

Department of Labour
TE TARI MAHI



EMPLOYMENT CASES SUMMARY

May 2008

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

Employment Cases Summary

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

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

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Significant Judgments/Decisions

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

Brief Summaries

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

FULL-TEXT OF DETERMINATIONS

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

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Significant Judgments/Decisions added to the Employment Law Database

1 April 2008 - 30 April 2008

Beamsley v Affco New Zealand Ltd

CA 455/07

Heard: 12 Nov 2007, Wellington

Judgment Date: 20 Nov 2007

Court/Authority: William Young P, Glazebrook, Chambers JJ

Appearances: CR French ; BWF Brown

COURT OF APPEAL – Practice and procedure – Application for leave to appeal against an Employment Court decision – Respondent advised applicant he would no longer be paid as full time union site secretary – Applicant contended decision was a breach of contract – Employment Court held that applicant was covered by collective agreement (“CA”) which was inconsistent, under s 61 Employment Relations Act 2000 (“ERA”), with memorandum that stated applicant was to provide full time union representation – Thus, respondent legally entitled to cease payment for full time role – Proposed grounds of appeal that Employment Court wrongly interpreted s 61 ERA, s 61 ERA was not a live issue, Employment Court misstated and misapplied law relating to redundancy and fixed term agreements, and no evidence to justify finding of redundancy – HELD – Proposed grounds of appeal related to construction of CA – Court had no jurisdiction to hear appeal under s 214 Employment Relations Act 2000 – No question of law raised – Application dismissed – Union secretary

This was an unsuccessful application for leave to appeal against an Employment Court decision.

The applicant was employed by the respondent as a full time company paid union secretary. In June 2006, the respondent advised the applicant that it would no longer pay for a full time union site secretary and he would be required to take up another position. The applicant disputed the respondent’s right to change his conditions of employment unilaterally and contended that it was a breach of contract.

The collective agreement (“CA”) provided that “the company may at its discretion allow union representatives reasonable paid time off to represent workers.” The applicant also relied on a memorandum which advised the applicant that he was to provide full time union representation (“the Goldsack memorandum”).

The Employment Court held that the applicant was covered by the CA, and the Goldsack memorandum was, under s 61 Employment Relations Act 2000 (“ERA”), inconsistent with the CA. Alternatively, if the applicant was not covered by the CA, the Employment Court held that the Goldsack memorandum was a fixed term agreement and the respondent was legally entitled to alter that agreement if the respondent genuinely considered the position was superfluous to its needs. (See: WC 19/07, 8 August 2007)

The applicant sought to appeal on the grounds that: (i) the Employment Court wrongly interpreted s 61 ERA; (ii) s 61 ERA was not a live issue; (iii) the Employment Court misstated and misapplied the law relating to fixed term contracts and redundancy; and (iv) there was no evidence to justify a finding of redundancy.

The respondent submitted that the applicant's real complaint related to the Employment Court's interpretation of the CA and the Goldsack memorandum, which was a matter over which the Court had no jurisdiction under s 214(1) ERA.

Held

(1) In the Court's view, the question of the construction of the CA and the Goldsack memorandum was so entwined with any statutory interpretation point that the two could not be sensibly separated. This meant that the Court had no jurisdiction in relation to the first proposed ground of appeal. (para 13)

(2) With regard to the second proposed ground of appeal, it did appear from the papers filed before the Authority and the Employment Court that the applicant would have been entitled to assume that possible inconsistency under s 61 of the ERA was not at issue in the proceedings. However, as the applicant accepted that he was covered by the CA, the question of how the Goldsack memorandum was to be interpreted in light of the CA was clearly at issue. (para 14)

(3) Turning to the applicant's third ground of appeal, the Employment Court held that the applicant was covered by the CA. This meant that the applicant's employment was not pursuant to a fixed term contract under the Goldsack memorandum. The finding that the applicant was covered by the CA resulted from the Employment Court's interpretation of the coverage clause of that agreement. As this was a matter of interpretation, no appeal to the Court was possible. (para 16)

(4) As to the applicant's proposed fourth ground of appeal, the Court accepted the respondent's submission that the complaint was as to the weight placed by the Employment Court on the evidence. There was therefore no question of law involved. (para 17)

Result: Application dismissed (leave to appeal) ; Costs in favour of respondent (\$1,500 plus disbursements)

Statutes considered:

ERA s61
ERA s103(1)(b)
ERA s214(1)

Pages: 2
[974277]

Hawkins v Commissioner of Police

WC 7/08
Heard: 28 Feb 2008, Wellington
Judgment Date: 27 Mar 2008
Court/Authority: Shaw J
Appearances: C P Brosnahan ; A Martin

UNJUSTIFIED DISMISSAL – Remedies – Substantive judgment held plaintiff was unjustifiably and constructively dismissed – Whether practicable to reinstate plaintiff after 7 ½ year absence – Extent of reimbursement of lost remuneration and whether likelihood of promotion from sergeant to senior sergeant should be recognised – Level of compensation – Plaintiff gave evidence of feeling suicidal and devastated – COSTS – Plaintiff sought 66 per cent of actual costs plus disbursement – HELD – Length of time since

termination only relevant to extent it impinges on whether reinstatement practicable – Defendant had not shown reinstatement would be impracticable – Plaintiff to be reinstated to sergeant position – Plaintiff awarded lost remuneration from time suspension lifted until reinstatement – Lost remuneration on basis of sergeant salary because Court unable to rationally calculate whether plaintiff would have been promoted – Compensation of \$35,000 for hurt and humiliation – Costs in favour of plaintiff (\$56,000 plus GST plus disbursement of \$21,532.50) – Sergeant

This decision determined remedies and costs following the substantive judgment which found that the plaintiff was unjustifiably and constructively dismissed.

