Department of Labour
TE TARI MAHI

EMPLOYMENT CASES SUMMARY

MAY 2006

Employment Institutions Information Centre

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 Employment Institutions Information Centre 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 DECISIONS

The Employment Institutions Information Centre is a service of the Department of Labour. Full-text copies of decisions may be obtained by contacting:

Ph: 04-4989993 or 04-4989985
Fax: 04-4712094
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 addresses to: The Librarian, Employment Institutions Information Centre , PO Box 2458, 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

Contents

Contents 3

Table of Cases Noted in This Issue 4

Editorial..9

Full Summaries of Significant Cases under the ERA 2000 16

Brief Summaries of Court Judgments, Authority Determinations —..

- Challenges to the Employment Court 34
- Arrears..35
  - Holiday Pay..36
- Bargaining..37
- Breach of Contract..38
- Compliance Order..39
- Costs..40
- Dispute 43
- Good Faith..45
- Jurisdiction..46
- Parental Leave..47
- Penalty..48
- Personal Grievance 49
  - Dismissal..50
  - Dismissal - Misconduct 54
  - Dismissal - Poor Performance..57
  - Dismissal - Redundancy..58
  - Raising of Personal Grievance 60
  - Unjustified Disadvantage 61
- Practice & Procedure 65
  - Consent Orders..70

Cases Noted in this issue

Case Name **Page**

Ah Chee v Panda Catering Ltd
(AA 27/06, 8 Feb 2006, M Urlich) , Unrep 58

Barnes v Telecom New Zealand Ltd
(CA 20/06, 14 Feb 2006, J Crichton) , Unrep 50

Blaker v B & D Doors (NZ) Ltd
(AA 40/06, 16 Feb 2006, J Wilson) , Unrep 54

Castle v New Zealand Fire Service
(AA 34/06, 13 Feb 2006, YS Oldfield) , Unrep 61

The Chief Executive Officer of the Department of Corrections v Corrections Association of New Zealand Inc
(AC 59/05, 17 Oct 2005, Colgan J) ,
To be reported [2005] ERNZ 19

Conquer v Status Produce Ltd
(AA 22/06, 2 Feb 2006, R Arthur) , Unrep 58

Dakers v Perry
(CA 65/06, 10 May 2006, J Crichton) , Unrep 47,65

Faithfull v Morris and Morris Ltd
(AA 1A/06, 9 Feb 2006, RA Monaghan) , Unrep 40

Faletolu v Tofilau Finance Ltd
(WA 15/06, 7 Feb 2006, PR Stapp) , Unrep 70

FINSEC Inc and Anor v ANZ National Bank
(WA 18/06, 10 Feb 2006, PR Stapp) , Unrep 43

Giddens and Anor v Kini and Anor
(AA 39/06, 15 Feb 2006, L Robinson) , Unrep 40

Graham v Crestline Pty Ltd
(AA 23/06, 7 Feb 2006, RA Monaghan) , Unrep 40

Greenlea Premier Meats Ltd v New Zealand Meat and Related Union Aotearoa Branch
(AA 162/06, 8 May 2006, Y Oldfield) , Unrep 65

Hankins v Ashley
(AA 19/06, 2 Feb 2006, R Arthur) , Unrep 36,38

Haywood v Blackwell Motors Ltd
(CA 18/06, 8 Feb 2006, H Doyle) , Unrep 50,61

Henare v After Hours Moorhouse Medical Ltd
(CA 27/06, 23 Feb 2006, J Crichton) , Unrep 49,50,62

Hunt v Mercury Consulting Group Ltd
(WA 22/06, 13 Feb 2006, PR Stapp) , Unrep 51,62

Jones v Gunson
(AA 36/06, 14 Feb 2006, K Anderson) , Unrep 48,54

Joseph v Lakes District Health Board
(AC 66/05, 1 Nov 2005, Couch J) , Unrep 30

Kereama v Feilding Venison Ltd
(WA 55/06, 10 Apr 2006, D Asher) , Unrep 45

Kingi v Responsive Maintenance 2000 Ltd
(AA 32/06, 10 Feb 2006, J Scott) , Unrep 54,63

Langford and Ors v Otago District Health Board
(CA 17/06, 7 Feb 2006, J Crichton) , Unrep 43

Lindsay v Carter Holt Harvey Ltd t/a CHH Futurebuild
(AA 28/06, 8 Feb 2006, RA Monaghan) , Unrep 40

Makiha v Northern Tree Harvesters Ltd
(AA 31/06, 10 Feb 2006, M Urlich) , Unrep 55

Manning v Saxon Print Group Ltd
(CA 19/06, 13 Feb 2006, H Doyle) , Unrep 57

Maritime Safety Authority v Sealord Group Ltd
(CRI-2005-042-732, 24 Jun 2005, Zohrab J) , Unrep 16

Marvel Distributors Ltd v Dizac
(AC 65/05, 28 Oct 2005, Travis J) , Unrep 66

Matich v Christian Healthcare Trust
(AA 24/06, 8 Feb 2006, A Dumbleton) , Unrep 55

McIntosh v Southern Lakes Holdings Ltd
(CA 22/06, 16 Feb 2006, P Cheyne) , Unrep 41,66

Meyrick v Aston Troon Ltd
(WA 24/06, 15 Feb 2006, D Asher) , Unrep 70

Monk v New Zealand Lotteries Commission
(WA 21/06, 10 Feb 2006, PR Stapp) , Unrep 41

Morrison v Spotless Services (New Zealand) Ltd
(WA 19/06, 10 Feb 2006, PR Stapp) , Unrep 51

Mulyadi v Spotless Services (NZ) Ltd
(AA 41/06, 16 Feb 2006, R Arthur) , Unrep 52

Nee Nee and Ors v TLNZ Auckland Ltd
(AA 35/06, 13 Feb 2006, A Dumbleton) , Unrep 66

New Zealand Dairy Workers Union v Fonterra Co-operative Group Ltd
(AA 33/06, 10 Feb 2006, M Urlich) , Unrep 43

New Zealand Public Service Association (Inc) (PSA) v The Chief Executive in respect of the Ministry of Agriculture and Forestry (MAF)
(WA 11/06, 3 Feb 2006, PR Stapp) , Unrep 67

New Zealand Public Service Association Inc v Southland Regional Council
(CC 15/05, 28 Oct 2005, Colgan J) ,
To be reported [2005] ERNZ 22

Patching v KSM Installations (NZ) Ltd
(WA 23/06, 13 Feb 2006, D Asher) , Unrep 46,67

Perkins v Urban Cuisine Ltd
(WA 25/06, 16 Feb 2006, D Asher) , Unrep 70

Phillips and Ors v Telecom (NZ) Ltd
(AC 64/05, 27 Oct 2005, Travis J) , Unrep 67

Pouesi v The Youth Horizons Trust
(AA 38/06, 16 Feb 2006, J Scott) , Unrep 60

Pradeep v Star Service Stations Ltd
(AC 67/05, 3 Nov 2005, Shaw J) , Unrep 67

Pryce v TelstraClear Ltd
(AA 37/06, 14 Feb 2006, RA Monaghan) , Unrep 38,59

Rollo v Pick-A-Part Avondale Ltd
(AA 30/06, 9 Feb 2006, M Urlich) , Unrep 52

Russell (Labour Inspector) v Hemara t/a Bass Cleaning
(WA 16/06, 7 Feb 2006, PR Stapp) , Unrep 39

Scrimgeour v The Wellesley Ltd
(WC 22/05, 10 Nov 2005, Couch J) , Unrep 34,41

The Service and Food Workers' Union Nga Ringa Tota and Ors v Heinz Wattie's Ltd
(WA 67/06, 24 Apr 2006, PR Stapp) , Unrep 37,39

Sinclair v Local Media Group Ltd
(AA 26/06, 8 Feb 2006, RA Monaghan) , Unrep 42

Singh v Sherildee Holdings Ltd t/a New World Opotiki
(AC 53A/05, 26 Oct 2005, Couch J) , Unrep 42

Taylor v eCOM New Zealand Ltd
(AA 29/06, 9 Feb 2006, D King) , Unrep 44,53,63

Waikato District Health Board v Draper
(AC 56A/05, 18 Oct 2005, Colgan J) , Unrep 68

Wilton v Stepping Stones Nursery Ltd
(WA 17/06, 8 Feb 2006, GJ Wood) , Unrep 70

X v Auckland District Health Board
(AC 52A/05, 31 Oct 2005, Colgan J) ,
To be reported [2005] ERNZ 26

Y v Bay of Plenty District Health Board
(AA 132/06, 20 Apr 2006, R Arthur) , Unrep 68

Yang v Wooding Jib Fixers (2005) Ltd
(CA 23/06, 17 Feb 2006, H Doyle) , Unrep 35,36

Editorial

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

Transferring public holidays under the Holidays Act 2003

I INTRODUCTION

The idea of a public holiday conjures up pleasant feelings to many New Zealand employees: a public holiday can mean a paid day off work, or perhaps the opportunity to work and earn time and a half. However, the existence of a public holiday can also cause problems for both employers and employees when it is not clear whether the employee is entitled to be paid for the public holiday, or what amount the employee is entitled to be paid.

One issue under the Holidays Act 2003 ("Holidays Act") which has caused some confusion recently concerns the transfer of public holidays: A transfer of a public holiday is when an employee and an employer agree that a public holiday is to be observed by the employee on another day. For example, an employer and an employee may agree that the employee will transfer the "Good Friday" public holiday to Easter Sunday (which is not a specified public holiday under the Holidays Act). The result of this transfer will mean that Good Friday is now an ordinary working day for the employee (no longer a public holiday) and Easter Sunday is now a "public holiday". The rules about public holidays, for this employer and employee, will now apply to the Easter Sunday instead of Good Friday – for example payment of time and a half and an alternative holiday are possible if Easter Sunday is an otherwise working day for the employee and then the employee does in fact does work on that day.

The Employment Court has recently dealt with two cases involving transfer of public holidays. This editorial will firstly give a brief background to public holidays under the Holidays Act before discussing those two cases: *Heinz Wattie's Limited v National Distribution Union Inc* [2005] 1 ERNZ 12 and *New Zealand Air Line Pilots Association Inc v Air New Zealand Ltd* [2005] 1 ERNZ 180.

II THE HOLIDAYS ACT AND TRANSFERRING PUBLIC HOLIDAYS – A BASIC EXPLANATION

Under the Holidays Act, employees are entitled to 11 paid public holidays each year. These days are listed in s44 as:

1. Christmas Day:
2. Boxing Day:
3. New Year's Day:
4. 2 January:
5. Waitangi Day:
6. Good Friday:
7. Easter Monday:
8. ANZAC Day:

9. the birthday of the reigning Sovereign (observed on the first Monday in June):
10. Labour Day (being the fourth Monday in October):
11. the day of the anniversary of a province or the day locally observed as that day.

If a public holiday is a day which would otherwise be a working day for an employee, either:

- The employee does not work on that public holiday, but is paid the relevant daily pay (as defined in s9 of the Holidays Act);[1] or
- The employee does work on the day and they are paid time and a half (for the time worked) and are entitled to an alternative holiday.[2]

An employee and an employer are able to agree that any public holiday (as listed above) is to be observed by the employee on another day.[3] However, the agreement to transfer a public holiday must not diminish the total number of paid public holidays "that would otherwise be available to the employee in any year."[4] This "observing of a public holiday on another day" has been referred to by the Employment Court as the "transferring of public holidays."

The Holidays Act itself provides for some specific instances where public holidays will be transferred. Section 45 provides for what happens if a public holiday, over the Christmas/New Year period, falls on a Saturday or a Sunday:

> **45 Transfer of public holidays over Christmas and New Year**
> (1) For the purposes of this subpart, if any of the public holidays listed in section 44(1)(a) to (d)—
> (a) falls on a Saturday and the day would otherwise be a working day for the employee, the public holiday must be treated as falling on that day:
> (b) falls on a Saturday and the day would not otherwise be a working day for the employee, the public holiday must be treated as falling on the following Monday:
> (c) falls on a Sunday and the day would otherwise be a working day for the employee, the public holiday must be treated as falling on that day:
> (d) falls on a Sunday and the day would not otherwise be a working day for the employee, the public holiday must be treated as falling on the following Tuesday.
> (2) To avoid doubt, this section does not entitle an employee to more than 4 public holidays for the days listed in section 44(1)(a) to (d).

III HEINZ WATTIE'S LTD V NATIONAL DISTRIBUTION UNION INC

A Facts

The *Heinz Wattie's* case concerned a number of night shift workers in the plaintiff's food processing plants. These night shift workers worked shifts which started before midnight

[1] Holidays Act 2003 s49.
[2] Holidays Act 2003 s50.
[3] Holidays Act 2003 s44(2)
[4] Holidays Act 2003 s44(3).

and continued into the following morning. For the purpose of the case, the example of a shift beginning at 10pm one night and finishing at 6am the following morning was used.

The parties' collective employment agreements ("CEAs") all included a provision similar to the following: "Where a shift overlaps into a public holiday, the work of the shift may be completed and paid for at the rate appropriate to that shift: provided that the next shift shall be allowed as the employee's public holiday." ("the overlapping provision"). The overlapping provision meant that the parties would treat the entire 10pm-6am shift as a normal working day and then the employee's next succeeding shift would be observed and paid as a public holiday.

Following the enactment of the Holidays Act, the plaintiff sought an opinion from a Labour Inspector to check the lawfulness of the overlapping provisions. The Labour Inspector's opinion indicated that the provisions were unlawful and that for a day to be transferred to another day, that other day must also run from midnight to midnight.

Because of the outcome of the Labour Inspector's opinion, the plaintiff changed some of its work patterns. These changes meant that, for example, a worker who would normally work from 10pm one night to 6am the following morning would now work from 10pm until 12pm the night before a public holiday and then from 12pm until 6pm starting at midnight at the end of the public holiday.

Both the defendant and the employees concerned wanted to continue the traditional practice as set out in the overlapping provision. The Court accepted that:[5]

> shift workers, especially continuous night shift employees, experience particular and often unnaturally disruptive life patterns. In addition to working when most others in the community are resting or sleeping (and vice versa), issues such as travel to and from work, child care arrangements, and making appointments in the "other" world of work, are but several examples. The certainty and predictability of working hours assist such employees to deal with these non-standard working conditions.

The arrangements in this case were noted to be typical of a large number of other employment relationships.

The plaintiff took this problem to the Employment Relations Authority. The Authority removed the matter to the Employment Court. A Labour Inspector and Business NZ were allowed leave to appear at the Court hearing.

B The issue

There were two issues for the Court to consider in order to determine whether the CEA had properly provided for the transfer of public holidays:

1. Whether the overlapping provision purported to transfer the observance of a public holiday under s44(2) or whether it provided for an alternative holiday under s56?
2. What is a "day" for the purposes of the Act?

C The Employment Court's findings

1 Whether transfer of public holiday or alternative holiday

[5] *Heinz Wattie's Limited v National Distribution Union Inc* [2005] 1 ERNZ 12, para 18.

Counsel for the Labour Inspector argued that the relevant provisions in the CEAs did not purport to transfer the public holiday but instead provided for an alternative holiday (as is required (in addition to payment of time and a half) if an employee works on a public holiday). The plaintiff disagreed and argued that the wording of the overlapping provision was sufficient to transfer the public holiday to the next shift.

The Court found that the overlapping provision provided for the transfer of public holidays rather than providing for an alternative holiday. The first reason for the Court's finding was that the overlapping provisions in the relevant CEAs were drafted before the provision of "alternative days" became mandatory. The Court explained the difference between alternative days and transferred public holidays:[6]

> An alternative [day] under s56 is not the transfer of the observance of the holiday as contemplated by s44(2). It is a statutory guarantee that a person who works on any part of a holiday is entitled to another day's holiday. It differs from the s44(2) observation of a public holiday on another day.
>
> If an employee works on Christmas Day (being a normal working day), he/she would receive payment at time and a half plus a s56 alternative holiday. Under s44(2) if the parties agree that the public holiday is to be observed on another day, then that other day becomes the public holiday. We interpret the "overlapping clauses" to fall within the latter section. If that is the case, and the parties agree to another day that is lawful for the observation of the public holiday, then the payments at time and a half under s50 for work on the holiday nominated by s41(1) do not apply.

The second reason for the Court's finding was that the wording of the overlapping clauses was found to be "clear and unambiguous:" "The words "the next shift shall be allowed as the employee's public holiday" can only mean what they say and the specific reference to public holiday eliminates the possibility that it is to be regarded as an alternative holiday."[7]

2 What is a "day"?

The Court looked at the many dictionary definitions of "day" (there is no definition of day in the Holidays Act), and old case law from the Arbitration Court which involved interpretation of the word "day." The Court found that it was "left to determine the meaning of the word in light of the purpose of the Act and in a manner that [did] not lead to an absurd or irrational result." The Court stated that the purposes of the Holidays Act were:[8]

> to provide what is now called work-life balance; to provide minimum entitlements to holidays and leave while, at the same time, allowing the parties to agree enhanced and additional entitlements provided they do not exclude or reduce any employee's entitlement to leave.

The Court was "satisfied that the definition of day as any period of 24 hours agreed by the parties is compliant in all respects with [the purposes of the Act]."

