant's account fell well short of obligations - Steps taken to prevent further offensive behaviour poorly conceived and executed - Suspension without contractual right unlawful - Constructive dismissal - Respondent commended for supporting counselling for SH - Length of service 11½ months - Painter

Result: Application granted ; Reimbursement of lost wages (\$1,950) ; Compensation for humiliation etc (\$10,000) ; Costs reserved

Hodges v Total Distribution Ltd

24 Jul 2006, D King, AA 250/06, (4 pages)

UNJUSTIFIED DISMISSAL - Whether dismissal or abandonment - Applicant involved in altercation with colleague - At later meeting applicant repeated abuse and other accusations but Authority did not accept applicant was threatened or abused - Applicant later left work without informing anyone - Next day applicant told Managing Director ("MD") would be

absent to see union representative - Applicant told representative could be seen at work and to come in unless sick - Applicant informed would be dismissed if did not provide medical certificate - Applicant contacted union and absent two days without medical certificate - Union representative spoke with MD who informed him applicant dismissed for abandonment - MD could not have safely concluded applicant did not intend to return and employment abandoned - MD aware applicant stressed and wanted to consult union - Decision should have been delayed until union spoken to and applicant given opportunity to comment - MD pre-empted disciplinary proceedings by stating employment abandoned - Dismissal unjustified - Remedies - If applicant had not behaved as he did personal grievance would not have arisen - Actions blameworthy - Contributory conduct 100 percent - Length of service not specified - Truck driver

Result: Application granted ; Reimbursement of lost wages (3 months reduced to 0) ; Compensation for humiliation etc (\$4,000 reduced to \$0) ; Costs reserved

Nicholls v Fox Manufacturing Ltd

18 Jul 2006, J Crichton, CA 104/06, (10 pages)

UNJUSTIFIED DISMISSAL - Misconduct - No appearance for respondent - Respondent in liquidation - After disagreement between applicant and worker, other workers refused to work with applicant - Applicant then redeployed to perform other work - Applicant questioned redeployment - Suspended after investigation - Alleged applicant failed to obey lawful instruction to perform work, and had negative affect on workplace - Workers' statements did not justify conclusion conduct so serious as to warrant dismissal - Was appropriate to question redeployment as had not seen job description - Respondent's evidence not credible - Procedural irregularities made dismissal resulting from process unsafe - Investigation so inadequate as to make dismissal substantively unjustified - Dismissal not decision fair and reasonable employer would have made - UNJUSTIFIED DISADVANTAGE - Disadvantaged by way respondent conducted itself at meeting, suspension and inappropriate process - Disadvantaged by way suspension raised at meeting, after respondent sought to persuade him meeting not disciplinary - Remedies - Significant award appropriate - Extreme health and financial consequences - Not appropriate to reserve costs - Length of service seven months - Beam saw operator

Result: Application granted ; Reimbursement of lost wages (\$3,960) ; Compensation for humiliation etc (\$12,000) ; Costs in favour of applicant (\$3,750)

O'Kelly-Barnes v Tillermans (2003) Ltd

11 Jan 2007, H Doyle, CA 2/07, (7 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Applicant advised restaurant owner study commitments required another chef to cover some shifts - Next day applicant given letter stating he would be replaced as head chef - Applicant resigned - No written employment agreement - More probable than not applicant did not clearly articulate intention to study at interview - No agreement applicant could study while head chef - Authority not satisfied relationship terminated by mutual agreement - Respondent's letter effectively dismissed applicant - Resignation within notice period in nature of constructive dismissal - Fair and reasonable employer in respondent's circumstances would conclude it required head chef to work all shifts - Dismissal substantively justified - There was difference between considering proposal and consequences if proposal unsuccessful - Fairness required applicant to be clear study leave put employment in jeopardy - Procedurally unfair to hand applicant letter advising of replacement - Dismissal unjustified - Remedies - No order for lost wages as employment would have inevitably terminated when course began - Applicant could have worked until then - Name of respondent amended by consent - Length of service less than three months - Head chef

Result: Application granted ; Compensation for humiliation etc (\$1,000) ; Costs reserved