The plaintiff was employed as a sergeant at the Taumarunui police station. In 2001, he voluntarily disengaged from the police. The plaintiff then raised a personal grievance of constructive dismissal alleging that his ill-health was caused by the bullying behaviour of his supervisor and that police management had failed to take action on his complaints. At the time he disengaged the plaintiff was facing assault charges, however, he was discharged at trial due to clear conflicts in evidence.

In a hearing limited to liability, the Court held that the plaintiff was unjustifiably and constructively dismissed. (See: WC 29/07, 30 November 2007).

The plaintiff sought reinstatement, compensation for hurt and humiliation, reimbursement of lost income, and an order for costs.

The defendant opposed reinstatement, in part because 7 ½ years had passed since the plaintiff's employment was terminated. The defendant further submitted that it would be impracticable for the plaintiff to return to the role of sergeant because it was the first line of supervision and required current experience and expertise.

The parties agreed that the plaintiff's entitlement to lost remuneration commenced in September 2003 after his suspension was lifted following his discharge but disputed the length of time for which he should be reimbursed. The plaintiff further submitted that the likelihood that he would have been promoted to senior sergeant should be taken into account.

In relation to compensation for hurt and humiliation, the plaintiff gave evidence that when he disengaged he was on the point of considering suicide and that the whole incident had had a devastating effect on him.

Held

(1) While the length of time since termination is a relevant consideration it is only relevant to the extent that it impinges on whether or not reinstatement would be practicable. The defendant had not discharged its onus of proving that it would be impracticable to reinstate the plaintiff to his former position of sergeant at the Taumarunui police station even after such a length of time. There was no evidence of any resistance to working with him at an area or local level or that he would be incapable of performing his former role. (paras 9, 16)

(2) It was accepted that it would be appropriate for the plaintiff to undergo tests or retraining necessary to bring him up to date with police practice and procedures, given the long period of time since he was employed. In addition, in the Court's view, it would not be unreasonable for the defendant to place the plaintiff in a position no less advantageous to him but at a larger police station other than Taumarunui for a limited period of time for the purposes of retraining before he takes up his position at Taumarunui. (paras 16, 17)

(3) Where an employee is reinstated, the actual loss suffered by the employee can be quantified accurately because, as well as a starting point for economic loss, the date of reinstatement marks its end and the Court does not have to calculate an artificial end

point for the payment of economic loss. In these circumstances, the principle of moderation is best met by the application of the principle of mitigation of loss. (para 21)

(4) The Court concluded that it was not possible to rationally calculate when, if at all, the plaintiff would have reached the rank of senior sergeant therefore the calculation of his lost income was to be on the basis of what a sergeant would have earned during the relevant time. Counsel advised that they could agree the arithmetic of the plaintiff's lost income. This should be calculated on the basis of what he would have received as a sergeant between 17 September 2003 and the date of reinstatement less income earned by him during that time. (para 23)

(5) The assessment of compensation for hurt and humiliation is necessarily an inexact science. While awards must be in accord with principle, any concept that such awards should fall within a permissible range such as that stipulated in NCR (NZ) Corporation Ltd v Blowes (cited below) is not in accord with statutory discretion. Principles to be applied include consideration of the injury suffered by the employee and the avoidance of penalising the employer. A comparison with like cases is also of assistance. In the case of constructive dismissal where the events leading up to the termination of employment are part of the dismissal process, the effects of the employer's treatment on an employee before termination is also relevant. The Court assessed the plaintiff's level of compensation at \$35,000. (paras 33, 39)

Result: Reinstatement ordered ; Reimbursement of lost wages (quantum to be determined by parties) ; Compensation for humiliation etc (\$35,000) ; Costs in favour of plaintiff (\$56,000 plus GST plus disbursement of \$21,532.50)

Statutes considered:

Crimes Act 1961 s347
ERA s123
ERA s123(1)(c)(i)
ERA s125
ERA s128
ERA s128(3)
HSE

Cases referred to in judgment:

Benge v Attorney-General [2000] 2 ERNZ 234 (HC)
Brickell v Attorney-General [2000] 2 ERNZ 529 (HC)
Cartwright v Commissioner of Police [2001] ERNZ 255
Hawkins v Commissioner of Police WC 29/07, 30 November 2007
NCR (NZ) Corporation Ltd v Blowes [2005] ERNZ 932 (CA)
New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School [1994] 2 ERNZ 414
South Taranaki Free Kindergarten Association v McLennan [2006] ERNZ 1019
Riddell v Commissioner of Police [2003] 2 ERNZ 136
Ryan v Commissioner of Police [2005] ERNZ 390
Telecom New Zealand Ltd v Nutter [2004] 1 ERNZ 315 (CA)
Telecom South v Post Office Union [1992] 1 ERNZ 711 (CA)
Waugh v Commissioner of Police [2004] 1 ERNZ 450
Woud v Department of Corrections [2005] ERNZ 314

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[974616]

Arrears - Employment Relations Act 2000

Burger v Motorpol Australasia Ltd

27 Mar 2008, A Dumbleton, AA 109/08, (5 pages)

ARREARS OF WAGES - BREACH OF CONTRACT - Employment agreement provided for quarterly bonus incentives - Claimed bonus not paid when due - Dispute as to amount owed - Applicant on ACC for six weeks - ACC paid 80 percent of applicant's earnings assessed at level received before accident - Applicant claimed because respondent had not paid bonus when due earnings related compensation received from ACC reduced - Sought compensation for reduction - Respondent acknowledged bonus not paid on time - Applicant paid part of bonus after applied to Authority - Respondent also acknowledged that, in principle, should compensate applicant for any shortfall in ACC payments - However, respondent concluded applicant overpaid as had voluntarily paid him difference between 80 percent and full earnings while on ACC, and applicant received ACC payments for three days while on paid sick leave - Authority accepted applicant owed amount claimed - Respondent produced little evidence to show why applicant's figure incorrect - Respondent to pay outstanding bonus owed - Authority found applicant entitled to be compensated for reduction in payments received from ACC - Did not accept respondent could offset compensation for reduction against voluntary payments it made to applicant - However ACC payment received while on paid sick leave to be deducted from amount owed - Applicant to be paid outstanding bonus and money for ACC payments made at incorrect amount - 10 percent interest awarded - Sales engineer