The Court found that it was "only commonsense" that the public holidays should coincide with the employees' shifts:[9]

---

[6] *Heinz Wattie's Limited v National Distribution Union Inc* [2005] 1 ERNZ 12, para 50-51.
[7] *Heinz Wattie's Limited v National Distribution Union Inc* [2005] 1 ERNZ 12, para 52.
[8] *Heinz Wattie's Limited v National Distribution Union Inc* [2005] 1 ERNZ 12, para 62.
[9] *Heinz Wattie's Limited v National Distribution Union Inc* [2005] 1 ERNZ 12, para 64-65..

> When a day worker observes a public holiday there is a break (depending on the length of the shift) of 36 to 40 hours between leaving work on the day before the holiday and returning on the day after. There is no reason for nightshift workers to enjoy a break of only 24 hours as might follow from the employer's response to the inspector's interpretation. The defendants' interpretation (and that of Business New Zealand) is therefore one that meets the objective of work-life balance.
>
> Secondly, we are not persuaded that the clauses restrict, exclude, or reduce the employees' entitlements to public holidays. The Act specifically provides for the observance of the public holiday on another day. There is therefore no loss of the employees' entitlement to leave. We accept the submission that the parties are at liberty to agree to transfer the public holiday to another day but do not accept the restrictive argument that the transfer must be to another day seen as having "*national, religious, or cultural significance*" for each employee concerned.

In conclusion, the Court made two declarations. Firstly, that the relevant overlapping provisions were lawful under the Holidays Act and could continue to be applied and secondly, "that the expression "another day" in s44(2) may be defined by employers and employees as a continuous 24 hour period running from and to a time other than midnight, provided that doing do is, in the particular circumstances, consistent with the legislation and compliant with s44(3)."

IV NEW ZEALAND AIR LINE PILOTS ASSOCIATION INC V AIR NEW ZEALAND LIMITED

A Facts

This case involved pilots who worked for Air New Zealand. The pilots could be required to work any day of the year (including public holidays). Which days each pilot did work was ascertained by way of a rostering system. The collective employment agreement ("CEA") between the parties provided that pilots had a specified number of days leave (between 37 and 51 days). This leave was stated to include annual leave and provision for public holidays.

An issue with this practice arose after the implementation of the Holidays Act. The problem was that if a pilot did work on a public holiday they would not receive time and a half for the work done.

The matter was removed by the Employment Relations Authority to the Employment Court. A number of interested parties were granted leave to appear at the Court hearing.

B Issues

The question in this case, was identified by the Court as being whether the defendant was obliged to pay the pilots in question time and a half (as required by s50 of the Holidays Act) for time worked on public holidays.

In answering that question, the Court had to determine whether the parties CEA properly provided for the transfer of the public holidays to other days. The Court looked at, firstly, what requirements must be fulfilled in order for a public holiday lawfully to be observed on another day? And secondly, did the relevant employment agreement ensure the statutory minimum holiday rights of the pilots?

C Court's Findings

1 Observance of a public holiday on another day

The Court noted that the practice of rostering did not allow for the identification of the public holiday component of the leave taken by the pilots. The Court found that the ability to transfer public holidays under s44(2) of the Holidays Act was "not unfettered:[10]"

> It is subject not only to an agreement between the parties as was required by s7A [of the Holidays Act 1981] but also requires that any public holiday has to be observed on another day. We interpret that requirement to mean the observation of a specified public holiday on a particular day. This interpretation is reinforced by s81(2)(i). This requires an employer to keep holiday and leave records which contain information on the dates of, and payments for, any public holiday on which the employee worked. This confounds [the defendant's] argument that "any" means "all" and "another day" means "days". In our view, "another day" must be specified and identified as a day upon which a public holiday is to be observed, not only so that employers can comply with s81(2)(i) but also so that it can be seen whether s44(3) has been respected.

The Court noted a difficulty with the current rostering practice: If an employee was called back from work when on holiday, it would not be possible to ascertain whether that "working day" was an annual leave day or a public holiday day. The current rostering practice meant that the defendant never had to pay time and a half for public holidays.

The Court found that Parliament "clearly intended two separate and discrete types of holidays (annual leave and public holidays) with the emphasis on observing the public holidays." The Court found that in that context the word "observe" must mean "to celebrate an anniversary":[11]

> This interpretation is supported by s40(1) which provides that if a public holiday occurs during an employee's annual holidays it must be treated as a public holiday and not as part of the employee's annual holiday.

The Court concluded that:

> under the 2003 Act the parties to employment agreements are able to agree to alternative arrangements for the observance of public holidays but these are constrained. The Act does not prevent an employer from providing an employee with enhanced or additional employee entitlements on a basis agreed with the employee but the employee must not lose out on the minimum entitlements which includes the observation of public holidays rather than extended annual leave. To achieve this purpose if a public holiday is to be observed other than on the day specified in s44 the day must be able to be identified as a public holiday and must be an otherwise working day.

2 Does the employment agreement ensure the statutory minimum rights of the pilots?

> The Court found that the CEA did not comply with the requirements of the Holidays Act 2003.

[10] *New Zealand Air Line Pilots Association Inc v Air New Zealand* [2005] 1 ERNZ 180, para 50.
[11] *New Zealand Air Line Pilots Association Inc v Air New Zealand* [2005] 1 ERNZ 180, para 54.

The relevant clause in the CEA did not allow for the payment of time and a half and an alternative day's holiday in the event that a pilot did work on a public holiday so the agreement did not comply with s50 of the Holidays Act.

The difference between the *Heinz Wattie's* and *Air New Zealand* cases was that the *Heinz Wattie's* collective agreement sufficiently specified the day on which the public holiday was to be observed.

V SUMMARY

The Court in the *Air New Zealand* case helpfully set out what elements need to be satisfied for there to be a lawful transfer of a public holiday (especially useful to employers and employees who deal with shift work situations):

- There is an agreement between the employer and the employee; and
- The agreement is that the public holiday is to be observed on another day which is able to be identified; and
- The agreement must not diminish the total number of paid public holidays that would otherwise be available to the employee in any year.

In addition, the Court in *Heinz Wattie's* helped to clarify further what "day" a public holiday can be transferred to:

- It may be to another 24 hour period other than from midnight to midnight (provided that in doing so, and in the particular circumstances, it is complies with the Holidays Act); and
- The day does not have to be a day seen as having national, religious, or cultural significance for the employee(s) concerned.

Significant Judgments/Decisions added to the Employment Law Database 1 April 2006 - 30 April 2006

Under the Employment Relations Act 2000

Maritime Safety Authority v Sealord Group Ltd

CRI-2005-042-732
Heard: 24 Jun 2005, Nelson
Judgment Date: 24 Jun 2005
Court/Authority/Tribunal: Zohrab J
Appearances: A Hopkinson ; A Stallard

> DISTRICT COURT - HEALTH AND SAFETY - Failure to comply with Part 2 Health and Safety in Employment Act 1992 by failure to take all practicable steps to ensure safety of employees while at work contrary to section 6 - Failure to provide adequate supervision and training for deceased employee in use and operation of meal plant procedures - Defendant pleaded guilty to charges arising out of fatal accident on board one of its ships while at sea - Deceased had been engaged in cleaning fishmeal cooking machine and became trapped in blades of machine's auger - Principles and purposes of sentencing taken into account - Defendant ordered to pay penalty of $5,000 for each offence plus reparation of $120,000 for first offence and $75,000 for second offence

This was the sentencing decision regarding two charges under the Health and Safety in Employment Act 1992 ("HSE") to which the defendant pleaded guilty.

The first charge was for failure to comply with Part 2 of the HSE by failing to take all practicable steps to ensure the safety of employees while at work, contrary to section 6. The second charge was for failure to provide adequate supervision and training for the deceased employee in the use and operation of meal plant procedures.

The deceased employee had been engaged in cleaning a fishmeal cooking machine when he became trapped in the blades of the machine's auger. He subsequently died.

The maximum penalty for each offence was $250,000.

HELD: (1) It was fair to say that industrial accidents were never intended, but owing to the vagaries of nature, the fishing industry was a particularly difficult and hazardous activity at the best of times, particularly in the southern oceans. However, the Court was left with a clear impression that the risk of entrapment of somebody in the fish cooker was a clearly identifiable hazard and should have been at best eliminated and minimised. The defendant had quite responsibly accepted that position by entering its plea at a very early opportunity. It was also clear that there was not proper training in place and that the

deceased employee had not been trained. It was clear that it was an accident waiting to happen.

(2) The Court was required to consider the purposes of sentencing. Firstly, the requirement to hold the offender accountable for harm done to the victim and the community by the offending. This was only one factor to consider, but was one of the factors of foremost concern to the Informant. Further, it was something which was foremost in the "mind" of the defendant.

(3) Another factor which needed to be considered was the need to promote in the offender a sense of responsibility for and an acknowledgement of that harm. There was evidence, in the Court, of the defendant taking responsibility and acknowledgement on behalf of the company.

(4) There was also a need to provide for the interests of the victims. The defendant had indicated a willingness to provide for the interests of the victims of the offence. There was also a need to provide reparation for harm done by their offending. No issue had been taken as to whether or not there was jurisdiction to be able to do so by way of payment of reparation to the deceased employee's family and the defendant had acknowledged that the appropriate jurisdiction had been established for that.

(5) There was also a need to denounce the conduct in which the offender was involved. Although the defendant had suggested that it was only too well aware of the impact of what happened, such that there was no need to denounce the behaviour, the Court had to think not only of the present case and the present employer, but also other employers. The fishing industry was a hazardous industry and employers needed to know that they needed to take care of their employees. The Court also had to be mindful of the fact that because of the nature of the industry, because of the fact that when people were out on ships, they were far from the standard emergency services that New Zealanders take for granted. That imposed a greater obligation on employers because they did not have that same safety net, so needed to be ever vigilant in those situations.

(6) There also need to be consideration given to the need to deter the offender or other persons from committing the same or similar offences. The Court accepted the defendant's submission that there was no need for deterrence as far as this particular company was concerned because they had shown genuine remorse. However, there was a need for general deterrence. There was a need for employers to be proactive in providing a safe working environment.

(7) The Court was required to consider the gravity of the offending in a particular case including the degree of culpability of the offender. Cleaning the auger was a difficult task at best of times, even if in a stable environment let alone if one factored in the movement of the sea. Also, whilst the defendant had taken steps to remedy the situation, in many ways that only served to highlight the aggravating factor, that those steps were readily available to be taken. It was considered an aggravating factor that the defendant was in breach of the Maritime Rules by failing to have a steel platform alongside the cooker and a ladder to the cooker.

(8) The seriousness of the type of offence in comparison to other types of offences as indicated by the maximum penalties prescribed for any offences also needed to be considered. The maximum penalty was $250,000 and there had been a recent increase in the penalties. The Court had to balance against that parity, in sentencing terms, for employers who came to Court facing charges under the HSE - they needed to know that they would be treated in an even-handed fashion. There was a general desirability for

consistency with appropriate sentences.

(9) The Court was also conscious of the fact that most employers in this country are small employers, employing less than 15 people, so Courts usually structured or tailored their sentences, taking into account the means of a defendant company to be able to pay a fine.

(10) The Court had to consider the safety record of the defendant to the extent that it showed whether any aggravating factor was absent. The informant's investigation revealed that the defendant had a responsible attitude in terms of employee safety, but it did have two previous convictions. However, it was necessary to balance those two convictions against what must have been thousands and thousands of hours of employee time. Putting it in perspective, therefore, it appeared that their record was pretty good. The informant was also aware of several previous incidents involving injuries suffered by employees in fishmeal plants (although not prosecuted). Those incidents had some significance as they had led to a series of recommendations, including that a dead man alarm system be fitted to fishmeal plants. The ship where the accident occurred, however, did not have a dead man alarm fitted to its fishmeal plant. Another recommendation was that all personnel receive a safety induction. There was no evidence that the deceased employee completed such course. Those failures were aggravating features.

(11) The defendant was entitled to some credit for the guilty plea. It was right and proper that if a defendant came to the Court and pleaded guilty at an early opportunity, as the defendant had in the present case, then there were good reasons why a defendant should be given credit, because it provided at least a measure of closure. There were public interest reasons as to why defendants should be given credit for pleas of guilty. Against that had to be balanced the fact that the Informant had a very strong case.

(12) The Court accepted unreservedly the expression of remorse which had been given on behalf of the company. The Court was further required to consider the co-operation that the defendant had shown with the Maritime Safety Authority. It was in everybody's interests that the defendants showed such co-operation, and they would be given credit for that.

(13) The Court was also required to consider the remedial action taken to prevent the recurrence of the offence. It was accepted that after the accident the defendant had carried out remedial action, that it was informed that that was insufficient and then the defendant voluntarily complied with the request from the MSA to take further steps. Additionally, steps had been taken subsequent and had gone further than the recommendations from the MSA.

(14) In relation to the charge under s6 HSE, the starting point was fixed as $150,000. It was regarded as a serious offence of its type. The defendant was given credit for matters including the guilty plea which amounted to $25,000. This resulted in a figure of $125,000. The Court proposed to fine the defendant $5,000 on that charge and order it to pay the sum of $120,000 by way of emotional harm reparation to the victim's family. In relation to the charge under s51 HSE the starting point was fixed at $100,000. Again, the defendant was given credit for matters including the guilty plea which amounted to $20,000. This brought the figure back to $80,000. The defendant was fined $5,000 and the balance of $75,000 was to be paid by way of payment of emotional harm reparation to the victim's family. Payment of the reparation was to made within 14 days.

Result: Penalty ($5,000)(First offence) ; ($5,000)(Second offence) ; Payment of emotional harm reparation ($120,000)(First offence) ; ($75,000)(Second offence) ; Costs

against defendant ($260)

Statutes considered:
Health and Safety in Employment Act 1992 Part 2
Health and Safety in Employment Act 1992 s6
Health and Safety in Employment Act 1992 s50(1)
Health and Safety in Employment Act 1992 s51A
Health and Safety in Employment Act 1992 s51A(2)(b)
Health and Safety in Employment Act 1992 s51A(2)(c)
Health and Safety in Employment Act 1992 s51A(2)(d)
Health and Safety in Employment Act 1992 s51A(2)(e)(i)
Health and Safety in Employment Act 1992 s51A(2)(e)(ii)
Health and Safety in Employment Act 1982 s51A(2)(e)(iii)
Health and Safety in Employment Act 1982 s51A(2)(e)(iv)
Sentencing Act 2002 s7
Sentencing Act 2002 s7(1)(a)
Sentencing Act 2002 s7(1)(b)
Sentencing Act 2002 s7(1)(c)
Sentencing Act 2002 s7(1)(d)
Sentencing Act 2002 s7(1)(e)
Sentencing Act 2002 s7(1)(f)
Sentencing Act 2002 s8
Sentencing Act 2002 s8(a)
Sentencing Act 2002 s8(b)
Sentencing Act 2002 s8(c)
Sentencing Act 2002 s8(e)
Sentencing Act 2002 s8(f)

Cases referred to in judgment:
Department of Labour v De Spa & Co Ltd [1994] 1 ERNZ 339
Pages: 13
[971584]

****

The Chief Executive Officer of the Department of Corrections v Corrections Association of New Zealand Inc

AC 59/05
Heard: 10 Oct 2005, Auckland
Judgment Date: 17 Oct 2005
Court/Authority/Tribunal: Colgan J
Appearances: C Toogood QC ; S Mitchell

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Dispute – Collective employment agreement – Interpretation – Maximum operating capacity – Total daily prison inmate numbers exceeded maximum capacity – Prisoners removed at night – Time at which maximum capacity to be ascertained – Capacity was defined in terms of beds in cells – Maximum operating capacities to be ascertained when inmates were locked down in cells – Challenge granted – Corrections officers

This was a successful de novo challenge to a determination of the Employment Relations Authority which had found that the collective employment agreement intended that the maximum number of inmates that could be held in a prison could not be exceeded at any time.

The defendant union represented corrections officers employed by the plaintiff. The relevant collective employment agreement ("cea") provided, under the title "Operating Capacity" that the "maximum capacity" was to be recorded at each prison and the "capacity" was not to be exceeded. The maximum capacity could be varied when extra inmate accommodation and facilities were made available or existing accommodation and/or facilities were made unavailable. "Operating Capacity", "maximum capacity" and "capacity" were not defined in the cea.

Before the cea was negotiated the parties entered into an agreement ("the Protocol') which provided a formula for the purpose of varying maximum capacities. The Protocol, referred to in the cea but not forming a part of it, defined "Maximum operating capacity" as the maximum number of inmates who "may be accommodated in a particular prison at a point in time".

Total daily prison inmate numbers began to frequently exceed the number of beds in cells. Excess prisoners were moved to other facilities at night. A dispute arose as to when the calculation of the maximum capacity was to be undertaken.

The Authority determined that the maximum operating capacity could not be exceeded at any time.

The plaintiff submitted that the phrase "at a point in time" meant "at a particular point in time". The particular point in time was during the hours of the night lockdown.

The defendant submitted that the maximum capacity was to be ascertained at any time. The defendant argued that it was beds in cells and inmate facilities that were together relevant in determining the maximum capacity.