Wilford v Aden Electrical Ltd

19 Jan 2007, J Wilson, AA 12/07, (11 pages)

UNJUSTIFIED DISADVANTAGE - Applicant claimed subjected to bullying - Asked that he not work with bullying employees - Dispute whether bullying occurred - Applicant obviously distressed - Fair and reasonable employer would and should have undertaken full investigation - Not investigating complaints constituted unjustified action - Unjustified disadvantage - UNJUSTIFIED DISMISSAL - Constructive dismissal - Manager made aware of situation and asked for time to investigate complaints - Applicant on stress leave when resigned - Not at work when resigned, so not at risk - Chose to resign before investigation completed because received offer of employment - Resignation not caused by breach of duty - No constructive dismissal - PENALTY - Applicant requested s4A Employment Relations Act 2000 ("ERA") penalty for breach of duty of good faith - Respondent accepted resignation with immediate effect - Applicant claimed by not being allowed to work notice was discriminated against on grounds had lodged grievance - If respondent did breach duty, breach not deliberate or sustained - No penalty warranted - ARREARS OF WAGES - Money deducted from final pay and due and owing - Length of service one year two months - Electrical apprentice

Result: Application dismissed (Unjustified dismissal, penalty) ; Application granted (Unjustified disadvantage) ; Compensation for humiliation etc (\$5,000) ; Arrears of wages (\$110.02) ; No order for costs

Personal Grievance - Dismissal - Misconduct

Grant v Nelson Heights Ltd

19 Jul 2006, J Crichton, CA 105/06, (8 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Applicant sold electrical goods at respondent's store - Three alleged instances of misconduct in handling of goods - Admitted alleged behaviour - Initially applicant indicated knew policy and procedures - Later tried to resile from statements - Applicant's evidence lacked credibility - Difficult for applicant to seriously contend unaware of policies - No disparity of treatment - Allegations supporting dismissal were examples of misconduct applicant acknowledged he knew were wrong - One allegation taken alone might not have grounded dismissal, but together represented course of conduct - Respondent justified in regarding as fundamental breach of duty of honesty and fair dealing - Had opportunity to resile from inappropriate behaviour - Length of service not specified - Sales consultant

Result: Application dismissed ; Costs reserved

Nathan v Ports of Auckland Ltd

26 Jul 2006, M Urlich, AA 251/06, (6 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Applicant dismissed for assaulting colleague ("CD") - Respondent also investigated alleged provocation by CD - Applicant claimed respondent failed to adequately weigh provocation and provide safe workplace free from racial abuse - Authority satisfied full and fair inquiry into circumstances of assault - Assault not denied and code of conduct clear it could constitute serious misconduct - Decision applicant's actions were serious misconduct fair and reasonable - Respondent unequivocally condemned previous racist comments and advised staff of complaints process - Applicant did not use process - Open to respondent to conclude CD's comments did not excuse assault - Decision to dismiss fair and reasonable in circumstances - Dismissal justified - Authority accepted applicant's health and safety compromised by racist comments - However, risk to applicant's psychological health not foreseeable by respondent - No evidence respondent alerted to concerns - No written policy regarding racial harassment - Authority unable to make recommendation as no personal grievance - However, in interests of respondent and its workforce to develop policy - Given limited information provided to expert witness, Authority unable to place much, if any, weight on evidence - Length of service two years six months - Stevedore

Result: Application dismissed ; Costs reserved

Personal Grievance - Dismissal - Poor Performance

Sullivan v Maxwell Marine Ltd

24 Jul 2006, R Arthur, AA 249/06, (8 pages)

UNJUSTIFIED DISMISSAL - Poor performance - Five step disciplinary process in employment agreement - Although respondent did not establish counselling provided as first step, any procedural error cured by subsequent meetings - Over seven months applicant received five written warnings and attended several disciplinary meetings - No procedural error or unfairness in labelling three warnings "final" - Genuine reasons for performance concerns - However, applicant given insufficient time and detail to prepare responses to examples given in disciplinary meetings - Respondent moved too far, too fast, particularly with last three warnings - So close together no real opportunity for improvement or proper preparation - Not clear applicant aware at start of last meeting termination could result - No opportunity to comment on decision to dismiss - Dismissal unjustified - UNJUSTIFIED DISADVANTAGE - Applicant's allegations demoted and discriminated against dismissed - Authority did not accept dismissal engineered to avoid paying redundancy entitlement - No disadvantage - Remedies - Authority not satisfied from applicant's evidence and general buoyancy of labour market that lost wages sufficiently mitigated - Contributory conduct 50 percent - Length of service not specified - Team leader