Result: Application granted ; Arrears of wages (\$1,670.78)(Bonus) ; Damages (\$4,085) ; Interest (10%) ; Disbursements in favour of applicant (\$70)(Filing fee)

Arrears - Holiday Pay - Employment Relations Act 2000

Pugh v Emerson

16 Apr 2008, G J Wood, WA 43/08, (2 pages)

ARREARS OF HOLIDAY PAY - Applicant sought arrears of holiday pay - No appearance by respondent - Authority satisfied applicant worked for respondent and was owed outstanding holiday pay - Arrears due and owing - Supervisor

Result: Application granted ; Arrears of holiday pay (\$2,737.11) ; Disbursements in favour of applicant (\$70)(Filing fee)

Taljaard (Labour Inspector) v Pacific Island Early Childhood Council of Aotearoa

26 Jun 2007, M Ulrich, AA 190/07, (3 pages)

ARREARS OF HOLIDAY PAY – Respondent did not dispute amount outstanding – Respondent claimed amount outstanding should be offset against overpayment made to employee – No overpayment claim lodged by respondent – Holiday pay a statutory minimum code entitlement that cannot be lawfully withheld to offset an alleged overpayment – Applicant not provided with wage and time records – Respondent claimed records in disarray and consultant engaged to assist with problems – Failure to provide records a serious matter which left respondent vulnerable to penalty – Authority satisfied penalty not necessary as respondent had taken steps to improve records - Arrears due and owing - Interest 7 percent

Result: Application granted ; Arrears of holiday pay (\$1,101.60) ; Interest (\$7%) ; Disbursements in favour of applicant (\$70)(Filing fee)

Breach of Contract - Employment Relations Act 2000

Brinkman v Versatile Buildings Ltd

5 Jun 2007, L Robinson, AA 164/07, (20 pages)

RAISING PERSONAL GRIEVANCE – Final written warning given for communicating untruthful position of accounts – Applicant claimed warning unreasonable – At time warning given applicant did not raise grievance – Authority declined to investigate justifiability of warning and no case to permit investigation out of time – UNJUSTIFIED DISMISSAL – Respondent claimed lost trust and confidence in applicant – Applicant received email directing him to attend meeting – At meeting applicant given documents outlining respondents concerns – Applicant suspended following meeting – Dismissal letter failed to outline reasons and findings justifying dismissal – Respondent claimed applicant hired new staff without senior management authorisation – Applicant never advised of senior managers role or how that role related to him – Respondent wrong to conclude applicant chose to ignore procedure – Respondent claimed applicant authorised claim for staff dinner outside level of authority – Alleged, claim constructed to avoid authorisation from senior manager – Lack of transparency led respondent to conclude serious misconduct – Authority found allegation on own could not justify dismissal, however, relevant to issue of loss of trust and confidence – Allegation of incorrect information provided to debtors not proven by respondent – Allegations never put to applicant for response – Respondent also raised concerns over applicant's email correspondence with co-worker – Evidence brought by respondent showed theme of disrespectful and unprofessional attitude towards senior manager – Matter more serious than simple personality conflict – Applicant acted to deliberately exclude senior manager – Also fostered environment with subordinate staff which was derogatory and divisive towards senior manager – Significant applicant steward of respondent's assets and funds – Respondent's loyalties misplaced – E-mail correspondence with co-worker evidence of unfaithful service – Respondent correct to have concluded that lost trust and confidence in applicant – Dismissal justified – UNJUSTIFIED DISADVANTAGE – Claimed suspension raised for first time at investigation meeting – No discussion with applicant before suspension – Suspension unjustified – Applicant suffered anxiety and embarrassment as result of suspension – BREACH OF CONTRACT – Applicant claimed bonus unreasonably withheld – Bonus discretionary – Bonus revoked due to applicant's performance – Claim dismissed – Branch manager

Result: Application dismissed (Unjustified dismissal and Breach of contract) ; Application granted (Unjustified disadvantage) ; Compensation for humiliation etc (\$2000)(Unjustified disadvantage) ; Costs reserved

Burger v Motorpol Australasia Ltd

27 Mar 2008, A Dumbleton, AA 109/08, (5 pages)

ARREARS OF WAGES - BREACH OF CONTRACT - Employment agreement provided for quarterly bonus incentives - Claimed bonus not paid when due - Dispute as to amount owed - Applicant on ACC for six weeks - ACC paid 80 percent of applicant's earnings assessed at level received before accident - Applicant claimed because respondent had not paid bonus when due earnings related compensation received from ACC reduced - Sought compensation for reduction - Respondent acknowledged bonus not paid on time - Applicant paid part of bonus after applied to Authority - Respondent also acknowledged that, in principle, should compensate applicant for any shortfall in ACC payments - However, respondent concluded applicant overpaid as had voluntarily paid him difference between 80 percent and full earnings while on ACC, and applicant received ACC payments for three days while on paid sick leave - Authority accepted applicant owed amount claimed - Respondent produced little evidence to show why applicant's figure incorrect - Respondent to pay outstanding bonus owed - Authority found applicant entitled to be compensated for reduction in payments received from ACC - Did not accept respondent could offset compensation for reduction against voluntary payments it made to applicant -

However ACC payment received while on paid sick leave to be deducted from amount owed - Applicant to be paid outstanding bonus and money for ACC payments made at incorrect amount - 10 percent interest awarded - Sales engineer