HELD: (1) The words, phrases and concepts at issue had not been used consistently. Thus, the Court was left to try to interpret what the parties may have meant by inconsistent use of language. (para 38)

(2) The Court did not accept that it was beds in cells and inmate facilities that were together relevant to the notion of capacity or its variants in the cea. Although for many purposes, including increasing or decreasing the capacity, numbers of beds in cells and inmate facilities co-operated, those were nevertheless distinct concepts. Only the former was specified as being relevant to the definition of "capacity". (para 45)

(3) The phrase "at a point in time" meant at a particular point and not at any point. The parties would have been unlikely to have agreed to an assessment at any time in light of a long history of inmate transitions through institutions during the day that had always seen those numbers exceeded, albeit briefly and always at times before evening lockdown muster. The phrase "at a point in time" was unlikely to have meant at any time because the constant of beds in cells was irrelevant other than at times of lockdown, that was when inmates were in cells and, principally but not exclusively, occupying beds. (paras 47, 48, 50)

(4) If the defendant's interpretation was accepted, prisoners in transit, stopping even briefly at the institution during the day, would, if they caused numbers of inmates to rise

above the maximum, bring about a breach of the cea. That tended to confirm the correctness of the plaintiff's interpretation. (para 49)

(5) The several variations on the word "capacity" in the cea ("Operating Capacity", "maximum capacity" and "capacity" itself) were synonymous. It would be illogical to read them otherwise. (para 51)

(6) The Protocol's definition of the phrase "maximum operating capacity" incorporated the concept of accommodation. The phrase "Inmate accommodation" was also defined. "Inmate accommodation" was logically synonymous with the adjacent phrase "… inmates who may be accommodated". "Inmate accommodation" was defined as "beds in cells". It followed that capacity was defined in terms of beds in cells and, therefore, "maximum capacity" and "maximum operating capacity" of inmates was also to be defined by reference to beds in cells. (paras 51-53)

(7) The above was an interpretation that was consistent with the history of operating capacities in prisons of which the parties would have been well aware at the time of negotiating and settling both predecessor clauses and the present clause. Thus, the "point in time" was intended to mean during lockdown, when inmates were locked in their cells. (paras 54, 55)

(8) Although the Court did not agree with the defendant's interpretation that maximum capacity may be ascertained at any time, nor did it consider that, although it was generally correct, the plaintiff's interpretation could include the very particular focus on the night lockdown alone. That was because the cea's emphasis on not exceeding the maximum capacity took its significance from when inmates were locked in cells (in which there were beds), rather than any particular lockdown as opposed to any other during which time the maximum capacity might not apply. (para 56)

(9) If a muster check at the start of a period of lockdown revealed the prescribed maximum inmate numbers (or an excess), then application of the cea required the plaintiff to move sufficient inmates from the institution for the period of that lockdown as would reduce the number to below the maximum. (para 59)

(10) As an alternative to temporary removals of excess inmates, it was open to the plaintiff to upgrade its inmate facilities for those additional inmates if it intended to keep in an institution at lunchtimes such of them as exceeded the specified maximum capacity for the institution. (para 61)

COMMENT: (1) The parties were to have a further opportunity to attempt to accommodate capacity problems in light of the interpretation provided and by resort to the goodwill that existed in difficult circumstances for all. A short time to explore options for compliance would not be unreasonable. Therefore, the Court was not prepared to address any issues of enforcement by compliance order arising out of the present judgment until such alternative dispute resolution methods had been thoroughly tried. (paras 67, 68)

(2) Neither party relied upon evidence of performance. Thus it was unnecessary in the present matter to determine the admissibility or reliability of such evidence generally. However, the Court should not be taken to agree that it should follow slavishly the principles of interpretation of commercial contracts expounded by the courts of general jurisdiction, in cases of interpretation of employment agreements to which different specialist considerations might apply. (para 14)

Result: Challenge granted ; Costs reserved

Statutes considered:
Corrections Act 2004
ERA s183(2)
Employment Relations Amendment Act (No 2) 2004 s61
Penal Institutions Act 1954

Words and phrases: Capacity ; Maximum operating capacity ; At a point in time

Cases referred to in judgment:
Association of Staff in Tertiary Education Inc: ASTE Te Hau Takitini O Aotearoa v Hampton, Chief Executive of the Bay of Plenty Polytechnic [2002] 1 ERNZ 491
Attorney-General v Dreux Holdings Ltd (1996) 7 TCLR 617
Corrections Association of New Zealand Inc v Attorney-General in respect of the Department of Corrections (No 2) [1999] 2 ERNZ 974
Potter v Potter [2003] 3 NZLR 145 ; [2003] NZFLR 1035
New Zealand Penal Officers' Association Inc v Attorney-General in respect of the Department of Corrections unreported, Goddard CJ, 26 June 1998, AC 29A/98
Pages: 16
[971991]

****

New Zealand Public Service Association Inc v Southland Regional Council

CC 15/05
Heard: 18 Oct 2005 - 19 Oct 2005 (2 days) Invercargill
Judgment Date: 28 Oct 2005
Court/Authority/Tribunal: Colgan J
Appearances: T Kennedy ; C French, T Cleary, P Roberts, R Wilson

> DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Dispute – Interpretation of collective employment agreement ("cea") – Clause required defendant to disclose fact and identifying details of new employees covered by cea to plaintiff – Defendant only made disclosures when new employees consented – Jurisdiction – Authority or Court not entitled to determine whether clause breached Privacy Act 1993 – However Privacy Act would inform Court's interpretation of other legislative provisions – Statutory interpretation – New Zealand Bill of Rights Act 1990 ss 6 and 17 – Freedom of association connoted also a freedom not to associate – Section 62(2)(c) Employment Relations Act 2000 ("ERA") – Statutory requirement of consent could not be removed by cea – Clause was clear and unambiguous but unlawful because inconsistent with ERA – Challenge dismissed

This was an unsuccessful de novo challenge to a determination of the Employment Relations Authority which held that a collective agreement was in breach of s62(2) Employment Relations Act 2000.

The plaintiff union and defendant employer were parties to a collective employment

agreement ("cea"). A provision in the cea ("the clause") required the defendant to disclose to the plaintiff, the fact and identifying details of new employees whose employment was covered by the cea. It was the defendant's practice to only make such disclosure with the consent of the new employees.

The Employment Relations Authority decided in favour of the defendant, essentially on two grounds. The first was that the clause was in breach of s62(2) Employment Relations Act 2000 ("ERA") which required the consent of a new employee to such disclosure. Second, the Authority concluded that the relevant principles under the Privacy Act 1993 governed the position in favour of an employee's privacy.

The intervener for the plaintiff submitted that the clause was a clear and unambiguous commitment voluntarily entered into. It said the defendant had a positive obligation in good faith to secure consent from new employees to disclose their identities and other employment information to the plaintiff.

The intervener for the defendant submitted that s54(3)(b) and s238 ERA provided that a cea must not contain anything contrary to law or inconsistent with the ERA, and that parties were not able to contract out of the ERA. It submitted that the clause was inconsistent with s62(2)(c) unless the consent of a new employee was obtained to disclosure. Therefore, the defendant was correct to obtain the consent of new employees before disclosure because that was required to comply with legislation that, in turn, trumped the cea if the latter was inconsistent with the ERA.

HELD: (1) The Authority wrongly determined that it was entitled to determine questions of privacy under the Privacy Act 1993. That was not only contrary to the express provision of s11(2) Privacy Act, but did not follow the conclusions of the Employment Court in NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand (cited below). It followed that the Authority was not entitled to determine whether the cea's provisions breached the Privacy Act or, in particular, any of the privacy principles established under it. However, the privacy legislation could and would in the present case inform the Court's interpretation of other legislative provisions and, in other cases, what was reasonable in employment. (paras 10-13)

(2) The purpose of s62(2) ERA was to encourage, but not to coerce, a new employee who was not a member of the relevant union to both join that union and agree to coverage by an applicable cea negotiated with it. (para 23)

(3) The ERA also contained safeguards for employees who elected not to become union members. That was a freedom of association issue, in particular the freedom not to associate - s17 of the New Zealand Bill of Rights Act 1990 ("NZBORA"). Therefore, s6 NZBORA called for an interpretation of s62 ERA that was consistent with s17 NZBORA. (para 24)

(4) On its face, the clause required neither the consent of a new employee to the defendant so advising the plaintiff, nor any obligation on the defendant to advise the employee of what it was about to do or had done. Arguably, on the plain words of the clause alone, the defendant could not be prevented from disclosing those details to the plaintiff, even if the new employee asked that they not be disclosed. On the plaintiff's interpretation of the clause, to accede to a new employee's request not to disclose those details would be a breach by the defendant of its contractual obligations to the plaintiff. Parliament could not have intended such a situation to arise or for an employer and a union to agree on a process that would not only allow but require it. (para 32)

(5) Section 62(2)(a) and (b) ERA placed a number of obligations on an employer when new employment covered by a cea was entered into. That was to be contrasted with s62(2)(c) at issue in the present case. That was the counterweight to the earlier provisions of the subsection. Section 62(2)(c) might be categorised as a pro-employee proviso contained in a broader pro-union provision. The proviso was an integral part of that provision. (paras 33-34)

(6) The repeated negotiation and settlement of the clause over more than one cea between these parties did not amount to an estoppel of the defendant from asserting that consent was required. A provision that was required by statute could not be the subject of an estoppel in those circumstances. A person could not be estopped from continuing to act in contravention of the law because that person might previously have agreed, even repeatedly, to so act and even arguably with the benefit of advice. (para 35)

(7) The combined effect of the legislation and the cea did not place a positive obligation on the defendant to seek consent from new employees to disclose their identities and other employment information to the plaintiff. The ERA predominated over agreement reached between the parties because s62(2)(c) emphasised the protection of individual employee rights that could not be removed by contract between the parties. Subsection (2)(c) protected the entitlement of an employee, for reasons of personal privacy and freedom of choice in respect of both employment agreement type and union membership, not to be subjected to undue influence to join the union within the first 30 days of employment. The plaintiff's obligation was therefore not to attempt to actively procure consent from a new employee, but rather to provide information and choices to the new employee, and permit that new employee to decide about disclosure for himself or herself on the basis of the information provided without influence from the defendant. But if consent was given, the defendant was obliged to inform the plaintiff. There was an obligation to seek consent but not to influence whether it was given or not. (paras 36-37)

(8) It was not lawful for the defendant to make acceptance of an offer of employment covered by a cea, conditional on compliance with a requirement in the cea of notification to the plaintiff. That would negate the consent of the new employee required by the statute. Parliament could not have contemplated that "consent" so extracted on a take-or-leave the job basis was real consent freely given. For a new employee both unwilling to have his or her details disclosed to the plaintiff but wanting and needing the job, such "consent" might amount in reality to coercion. That was not what the statute intended and should not be countenanced by the Court, even theoretically. (para 38)

(9) Employees taking up new employment could not be considered to have consented impliedly by the act of taking the job. Section 62(2)(c) ERA required not only true consent but also express consent. It was true that the ERA did not require such consent to be in writing although doing so was obviously sensible. There could be express consent otherwise than in writing but "implied consent" was something else altogether. The ERA required express consent and a wise practice would be to get that in writing. (para 39)

(10) The legislative scheme was generally to encourage collectivism (unions and ceas) but also to allow for individual choice and freedom of association. The free exchange of relevant information underpinned both of those statutory objectives. In the matter of union membership by, and collective coverage of, new employees, that balance was achieved by requiring the employer to advise a new employee how to contact the union and to give that new employee a copy of the cea. Balanced against that was a statutory requirement that the employer obtained the new employee's consent to disclose his or her details to the union to allow it to recruit actively the new employee. The scheme of the legislation was that a well-informed employee would be able to make the election both

whether to initiate contact with the union and join it and, therefore, join the cea. New employees might be vulnerable in such circumstances and at risk of undue influence to join a union. The legislation left an element of control with the new employee by requiring consent. The clause had to be read subject to that statutory requirement. (paras 40-41)

(11) The clause was clear and unambiguous but it was unlawful because it was inconsistent with s62(2)(c) ERA. Whether the parties should amend the cea provision to record the necessity for consent or whether the provision as currently worded must always be read and applied subject to the statutory requirement for consent, may not matter, or was at least for the parties to resolve. Consent was required in any event. (para 42)

Result: Challenge dismissed ; Costs reserved

Statutes considered:
ECA pt 1
ERA s3(a)(iv)
ERA s7
ERA s8
ERA s9
ERA s11
ERA s54(3)(b)
ERA s62
ERA s62(2)
ERA s62(2)(a)
ERA s62(2)(a)(iii)
ERA s62(2)(b)
ERA s62(2)(c)
ERA s63
ERA s238
International Covenant on Civil and Political Rights Art 22
International Covenant on Economic Social and Cultural Rights Art 8
Interpretation Act 1999 s5
New Zealand Bill of Rights Act 1990 s6
New Zealand Bill of Rights Act 1990 s17
Privacy Act 1993 s11(2)
Universal Declaration of Human Rights Art 20

Cases referred to in judgment:
Air New Zealand Ltd v Kippenberger [1999] 1 ERNZ 390
Eketone v Alliance Textiles (NZ) Ltd [1993] 2 ERNZ 783
Hosking v Runting [2005] 1 NZLR 1
MOT v Noort ; Police v Curran [1992] 3 NZLR 260 ; (1992) 8 CRNZ 114
NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd [2004] 1 ERNZ 614
NZ Dairy Workers Union Inc v New Zealand Milk Products Ltd [2004] 1 ERNZ 376
NZ Dairy Workers v NZMP Ltd [2002] 1 ERNZ 361
Pages: 11
[972032]

****

X v Auckland District Health Board

AC 52A/05
Heard: 21 Oct 2005 - 27 Oct 2005, Auckland
Judgment Date: 31 Oct 2005
Court/Authority/Tribunal: Colgan J
Appearances: P Swarbrick ; BJ Banks, R Larmer

> PRACTICE AND PROCEDURE – Interlocutory judgment – Admissibility of evidence – Opinion evidence – Plaintiff dismissed after discovery of certain digital images on work computer – Defendant alleged new justification test in s103A Employment Relations Act 2000 enabled broader range of opinion evidence to be called – Parliament did not intend that ultimate issue of determining justification for dismissal or disadvantage should be removed from Court by permitting parties to introduce evidence from other employers about what they might have done in same circumstances – Admission of such evidence not in interests of justice – "Fair and reasonable" standard was notional, as opposed to actually identifiable, standard – Evidence inadmissible – Defendant sought to admit evidence of further digital images found after dismissal and unknown to defendant at time of dismissal – Plaintiff had asserted his general innocence of the sort of conduct that led to dismissal and had placed his general behaviour in issue – In those circumstances new evidence was relevant – Also relevant to issue of reinstatement – Evidence admissible – Senior clinician

This was a partially successful interlocutory application by the plaintiff to have certain evidence proposed to be called by the defendant ruled inadmissible.

The plaintiff was employed in a senior clinical position by the defendant District Health Board ("DHB"). As a result of the discovery of a number of allegedly pornographic digital images on the plaintiff's work computer, the plaintiff, after an investigation, was dismissed for serious misconduct.

The plaintiff brought a personal grievance claim and applied to the Employment Relations Authority for an interim order for reinstatement in employment pending the investigation and determination of his personal grievance. The Authority granted the order. The defendant then made an urgent ex parte application to the Employment Court for a stay of the order. The Court granted a partial stay. However, the defendant's challenge against the granting of interim reinstatement was dismissed by the Court. The substantive hearing was then removed to the Court for hearing at first instance.

The defendant proposed to call a number of witnesses whose evidence fell into a number of broad categories. Firstly, the defendant proposed to call witnesses from other employers in the same field to give opinion evidence about the propriety of the plaintiff's conduct and how they, as reasonable employers, would have responded to the information disclosed about the plaintiff's conduct. Secondly, the defendant proposed to call witnesses who would offer an opinion on what the mainstream public would think or

what patients and their families might think of the plaintiff's conduct. Finally, the defendant proposed calling a witness to give evidence of the existence of other similar electronic imagery found on the plaintiff's work computer after his dismissal and unknown to the defendant at the time of the dismissal ("new evidence").

The plaintiff challenged the admissibility of the evidence. The plaintiff alleged the evidence of the witnesses: went to the "ultimate issues" in the case and was especially unacceptable in the absence of a sound basis of factual findings about what occurred; was irrelevant; or was hearsay. The plaintiff submitted the new evidence's prejudicial effect outweighed its probative value. As a fall-back argument, the plaintiff alleged that even if viva voce evidence about the new evidence was to be admitted, copies of the images should not be introduced in evidence as they were without probative value.

The defendant submitted that the new test under s103A Employment Relations Act 2000 ("ERA") enabled admission of the first category of evidence. The defendant submitted the new evidence was relevant first because it went to the plaintiff's credibility in the sense that it would disprove assertions he had made that the discoveries that led to his dismissal were of material that was uncharacteristic of his past behaviour. Second its relevance addressed the broader question of reinstatement in employment that the plaintiff had sought.