Result: Application granted (Unjustified dismissal) ; Reimbursement of lost wages (8 weeks reduced to 4 weeks) ; Compensation for humiliation etc (\$2,000 reduced to \$1,000) ; Application dismissed (Unjustified disadvantage) ; Costs reserved

Personal Grievance - Raising of Personal Grievance

Hawe v The Attorney General in respect of The Chief Executive Officer of the Child Youth and Family Services of Wellington

22 Aug 2006, D King, AA 270/06, (5 pages)

RAISING PERSONAL GRIEVANCE - Whether grievances raised within 90-day period - Whether grievances brought to attention of respondent - Respondent not aware was anything to respond to, believed first issue dealt with - Workload issue raised in context of management issue - Applicant did not dispute what needed to be done regarding workload - Applicant made no attempt to follow up complaints - Mere expression of dissatisfaction did not constitute submission of grievances - Claimed traumatised by failure of respondent to respond to first grievance, that unable to consider raising others - No evidence supporting claim - No exceptional circumstances - Social worker

Result: Application dismissed ; Costs reserved

Kumar v New Zealand Automobile Association Inc.

22 Jan 2007, R Arthur, AA 13/07, (4 pages)

RAISING PERSONAL GRIEVANCE - Whether grievance raised within 90 day period – Applicant claimed raised grievance at dismissal meeting - On balance of probabilities more likely than not applicant made no reference to raising grievance at meeting - Consistent with fact sought advice from union about prospects of success - Also claimed grievance raised in letter to Mediation Service requesting mediation and referring to unjustified dismissal – Respondent contacted by Mediation Service ("MS") after 90 day period expired - Applicant had clear obligation under employment agreement to raise grievance with respondent himself - MS does not act as representative of any party to an employment relationship problem – While carrying out statutory duties, MS may communicate information between parties, but that does not extend to notifying grievances - Applicant misunderstood requirement of employment agreement and law - Grievance not properly raised through letter – No exceptional circumstances - Vehicle testing officer

Result: Application dismissed ; No order for costs

Rarere v Electrotech Controls Ltd

21 Jul 2006, GJ Wood, WA 108/06, (9 pages)

RAISING PERSONAL GRIEVANCE - Whether grievances raised within 90 days - Applicant's concerns presented to Managing Director ("MD") in written statement - MD asked whether raising personal grievance but received no reply - Employer raising direct question in those circumstances entitled to direct response - Requests overrode possibility of written concerns constituting raising of grievances in and of themselves - Respondent entitled to conclude concerns not raised as grievances in absence of positive response - All claims out of time - Section 122 Employment Relations Act 2000 ("ERA") did not apply to grievances not raised in time - Section 160(3) ERA of general application and interpreted as subordinate to more specific provisions - Could not override specific requirements of s114 ERA - Respondent had reserved right to pursue 90 day issue - No consent to raising grievances out of time - Whether exceptional circumstances - No exceptional circumstances for sexual harassment and discrimination claims - Applicant made reasonable arrangements to have disadvantage and dismissal grievances raised on her behalf - Advocate unreasonably failed to ensure raised in time - New representatives raised grievances two months later - Exceptional circumstances over dismissal grievance continued as applicant acted reasonably in obtaining new representation - As subject matter of dismissal grievance contained in letter recourse could be had to s122 ERA - Authority could determine disadvantage grievance as dismissal grievance - Delay in raising disadvantage and dismissal grievances occasioned by exceptional circumstances - Just to grant leave as applicant had genuine concerns about how

employment ended, delays not particularly significant and no evidence of prejudice to respondent in having to defend claims - Failings primarily those of advocate - Implicit in s115(b) ERA applicant should not be disadvantaged by that - Leave to raise grievances out of time granted - Electrical apprentice