Result: Application granted ; Arrears of wages (\$1,670.78)(Bonus) ; Damages (\$4,085) ; Interest (10%) ; Disbursements in favour of applicant (\$70)(Filing fee)

Costs - Employment Relations Act 2000

Anderson v Resolution Audio Visual Consultants Ltd

15 Apr 2008, R A Monaghan, AA 53A/08, (2 pages)

COSTS - Unsuccessful personal grievance - One day investigation meeting - Respondent sought contribution to costs plus disbursements - Respondent's time taken up unnecessarily by voluminous reference material used to present misconceived argument - Respondent's costs were \$7,525 which were reasonably incurred - Authority - not in position to take respondent's claim that applicant attended mediation in bad faith any further - Respondent entitled to contribution to costs of \$4,000 - No order in respect of disbursements
Result: Costs in favour of respondent (\$4,000)

Brodie v Opotiki Packaging and Coolstores Ltd

31 Mar 2008, R A Monaghan, AA 47A/08, (2 pages)

COSTS - Successful personal grievance - Length of investigation meeting not specified - Applicant sought \$2,000 as contribution to costs - Authority confirmed remedies awarded in substantive determination and made further order for payment of interest - Respondent to make contribution to applicant's costs
Result: Costs in favour of applicant (\$2,000)

Coffey v The Christchurch Press, a division of Fairfax New Zealand Ltd

1 Apr 2008, H Doyle, CA 32/08, (4 pages)

COSTS - Unsuccessful personal grievance - One day investigation meeting - Respondent sought contribution to costs of \$6,769 - Submitted costs accumulated were neither unnecessary or unreasonable as was required to provide detailed evidence, comprehensive submissions and additional submissions after investigation meeting - Applicant submitted no issues with quantum of respondent's costs, only issue was what would be reasonable contribution to costs - Submitted contribution of \$2,000 to costs appropriate - Costs to follow event - Respondent entitled to fair contribution to costs of \$2,500
Result: Costs in favour of respondent (\$2,500)

Fanto v Pacific Flight Catering Ltd

15 Apr 2008, R A Monaghan, AA 95A/08, (2 pages)

COSTS - Unsuccessful personal grievance - Length of investigation meeting not specified - Respondent submitted costs figure of \$7,000, comprising of \$5,400 for legal costs, \$1,100 for witnesses costs and \$500 lawyers fees - Legal advice obtained by respondent prior to legal action by applicant cannot be addressed in costs - Accordingly no order for contribution to legal costs - No order for reimbursement of costs for attendance of witnesses as costs concerned provision of cover as result of certain witnesses unavailability for work - Respondent entitled to \$500 contribution to costs

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

Rippon v Norsand Ltd

31 Mar 2008, Y S Oldfield, AA 120/08, (2 pages)

COSTS - Partially successful personal grievance - One day investigation meeting - Applicant's actual costs were \$5,260 and sought contribution to costs of \$3,000 as investigation meeting was unnecessarily extended by respondent's late provision of Minutes - Respondent argued applicant only partially successful and investigation was extended by unsuccessful claims - Submitted costs of \$4,558 incurred and that costs should lie where they fall - Authority found applicant had withdrawn claim for lost earnings early on which saved time but found respondent tabled document part way through proceedings causing delays - Applicant therefore entitled to fair and reasonable contribution to costs

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

Smith & Anor v Career Engineer Ltd

14 Apr 2008, R A Monaghan, AA 1B/08, (3 pages)

COSTS - Supplementary costs decision - Previous costs award in favour of respondent for \$750 - Applicant submitted did not receive opportunity to respond to respondent's costs claims for breach of contract and penalties - Authority accepted timetable set in substantive determination not clear in its application - Applicant invited to file response and advised would reconsider order for costs - Took into account all submissions filed by both parties regarding costs - No reason to visit result of dispute on either party in costs relating to substantive determination - Respondent was marginally more successful party and costs reflected that - No additional relevant factual information provided by applicant for this submission - No variation to original costs order

Result: Application dismissed ; No order for costs

Stein v Garrard's (NZ) Ltd

10 Apr 2008, R A Monaghan, AA 94A/08, (2 pages)

COSTS - Successful personal grievance - Less than half day investigation meeting - Applicant sought full costs of \$8,000 due to 'belligerent' approach of respondent in the resolution of matter - Submitted respondent failed to make final payments which applicant entitled to, with it's position that payments would be made if applicant did not pursue grievance - Respondent argued full costs would be inappropriate as investigation meeting less than half a day - Applicant, as successful party entitled to contribution to costs

Result: Costs in favour of applicant (\$3,500)

Injunction - Employment Relations Act 2000

New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc & Anor v Sitel New Zealand Ltd & Ors