HELD: (1) Opinion evidence provided by qualified experts, accepted as such by the Court, and whose role and conduct were governed by rules of practice promulgated by the High Court, would generally not be permitted to be given about what was commonly known as "the ultimate issue", that was the questions the Court had to decide. In personal grievance cases the ultimate issue questions included, but not necessarily exhaustively: Was the conduct (misconduct or serious misconduct) that led to dismissal a breach of the employment agreement? Did the employer so decide, as a fair and reasonable employer would, after a fair inquiry? If so, would a fair and reasonable employer have dismissed the employee? If not, what remedies were appropriate including, if practicable, reinstatement? (paras 12, 13)

(2) Regarding the first category of evidence, such broad opinion evidence had not been permitted in the past. That was for a number of reasons. The "ultimate issue" for decision by the Court was the justification for the employer's actions. Witnesses were generally not permitted to proffer their opinions on the ultimate issue for the Court. Some latitude for the introduction of opinion evidence was allowed for expert witnesses but even then, their evidence on such issues was not on the ultimate issue for determination by the Court but rather addressed technical or expert issues on which the Court was assisted by dispassionate professional opinion evidence by a suitably qualified expert witness. (para 21)

(3) Under s103A ERA the tests of objectivity and fairness and reasonableness of what a notional employer would have done in all the circumstances remained the ultimate issue for determination by the Court. Parliament did not intend that the ultimate issue of determining justification for dismissal or disadvantage in employment should be removed at all from the Court or the Authority by permitting parties to introduce evidence from other employers about what they might have done in the same or similar circumstances and, by implication, establishing that they were "fair and reasonable" employers. The "fair and reasonable" standard was a notional, as opposed to an actually identifiable, standard in the sense that the Court would not point to some other particular employer's record and opinion in determining justification for the actions of the employer party. (paras 22, 23)

(4) Permitting each party to present a number of employers who diverged in their opinions about the fairness and reasonableness of the conduct of an employee of another employer, would not be in the interests of justice. Such witnesses could, of course, only know what they were told of the circumstances by the party calling them and in advance of the trial. Even if the evidence were to be allowed, such witnesses would really have to sit through the whole of the trial before expressing their opinions if these were to have more than theoretical value. (para 24)

(5) Except that evidence about the other DHBs' IT/email policies to be given by the witnesses (or indeed by any other knowledgeable witnesses) was admissible, the remainders of the relevant briefs of evidence were inadmissible. Section 103A ERA did not allow such opinion evidence to be given of the new tests applied in a particular case. (para 38)

(6) A senior and experienced manager in the women's and children's health divisions of the defendant who was not involved in the defendant's investigation or decision making processes that led to dismissal, was able to give evidence about the issuing of relevant policies intended for the defendant employees. The intended evidence of her views of the plaintiff's awareness of particular policies, and her views on the acceptability of the material for which he was dismissed, were, however, not admissible. Nor were her assessments of degrees of offensiveness of allegedly pornographic material. Also inadmissible in evidence were: her views about the probability of the truth of the plaintiff's accounts and explanations; and her intended evidence about the plaintiff's sense of humour, whether he seriously misconducted himself in employment, whether he might have done similar things in the past, and her assessment of the relevance of the plaintiff's career in the defendant's decision to dismiss. Those were all ultimate issues for the Court and from which it would not derive forensic benefit of the witness's views. (paras 45-47)

(7) The above witness was able to assist the Court with general (as opposed to plaintiff-specific) evidence of the perceptions and aspirations of hospital patients and, in the cases of children, their families. In particular, the point the witness made in her intended evidence about name confusion and patient sensitivity may have been relevant to the Court's inquiry. However, the Court did not consider admissible evidence that the witness may tender about "public" perceptions of misconduct by clinicians, that was her understanding of such perceptions of people other than patients as defined above. (para 48)

(8)The Court would not be assisted by the Director of Advocacy at the office of the Health and Disability Commissioner's intended evidence of what she described as the differing perceptions of patients and doctors. That was because, although many of the people involved in the present case were doctors (including people who were responsible for the decision to dismiss the plaintiff), the issues for decision by the Court were legal ones to be made by a judge who was neither a doctor nor, for relevant purposes, a patient. The opinions of someone not involved in the dismissal about issues of doctor/patient perception divergences that were not otherwise for decision in an employment case, were inadmissible. However, it was open to the witness to give evidence, based on her professional experience, of hospital patient expectations and perceptions generally, that was without particular reference to the circumstances or what she understood to be the circumstances of the present case. (paras 55, 57)

(9) Regarding the new evidence, the plaintiff had asserted or may have asserted his general innocence of the sort of conduct that led to his dismissal. He had placed his general behaviour at the heart of the case. In those circumstances the new evidence was

relevant to issues in the case and it was thereby admissible. The Court did not accept the plaintiff's argument that its prejudicial effect outweighed its probative value. Nor was it grounds to reject the evidence entirely that it may, as the plaintiff said, have been about a very modest proportion of his substantial email traffic. That was a matter for cross-examination and submission but not exclusion on grounds of inadmissibility. The new evidence was also relevant to the broader question of reinstatement that the plaintiff sought. (paras 64-66)

(10) Copies of the images were admissible in evidence as they had probative value. It would be difficult to determine the fairness and reasonableness of the defendant's decision if the Court was deprived of seeing some of the material that had caused it to oppose reinstatement. The plaintiff's fear that there was a risk that the new evidence might fall into the wrong hands was a question of exhibit management by the Court rather than admissibility of evidence at trial. (para 67)

(11) One witness' intended evidence related hearsay, and in some places arguably double-hearsay, about events that were critical to the plaintiff's case based on conversations the witness alleged took place after the plaintiff's dismissal and in preparation for the present case. That included accounts of conversations with persons who were either already giving evidence or were available to give evidence. In the particular circumstances of the importance of the evidence, the Court was not prepared to admit the hearsay. (para 72)

(12) The interim order for non-publication of the name or identifying details of the plaintiff was to remain in place at least until final submissions at the hearing, at which time counsel were to make submissions as to whether the interim order should either lapse or a permanent order should be made in substitution. (para 74)

COMMENT: (1) The new test set out in s103A ERA very arguably altered the previous law contained in a series of judgments of the Court of Appeal culminating in one that Parliament expressly intended to alter, W & H Newspapers Ltd v Oram (cited below). (para 17)

(2) The ERA entrusted to the Court (and the Authority) the decisions about justification for what an employer did. That inevitably involved the exercise of professional value judgments as well as the application of black letter law. The role of a judge included to be aware of community expectations and the diversity of many of these. Employment law vested more value judgment exercises in decision makers than in some other areas of the law: concepts such as "fairness and reasonableness", "good faith" and "justification" allowed for the application of value judgments despite some broad judicial interpretations of them. None of that was to say that judges did not strive for consistency and predictability even within the diversity of individual cases that turn substantially on their own unique facts. (para 15)

Result: Certain evidence inadmissible ; Orders accordingly ; No order for costs

Statutes considered:
Employment Court Regulations 2000 r60
ERA s103A
ERA s189(2)
Employment Relations Amendment Act (No 2) 2004

Words and phrases: Ultimate issue

Cases referred to in judgment:
Attorney-General v Equiticorp Industries Group Ltd (In Statutory Management) [1995] 2 NZLR 135
W & H Newspapers Ltd v Oram [2000] 2 ERNZ 448 ; [2001] 3 NZLR 29
Pages: 15
[972040]

****

Joseph v Lakes District Health Board

AC 66/05
Heard: 17 Aug 2005, Auckland
Judgment Date: 1 Nov 2005
Court/Authority/Tribunal: Couch J
Appearances: B Corkill ; S Dyhrberg

> DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Dispute – Interpretation, application and operation of collective employment agreement ("CEA") and individual employment contract ("IEC") – Section 61(1)(b) Employment Relations Act 2000 ("ERA") – Arrears of wages – Plaintiff on sick leave for 23 weeks – Plaintiff alleged he was not paid at correct rate as payments excluded "on call" payments – Also alleged defendant's discontinuance of sick pay, after 20 weeks, breached CEA – CEA provided for "reasonable leave" – IEC permitted by s61(1) ERA – Not inconsistent with the terms and conditions of CEA – "On call" payments were for work actually done – Not entitled to payment for "on call" work while on sick leave – Reasonable to discontinue sick pay – No breach of terms and conditions of employment – Challenge dismissed – Specialist anaesthetist

This was an unsuccessful de novo challenge to a determination of the Employment Relations Authority which held that the plaintiff's "salary" for the purpose of his sick pay entitlement excluded call out payments, and that he had received his entitlement to reasonable sick leave.

The plaintiff was employed by the defendant for seven years as a specialist anaesthetist. As a result of ill health, the plaintiff was unable to work for 23 weeks. He went on paid sick leave but did not receive any "on call" payments for call out work. After 20 weeks, the defendant discontinued the plaintiff's paid sick leave. Shortly prior to making that decision, a union representative spoke to an employee of the defendant, who was representing the defendant on other issues relating to senior medical staff, and who the union representative had a good working relationship with ("Dr H"). The union representative told Dr H that things were looking better for the plaintiff and that the plaintiff was expecting to return to work in four weeks. That information was not conveyed to the representative of the defendant dealing with the plaintiff's situation.

The plaintiff's terms and conditions of employment were set out in a collective employment agreement ("CEA"). Additional terms of employment were set out in an individual employment contract ("IEC"). The CEA provided: that employees were entitled to "reasonable leave with no deduction from salary" in the event of personal

illness ("sick leave clause"). The CEA also included a clause that allowed the defendant to seek advice from a review panel, if an employee had been sick for three months ("the review clause"). The CEA made provision for "on call" work to be reflected in an employee's base salary which would in turn be reflected in the sick leave clause. However, the IEC made provision for "on call" payments to be made for the amount of call out work actually done, which were listed separately to "base salary".

The plaintiff commenced proceedings in the Employment Relations Authority for arrears of wages alleging a failure to pay sick leave, in breach of the sick leave clause. He also claimed an entitlement to "on call" payments during his period of paid sick leave. The Authority dismissed the plaintiff's claims.

In respect of the claim to "on call" payments during sick leave, the plaintiff relied on the reference in the sick leave clause to s30A Holidays Act 1981 and, in addition, submitted that the word "salary" was synonymous with the term "wages" as it was used in s2 Wages Protection Act 1983. The plaintiff further submitted that the expression "salary", as used in the IEC, was to be construed in a manner not inconsistent with the terms of the CEA. Thus, the term "salary" was to include a component for "on call" work.

In respect of the failure to continue sick leave beyond 20 weeks the plaintiff submitted the defendant acted unfairly. He submitted that there was a "nexus" between the sick leave clause and the review clause and that the review clause needed to be followed before any decision to stop sick pay could properly be made. As a fall back argument the plaintiff contended that that there was a "custom and practice" that sick pay would be continued until a review of the type provided for in the review clause was conducted.

The defendant submitted that the on call payments were not part of the plaintiff's "salary" and were not payable while he was on sick leave. The defendant submitted that the words "no deduction from salary" in the sick leave clause were not to be equated with the concept of "full pay" as that expression was used in cases under the Holidays Act 1981. The defendant submitted that it was entitled to cease payment of sick leave because the plaintiff's entitlement to "reasonable leave" had run out.

HELD: (1) The CEA permitted alternatives to "on call" work being included in "base salary". That was precisely what the anaesthetists employed by the defendant, including the plaintiff, had chosen to do. Their agreement to be paid directly for on call work actually done rather than receive remuneration for that work indirectly as part of their base salary was not inconsistent with the terms and conditions of the CEA as a whole. Thus, the agreement was permitted by s61(1) ERA.

(2) The "on call" payment agreement was very much to the advantage of anaesthetists. Having elected to have the benefit of such an agreement, the plaintiff was bound by its terms. The clear terms of the agreement were that he was to be paid for on call work actually done. The rate of pay for such work was generous but, if no such work was actually done, the plaintiff had no entitlement to any payment. While he was on sick leave, the plaintiff performed no on call work. He was therefore not entitled to any payment for on call work. It was clear from that conclusion that whether the payments to the plaintiff were part of his "salary" did not affect the outcome. There was therefore no reason for the Court to decide that issue and it did not do so.

(3) There was clearly a measure of overlap between the sick leave clause and the review clause in that both related to employees unable to work as a result of accident or ill health. However, whereas the sick leave clause was concerned with sick leave and sick pay, the review clause was concerned with the ability of a chronically unfit employee to

return to work and rehabilitation of such an employee. Those were separate and distinct issues and, in the absence of any requirement in the CEA to do so, there was no obligation on the defendant to apply the process provided for in the review clause in respect of issues which arose under the sick leave clause.

(4) The defendant was obliged to follow a fair process in deciding whether the plaintiff had received "reasonable leave". However, the process actually followed by the defendant was fair. The defendant clearly raised with the plaintiff whether his sick leave should continue as paid sick leave or become unpaid sick leave. It expressed a preliminary view that sick pay should continue only for a specified period. It set out in detail the reasons for that view and invited the plaintiff's response before a final decision was made. That was entirely proper.

(5) The one aspect of the correspondence which was potentially unfair was that the plaintiff was given only 3 days in which to respond. Following union involvement, however, the defendant readily agreed to two extensions of time and continued the plaintiff's sick pay to the same date. Those extensions of time avoided the potential unfairness of the initial, very tight timeframe for a response. The union representative acknowledged that he had the opportunity to make further submissions or comment on the plaintiff's behalf but that he chose not to do so. On that basis, the overall process adopted and followed by the defendant in deciding whether to continue making payment to the plaintiff during his period of sick leave was fair and appropriate.

(6) The Court did not find that the evidence was sufficient to establish a custom and practice (that sick pay would be continued until a review under the review clause had been conducted) binding on the defendant in the present case. In reaching that conclusion, the Court took into account the fact that the practice of the defendant was that as a general rule it regarded "reasonable" sick leave under the sick leave clause to be around 3 months, unless the employee was long-serving (over 10 years) or there were other extenuating circumstances.

(7) Given that Mr H was held out by the defendant as its representative, the Court regarded the defendant as having knowledge of what the union representative said to Mr H, whether or not Mr H actually communicated that to the defendant.

(8) On one view of the matter, the likelihood of the plaintiff being able to return to work was irrelevant to an objective determination of whether the extent of paid sick leave the plaintiff had received was "reasonable". In the present case, however, the Court approached the matter on the basis that a good employer would have had regard to the prospects of an imminent return to work when deciding whether or not to continue sick pay to an employee in the plaintiff's circumstances.

(9) What the union representative said to Mr H was of distinctly limited value. He passed on the plaintiff's view of his own condition. While the plaintiff was a medical practitioner and undoubtedly familiar to some extent with the nature of his own illness, he was not a psychiatrist. The union representative had also spoken with the psychiatrist employed by the defendant who was managing the plaintiff's medication but the union representative did not say that he had conveyed that fact or that doctor's view of the plaintiff's condition to Mr H. In any event, what the union representative said to Mr H had to be put into the context of the formal opinion the defendant had from the specialist psychiatrist attending the plaintiff that the plaintiff's prognosis was uncertain. Taking all aspects of the matter into account, it was reasonable for the defendant to discontinue sick pay to the plaintiff when it did. Accordingly, the defendant was not in breach of its obligation under the sick leave clause.

Result: Challenge dismissed ; Costs reserved

Statutes considered:
ERA s61(1)
ERA s61(1)(b)
Holidays Act 1981 s18(7)
Holidays Act 1981 s30A
Holidays Act 1981 s30A(4)
Wages Protection Act 1983 s2

Cases referred to in judgment:
Commissioner for Government Transport v Kesby (1972) 127 CLR 374
Pages: 15
[972049]

****

Challenges to the Employment Court - Employment Relations Act 2000

Scrimgeour v The Wellesley Ltd

10 Nov 2005, Couch J, WC 22/05, (4 pages)

NON DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Mediated settlement – Number of employment relationship problems – Plaintiff's claims dismissed by Authority – Settlement agreement entered between parties but no written record – Payment to plaintiff agreed as part of settlement – Plaintiff challenged determination to the extent it related to claim for arrears of wages – Alleged settlement payment was "ex gratia" and not made in full and final settlement – Court considered evidence of mediation on basis that parties consented – HELD – Far more likely defendant would have made payment only in order to bring matter to an end – No longer open to plaintiff to pursue claim further – Challenged dismissed – COSTS – Defendant represented by managing director – No basis on which to make order as to costs/disbursements – No order for costs – Hotel worker

Result: Challenge dismissed ; No order for costs

Arrears - Employment Relations Act 2000

Yang v Wooding Jib Fixers (2005) Ltd
17 Feb 2006, H Doyle, CA 23/06, (4 pages)

ARREARS OF WAGES AND HOLIDAY PAY - No appearance for respondent - Given history of matter and in knowledge that all parties having been served were aware of date, time and venue of investigation meeting, Authority proceeded in absence of respondent - Identity of employer - Satisfied that respondent was employer - Respondent was soon to be put into liquidation - Applicant sought payment for 52.5 hours - Monies due and owing - Entitled to holiday pay on that amount - Also entitled to interest on amount owing of 8.5 percent

Result: Application granted ; Arrears of wages ($656.25) ; Arrears of holiday pay ($51.37) ; Interest (8.5 percent) ; Disbursements ($70)(Lodgement fee)

Arrears - Holiday Pay - Employment Relations Act 2000

Hankins v Ashley

2 Feb 2006, R Arthur, AA 19/06, (3 pages)

ARREARS OF HOLIDAY PAY - No appearance for respondent - Applicant sought three weeks' holiday pay - No written employment agreement - Identity of employer - Applicant alleged she was employed directly by respondent and nothing indicated she was employed by or on behalf of companies owned by respondent - None of respondent's replies suggested he considered he was not responsible for paying applicant - Applicant employed by respondent - Applicant did not go to work after she was not paid for two weeks - Respondent told her that he could not afford her anymore and needed to "call it quits here today" - Applicant did not take issue with genuineness of redundancy - Applicant entitled to holiday pay - BREACH OF CONTRACT - Authority could not award compensation for redundancy as no term of employment providing for such compensation - However applicant entitled to period of notice of her dismissal, and failing that, payment for period of notice - Taking into account applicant's role in respondent's business and length of service, reasonable notice period was two weeks - Applicant also entitled to be reimbursed by respondent for cost of filing application with Authority - Manager

Result: Application granted ; Arrears of holiday pay ($2,004.63) ; Damages (notice) ($1,336.42) ; No order for costs ; Filing fee in favour of applicant ($70)