Result: Application granted in part ; Parties directed to mediation ; Costs reserved

Personal Grievance - Unjustified Disadvantage

Geen v The Commissioner of Police

17 Jul 2006, A Dumbleton, AA 241/06, (12 pages)

UNJUSTIFIED DISADVANTAGE - Applicant on sick leave - Had developed medical condition preventing keyboard use, which was essential to her position - Respondent sent letter advising sick leave entitlement exhausted - Applicant claimed compelled to return to work - Injured at work in accident - Could have happened to her, or any employee, any time - Not compelled to return to work by letter, and no causal link between this and injury - Letter necessary under collective employment agreement ("CEA") - Applicant not offered alternative position which involved keyboard use - Respondent discharged obligation to consider suitable redeployment opportunities - No unjustified action in any of above - No disadvantage - UNJUSTIFIED DISMISSAL - Medical retirement - CEA had termination clause allowing respondent to cry halt to employment relationship with injured employee - Fair and reasonable employer would not have dismissed without giving access to information relevant to continuation of employment, or without giving opportunity to comment - Breached s4(1A) Employment Relations Act 2000 duty of good faith - Statutory, contractual and judicial principles of procedural fairness breached - Remedies - Likely still would have been medically retired had respondent acted in good faith - No loss as reasonable alternative positions not acceptable to applicant - ARREARS OF HOLIDAY PAY - Claimed should have been paid sick leave while on holiday - Appropriate to deduct annual leave as leave taken for purpose of holiday - No holiday pay owing - Length of service 18 years - Dispatcher

Result: Application dismissed (Unjustified disadvantage, arrears of holiday pay) ; Application granted (Unjustified dismissal) ; Reimbursement of lost wages (three months) ; Compensation for humiliation etc (\$4,000) ; Costs reserved

Hubber v Air New Zealand Ltd

25 Jul 2006, P Montgomery, CA 108/06, (4 pages)

UNJUSTIFIED DISADVANTAGE - Applicant alleged unjustifiably disadvantaged by final warning issued by respondent - Respondent investigated allegation applicant breached code of conduct and check-in procedures - Applicant checked herself in and removed baggage tags from airport - Finding of misconduct in respect of baggage tags open to respondent following full and extensive inquiry - No disparity of treatment - Incidents of others removing tags were simply allegations and although applicant undertook to provide further information on issue to respondent, she failed to do so - Respondent entitled to impose appropriate sanction - No unjustified disadvantage - Length of service over 25 years - Duty Terminal Manager

Result: Application dismissed ; Costs reserved

Nicholls v Fox Manufacturing Ltd

18 Jul 2006, J Crichton, CA 104/06, (10 pages)

UNJUSTIFIED DISMISSAL - Misconduct - No appearance for respondent - Respondent in liquidation - After disagreement between applicant and worker, other workers refused to work with applicant - Applicant then redeployed to perform other work - Applicant questioned redeployment - Suspended after investigation - Alleged applicant failed to obey lawful instruction to perform work, and had negative affect on workplace - Workers' statements did not justify conclusion conduct so serious as to warrant dismissal - Was appropriate to question redeployment as had not seen job description - Respondent's evidence not credible - Procedural irregularities made dismissal resulting from process unsafe - Investigation so inadequate as to make dismissal substantively unjustified - Dismissal not decision fair and reasonable employer would have made - UNJUSTIFIED

DISADVANTAGE - Disadvantaged by way respondent conducted itself at meeting, suspension and inappropriate process - Disadvantaged by way suspension raised at meeting, after respondent sought to persuade him meeting not disciplinary - Remedies - Significant award appropriate - Extreme health and financial consequences - Not appropriate to reserve costs - Length of service seven months - Beam saw operator

Result: Application granted ; Reimbursement of lost wages (\$3,960) ; Compensation for humiliation etc (\$12,000) ; Costs in favour of applicant (\$3,750)