25 Mar 2008, P Cheyne, WA 31/08, (11 pages)

INTERIM INJUNCTION - JURISDICTION - First respondent ("Employer") operated call centre from building owned by second respondent - Lost contract with second respondent which resulted in redundancies - Some affected employees members of first applicant ("Union") and covered by collective agreement - Union asked to exercise right of entry to discuss redundancy situation with members - Employer declined request - Union officials attempted to exercise right of entry regardless - Employer resisted access with security officers and others - Union organiser arrested and charged with assault - Union organiser served trespass notice by second respondent in capacity as building owner - Union sought interim and permanent injunctions against employer and second respondent - Second respondent had no employment relationship with Union or employer - Argued Authority lacked jurisdiction to make orders sought - Authority had power to extend remedial orders beyond those party to employment relationship - High Court contemplated Authority having powers to take action against non parties to employment agreement - Authority distinguished *Credit Consultants Debts Service v Wilson (No 2)* (cited below) - Established, to arguable standard, had jurisdiction - However, no order made against second respondent - Section 13 Trespass Act 1980 stated nothing in Act should derogate from anything any person was authorised to do by or under any other enactment or restrict provisions of any enactment conferring a right of entry on any land - Second respondent accepted Union organiser not trespasser if entered building under ss20 and 21 Employment Relations Act 2000 ("ERA") - Full Court in *National Distribution Union Inc v Carter Holt Harvey Ltd* (cited below) held person exercising statutory rights of entry could not ordinarily be trespasser - Application against second respondent dismissed - Authority concluded should be a form of interim injunction against employer - No current agreement between Union and employer concerning access to workplace - When exercising right of entry must do so in reasonable way, having regard to normal business operations - Employer's interpretation failed to recognise overall objects of ERA - Good faith argument raised by employer not helpful - Arguable employer's own actions lacked good faith - Section 26 ERA argument unhelpful - Employment Court had recognised s26 ERA dealt with a different topic to ss20 and 21 ERA - Authority found strongly arguable case employer did not comply with, and was in breach of ss20 and 21 ERA - Balance of convenience favoured Union - Employees in much weaker bargaining position if redundant, and redundancy was imminent - Orders made restraining employer from obstructing or denying Union representatives accessing building when access for purpose of discussion with members about redundancy issues - Application against employer granted, with conditions

Result: Application granted (Interim injunction against first respondent) ; Orders accordingly ; Application dismissed (Interim injunction against second respondent) ; Costs reserved

Jurisdiction - Employment Relations Act 2000

New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc & Anor v Sitel New Zealand Ltd & Ors

25 Mar 2008, P Cheyne, WA 31/08, (11 pages)

INTERIM INJUNCTION - JURISDICTION - First respondent ("Employer") operated call centre from building owned by second respondent - Lost contract with second respondent which resulted in redundancies - Some affected employees members of first applicant ("Union") and covered by collective agreement - Union asked to exercise right of entry to discuss redundancy situation with members - Employer declined request - Union officials attempted to exercise right of entry regardless - Employer resisted access with security officers and others - Union organiser arrested and charged with assault - Union organiser served trespass notice by second respondent in capacity as building owner - Union sought interim and permanent injunctions against employer and second respondent - Second respondent had no employment relationship with Union or employer - Argued Authority lacked jurisdiction to make orders sought - Authority had power to extend remedial orders beyond those party to employment relationship - High Court contemplated Authority having powers to take action against non parties to employment agreement - Authority distinguished *Credit Consultants Debts Service v Wilson (No 2)* (cited below) - Established, to arguable standard, had jurisdiction - However, no order made against second respondent - Section 13 Trespass Act 1980 stated nothing in Act should derogate from anything any person was authorised to do by or under any other enactment or restrict provisions of any enactment conferring a right of entry on any land - Second respondent accepted Union organiser not trespasser if entered building under ss20 and 21 Employment Relations Act 2000 ("ERA") - Full Court in *National Distribution Union Inc v Carter Holt Harvey Ltd* (cited below) held person exercising statutory rights of entry could not ordinarily be trespasser - Application against second respondent dismissed - Authority concluded should be a form of interim injunction against employer - No current agreement between Union and employer concerning access to workplace - When exercising right of entry must do so in reasonable way, having regard to normal business operations - Employer's interpretation failed to recognise overall objects of ERA - Good faith argument raised by employer not helpful - Arguable employer's own actions lacked good faith - Section 26 ERA argument unhelpful - Employment Court had recognised s26 ERA dealt with a different topic to ss20 and 21 ERA - Authority found strongly arguable case employer did not comply with, and was in breach of ss20 and 21 ERA - Balance of convenience favoured Union - Employees in much weaker bargaining position if redundant, and redundancy was imminent - Orders made restraining employer from obstructing or denying Union representatives accessing building when access for purpose of discussion with members about redundancy issues - Application against employer granted, with conditions

Result: Application granted (Interim injunction against first respondent) ; Orders accordingly ; Application dismissed (Interim injunction against second respondent) ; Costs reserved

Smith v Pacific Palms International Resort & Golf Club Ltd

16 Apr 2008, L Robinson, AA 141/08, (12 pages)

JURISDICTION – Whether employee or independent contractor – Credibility finding in favour of applicant – Respondent's director ("A") established company ("B&B") with applicant and wife as directors and shareholders – At A's request applicant prepared management contract between B&B and respondent – Contract never executed by A – Respondent's solicitors purported to confirm contract but with revised remuneration – Applicant accepted revised remuneration effectively imposed by A – Parties' intention relevant but not decisive – Authority unable to find both parties had explicit common intention that applicant employee – Significant control imposed indicative of employment – Applicant's role as General Manager integral part of operation – Relationship in

practice indicated applicant an employee – Applicant employee – UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant rendered 12 invoices to respondent during period of employment of which only 4 were paid – Despite repeated requests and A's repeated promises, applicant not paid – Applicant tolerated delay because of parties close relationship and trust placed in A – Resigned when tolerance and patience ran out – Failure to pay breach of duty owed to applicant – Breach of duty so serious reasonably foreseeable that substantial risk applicant would resign – Dismissal unjustified – Remedies – No contributory conduct – Applicant extremely hurt and humiliated by A's behaviour – Applicant distressed to learn of rumours, hurtful criticism and untrue allegations made by A – Situation exacerbated by personal friendship with A and applicant's devotion to job – Respondent's failure to pay placed applicant in situation where had to sell house as unable to pay mortgage – Property eventually sold at a loss – Entitled to compensation of \$15,000 – General manager

Result: Application granted ; Reimbursement of lost wages (\$72,000) ; Arrears of wages (\$117,750) ; Interest (10%) ; Compensation for humiliation etc (\$15,000) ; Costs reserved