Yang v Wooding Jib Fixers (2005) Ltd

17 Feb 2006, H Doyle, CA 23/06, (4 pages)

ARREARS OF WAGES AND HOLIDAY PAY - No appearance for respondent - Given history of matter and in knowledge that all parties having been served were aware of date, time and venue of investigation meeting, Authority proceeded in absence of respondent - Identity of employer - Satisfied that respondent was employer - Respondent was soon to be put into liquidation - Applicant sought payment for 52.5 hours - Monies due and owing - Entitled to holiday pay on that amount - Also entitled to interest on amount owing of 8.5 percent

Result: Application granted ; Arrears of wages ($656.25) ; Arrears of holiday pay ($51.37) ; Interest (8.5 percent) ; Disbursements ($70)(Lodgement fee)

Bargaining - Employment Relations Act 2000

The Service and Food Workers' Union Nga Ringa Tota and Ors v Heinz Wattie's Ltd
24 Apr 2006, PR Stapp, WA 67/06, (14 pages)

BARGAINING - COMPLIANCE ORDER - Whether terms of settlement reached in bargaining binding - Parties had a collective employment agreement ("CEA") which covered crop-based fresh produce seasonal employees at Hastings plant and frozen food employees at Christchurch and Hastings plants - Respondent's mandate document provided that terms of settlement had to be signed off by respondent's executive to be ratified by respondent - Parties reached bargaining process agreement ("BPA") - BPA included provision that parties to negotiations would have authority to reach agreement, subject only to ratification process for applicants and respondent, and any limitations on authority in respect of ratification processes would be outlined immediately prior to initial commencement of negotiations - Also provision that terms of settlement would not be taken as agreed record until signed off by both/all parties - Applicants denied or could not recall that respondent's Employee Relations Manager ("R") advised them of respondent's ratification process - Parties reached terms of settlement - Executive member advised R he would not approve settlement for crop-based production employees - R did not convey this to applicants and signed Terms of Settlement - Applicants' members ratified terms of settlement - Steps taken by respondent to put in place remuneration increases to all applicants' members except crop-based employees - Several months later respondent informed applicants its position that there was no agreement and it had not ratified the agreement - Applicants alleged they never really had any knowledge of authority for respondent but understood it was R who held authority/mandate to sign binding terms of settlement - Respondent submitted R had no actual authority to commit respondent to CEA with respondent's approval - Remarkable failure by R to tell applicants that respondent had not approved terms of settlement - Respondent came close to being bound by R's conduct - However evidence did not establish that R did not say something about respondent's ratification at commencement of negotiations - Meant Authority could not make orders for compliance as sought in regard to terms of settlement - Respondent could not be bound by terms of settlement unless they were rectified, and threshold not reached for Authority to make such a finding - Although R signed terms of settlement, knowing that approval had not been given, and that terms as agreed were within respondent's mandate, the provisions of the BPA requiring approval from the executive did not support R having ostensible authority to bind respondent to CEA - Approval that R was required to obtain meant the terms of settlement could not bind the respondent

Result: Application dismissed ; Costs reserved

Breach of Contract - Employment Relations Act 2000

Hankins v Ashley
2 Feb 2006, R Arthur, AA 19/06, (3 pages)

ARREARS OF HOLIDAY PAY - No appearance for respondent - Applicant sought three weeks' holiday pay - No written employment agreement - Identity of employer - Applicant alleged she was employed directly by respondent and nothing indicated she was employed by or on behalf of companies owned by respondent - None of respondent's replies suggested he considered he was not responsible for paying applicant - Applicant employed by respondent - Applicant did not go to work after she was not paid for two weeks - Respondent told her that he could not afford her anymore and needed to "call it quits here today" - Applicant did not take issue with genuineness of redundancy - Applicant entitled to holiday pay - BREACH OF CONTRACT - Authority could not award compensation for redundancy as no term of employment providing for such compensation - However applicant entitled to period of notice of her dismissal, and failing that, payment for period of notice - Taking into account applicant's role in respondent's business and length of service, reasonable notice period was two weeks - Applicant also entitled to be reimbursed by respondent for cost of filing application with Authority - Manager

Result: Application granted ; Arrears of holiday pay ($2,004.63) ; Damages (notice) ($1,336.42) ; No order for costs ; Filing fee in favour of applicant ($70)

Pryce v TelstraClear Ltd
14 Feb 2006, RA Monaghan, AA 37/06, (4 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Respondent recruited applicant on fixed term employment agreement as manager for in-house door-to-door sales team to sell new product - Four months later applicant's role disestablished - Whether redundancy genuine - Authority accepted redundancy was genuine in that continuing operation of in-house door to door sales team not financially viable - Immediacy with which recruitment and retention problems arose called into question adequacy of human resource planning, but did not affect genuineness of redundancy - That new product was still available did not mean position was available to manage its sale - Fair procedure used to implement redundancy - Authority did not accept respondent failed to properly consider alternative positions for applicant - BREACH OF CONTRACT - Applicant sought payment for balance of fixed term - Applicant made redundant in reliance on provision in agreement for early termination in event of redundancy - No breach arising out of early termination - Sales manager

Result: Application dismissed ; Costs reserved

Compliance Order - Employment Relations Act 2000

Russell (Labour Inspector) v Hemara t/a Bass Cleaning
7 Feb 2006, PR Stapp, WA 16/06, (4 pages)

COMPLIANCE ORDER - Applicant Labour Inspector sought compliance order in respect of demand notice - Demand notice required respondent to pay employee "W" holiday pay of $1,572 - Respondent challenged Authority's jurisdiction given rights of tangata whenua - Authority's jurisdiction applied under Employment Relations Act 2000 - Respondent alleged W was a contractor and raised issue with W's length of service - Demand notice prima facie evidence that respondent owed W holiday pay specified in notice - Respondent did not produce any supporting documentation for allegations - Compliance ordered

Result: Application granted ; Compliance order made ; No order for costs

The Service and Food Workers' Union Nga Ringa Tota and Ors v Heinz Wattie's Ltd
24 Apr 2006, PR Stapp, WA 67/06, (14 pages)

BARGAINING - COMPLIANCE ORDER - Whether terms of settlement reached in bargaining binding - Parties had a collective employment agreement ("CEA") which covered crop-based fresh produce seasonal employees at Hastings plant and frozen food employees at Christchurch and Hastings plants - Respondent's mandate document provided that terms of settlement had to be signed off by respondent's executive to be ratified by respondent - Parties reached bargaining process agreement ("BPA") - BPA included provision that parties to negotiations would have authority to reach agreement, subject only to ratification process for applicants and respondent, and any limitations on authority in respect of ratification processes would be outlined immediately prior to initial commencement of negotiations - Also provision that terms of settlement would not be taken as agreed record until signed off by both/all parties - Applicants denied or could not recall that respondent's Employee Relations Manager ("R") advised them of respondent's ratification process - Parties reached terms of settlement - Executive member advised R he would not approve settlement for crop-based production employees - R did not convey this to applicants and signed Terms of Settlement - Applicants' members ratified terms of settlement - Steps taken by respondent to put in place remuneration increases to all applicants' members except crop-based employees - Several months later respondent informed applicants its position that there was no agreement and it had not ratified the agreement - Applicants alleged they never really had any knowledge of authority for respondent but understood it was R who held authority/mandate to sign binding terms of settlement - Respondent submitted R had no actual authority to commit respondent to CEA with respondent's approval - Remarkable failure by R to tell applicants that respondent had not approved terms of settlement - Respondent came close to being bound by R's conduct - However evidence did not establish that R did not say something about respondent's ratification at commencement of negotiations - Meant Authority could not make orders for compliance as sought in regard to terms of settlement - Respondent could not be bound by terms of settlement unless they were rectified, and threshold not reached for Authority to make such a finding - Although R signed terms of settlement, knowing that approval had not been given, and that terms as agreed were within respondent's mandate, the provisions of the BPA requiring approval from the executive did not support R having ostensible authority to bind respondent to CEA - Approval that R was required to obtain meant the terms of settlement could not bind the respondent

Result: Application dismissed ; Costs reserved

Costs - Employment Relations Act 2000

Faithfull v Morris and Morris Ltd
9 Feb 2006, RA Monaghan, AA 1A/06, (2 pages)

COSTS - Successful personal grievance - Less than one day investigation meeting - Applicant sought contribution of $5,000 to actual costs of $7,200 - Respondent sought contribution of $2,000 to actual costs of $17,000 - Respondent relied on Calderbank offer - Offer sent on Friday before Monday of investigation meeting - If offer had been made earlier it would have had more weight, but it was not made in circumstances where its acceptance could reasonably be considered likely - Calderbank offer did not assist - Very much a matter that should have been settled early and for a relatively modest sum - Contribution by respondent ordered with regard to nature of case, mixed success achieved by parties and length of investigation meeting

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

Giddens and Anor v Kini and Anor
15 Feb 2006, L Robinson, AA 39/06, (3 pages)

COSTS - Successful application for penalties - One day investigation meeting - First applicant sought award of $7,975 - Second applicant sought award of $3,473 - Applicants properly regarded as successful parties and entitled to awards of costs on contribution basis - Applicants initially claimed recovery against limited liability company but after liquidation proceeded against respondent personally - Not right to hold respondent liable for legal expenses incurred in application initially pursued principally against another party

Result: Costs in favour of applicants ($1,000)(First applicant) ; ($300)(Second applicant)

Graham v Crestline Pty Ltd
7 Feb 2006, RA Monaghan, AA 23/06, (5 pages)

COSTS - Previous determination found that respondent was not applicant's employer - Investigation meeting over three days long - Respondent sought contribution of $49,469 towards total costs of $112,112 - This was a problem in which the so-called tariff applied in the Authority should be revised upwards - Its length and complexity required a degree of assistance from the parties which involved more of the elements of an adversarial process than in less complex problems - Number of additional activities such as considering certain financial and other documentary information added to costs - Total overall reasonable costs assessed as $32,800 - Costs of travel and accommodation valid expenses - Administration costs of $4,767 high but accepted were reasonably incurred - While applicant suffered drop in income after termination of employment not enough to persuade Authority a nil or small award of costs would be appropriate - Contribution of $15,000 plus disbursements appropriate

Result: Costs in favour of respondent ($15,000) ; Disbursements ($9,370)

Lindsay v Carter Holt Harvey Ltd t/a CHH Futurebuild
8 Feb 2006, RA Monaghan, AA 28/06, (3 pages)

COSTS - Unsuccessful personal grievance - Two day investigation meeting - Respondent sought contribution of $20,000 to actual costs of $37,636 plus disbursements and witness expenses - Applicant submitted costs should lie where they fall - Many employment relationship problems coming before Authority did

not, and should not have, required parties to incur more than relatively modest costs - Approach of Authority had been to reinforce that by making modest awards when asked to determine costs - In this case great deal of factual material traversed and preparation required favoured increase in what might be considered a "daily rate" - Contribution of $8,000 appropriate - Some witness expenses and disbursements also granted

Result: Costs in favour of respondent ($8,000) ; Disbursements ($650.50) ; Witness expenses (airfares, travel costs, accommodation)($2,410.79)

McIntosh v Southern Lakes Holdings Ltd

16 Feb 2006, P Cheyne, CA 22/06, (2 pages)

PRACTICE AND PROCEDURE - Amount of reimbursement of lost wages - Applicant awarded three months lost remuneration - Left to parties to calculate amount - Applicant lodged memorandum regarding costs and remuneration - Nothing received from respondent - Accepted that $8,595 appropriate amount of remuneration - COSTS - Successful personal grievance - Applicant sought costs of $1,500 for steps taken prior to investigation meeting, $750 for attendance, lodgement fee and reimbursement of printing and photocopying expenses - Not sure whether amount was full amount of legal fees or a contribution - Considered $1,500 appropriate award plus disbursements - These amounts were in addition to orders set out in previous determination

Result: Costs in favour of applicant ($1,500) ; Disbursements ($70)(Lodgement fee) ; ($25)(Photocopying and printing)

Monk v New Zealand Lotteries Commission

10 Feb 2006, PR Stapp, WA 21/06, (2 pages)

COSTS - Successful personal grievance - Three day investigation meeting - Applicant sought costs of $18,566 plus GST, being 66 percent of total legal fees incurred - Sought full disbursements of $605 which included couriers, filing fee, hearing fees and photocopying expenses - Amount awarded to applicant exceeded respondent's Calderbank letter so this could not be used to overturn applicant's right to contribution towards costs - GST not normally included and would not be included as matter of principle applied generally in Authority - Reasonable costs assessed as 66 percent of range of $15,001

Result: Costs in favour of applicant ($9,900.66) ; Disbursements ($605.50)

Scrimgeour v The Wellesley Ltd

10 Nov 2005, Couch J, WC 22/05, (4 pages)

NON DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Mediated settlement – Number of employment relationship problems – Plaintiff's claims dismissed by Authority – Settlement agreement entered between parties but no written record – Payment to plaintiff agreed as part of settlement – Plaintiff challenged determination to the extent it related to claim for arrears of wages – Alleged settlement payment was "ex gratia" and not made in full and final settlement – Court considered evidence of mediation on basis that parties consented – HELD – Far more likely defendant would have made payment only in order to bring matter to an end – No longer open to plaintiff to pursue claim further – Challenged dismissed – COSTS – Defendant represented by managing director – No basis on which to make order as to costs/disbursements – No order for costs – Hotel worker

Result: Challenge dismissed ; No order for costs

Sinclair v Local Media Group Ltd

8 Feb 2006, RA Monaghan, AA 26/06, (1 pages)

COSTS - Authority determined applicant not an employee - Length of investigation meeting not specified - Respondent sought contribution of $3,000 to actual costs of $19,167 - No response from applicant - Respondent's suggestion of contribution eminently reasonable

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

Singh v Sherildee Holdings Ltd t/a New World Opotiki

26 Oct 2005, Couch J, AC 53A/05, (4 pages)

COSTS – Successful challenge – Contribution of $3,500 sought – No details of expenses provided except $1,000 legal fees – Court declined to adjust costs award on basis that remedies awarded to plaintiff were reduced for contributory conduct – Two thirds contribution appropriate to costs identified – Costs of $670 plus disbursements of $760 awarded in favour of plaintiff

Result: Costs in favour of plaintiff ($670) ; Disbursements ($760)

Dispute - Employment Relations Act 2000

FINSEC Inc and Anor v ANZ National Bank
10 Feb 2006, PR Stapp, WA 18/06, (6 pages)

DISPUTE - Whether second applicant covered by collective employment agreement between first applicant union and respondent employer - Coverage clause provided that collective agreement covered generalist banking roles and S1-S4 specialist roles as described in clause 30, but did not cover staff members in management roles - Respondent alleged S1-S4 specialist roles were defined among other things by salary attached to role - Alleged that applicant's salary had to fall within salary scale specified in collective agreement in order for applicant to be covered by collective agreement - Applicant's salary exceeded maximum specialist salary payable under collective agreement by nearly $30,000 - Coverage determined not by salary but by coverage clause - No salary cap under terms of collective agreement - Only exclusion where employee in management role - Nothing that prevented cover under collective agreement where employee was paid more by arrangement under individual terms - Employment Relations Act 2000 permitted overlapping coverage by collective and individual employment agreements - Therefore, as applicant held specialist role, provided it was described in clause 30, he would be entitled to coverage - Respondent could not rely on applicant's role being management role when it clearly was not - Applicant entitled to coverage as member of union - Senior analyst programmer

Result: Dispute answered in favour of applicants ; Costs reserved

Langford and Ors v Otago District Health Board
7 Feb 2006, J Crichton, CA 17/06, (3 pages)

DISPUTE - Applicants alleged respondent failed to pay shoe allowance under collective employment agreement - Respondent required applicants to wear "closed footwear" - Whether "closed footwear" constituted an example of "a particular type of shoe" as relevant clause of collective agreement required - Authority had issued interim determination with provisional conclusion that applicants' claim failed - Parties made further submissions - Applicants alleged interim determination construed meaning of relevant clause too narrowly - Alleged intention was to provide for circumstances where workers would receive some reimbursement in event that their employer sought to restrict, in some way, footwear that they might otherwise reasonably wear to work - Ordinary dictionary definition of word "shoe" seemed to contemplate item which was particular kind of footwear - If parties had meant to use "footwear" in relevant clause it was available to them to do so - Authority's task was to discern ordinary meaning of relevant clause as it was written, not to attempt to guess parties' intentions when clause negotiated - Applicants' application failed

Result: Application dismissed ; Costs reserved

New Zealand Dairy Workers Union v Fonterra Co-operative Group Ltd
10 Feb 2006, M Urlich, AA 33/06, (3 pages)

DISPUTE - Interpretation of collective employment agreement - Parties agreed to extend respondent's productivity scheme to temporary employees - Employees had to apply for payment - Final two sentences of relevant clause stated "Application should be made to the site payroll officer before the last Friday of July each year" and "It will be paid on a pro-rated basis, by end of August" - Respondent alleged that this meant no more applications from temporary employees would be processed after that date - Applicant alleged that applications received by that date would be

paid by end of August, but applications received after that date would be processed in due course - "Should" could be read as definite or indefinite - After looking at clause as a whole it was artificial to say that timeframe established in final two sentences established a cut-off date for applications to be lodged - If parties intended to introduce a cut-off date then they should have used unequivocal language