Sullivan v Maxwell Marine Ltd

24 Jul 2006, R Arthur, AA 249/06, (8 pages)

UNJUSTIFIED DISMISSAL - Poor performance - Five step disciplinary process in employment agreement - Although respondent did not establish counselling provided as first step, any procedural error cured by subsequent meetings - Over seven months applicant received five written warnings and attended several disciplinary meetings - No procedural error or unfairness in labelling three warnings "final" - Genuine reasons for performance concerns - However, applicant given insufficient time and detail to prepare responses to examples given in disciplinary meetings - Respondent moved too far, too fast, particularly with last three warnings - So close together no real opportunity for improvement or proper preparation - Not clear applicant aware at start of last meeting termination could result - No opportunity to comment on decision to dismiss - Dismissal unjustified - UNJUSTIFIED DISADVANTAGE - Applicant's allegations demoted and discriminated against dismissed - Authority did not accept dismissal engineered to avoid paying redundancy entitlement - No disadvantage - Remedies - Authority not satisfied from applicant's evidence and general buoyancy of labour market that lost wages sufficiently mitigated - Contributory conduct 50 percent - Length of service not specified - Team leader

Result: Application granted (Unjustified dismissal) ; Reimbursement of lost wages (8 weeks reduced to 4 weeks) ; Compensation for humiliation etc (\$2,000 reduced to \$1,000) ; Application dismissed (Unjustified disadvantage) ; Costs reserved

Wilford v Aden Electrical Ltd

19 Jan 2007, J Wilson, AA 12/07, (11 pages)

UNJUSTIFIED DISADVANTAGE - Applicant claimed subjected to bullying - Asked that he not work with bullying employees - Dispute whether bullying occurred - Applicant obviously distressed - Fair and reasonable employer would and should have undertaken full investigation - Not investigating complaints constituted unjustified action - Unjustified disadvantage - UNJUSTIFIED DISMISSAL - Constructive dismissal - Manager made aware of situation and asked for time to investigate complaints - Applicant on stress leave when resigned - Not at work when resigned, so not at risk - Chose to resign before investigation completed because received offer of employment - Resignation not caused by breach of duty - No constructive dismissal - PENALTY - Applicant requested s4A Employment Relations Act 2000 ("ERA") penalty for breach of duty of good faith - Respondent accepted resignation with immediate effect - Applicant claimed by not being allowed to work notice was discriminated against on grounds had lodged grievance - If respondent did breach duty, breach not deliberate or sustained - No penalty warranted - ARREARS OF WAGES - Money deducted from final pay and due and owing - Length of service one year two months - Electrical apprentice

Result: Application dismissed (Unjustified dismissal, penalty) ; Application granted (Unjustified disadvantage) ; Compensation for humiliation etc (\$5,000) ; Arrears of wages (\$110.02) ; No order for costs

Practice & Procedure

Busby v Talent Base Ltd

20 Jul 2006, RA Monaghan, AA 247/06, (6 pages)

PRACTICE AND PROCEDURE - Application to reopen investigation - Respondent claimed out of country and unaware employment relationship problem filed - Disputed amounts awarded to applicant - Background did not make for compelling application to reopen - However, apparent original orders should be amended - Unpaid wages and holiday pay to be recalculated - Qualifying billings for commission reduced by agreement - Written agreement silent about commission for billings in excess of \$28,000 - Applying usual approach to interpretation Authority might have accepted no commission payable on those billings - However, commission supposed to provide incentive and lack of further commission was disincentive - Authority did not accept that was parties' intention and no evidence to suggest intended to cap commission - Commission payable on billings over \$28,000 at top rate of sliding scale - \$7,185 commission payable - Given applicant's acknowledgment of overpayment, parties urged to take pragmatic approach to resolving issue of deductions - Leave reserved if unable to resolve matter - PENALTY - Authority allowed reintroduction of penalty application withdrawn at original investigation, but declined to address additional application for penalties against director personally - Failure to attend to final payment breached employment agreement - Subsequent payment attempt to remedy breach and weighed in respondent's favour - Reason for not paying commission not very compelling - Timely payment of wages too important to allow failure to address matter to go unpenalised - Director inexcusably lax - \$2,000 penalty for breach of employment agreement - Authority did not believe actions reached level of deliberate, serious, or sustained breaches of duty of good faith set out in s4A Employment Relations Act 2000 - Declined to order further penalty for breach of good faith - Talent manager