Penalty - Employment Relations Act 2000

Burns v Autoglas-Stieger

7 Mar 2008, H Doyle, CA 22/08, (16 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - UNJUSTIFIED DISADVANTAGE - Applicant had accident in work van - Informed respondent immediately - Deductions made from applicant's wages for damage to van - Dispute as to whether applicant verbally authorised deductions - Applicant given written warning in which told not allowed to drive work van and to improve appearance - Dispute as to whether applicant told not allowed to drive work van prior to accident - Dispute as to whether applicant raised concerns about wage deductions - Following meeting with respondent, where applicant told debt would be wiped if found another job, applicant took two days sick leave and then resigned - Respondent conceded deductions from wages not authorised in writing as required by law - Authority preferred applicant's evidence that did not know about deductions until received second pay slip - Authority found that it was not made clear to applicant he could not drive work van - Respondent unilaterally varied applicant's job from windscreen repairer to a warehouse role after informed by customer did not want applicant working on their cars - Authority found deductions of money, suggestion if found another job debt would be wiped, and unilateral variation of job were sufficiently serious as to make it reasonably foreseeable applicant not be prepared to continue to work under those conditions - Applicant constructively dismissed - Dismissal unjustified - Deductions to wages caused applicant unjustified disadvantage - Events relating to both personal grievances overlapped - Not appropriate to make distinct awards - Compensation to be considered on global basis - Respondent submitted finding of 100 per cent contributory conduct should be made - Authority found no contributory conduct - REMEDIES - Applicant attempted to mitigate loss - However, no evidence provided applicant could not have applied for more positions - In circumstances appropriate to limit reimbursement to three months lost wages - Dismissal had serious effect on applicant - Suffered humiliation, loss of interest in socialising, and general lethargy - Appropriate case to make global award of compensation - In all circumstances award of \$8,000 appropriate - PENALTIES - Applicant not supplied with written employment agreement - In circumstances penalty of \$300, payable to Crown, appropriate - Breach of Wages Protection Act 1983 - Unauthorised deductions serious matter, however, money refunded, respondent conceded breach, and unfamiliar with New Zealand law - But for those factors higher penalty would have been awarded - Penalty of \$500 appropriate with \$250 payable to Crown, \$250 payable to applicant - Windscreen repairer

Result: Application granted ; Reimbursement of lost wages (\$6069.44)(3 months) ; Compensation for humiliation etc (\$8,000) ; Penalty (\$300)(Failure to provide written employment agreement)(Payable to Crown) ; Penalty (\$500)(Unlawful deductions to wages)(\$250)(Payable to Crown)(\$250)(Payable to Applicant) ; Costs reserved

Personal Grievance – Dismissal – Employment Relations Act 2000

Birkett v Star Design Furniture Ltd

6 Jun 2007, J Scott, AA 166/07, (6 pages)

UNJUSTIFIED DISMISSAL - Applicant had several warnings for poor attendance - Parties met and agreed to "clean the slate" - Applicant promised to improve performance and given wage increase - Absences continued - Applicant asked for final written warning - Applicant absent again and, despite promising to, and repeated requests, failed to provide evidence genuinely sick - At subsequent meeting applicant believed reached agreement he would get another job, then resign - Respondent claimed suggestion made but not agreed to - Following day applicant dismissed - Applicant not credible witness - Authority found no agreement reached regarding resignation - Applicant's argument respondent had no right to consider prior conduct due to "clean slate" not accepted - Conduct leading to dismissal on all four legs with respondent's historical concerns and applicant had received further warnings since slate cleaned - Applicant had good faith obligation to demonstrate genuinely sick and failed to do so - Respondent's conduct and actions those of fair and reasonable employer - Dismissal justified - Machinist

Result: Application dismissed ; Costs reserved

Brinkman v Versatile Buildings Ltd

5 Jun 2007, L Robinson, AA 164/07, (20 pages)

RAISING PERSONAL GRIEVANCE – Final written warning given for communicating untruthful position of accounts – Applicant claimed warning unreasonable – At time warning given applicant did not raise grievance – Authority declined to investigate justifiability of warning and no case to permit investigation out of time – UNJUSTIFIED DISMISSAL – Respondent claimed lost trust and confidence in applicant – Applicant received email directing him to attend meeting – At meeting applicant given documents outlining respondents concerns – Applicant suspended following meeting – Dismissal letter failed to outline reasons and findings justifying dismissal – Respondent claimed applicant hired new staff without senior management authorisation – Applicant never advised of senior managers role or how that role related to him – Respondent wrong to conclude applicant chose to ignore procedure – Respondent claimed applicant authorised claim for staff dinner outside level of authority – Alleged, claim constructed to avoid authorisation from senior manager – Lack of transparency led respondent to conclude serious misconduct – Authority found allegation on own could not justify dismissal, however, relevant to issue of loss of trust and confidence – Allegation of incorrect information provided to debtors not proven by respondent – Allegations never put to applicant for response – Respondent also raised concerns over applicant's email correspondence with co-worker – Evidence brought by respondent showed theme of disrespectful and unprofessional attitude towards senior manager – Matter more serious than simple personality conflict – Applicant acted to deliberately exclude senior manager – Also fostered environment with subordinate staff which was derogatory and divisive towards senior manager – Significant applicant steward of respondent's assets and funds – Respondent's loyalties misplaced – E-mail correspondence with co-worker evidence of unfaithful service – Respondent correct to have concluded that lost trust and confidence in applicant – Dismissal justified – UNJUSTIFIED DISADVANTAGE – Claimed suspension raised for first time at investigation meeting – No discussion with applicant before suspension – Suspension unjustified – Applicant suffered anxiety and embarrassment as result of suspension – BREACH OF CONTRACT – Applicant claimed bonus unreasonably withheld – Bonus discretionary – Bonus revoked due to applicant's performance – Claim dismissed – Branch manager