Result: Question answered in favour of applicant ; Costs reserved

Taylor v eCOM New Zealand Ltd

9 Feb 2006, D King, AA 29/06, (8 pages)

UNJUSTIFIED DISMISSAL - Respondent received complaints about applicant from clients, staff and major supplier - Sought to set up meeting with respondent - Delay in holding meeting until respondent supplied details of allegations to applicant - Respondent gave number of reasons for dismissing applicant but would have dismissed on basis of complaints alone - Respondent depended on maintaining good relations with its very few good customers and would have been in jeopardy if relationships compromised - While some of other reasons were not substantive grounds for dismissal it was clear that complaints were adequate grounds for termination - Authority did not accept applicant's submission that customer issues merely performance issues and not a "reasonable reason" to dismiss - Clear breakdown of relationship of trust and confidence - Decision to dismiss one reasonable employer could have taken in circumstances - UNJUSTIFIED DISADVANTAGE - Suspensions during delay before meeting held were unjustified - Remedies - No evidence of effect of suspensions so no award for humiliation and distress - DISPUTE - Applicant's individual employment agreement had clause that "performance incentive of 5% will be paid on all new business closed from new or existing clients" - Applicant contended he was entitled to performance bonus regardless of whether he had any involvement in closing of new business - Performance incentive that had nothing to do with performance contradictory - Logically performance had to be applicant's performance, not respondent's performance - Implied term - That payment of performance incentive contingent on applicant's efforts so obvious it went without saying - Leave reserved on matter of any arrears based on interpretation of clause - Business Development Manager

Result: Application dismissed (dismissal) ; Application granted (unjustified disadvantage) ; Orders accordingly ; Costs reserved

Kereama v Feilding Venison Ltd

10 Apr 2006, D Asher, WA 55/06, (8 pages)

GOOD FAITH - Preliminary matter – Whether ss4(1A)(c)(i) and (ii) applied to seasonal lay off situations – Percentage of respondent's workforce was laid off each season - Alleged unjustified disadvantage and unjustified dismissal – Applicant asked Authority to determine initial matter of whether ss4(1A)(c)(i) and (ii) of the ERA applied - Respondent alleged applicant was justifiably laid off at end of season and that employment relationship was ongoing therefore s4(1A) did not apply – Applicant was told he was to be laid off because of his attitude and attendance – Respondent declined to answer applicant's request for names of persons to be laid off, and certain information about those people – Section 4(1A) applied when employer was proposing to make decision that "will, or is likely to, have an adverse impact on the continuation of employment of 1 or more of his or her employees" – Whether limited to cases of dismissal or whether could also apply to discontinuation with possibility of re-engagement – Authority found in favour of applicant's preliminary application – Accepted that he was entitled to access information relevant to the continuation of his employment and have opportunity to comment before respondent determined to lay him off – Would be reading down the scope of the new section by applying it only to impending dismissals: plainly that was not how the section was expressed – Applicant being laid off and not receiving pay for that time could not be seen as anything other than an "adverse effect on the continuation of employment" - Leave reserved for applicant to bring back remaining aspects of the employment relationship problem to Authority

Result: Question answered in favour of applicant ; Costs reserved

Jurisdiction - Employment Relations Act 2000

Patching v KSM Installations (NZ) Ltd

13 Feb 2006, D Asher, WA 23/06, (8 pages)

PRACTICE AND PROCEDURE - Respondent's counsel advised three days prior to investigation meeting that he was unable to attend because of High Court appearance - High Court appearance was moving nephew's admission to bar - Refused Authority's proposal to accommodate this by adjournment for some of day - Advised respondent's directors also unable to attend - Appropriate for Authority to proceed - Employment Court could be assisted by good faith report in event respondent challenged determination - JURISDICTION - Whether independent contractor or employee - No written agreement - At respondent's suggestion applicant invoiced respondent using company he had previously set up for franchise he had operated - While respondent described staff as contractors, reality was that applicant was employee - Respondent held to itself power to control hours worked by applicant, to hire and fire applicant, and to profit or lose from enterprise - Respondent supplied all materials including equipment, and applicant not expected to take skills elsewhere - Hammer-hand

Result: Application granted ; Filing fee in favour of applicant ($70)

Parental Leave - Employment Relations Act 2000

Dakers v Perry
10 May 2006, J Crichton, CA 65/06, (10 pages)

PRACTICE AND PROCEDURE - Admissibility of letter respondent wrote to Mediation Service which contained reasons for dismissal - Respondent alleged letter attracted privilege which attached to documents written in contemplation of mediation and ought not be disclosed in investigation meeting - However respondent had provided copy of letter to applicant and any privilege which might have attached must have been waived by respondent's subsequent use of document for entirely separate purpose - Letter could not be seen as written in contemplation of mediation because letter itself made it clear that respondent refused to attend mediation - PARENTAL LEAVE - Identity of employer - Respondent was dentist practising with other dentists - Alleged applicant employed by group of dentists - Dentists' Deed of Association allowed for employment by group or by individual dentists - Evidence equivocal but Authority inclined to view that applicant employed by respondent - In any event doctrine of undisclosed principal applied - Applicant on maternity leave - Telephone conversations between parties led applicant to believe she had been dismissed - Whether or not respondent used words "dismissal" or "fired", only proper conclusion applicant could have reached was that her employment had ended - Respondent alleged s51 Parental Leave and Employment Protection Act 1987 ("PLEPA") applied because nature of position applicant occupied prior to going on parental leave was significantly different from any position which she might be offered with respondent after end of her parental leave - Relied on contention that because applicant was employed for 40 hours a week when parental leave started, that was only position that she could legally aspire to at end of parental leave - Respondent's assistant now worked less hours per week because respondent had reduced his hours of work - Applicant's evidence was that in period immediately prior to parental leave her hours had started to reduce - Because of her baby she sought a part-time position which, on respondent's evidence, was kind of position respondent had to offer - Employee undertaking applicant's position understood she was relieving it temporarily until applicant returned - Vacant position to which applicant could have been appointed to - Position substantially similar even though hours had reduced - Every prospect that applicant could have been appointed to position if had been any consultation - No consultation - Respondent breached obligations under PLEPA - Remedies awarded under PLEPA

Result: Application granted ; Reimbursement of lost wages ($9,162.17)(5 months) ; Compensation for humiliation etc ($12,500) ; Costs reserved

Penalty - Employment Relations Act 2000

Jones v Gunson

14 Feb 2006, K Anderson, AA 36/06, (5 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Respondent owned and operated locally produced complimentary newspaper - Respondent became aware that applicant had approved material for publication that respondent considered was inappropriate and could potentially damage reputation of newspaper - When respondent looked at computer files she discovered variety of material that raised concern - Also became aware of what appeared to be unauthorised presence of applicant's partner on business premises, and inappropriate use of business computer to access pornographic websites - Authority concluded that some of applicant's behaviour was very questionable but not role of Authority to make value judgements as to how individuals conducted their personal lives - Respondent entitled to view actions of applicant as serious misconduct warranting dismissal - Dismissal justified - PENALTY - Respondent failed to provide written individual employment agreement but applicant did not seek penalty for this breach - Editor/Manager

Result: Application dismissed ; Costs to lie where they fall

Personal Grievance - Employment Relations Act 2000

Henare v After Hours Moorhouse Medical Ltd
23 Feb 2006, J Crichton, CA 27/06, (12 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Alleged resigned because of respondent's treatment of her illness and its apparent consequences in workplace - Applicant suffered from endometriosis - Alleged respondent made it difficult for her to take sick leave when needed and refused to allow annual leave when sick leave was extinguished - Applicant took significant amount of leave and only one instance of leave not being granted was documented - Not persuaded on evidence that respondent behaved unfairly or inappropriately in relation to requests for leave - Applicant alleged practice manager sighed and grumbled when she rang to say would be ill and said applicant was putting pressure on other staff - Not accepted such comments made - Concluded that effect of illness may have had effect of dimming recollection of events - No other inappropriate behaviour - Alleged practice manager effectively tried to manipulate leave position - Claim not accepted - Reason was no record of leave without pay was because applicant preferred to have leave on pay -No evidence suggesting applicant unjustly treated in relation to leave - Alleged director and shareholder of respondent said if lawyers were to be involved he would prefer applicant's resignation - Comments did not amount to constructive dismissal - Not persuaded that applicant accurately reported what director said - No constructive dismissal - Alleged suffered workplace stress because of way treated - Medical evidence suggested applicant was suffering from workplace stress - However, scant evidence that applicant ever advised employer of stress - No viable cause of action - Some performance issues - Nothing inappropriate in behaviour of employer in relation to performance issues - UNJUSTIFIED DISADVANTAGE - No evidence to support claim - Claim dismissed - DISCRIMINATION - Alleged discriminated against by reason of physical illness - No evidence to support claim - Claim dismissed - Casual medical receptionist

Result: Application dismissed ; Costs reserved

Personal Grievance - Dismissal - Employment Relations Act 2000

Barnes v Telecom New Zealand Ltd
14 Feb 2006, J Crichton, CA 20/06, (7 pages)

UNJUSTIFIED DISMISSAL - Whether person intending to work - Applicant alleged she was unjustifiably dismissed when respondent withdrew unconditional offer of employment - Respondent alleged employment was conditional on second satisfactory reference check and there was never a concluded employment relationship - Respondent used recruitment agency - Conflict of evidence over how recruitment agent ("B") explained respondent's recruitment process to applicant - Risky strategy for complicated recruitment patterns to be managed exclusively with verbal communication - Applicant would have been excited when process first explained and may simply have misheard what she was told - Having misheard process the first time, it was easier for applicant to confuse the process when there were further discussions about it - Difficult to see how experienced professional person such as B could have got process so wrong as to make mistake in conveying information to applicant - More likely that applicant simply did not hear that there were two points at which reference checking came into question - Employment relationship never created

Result: Application dismissed ; Costs reserved

Haywood v Blackwell Motors Ltd
8 Feb 2006, H Doyle, CA 18/06, (9 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Applicant's position as car sales manager disestablished - Worked as car salesman until resignation - Whether decision to disestablish was for genuine commercial reasons - Respondent considered efficiency of management structure in used car department against background of drop in profit and sustained losses - Respondent concluded it would reorganise department and disestablish position of car sales manager - No predetermination - Evidence did not support submission that restructuring was merely an exercise to restructure applicant's wages - Role of car sales manager ceased to exist and duties absorbed into other roles - Applicant given choice of taking alternative position or being paid out extended period of notice for redundancy - Applicant decided to take alternative position which had same base rate but less favourable commission package - Applicant not dismissed - Disestablishment for genuine commercial reasons - Whether fair and reasonable process - Applicant not advised to take representative to meeting - However applicant an intelligent man who was not materially disadvantaged by lack of representation - Overall process used was fair and reasonable - Respondent not obliged to redeploy applicant to position on no less favourable terms and conditions so this could not form basis of disadvantage claim - Applicant claimed he never received a letter which set out package for new role as car salesman and included a clause reserving respondent's right to change commission rates - Clause could not be held to have disadvantaged applicant because he had no knowledge of it - Non-publication order in respect of respondent's financial records - Car salesman/car sales manager

Result: Application dismissed ; Orders accordingly ; Costs reserved

Henare v After Hours Moorhouse Medical Ltd
23 Feb 2006, J Crichton, CA 27/06, (12 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Alleged resigned because of respondent's treatment of her illness and its apparent consequences in workplace - Applicant suffered from endometriosis - Alleged respondent made it difficult for her to take sick leave when needed and refused to allow annual leave when sick leave was extinguished - Applicant took significant amount of leave and only one instance of leave not being granted was documented - Not persuaded on evidence that respondent behaved unfairly or inappropriately in relation to requests for leave - Applicant alleged practice manager sighed and grumbled when she rang to say would be ill and said applicant was putting pressure on other staff - Not accepted such comments made - Concluded that effect of illness may have had effect of dimming recollection of events - No other inappropriate behaviour - Alleged practice manager effectively tried to manipulate leave position - Claim not accepted - Reason was no record of leave without pay was because applicant preferred to have leave on pay -No evidence suggesting applicant unjustly treated in relation to leave - Alleged director and shareholder of respondent said if lawyers were to be involved he would prefer applicant's resignation - Comments did not amount to constructive dismissal - Not persuaded that applicant accurately reported what director said - No constructive dismissal - Alleged suffered workplace stress because of way treated - Medical evidence suggested applicant was suffering from workplace stress - However, scant evidence that applicant ever advised employer of stress - No viable cause of action - Some performance issues - Nothing inappropriate in behaviour of employer in relation to performance issues - UNJUSTIFIED DISADVANTAGE - No evidence to support claim - Claim dismissed - DISCRIMINATION - Alleged discriminated against by reason of physical illness - No evidence to support claim - Claim dismissed - Casual medical receptionist

Result: Application dismissed ; Costs reserved

Hunt v Mercury Consulting Group Ltd

13 Feb 2006, PR Stapp, WA 22/06, (11 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Constructive dismissal - Applicant alleged increased workload - Concerned about security of job when manager and Managing director overseas - Alleged during that time had to deal with matters outside her responsibility - Off work on sick leave - Medical certificate mentioned stress over increased workload - Another person was engaged to help out - Manager and Managing director became aware applicant was being treated by GP - Decided to wait results of tests - Called meeting to discuss health - Dispute over what was said at meeting - Doctor advised she had clinical depression caused by work related stress - Applicant left work - Raised claim for personal grievance and a few weeks later alleged manager had sexually harassed and bullied her - Whether breach of employment agreement or Health and Safety in Employment Act 1992 - Medical evidence one sided - Could not accept claim that stress caused by workplace - Evidence of other factors potentially bringing about medical conditions - Not established that manager's alleged behaviour caused her to leave employment - No link between any stress and alleged bullying and sexual harassment - Applicant did not complain about bullying and sexual harassment until later - Potential 90 day issue - Not foreseeable applicant would resign - No constructive dismissal - Career Services Sales and Service Executive

Result: Application dismissed ; Costs reserved

Morrison v Spotless Services (New Zealand) Ltd

10 Feb 2006, PR Stapp, WA 19/06, (10 pages)

UNJUSTIFIED DISMISSAL - Whether applicant was dismissed or abandoned her employment - Written employment agreement provided that if applicant was absent

from work for continuous period exceeding two working days without notification to and consent from respondent or without good cause, applicant deemed to have abandoned employment - Over one year and seven months applicant took sixty three days sick leave, as well as annual leave and leave without pay - Discussions between parties about ongoing absences - Applicant informed respondent she was to have operation under private health system and intended to be absent for four weeks - Respondent declined request for leave without pay - Applicant informed applicant she would take leave anyway - Respondent confirmed that leave had not been granted and put applicant on notice her employment would be terminated if she failed to contact respondent - Applicant made another request for leave - Respondent dismissed applicant - Abandonment clause in employment agreement did not apply because respondent knew applicant was not abandoning employment - Information available to respondent sufficient to alert fair and reasonable employer that applicant had significant medical issue - Applicant's decision to take time off work when leave had not been approved was more in nature of disciplinary matter than abandonment - Fair and reasonable employer would not have dismissed applicant for being defiant, not providing sufficient medical information, and for sickness where sick leave was exhausted because those were not matters put to applicant for comment - Unjustified dismissal - Remedies - Contributory conduct - Applicant's failure to provide detailed information about reason for her surgery was linked to respondent's decision - However Authority could not attribute any contributory fault when respondent had enough information that would have alerted it to applicant's significant health issue, and had decided to temporarily fill her position with fixed term agreement - No contributory fault - Service Centre Operator

Result: Application granted ; Reimbursement of lost wages ($5,123)(3 months) ; Compensation for humiliation ($7,000) ; Costs reserved

Mulyadi v Spotless Services (NZ) Ltd

16 Feb 2006, R Arthur, AA 41/06, (3 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Applicant employed on hourly rate - However, was paid on piece work basis - Applicant and her husband complained - Respondent's response inaccurate and abrasive - Told her she had been paid correctly on basis of rooms cleaned and dismissed her husband's concern - Applicant resigned - Monies owing paid after intervention of Labour Inspector - Respondent not entitled to pay on that basis - During applicant's brief employment respondent "trimmed" 24.25 hours - An employee's resignation must be a sensible and reasonable response, not an over-reaction or hasty - Resignation was hasty in the circumstances - She had at most two conversations with respondent which was not sufficient pursuit of issue to enable her to conclude that respondent would not pay her on hourly basis in future - Applicant's conclusion premature - Not constructively dismissed - Respondent was, however, in breach of agreement to pay her on hourly rate basis - May have also breached duties to advise applicant of process for dealing with employment relationship problems - If applicant had sought penalties for breaches would have considered awarding them - Cleaner

Result: Application dismissed ; Costs reserved

Rollo v Pick-A-Part Avondale Ltd

9 Feb 2006, M Urlich, AA 30/06, (5 pages)

UNJUSTIFIED DISMISSAL - Whether applicant abandoned employment - Respondent's director formed view that things were going missing - Arranged set-up to catch who was responsible - Applicant directed to pick up car - When applicant returned car to yard its mag wheels were no longer there - Director laid complaint with police that applicant had stolen mag wheels - Later that day applicant arrested

for theft - District Court dismissed charge against applicant and District Court's judgment recorded that observer did not see applicant or anyone else remove mag wheels - Applicant did not return to work after day of arrest - Employment agreement provided that where employee absented himself from work for continuous period of two days without notifying or obtaining consent of respondent, he was deemed to have abandoned employment - Evidence showed applicant and respondent were in regular contact from day after applicant's arrest - Respondent did not expect applicant back at work after arrest and wanted to meet with him to discuss issue - Could not be said applicant abandoned his employment - Applicant unable to resume normal duties without express authorisation from respondent - Applicant was dismissed when respondent hired a replacement driver - Respondent unable to demonstrate requirements of procedural or substantive fairness were followed to justify dismissal - No reasonable basis upon which respondent could conclude applicant responsible for disappearance of mag wheels - Respondent did not take reasonable steps to set up meeting with applicant - Remedies - Applicant suspended from day after arrest until dismissal and that suspension should have been on pay - Driver