Result: Orders accordingly ; Penalty (\$2,000)(Payable to Crown) ; Interest (7.5%) ; Costs reserved

Eruera-Morrison v New Zealand Post

21 Dec 2006, Travis J, AC 75/06, (3 pages)

PRACTICE AND PROCEDURE – Challenge to determination of Employment Relations Authority – Interlocutory judgment – Whether Court should request good faith report – Section 181 Employment Relations Act 2000 – Plaintiff dismissed for allegedly taking cell phone – Plaintiff refused to take oath or affirmation or give viva voce evidence before Authority – Plaintiff filed affidavit and attended investigation meeting and Authority heard from other witnesses – Alleged plaintiff had propensity to give answers she believed questioner was seeking due to being victim of domestic violence – HELD – Latter feature led Court to conclude that it was likely that plaintiff facilitated rather than obstructed the Authority's investigation – Authority did not clearly signal that there had been obstruction by plaintiff and appeared to have been able to proceed with investigation – Was borderline case – In interests of expediting matter and reducing cost, Court decided not exercise its discretion to request good faith report

Result: Application dismissed

Fisher v Fisher & Anor

1 Feb 2007, Perkins J, AC 2/07, (1 pages)

PRACTICE AND PROCEDURE – De novo challenge to determination of Employment Relations Authority – Interlocutory judgment – Application for leave to file statement of defence out of time – Ten day delay – Plaintiff opposed defendant's application but

withdrew that opposition one day before hearing – HELD – Was appropriate for leave to be granted – Delay was short and clearly result of oversight – Subsequent information showed explanation for delay – Application granted – Timetabling directions given – COSTS – Plaintiff’s opposition to defendant’s application unreasonable – No real prejudice suffered by plaintiff – Costs to lie where they fell

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

Fletcher v ATL Systems Ltd

24 Jan 2007, R Arthur, AA 17/07, (4 pages)

PRACTICE AND PROCEDURE – Application for removal to Employment Court – Applicant received base salary plus commission – Whether commission payments properly included in holiday pay calculated under Holidays Act 1981 and Holidays Act 2003 – Applicant claimed important question of law arose regarding meaning of “holiday pay” and “on pay” in legislation – Respondent opposed application - Whichever interpretation about inclusion of commission payments correct likely to be of wider interest – Issue may not appear contentious as gross earnings definition in legislation includes commission payments in holiday pay calculation – Findings of fact may be decisive on what was or was not included in payments - However, how this was done or not done were questions of law – Also, parties needed guidance on correct method of calculation as contentious between them – Authority satisfied answers to questions of interpretation will be decisive -Important questions of law likely to arise other than incidentally – No sufficient reason not to order removal – Removal ordered

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

Houston v Oldco PTI Ltd

13 Oct 2005, M Urlich, AA 414/05, (2 pages)

PRACTICE AND PROCEDURE - Application for blanket suppression order - Respondent claimed evidence commercially sensitive, or so entwined with commercially sensitive evidence unable to be separated - Blanket suppression orders issued by High Court in related litigation still applied - Applicant opposed suppression - Respondent alleged disclosure of any of material for which suppression order sought likely to rock confidence of respondent's customers or suppliers, whose goodwill was respondent's major asset - Fact principal shareholder in receivership in public domain - Applicant's relationship to shareholder in public domain - Ending of parties relationship and connection to receivership of principal shareholder in public domain - Issues historical and respondent continued to trade - Authority not satisfied Anderson (cited below) test for suppression met - Could seek suppression of evidence during course of investigation - Respondent's counsel sought adjournment on grounds did not have instructions to proceed on that basis and advised challenge to refusal to grant suppression order would be sought - Adjournment granted - Determination only distributed to parties until outcome of challenge known - Authority's file not to be released without order of Authority

Result: Application dismissed (Suppression order) ; Investigation adjourned ; No order for costs