Result: Application dismissed (Unjustified dismissal and Breach of contract) ; Application granted (Unjustified disadvantage) ; Compensation for

humiliation etc (\$2000)(Unjustified disadvantage) ; Costs reserved

Burns v Autoglas-Stieger

7 Mar 2008, H Doyle, CA 22/08, (16 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - UNJUSTIFIED DISADVANTAGE - Applicant had accident in work van - Informed respondent immediately - Deductions made from applicant's wages for damage to van - Dispute as to whether applicant verbally authorised deductions - Applicant given written warning in which told not allowed to drive work van and to improve appearance - Dispute as to whether applicant told not allowed to drive work van prior to accident - Dispute as to whether applicant raised concerns about wage deductions - Following meeting with respondent, where applicant told debt would be wiped if found another job, applicant took two days sick leave and then resigned - Respondent conceded deductions from wages not authorised in writing as required by law - Authority preferred applicant's evidence that did not know about deductions until received second pay slip - Authority found that it was not made clear to applicant he could not drive work van - Respondent unilaterally varied applicant's job from windscreen repairer to a warehouse role after informed by customer did not want applicant working on their cars - Authority found deductions of money, suggestion if found another job debt would be wiped, and unilateral variation of job were sufficiently serious as to make it reasonably foreseeable applicant not be prepared to continue to work under those conditions - Applicant constructively dismissed - Dismissal unjustified - Deductions to wages caused applicant unjustified disadvantage - Events relating to both personal grievances overlapped - Not appropriate to make distinct awards - Compensation to be considered on global basis - Respondent submitted finding of 100 per cent contributory conduct should be made - Authority found no contributory conduct - REMEDIES - Applicant attempted to mitigate loss - However, no evidence provided applicant could not have applied for more positions - In circumstances appropriate to limit reimbursement to three months lost wages - Dismissal had serious effect on applicant - Suffered humiliation, loss of interest in socialising, and general lethargy - Appropriate case to make global award of compensation - In all circumstances award of \$8,000 appropriate - PENALTIES - Applicant not supplied with written employment agreement - In circumstances penalty of \$300, payable to Crown, appropriate - Breach of Wages Protection Act 1983 - Unauthorised deductions serious matter, however, money refunded, respondent conceded breach, and unfamiliar with New Zealand law - But for those factors higher penalty would have been awarded - Penalty of \$500 appropriate with \$250 payable to Crown, \$250 payable to applicant - Windscreen repairer

Result: Application granted ; Reimbursement of lost wages (\$6069.44)(3 months) ; Compensation for humiliation etc (\$8,000) ; Penalty (\$300)(Failure to provide written employment agreement)(Payable to Crown) ; Penalty (\$500)(Unlawful deductions to wages)(\$250)(Payable to Crown)(\$250)(Payable to Applicant) ; Costs reserved

Morrison v Cova Ltd

31 Jan 2008, V Campbell, AA 27/08, (10 pages)

UNJUSTIFIED DISMISSAL – Owner of respondent had physical altercation with applicant's partner ("W") – Respondent claimed punched by W – Applicant claimed when arrived at work W had bruises and was bleeding – Applicant's evidence not corroborated by security video footage – W subsequently charged with assault and discharged without conviction – Following physical altercation applicant instructed to leave premises – Applicant asked to provide explanation of events leading to assault – No explanation provided and applicant did not return to work – Respondent claimed applicant abandoned employment – Applicant received letter from respondent's solicitors claiming justification for instant dismissal – Applicant assumed letter confirmed dismissal – Applicant received second letter asking her to attend disciplinary meeting – Applicant did not respond to letters - Applicant claimed already dismissed and banned from

premises therefore no point attending meeting or responding – Authority found owner angry and suffered shock following assault – Owner believed applicant either supportive or contributed to W's actions – Failure to respond to letters lead to fair conclusion that applicant had abandoned employment – UNJUSTIFIED DISADVANTAGE – Owner's instruction to applicant tantamount to suspension – Suspension to be on pay unless expressly provided for by employment agreement – Employee also entitled to be consulted before decision to suspend – Suspension unjustified – Compensation for humiliation suffered by way suspension imposed – Café worker

Result: Application dismissed (Unjustified dismissal) ; Application granted (Unjustified disadvantage) ; Reimbursement of lost wages (\$1,056) ; Compensation for humiliation etc (\$1,500)

Smith v Pacific Palms International Resort & Golf Club Ltd

16 Apr 2008, L Robinson, AA 141/08, (12 pages)

JURISDICTION – Whether employee or independent contractor – Credibility finding in favour of applicant – Respondent's director ("A") established company ("B&B") with applicant and wife as directors and shareholders – At A's request applicant prepared management contract between B&B and respondent – Contract never executed by A – Respondent's solicitors purported to confirm contract but with revised remuneration – Applicant accepted revised remuneration effectively imposed by A – Parties' intention relevant but not decisive – Authority unable to find both parties had explicit common intention that applicant employee – Significant control imposed indicative of employment – Applicant's role as General Manager integral part of operation – Relationship in practice indicated applicant an employee – Applicant employee – UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant rendered 12 invoices to respondent during period of employment of which only 4 were paid – Despite repeated requests and A's repeated promises, applicant not paid – Applicant tolerated delay because of parties close relationship and trust placed in A – Resigned when tolerance and patience ran out – Failure to pay breach of duty owed to applicant – Breach of duty so serious reasonably foreseeable that substantial risk applicant would resign – Dismissal unjustified – Remedies – No contributory conduct – Applicant extremely hurt and humiliated by A's behaviour – Applicant distressed to learn of rumours, hurtful criticism and untrue allegations made by A – Situation exacerbated by personal friendship with A and applicant's devotion to job – Respondent's failure to pay placed applicant in situation where had to sell house as unable to pay mortgage – Property eventually sold at a loss – Entitled to compensation of \$15,000 – General manager