Result: Application granted ; Reimbursement of lost wages (suspension)(1 month) ; (dismissal)(3 months)(quantum to be determined by parties) ; Compensation for humiliation etc ($4,000) ; Filing fee ($70)

Taylor v eCOM New Zealand Ltd

9 Feb 2006, D King, AA 29/06, (8 pages)

UNJUSTIFIED DISMISSAL - Respondent received complaints about applicant from clients, staff and major supplier - Sought to set up meeting with respondent - Delay in holding meeting until respondent supplied details of allegations to applicant - Respondent gave number of reasons for dismissing applicant but would have dismissed on basis of complaints alone - Respondent depended on maintaining good relations with its very few good customers and would have been in jeopardy if relationships compromised - While some of other reasons were not substantive grounds for dismissal it was clear that complaints were adequate grounds for termination - Authority did not accept applicant's submission that customer issues merely performance issues and not a "reasonable reason" to dismiss - Clear breakdown of relationship of trust and confidence - Decision to dismiss one reasonable employer could have taken in circumstances - UNJUSTIFIED DISADVANTAGE - Suspensions during delay before meeting held were unjustified - Remedies - No evidence of effect of suspensions so no award for humiliation and distress - DISPUTE - Applicant's individual employment agreement had clause that "performance incentive of 5% will be paid on all new business closed from new or existing clients" - Applicant contended he was entitled to performance bonus regardless of whether he had any involvement in closing of new business - Performance incentive that had nothing to do with performance contradictory - Logically performance had to be applicant's performance, not respondent's performance - Implied term - That payment of performance incentive contingent on applicant's efforts so obvious it went without saying - Leave reserved on matter of any arrears based on interpretation of clause - Business Development Manager

Result: Application dismissed (dismissal) ; Application granted (unjustified disadvantage) ; Orders accordingly ; Costs reserved

Personal Grievance - Dismissal - Misconduct - Employment Relations Act 2000

Blaker v B & D Doors (NZ) Ltd
16 Feb 2006, J Wilson, AA 40/06, (8 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Taking of company property without authorisation - Lied to company representatives during investigation of that theft - A staff member was seen loading aluminium off-cuts onto trailer - Applicant said he had taken material to scrap heap at request of another employee - Applicant alleged was a widespread understanding that off-cuts could be and were removed by employees - Satisfied applicant was advised of all relevant information and offered reasonable opportunity to respond - Failure to adjourn meeting and make further inquiries not prejudicial to applicant - Respondent entitled to seek views of senior staff as to alleged widely held belief that staff could remove off-cuts - Decision to dismiss made after careful consideration of information - Serious misconduct - Justified dismissal - Installation supervisor

Result: Application dismissed ; Costs reserved

Jones v Gunson
14 Feb 2006, K Anderson, AA 36/06, (5 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Respondent owned and operated locally produced complimentary newspaper - Respondent became aware that applicant had approved material for publication that respondent considered was inappropriate and could potentially damage reputation of newspaper - When respondent looked at computer files she discovered variety of material that raised concern - Also became aware of what appeared to be unauthorised presence of applicant's partner on business premises, and inappropriate use of business computer to access pornographic websites - Authority concluded that some of applicant's behaviour was very questionable but not role of Authority to make value judgements as to how individuals conducted their personal lives - Respondent entitled to view actions of applicant as serious misconduct warranting dismissal - Dismissal justified - PENALTY - Respondent failed to provide written individual employment agreement but applicant did not seek penalty for this breach - Editor/Manager

Result: Application dismissed ; Costs to lie where they fall

Kingi v Responsive Maintenance 2000 Ltd
10 Feb 2006, J Scott, AA 32/06, (7 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - While visiting supplier applicant became abusive when disputing nature of supplier's special offer - Similar past conduct to colleagues and supervisors - Respondent dismissed applicant for confronting supplier in inappropriate and intimidating manner while being recognised as respondent's employee, bringing respondent into disrepute, and breaching expectations of employees contained in employment agreement and Code of Conduct - Applicant well aware of nature of special offer - Conduct was "egregious" within meaning of Amaltal Fishing v Morunga (cited below), "outstandingly bad or infamous" - Respondent reached sound conclusion that it could not be confident there would be no repetition of similar conduct - Normally failure of decision maker to be present to hear employee's explanation would render dismissal unjustified - However in this case director not a remote decision maker as he had been closely involved in matter from beginning of inquiry - Dismissal

justified - Even if this wrong then applicant's contribution disentitled him to remedies - Applicant alleged he went to supplier in private capacity - Applicant there in work time and clearly identified as member of respondent's staff - Nexus between employment and conduct complained of clearly established - UNJUSTIFIED DISADVANTAGE - Suspension - Certain circumstances where safety an issue so could be appropriate to suspend employee even where no statutory or contractual right to do so - Suspension not implemented until 12 days after event - Inconsistent with submission that suspension warranted to ensure safety of others - Applicant entitled to notice of proposal to suspend and opportunity to comment - Unjustified disadvantage - Remedies - Contributory conduct - Applicant's contribution was total and no remedy was to be awarded

Result: Application dismissed (unjustified dismissal) ; Application granted (unjustified disadvantage) ; Costs reserved

Makiha v Northern Tree Harvesters Ltd

10 Feb 2006, M Urlich, AA 31/06, (5 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Applicant required under employment agreement to carry out daily checks of truck including of oil level - Respondent concluded that applicant failed to maintain required oil check on truck and this failure resulted in serious damage to engine - Dismissed applicant for serious misconduct - Applicant alleged respondent failed to properly consider all possible explanations for damage sustained to truck's engine - Authority satisfied that respondent fairly considered alternative explanations - Applicant alleged he should have had opportunity to address decision-maker - Respondent's manager conducted investigation, reached conclusion and put recommendation to respondent's Board to vote - Manager put recommendation to Board to seek support for difficult decision but this not same as relinquishing decision-making role to Board - Decision to dismiss one that would have been made by reasonable employer

Result: Application dismissed ; Costs reserved

Matich v Christian Healthcare Trust

8 Feb 2006, A Dumbleton, AA 24/06, (11 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Respondent determined applicant had failed to provide assistance when requested by resident for another resident ("first incident"), and failed to assist another resident when he requested assistance ("second incident") - Respondent found applicant's conduct was gross misconduct under employment agreement and dismissed her - Test of justification provided by s103A Employment Relations Act 2000 ("ERA") overruled test in Oram (cited below) - Many decisions given under legislation prior to ERA and its 2004 amendment remained good law in so far as they were relevant to role of tribunal or court such as Authority when determining personal grievance claim - Authority satisfied that after carrying out full and substantially fair investigation respondent had reasonable grounds for believing applicant failed to perform duty in relation to both incidents - However caregiver ("J") who was with applicant at time of first incident also heard request and failed to assist - J given a "talking to" but otherwise not disciplined - Applicant blamed for preventing J from responding to request - J told respondent she had felt intimidated by applicant but applicant not told that "bullying" or similar behaviour was being investigated against her - Without conducting adequate inquiry respondent could not fairly conclude that bullying by applicant prevented J from carrying out her duty - Disparity of treatment - Explanation for disparity not adequate - Disparity too great to ignore as matter detracting from justification for dismissal - Respondent relied on cumulative effect of misconduct from both incidents when reaching decision to dismiss - Half of that combination could not prop up decision to dismiss - Unjustified dismissal -

Remedies - Respondent tendered settlement proposal, which included reinstatement, to Authority before investigation meeting - Unusual and irregular step which achieved no useful purpose at that stage of investigation - Did not amount to admission that dismissal unjustified as justification was much a legal as factual question and one for Authority to decide - However did show reinstatement was practicable - Contributory conduct - Reinstatement could not be meaningfully adjusted to take account of contributory behaviour - Respondent would be justified in issuing applicant with formal disciplinary warning for second incident but this left to discretion of respondent - Caregiver

Result: Application granted ; Reinstatement ordered ; Reimbursement of lost wages (quantum to be determined by parties)(contributory conduct 50%) ; Interest (8.5%) ; Compensation for humiliation (close to $10,000 reduced to $4,000) ; Costs reserved

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

Manning v Saxon Print Group Ltd
13 Feb 2006, H Doyle, CA 19/06, (6 pages)

UNJUSTIFIED DISMISSAL - Poor performance - Applicant dismissed because of his declining sales figures and respondent's dissatisfaction with his performance - Respondent genuinely dissatisfied with applicant's sales figures - Discussions between respondent's managing director and applicant - Individual employment agreement contained full procedure for dealing with disciplinary issues - Verbal reprimand at one of the meetings - No clear and explicit warning that applicant's job on line if no improvement in performance as required by agreement - During one meeting managing director decided to dismiss applicant - Not advised to have support person at meeting and not advised that a consequence of meeting could be dismissal - No evidence to suggest respondent carefully analysed applicant's explanations - No fair process - Unjustified dismissal - Remedies - Account manager

Result: Application granted ; Reimbursement of lost wages ($8,676)(3 months) ; Compensation for humiliation ($9,000) ; Costs reserved

Personal Grievance - Dismissal - Redundancy - Employment Relations Act 2000

Ah Chee v Panda Catering Ltd
8 Feb 2006, M Urlich, AA 27/06, (3 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Applicant dismissed for redundancy after applicant's brothers sold shares in respondent - Process used by respondent to implement redundancy fell well below accepted standard - No evidence applicant consulted about new structure or how this might affect her position - Not given fair notice of dismissal meeting or given opportunity to seek advice or have representative present - Unjustified dismissal - Remedies - Respondent alleged its legal obligations to applicant were subordinate to moral obligations owed to applicant by brothers - Requested Authority take into account gift applicant received from brothers on sale of shares - No evidence gift made by respondent - What occurred between applicant and brothers a private matter which fell outside scope of investigation - Remedies took into account applicant was employee of 30 years standing

Result: Application granted ; Compensation for humiliation etc ($12,000) ; Cost reserved

Conquer v Status Produce Ltd
2 Feb 2006, R Arthur, AA 22/06, (14 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Applicant alleged that redundancy a ruse to remove him for other reasons - Significant tensions in working relationships between operations manager, applicant and applicant's mother and father (who also worked for respondent) - Operations manager had concerns about applicant's allegedly poor performance - However applicant had not met burden of establishing that redundancy motivated solely by ulterior motive - Performance concerns contributed to "mixed motive" for redundancy - Whether genuine commercial reasons for redundancy - Applicant alleged new job created was really his old job renamed - Reason given for restructuring was to remove duplication between roles and improve communication and organisational efficiency - Applicant's employment agreement defined "redundancy" as "a situation where your position is wholly or partly surplus to the Company's needs" - Use of word "partly" did not allow any small superfluity in role to fall within redundancy definition - Work of new role was substantially same as old role - What change might have been required was nothing more than change of focus or emphasis - Genuine business reasons for redundancy not established - Authority did not need to consider further any "mixed motive" aspects - Whether procedural fairness - Applicant told that selection for new position would comprise interview by panel and past performance would be taken into account - Instead applicant interviewed by only one person, a consultant, who had no information about applicant's past performance - Restructuring proposal also advised applicant that respondent would take initiative in finding him another job - No steps taken to identify any retraining or other assistance that applicant might need for positions respondent suggested - Unjustified dismissal - Remedies - Reimbursement of lost wages - Applied unsuccessfully for five jobs over 28 weeks - Circumstances of losing job with respondent affected applicant's confidence in seeking work - Adequate endeavours to mitigate loss - Loss of income assessed at 35 weeks salary with deductions for wages in lieu of notice and redundancy compensation - Grading manager

Result: Application granted ; Reimbursement of lost wages (20 weeks) ; Compensation for humiliation etc ($8,000) ; Costs reserved

Pryce v TelstraClear Ltd

14 Feb 2006, RA Monaghan, AA 37/06, (4 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Respondent recruited applicant on fixed term employment agreement as manager for in-house door-to-door sales team to sell new product - Four months later applicant's role disestablished - Whether redundancy genuine - Authority accepted redundancy was genuine in that continuing operation of in-house door to door sales team not financially viable - Immediacy with which recruitment and retention problems arose called into question adequacy of human resource planning, but did not affect genuineness of redundancy - That new product was still available did not mean position was available to manage its sale - Fair procedure used to implement redundancy - Authority did not accept respondent failed to properly consider alternative positions for applicant - BREACH OF CONTRACT - Applicant sought payment for balance of fixed term - Applicant made redundant in reliance on provision in agreement for early termination in event of redundancy - No breach arising out of early termination - Sales manager

Result: Application dismissed ; Costs reserved

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

Pouesi v The Youth Horizons Trust
16 Feb 2006, J Scott, AA 38/06, (5 pages)

RAISING PERSONAL GRIEVANCE - Whether grievance raised within 90 days - Applicant given seven days notice of termination - Applicant alleged was seven working days - Expression "seven days" normally interpreted to mean seven calendar days unless otherwise stated - Employment ended on 12 May - Grievance raised out of time - Whether exceptional circumstances - Applicant alleged the fact her arrears claim was not resolved in mediation constituted an exceptional circumstance which warranted the granting of leave to raise grievance out of time - Not an exceptional circumstance

Result: Application dismissed ; Costs reserved

Personal Grievance - Unjustified Disadvantage - Employment Relations Act 2000

Castle v New Zealand Fire Service
13 Feb 2006, YS Oldfield, AA 34/06, (5 pages)

UNJUSTIFIED DISADVANTAGE - Instruction - Respondent concerned that applicant had sent client a report criticising private sector fire engineer - Instructed applicant he was not to send out any reports to outside agencies that were controversial, challenging or critical of third party without having cleared them first - Subsequently respondent received complaint about email applicant had forwarded from another staff member - Letter commencing disciplinary proceedings indicated alleged conduct could amount to breach of earlier instruction and respondent's Standards of Conduct - Earlier instruction described as advice not to send out any further advisories to external stakeholders without prior consultation with Chief Fire Safety Officer - Applicant felt original instruction was being held out as something other than it had been, and that scope of direction now made it impossible for him to do job - Just over a month after letter respondent formally rescinded instruction - Respondent justified in commending disciplinary proceedings in relation to Standards of Conduct and original instruction, but not in relation to instruction as re-expressed - Additional disciplinary risk for applicant - Instruction of wider scope not justified - Unjustified action - Applicant went on sick leave and was distressed by limits placed on his autonomy - Once grievance lodged respondent remedied it in timely way and although applicant suffered some distress in interval he contributed in major way by prevarication and obfuscation - No award of compensation warranted - Fire Safety Officer

Result: Application granted ; Costs reserved

Haywood v Blackwell Motors Ltd
8 Feb 2006, H Doyle, CA 18/06, (9 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Applicant's position as car sales manager disestablished - Worked as car salesman until resignation - Whether decision to disestablish was for genuine commercial reasons - Respondent considered efficiency of management structure in used car department against background of drop in profit and sustained losses - Respondent concluded it would reorganise department and disestablish position of car sales manager - No predetermination - Evidence did not support submission that restructuring was merely an exercise to restructure applicant's wages - Role of car sales manager ceased to exist and duties absorbed into other roles - Applicant given choice of taking alternative position or being paid out extended period of notice for redundancy - Applicant decided to take alternative position which had same base rate but less favourable commission package - Applicant not dismissed - Disestablishment for genuine commercial reasons - Whether fair and reasonable process - Applicant not advised to take representative to meeting - However applicant an intelligent man who was not materially disadvantaged by lack of representation - Overall process used was fair and reasonable - Respondent not obliged to redeploy applicant to position on no less favourable terms and conditions so this could not form basis of disadvantage claim - Applicant claimed he never received a letter which set out package for new role as car salesman and included a clause reserving respondent's right to change commission rates - Clause could not be held to have disadvantaged applicant because he had no knowledge of it - Non-publication order in respect of respondent's financial records - Car salesman/car sales manager

Result: Application dismissed ; Orders accordingly ; Costs reserved

Henare v After Hours Moorhouse Medical Ltd

23 Feb 2006, J Crichton, CA 27/06, (12 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Alleged resigned because of respondent's treatment of her illness and its apparent consequences in workplace - Applicant suffered from endometriosis - Alleged respondent made it difficult for her to take sick leave when needed and refused to allow annual leave when sick leave was extinguished - Applicant took significant amount of leave and only one instance of leave not being granted was documented - Not persuaded on evidence that respondent behaved unfairly or inappropriately in relation to requests for leave - Applicant alleged practice manager sighed and grumbled when she rang to say would be ill and said applicant was putting pressure on other staff - Not accepted such comments made - Concluded that effect of illness may have had effect of dimming recollection of events - No other inappropriate behaviour - Alleged practice manager effectively tried to manipulate leave position - Claim not accepted - Reason was no record of leave without pay was because applicant preferred to have leave on pay -No evidence suggesting applicant unjustly treated in relation to leave - Alleged director and shareholder of respondent said if lawyers were to be involved he would prefer applicant's resignation - Comments did not amount to constructive dismissal - Not persuaded that applicant accurately reported what director said - No constructive dismissal - Alleged suffered workplace stress because of way treated - Medical evidence suggested applicant was suffering from workplace stress - However, scant evidence that applicant ever advised employer of stress - No viable cause of action - Some performance issues - Nothing inappropriate in behaviour of employer in relation to performance issues - UNJUSTIFIED DISADVANTAGE - No evidence to support claim - Claim dismissed - DISCRIMINATION - Alleged discriminated against by reason of physical illness - No evidence to support claim - Claim dismissed - Casual medical receptionist