Miller v Michael Percy Investments Ltd

18 Jan 2007, Couch J, CC 1/07, (1 pages)

PRACTICE AND PROCEDURE – Application to recall judgment (see: CC 11/06) – Court held that plaintiff was employee and confirmed the terms of the employment agreement – Applicant alleged was neither necessary nor proper for Court to determine specific terms of agreement – Alleged Court’s jurisdiction was limited to issue of employment status – Alleged unfair and unjust for Court to have made findings regarding specific terms of agreement – Alleged if known that Court would decide terms of agreement, applicant would

have provided further evidence – Respondent accepted findings about certain term were incorrect and was appropriate to recall judgment – HELD – Court had to resolve terms of agreement before it could consider its effect on nature of employment relationship – Having made those findings of fact, Court was obliged to record them – Court misconstrued parts of evidence – Respondent’s concession amounted to very special reason to recall substantive judgment for correction of that finding of fact – Judgment to be recalled and reissued with amendments – Sales person

Result: Application granted (recall judgment); Orders accordingly ; Costs reserved

Service and Food Workers Union Nga Ringa Tota Inc v Auckland District Health Board and 19 Ors

1 Feb 2007, D Asher, WA 16/07, (3 pages)

PRACTICE AND PROCEDURE - Application for removal to Employment Court - Applicant claimed respondents in breach of duty of good faith to conclude multi-employer collective agreement (“MECA”) under s33 Employment Relations Act 2000 (“ERA”) - Also claimed in breach of duty in ERA Schedule 1B cl 6(1) to support MECA - Issue novel, untested and central to employment relationship problem - Important questions of law likely to arise other than incidentally - Matter also involved essential service bargaining problem, issue of promotion of productive employment relationships in public sector in context of Schedule 1B obligations that every employer be a good employer (cl 5) and, parties obligation to recognise and support Treaty of Waitangi principles (cl 7) - Respondents did not submit statements in reply – Satisfied statements of defence required by Court would properly inform it of respondents' positions and avoid unnecessary costs - Requirement for statements in reply waived - Matter removed to Court

Result: Application granted ; Costs reserved

Tairi v Bay of Plenty District Health Board

27 Jul 2006, J Scott, AA 252/06, (9 pages)

PRACTICE AND PROCEDURE - Application to strike out - Whether accord and satisfaction - Applicant claimed dismissal unjustified - Respondent asserted agreement for additional three weeks pay settled all issues between parties - After respondent advised intended to dismiss applicant, union delegate met with it and reached agreement - Delegate authorised to act for applicant - Applicant claimed told by delegate union had agreed not to take matter further, but applicant could pursue it personally - No signed settlement agreement - Union delegate died before investigation meeting - Acting as applicant's agent, delegate reached agreement to conclude all matters between parties - To find otherwise would offend against good faith provisions of Employment Relations Act 2000 - Situation made clear in subsequent letter to applicant - Board entitled to take acceptance of payment as confirmation of agreement - Respondent's failure to point out full and final nature of settlement when grievance submitted did not amount to it accepting submission - Personal grievance struck out - Carpenter

Result: Application granted ; Personal grievance struck out ; Costs reserved

Practice & Procedure - Consent Orders

de Boer v EC Credit Control Ltd

19 Jan 2007, GJ Wood, WA 5/07, (1 pages)

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

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

Grieg v Samson Good Enterprises Ltd t/a New World Foxton

11 Jan 2007, D Asher, WA 2/07, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of full and final settlement - Terms of settlement to be orders of Authority - Settlement terms were ban on applicant entering respondent's premises lifted and applicant to withdraw application against respondent - Costs to lie where they fall

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

Nicholas v Byrne Investments Ltd t/a Cottage Brick and Blocklayers

18 Jan 2007, K Raureti, AA 10/07, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Respondent agreed to pay applicant total sum of \$1,000 by way of three separate instalments by specified dates - Payments to be made without deduction in accordance with s123(1)(c)(i) Employment Relations Act 2000 - Terms of settlement were in respect of all employment related matters between the parties and were full, final and binding

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

Rowe v Groganic Fertilisers Ltd

22 Jan 2007, R Arthur, AA 14/07, (1 pages)

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

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

Department of Labour
TE TARI MAHI