Result: Application dismissed ; Costs reserved

Hunt v Mercury Consulting Group Ltd

13 Feb 2006, PR Stapp, WA 22/06, (11 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Constructive dismissal - Applicant alleged increased workload - Concerned about security of job when manager and Managing director overseas - Alleged during that time had to deal with matters outside her responsibility - Off work on sick leave - Medical certificate mentioned stress over increased workload - Another person was engaged to help out - Manager and Managing director became aware applicant was being treated by GP - Decided to wait results of tests - Called meeting to discuss health - Dispute over what was said at meeting - Doctor advised she had clinical depression caused by work related stress - Applicant left work - Raised claim for personal grievance and a few weeks later alleged manager had sexually harassed and bullied her - Whether breach of employment agreement or Health and Safety in Employment Act 1992 - Medical evidence one sided - Could not accept claim that stress caused by workplace - Evidence of other factors potentially bringing about medical conditions - Not established that manager's alleged behaviour caused her to leave employment - No link between any stress and alleged bullying and sexual harassment - Applicant did not complain about bullying and sexual harassment until later - Potential 90 day issue - Not foreseeable applicant would resign - No constructive dismissal - Career Services Sales and Service Executive

Result: Application dismissed ; Costs reserved

Kingi v Responsive Maintenance 2000 Ltd
10 Feb 2006, J Scott, AA 32/06, (7 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - While visiting supplier applicant became abusive when disputing nature of supplier's special offer - Similar past conduct to colleagues and supervisors - Respondent dismissed applicant for confronting supplier in inappropriate and intimidating manner while being recognised as respondent's employee, bringing respondent into disrepute, and breaching expectations of employees contained in employment agreement and Code of Conduct - Applicant well aware of nature of special offer - Conduct was "egregious" within meaning of Amaltal Fishing v Morunga (cited below), "outstandingly bad or infamous" - Respondent reached sound conclusion that it could not be confident there would be no repetition of similar conduct - Normally failure of decision maker to be present to hear employee's explanation would render dismissal unjustified - However in this case director not a remote decision maker as he had been closely involved in matter from beginning of inquiry - Dismissal justified - Even if this wrong then applicant's contribution disentitled him to remedies - Applicant alleged he went to supplier in private capacity - Applicant there in work time and clearly identified as member of respondent's staff - Nexus between employment and conduct complained of clearly established - UNJUSTIFIED DISADVANTAGE - Suspension - Certain circumstances where safety an issue so could be appropriate to suspend employee even where no statutory or contractual right to do so - Suspension not implemented until 12 days after event - Inconsistent with submission that suspension warranted to ensure safety of others - Applicant entitled to notice of proposal to suspend and opportunity to comment - Unjustified disadvantage - Remedies - Contributory conduct - Applicant's contribution was total and no remedy was to be awarded

Result: Application dismissed (unjustified dismissal) ; Application granted (unjustified disadvantage) ; Costs reserved

Taylor v eCOM New Zealand Ltd
9 Feb 2006, D King, AA 29/06, (8 pages)

UNJUSTIFIED DISMISSAL - Respondent received complaints about applicant from clients, staff and major supplier - Sought to set up meeting with respondent - Delay in holding meeting until respondent supplied details of allegations to applicant - Respondent gave number of reasons for dismissing applicant but would have dismissed on basis of complaints alone - Respondent depended on maintaining good relations with its very few good customers and would have been in jeopardy if relationships compromised - While some of other reasons were not substantive grounds for dismissal it was clear that complaints were adequate grounds for termination - Authority did not accept applicant's submission that customer issues merely performance issues and not a "reasonable reason" to dismiss - Clear breakdown of relationship of trust and confidence - Decision to dismiss one reasonable employer could have taken in circumstances - UNJUSTIFIED DISADVANTAGE - Suspensions during delay before meeting held were unjustified - Remedies - No evidence of effect of suspensions so no award for humiliation and distress - DISPUTE - Applicant's individual employment agreement had clause that "performance incentive of 5% will be paid on all new business closed from new or existing clients" - Applicant contended he was entitled to performance bonus regardless of whether he had any involvement in closing of new business - Performance incentive that had nothing to do with performance contradictory - Logically performance had to be applicant's performance, not respondent's performance - Implied term - That payment of performance incentive contingent on applicant's efforts so obvious it went without saying - Leave reserved on matter of any arrears based on interpretation of clause - Business Development

Manager

Result: Application dismissed (dismissal) ; Application granted (unjustified disadvantage) ; Orders accordingly ; Costs reserved

Practice & Procedure - Employment Relations Act 2000

Dakers v Perry

10 May 2006, J Crichton, CA 65/06, (10 pages)

PRACTICE AND PROCEDURE - Admissibility of letter respondent wrote to Mediation Service which contained reasons for dismissal - Respondent alleged letter attracted privilege which attached to documents written in contemplation of mediation and ought not be disclosed in investigation meeting - However respondent had provided copy of letter to applicant and any privilege which might have attached must have been waived by respondent's subsequent use of document for entirely separate purpose - Letter could not be seen as written in contemplation of mediation because letter itself made it clear that respondent refused to attend mediation - PARENTAL LEAVE - Identity of employer - Respondent was dentist practising with other dentists - Alleged applicant employed by group of dentists - Dentists' Deed of Association allowed for employment by group or by individual dentists - Evidence equivocal but Authority inclined to view that applicant employed by respondent - In any event doctrine of undisclosed principal applied - Applicant on maternity leave - Telephone conversations between parties led applicant to believe she had been dismissed - Whether or not respondent used words "dismissal" or "fired", only proper conclusion applicant could have reached was that her employment had ended - Respondent alleged s51 Parental Leave and Employment Protection Act 1987 ("PLEPA") applied because nature of position applicant occupied prior to going on parental leave was significantly different from any position which she might be offered with respondent after end of her parental leave - Relied on contention that because applicant was employed for 40 hours a week when parental leave started, that was only position that she could legally aspire to at end of parental leave - Respondent's assistant now worked less hours per week because respondent had reduced his hours of work - Applicant's evidence was that in period immediately prior to parental leave her hours had started to reduce - Because of her baby she sought a part-time position which, on respondent's evidence, was kind of position respondent had to offer - Employee undertaking applicant's position understood she was relieving it temporarily until applicant returned - Vacant position to which applicant could have been appointed to - Position substantially similar even though hours had reduced - Every prospect that applicant could have been appointed to position if had been any consultation - No consultation - Respondent breached obligations under PLEPA - Remedies awarded under PLEPA

Result: Application granted ; Reimbursement of lost wages ($9,162.17)(5 months) ; Compensation for humiliation etc ($12,500) ; Costs reserved

Greenlea Premier Meats Ltd v New Zealand Meat and Related Union Aotearoa Branch

8 May 2006, Y Oldfield, AA 162/06, (2 pages)

PRACTICE AND PROCEDURE - Applicant sought interlocutory injunction against respondent preventing it from conducting two union meetings on applicant's site and with applicant's employees on the following day, one during morning shift, one during afternoon shift - Alleged respondent was not complying with s26 of Employment Relations Act 2000 which provided that union must make such arrangements with employer as may be necessary to ensure that employer's business was maintained during any union meeting - Authority identified question of whether it had jurisdiction to deal with an application for injunctive relief of this sort, following BDM Grange Ltd v Parker (cited below) - Applicant filed application to remove matter to Employment Court - Authority of view it was unsafe for it to

consider application for injunctive relief and important question of law arose of whether Authority had jurisdiction - Matter removed to Court

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

Marvel Distributors Ltd v Dizac

28 Oct 2005, Travis J, AC 65/05, (6 pages)

PRACTICE AND PROCEDURE – Applications by plaintiff for leave to file challenge out of time and stay of Authority's remedies – Challenge filed some 59 days late – Plaintiff not legally represented – Plaintiff's affidavits did not provide clear evidence to support applications – Leave application adjourned to allow plaintiff to file subsequent affidavit on condition that plaintiff follow various directions – Defendant allowed to elect whether to defend leave application as separate matter, or allow challenge to proceed with leave application to be resolved once the merits of the challenge were dealt with – Defendant had earlier applied to Authority for compliance order – Plaintiff claimed impecuniosity to pay Authority's award – No evidence in support of that assertion – Stay granted on condition that plaintiff pay into Court total amount of Authority's award, together with additional sum for security for costs for Court proceedings – If money not paid in by certain date, stay to be vacated and defendant free to pursue compliance order

Result: Application adjourned on conditions (leave) ; Application granted on conditions (stay) ; Costs reserved

McIntosh v Southern Lakes Holdings Ltd

16 Feb 2006, P Cheyne, CA 22/06, (2 pages)

PRACTICE AND PROCEDURE - Amount of reimbursement of lost wages - Applicant awarded three months lost remuneration - Left to parties to calculate amount - Applicant lodged memorandum regarding costs and remuneration - Nothing received from respondent - Accepted that $8,595 appropriate amount of remuneration - COSTS - Successful personal grievance - Applicant sought costs of $1,500 for steps taken prior to investigation meeting, $750 for attendance, lodgement fee and reimbursement of printing and photocopying expenses - Not sure whether amount was full amount of legal fees or a contribution - Considered $1,500 appropriate award plus disbursements - These amounts were in addition to orders set out in previous determination

Result: Costs in favour of applicant ($1,500) ; Disbursements ($70)(Lodgement fee) ; ($25)(Photocopying and printing)

Nee Nee and Ors v TLNZ Auckland Ltd

13 Feb 2006, A Dumbleton, AA 35/06, (2 pages)

PRACTICE AND PROCEDURE - Applicants applied for removal of matter to Employment Court - Respondent consented to removal - In prior dispute proceedings Authority determined that redundancies proposed by respondent were within scope of redundancy clause in employment agreements - Respondent subsequently made applicants redundant - Applicants challenged determination to Court and brought personal grievances in Authority - If challenge succeeded it would follow that dismissals unjustified - Court already had before it proceedings which were between same parties and which involved same or similar issues - Removal ordered

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

New Zealand Public Service Association (Inc) (PSA) v The Chief Executive in respect of the Ministry of Agriculture and Forestry (MAF)

3 Feb 2006, PR Stapp, WA 11/06, (1 pages)

PRACTICE AND PROCEDURE - Applicant requested amendment to Authority's determination - Original determination could not be recalled and amended - For avoidance of any confusion and doubt the applicant's representative who attended investigation meeting was not applicant's lawyer referred to in case - Determination to be read as part of original determination

Result: Orders accordingly ; No order for costs

Patching v KSM Installations (NZ) Ltd

13 Feb 2006, D Asher, WA 23/06, (8 pages)

PRACTICE AND PROCEDURE - Respondent's counsel advised three days prior to investigation meeting that he was unable to attend because of High Court appearance - High Court appearance was moving nephew's admission to bar - Refused Authority's proposal to accommodate this by adjournment for some of day - Advised respondent's directors also unable to attend - Appropriate for Authority to proceed - Employment Court could be assisted by good faith report in event respondent challenged determination - JURISDICTION - Whether independent contractor or employee - No written agreement - At respondent's suggestion applicant invoiced respondent using company he had previously set up for franchise he had operated - While respondent described staff as contractors, reality was that applicant was employee - Respondent held to itself power to control hours worked by applicant, to hire and fire applicant, and to profit or lose from enterprise - Respondent supplied all materials including equipment, and applicant not expected to take skills elsewhere - Hammer-hand

Result: Application granted ; Filing fee in favour of applicant ($70)

Phillips and Ors v Telecom (NZ) Ltd

27 Oct 2005, Travis J, AC 64/05, (2 pages)

PRACTICE AND PROCEDURE – Interim costs judgment – Successful defendant applied for costs by way of memorandum – Plaintiffs submitted in memorandum that Court should hear issues as orally – Normal practice was for costs to be determined on the papers – Oral hearing would incur additional costs – Plaintiffs had stated in memorandum that unable to fund further costs therefore did not appeal – Declined to order oral hearing – Counsel for the plaintiffs free to file supplementary memorandum in relation to those aspects he wished to have addressed orally

Result: Request for order of oral hearing as to costs declined

Pradeep v Star Service Stations Ltd

3 Nov 2005, Shaw J, AC 67/05, (3 pages)

PRACTICE AND PROCEDURE – Application to dismiss challenge – No appearance by plaintiff – Registrar unable to contact plaintiff – Court waited one hour – Court file indicated plaintiff knew there was a hearing on the present day and that his attendance was required – Application entirely justified particularly as notice of hearing clearly stated consequences of non-attendance – Application granted – Challenge dismissed

Result: Application granted ; Costs reserved

Waikato District Health Board v Draper

18 Oct 2005, Colgan J, AC 56A/05, (6 pages)

PRACTICE AND PROCEDURE – Reasons for oral interlocutory judgment AC 56/05 – Application for partial stay of Authority's remedies order pending hearing of de novo challenge – Defendant returned to work after Authority ordered reinstatement – Plaintiff alleged reinstatement intolerable due to nature of work (administrative role in smooth operation of hospital) and nature of complaint made against defendant. Colleague complaint had alleged defendant call her "scab" after complainant decided not to participate in strike action – Court considered whether benefit to plaintiff of successful challenge might be lost if stay not granted – Whether defendant would be unduly prejudiced if stay granted – Whether plaintiff's challenge bone fide – Whether continued reinstatement likely to be prejudicial to plaintiff or any other relevant person – Maintenance of status quo and justice of case – HELD – Plaintiff's opportunity for its bone fide challenge would not be lost but might be adversely affected without some modification of Authority's order – Interim reinstatement would prejudice plaintiff's ability to argue on challenge that consequence of misconduct precluded reinstatement – Defendant would be unduly prejudiced if not reinstated – Social network among hospital staff important to her – In her 50s and had no retirement savings – However, reinstatement had factionalised staff – Assessment of overall justice of case was more helpful than attempting to define what was the status quo - Authority's reinstatement order stayed on condition that defendant reinstated to another position with plaintiff no less advantageous – Emergency department receptionist

Result: Application granted ; Partial stay of Authority's remedies ordered on conditions ; Costs reserved

Y v Bay of Plenty District Health Board

20 Apr 2006, R Arthur, AA 132/06, (10 pages)

PRACTICE AND PROCEDURE - Application by respondent to remove matter to Employment Court - Applicant dismissed by respondent following investigation of complaint about his management of patient who died while under applicant's care - Respondent sought removal on basis of s178(2)(d) Employment Relations Act 2000 ("ERA") - Parties agreed removal not warranted under s178(2)(a)-(c) ERA - Alleged in public interest to remove matter to Court because how respondent inquired into and dealt with complaint about patient death had wide, potential effect on how consumers of its services and wider public saw its services - Not a factor favouring removal in this case - Other public interests to consider such as that ERA did not allow for "forum shopping" - Authority did not accept likely media attention was a factor favouring removal - Statutory power of Authority relating to non-publication of evidence and names was same as that of the Court - Likelihood of challenge to Authority's determination was, at best, a weak factor in this case - Respondent did not identify any important questions of law - Alleged that in this case expert evidence required extensive and robust cross-examination by counsel in Court rather than by Authority's inquisitorial process - Submission misconceived nature of proceedings in Authority and Court - Almost invariably there was opportunity in Authority for representatives of both parties to ask additional questions of witnesses - Alleged particular discovery required in this case including material from hospital files - While Employment Court Regulations 2000 provided regime for mutual disclosure and inspection there should be no difficulty in securing necessary documents for investigation in Authority - Possible challenges to admissibility of certain evidence was not a factor favouring removal - Respondent's intention to seek strike out of remedy of reinstatement also not a factor favouring removal - Alleged "chronic delay" in applicant's prosecution of claim - Claim filed within statutory period and case law prior to enactment of statutory period about

effect of delay was no longer directly relevant to claims filed within express statutory timeframe - Applicant supported removal to Court but that not of itself decisive - Not parties' shared view but reasons for shared view that were relevant - Not persuaded that case as complex as suggested by parties - Authority not of opinion that in all circumstances Court should determine matter - Application for removal declined - Non-publication order in respect of applicant's name, former position, other details which might identify part of respondent's services where applicant worked, and any information which could identify patient or patient's family - Order on an interim basis until start of Authority's investigation meeting
Result: Application dismissed ; Orders accordingly ; No order for costs

Practice & Procedure - Consent Orders - Employment Relations Act 2000

Faletolu v Tofilau Finance Ltd
7 Feb 2006, PR Stapp, WA 15/06, (2 pages)

CONSENT ORDER - Application for recovery of wages and holiday pay - By consent respondent ordered to pay specified sum to applicant - No issue on costs

Result: Consent order granted ; No order for costs

Meyrick v Aston Troon Ltd
15 Feb 2006, D Asher, WA 24/06, (2 pages)

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

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

Perkins v Urban Cuisine Ltd
16 Feb 2006, D Asher, WA 25/06, (2 pages)

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

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

Wilton v Stepping Stones Nursery Ltd
8 Feb 2006, GJ Wood, WA 17/06, (1 pages)

CONSENT ORDER - At investigation meeting parties advised they had successfully resolved all matters between themselves - 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

Department of Labour

TE TARI MAHI