Result: Application granted ; Reimbursement of lost wages (\$72,000) ; Arrears of wages (\$117,750) ; Interest (10%) ; Compensation for humiliation etc (\$15,000) ; Costs reserved

Personal Grievance - Dismissal - Misconduct - Employment Relations Act 2000

Buchanan v Vice-Chancellor, University of Auckland

26 Mar 2008, V Campbell, AA 108/08, (18 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Sent offensive email to international student who requested extension for assignment due to bereavement - Respondent concluded email so serious undermined trust and confidence in applicant - Applicant's employment governed by collective employment agreement that provided for termination without notice for serious misconduct - University policy set out guidelines for use of email system - At time email sent applicant recovering from surgery - Applicant raised health issues during inquiry but not to level of detail provided to Authority - During inquiry applicant said sent email because angry, after dismissal suggested sent it as judgement effected by health - Applicant provided no evidence that claim for dismissal politically motivated - Authority found fair and reasonable employer would not have dismissed applicant for reasons it did - Respondent took into account previous unrelated correspondence that it had not addressed at time - Unfair and unreasonable to do so - Unreasonable of respondent to escalate applicant's conduct to serious misconduct - However applicant's actions were misconduct - Suggestions applicant made during disciplinary process to help ensure similar situation did not occur again completely ignored or overlooked - Unjustifiably dismissed - REMEDIES - Applicant contributed significantly to grievance - Contributory conduct 25 percent - Applicant's reinstatement opposed by respondent - Not practicable to reinstate applicant to role with little supervision when had failed to demonstrate fundamental awareness of how actions and conduct impacted on others - Very public, and extremely critical, remarks applicant made about respondent also taken into account - Authority assessed applicant's lost remuneration at eight months, less contribution - Applicant provided insufficient evidence for other lost income claims - Applicant produced little evidence to support compensation claim - However, Authority accepted had suffered some distress - Taking into account tenure and damage to reputation compensation appropriate - Award of \$20,000 would have been justified, taking contribution into account \$15,000 awarded - Senior Lecturer

Result: Application granted ; Reimbursement of lost wages (\$68,000 reduced to \$51,000)(8 months) ; Compensation for hurt etc (\$20,000 reduced to \$15,000) ; Costs reserved

Quinn v Metallic Sweeping (1998) Ltd

2 Apr 2008, P Cheyne, CA 34/08, (7 pages)

UNJUSTIFIED DISMISSAL - Misconduct - Employment agreement provided for 12 week probationary period - Employment deemed to be permanent on its satisfactory completion - Unsatisfactory work would result in termination without notice or offer of extended probationary period - Part way through probationary period applicant suffered accident and was unfit for work - Called to disciplinary meeting whilst incapacitated after complaint received - Also discussed purchase of cigarettes on respondent's account and general issues of poor performance - Respondent investigated but did not speak with complainant personally - Applicant dismissed - Authority found applicant not credible witness - Fair and reasonable employer would have spoken directly to complainant - Dismissal unjustified - REMEDIES - Applicant's denial of complaint rejected - Also respondent probably would have dismissed applicant for breach of trust for unauthorised cigarette purchase - Dismissal would have been justified - Contributory conduct 100 percent - COSTS - Costs to lie where they fall - Cleaner

Result: Application granted ; Costs to lie where they fall

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

Nathan v 123 Metals Ltd, formerly Cash for Scrap Ltd

4 Apr 2008, G J Wood, WA 37/08, (6 pages)

UNJUSTIFIED DISMISSAL - Poor performance - No appearance by respondent - Applicant returned to office in his truck - Office worker removed his keys and refused to return them or provide explanation - Applicant went home as no truck to drive - Rang head office repeatedly and finally informed had been suspended but told to ring another manager for reasons - Informed suspended for taking too long on jobs - Applicant disputed that - Asked about pay and informed had been stopped - Requested holiday pay not forthcoming - Applicant believed had been dismissed and sought advice - Respondent did not reply to lawyer's correspondence - Respondent never raised performance concerns, if indeed there were any - Fair and reasonable employer would not have acted in manner respondent did and would not have effectively dismissed employee without reasons or prior warning - Dismissal unjustified - Driver

Result: Application granted ; Reimbursement of lost wages (\$5,400)(9 weeks) ; Holiday pay (\$528) ; Compensation for hurt etc (\$9,000) ; Disbursements in favour of applicant (\$70)(Filing fee)

Personal Grievance - Dismissal - Redundancy - Employment Relations Act 2000

Panoho v The Vice-Chancellor of the University of Auckland

24 Apr 2008, L Robinson, AA 153/08, (28 pages)

UNJUSTIFIED DISMISSAL - Redundancy - Workplace issues arose out of incident involving applicant and another staff member - Applicant became increasingly unwell - Took period of sick leave - During that period University undertook restructuring process - Applicant advised not required to participate in process if likely to adversely impact on health - Applicant's department selected for redundancies - Staff to submit documents to Selection Committee to assist selection decisions - Applicant raised concerns about having to provide information while on sick leave and it was arranged that department would provide required information - While restructuring process underway applicant attempted to arrange meeting to discuss plans for return to work - Meeting did not eventuate - Selection Committee recommended applicant's position be disestablished - Applicant not given opportunity to respond - Applicant's employment terminated by reason of redundancy - Authority did not accept position was redundant - Selection Committee breached duty of good faith and natural justice in reaching conclusions without having sought applicant's response - Authority concluded likely applicant actually dismissed for poor performance - Applicant not treated fairly or sensitively - Respondent's decision and actions not those of fair and reasonable employer - Dismissal unjustified - REMEDIES - Respondent argued reinstatement impracticable as no vacant position and no funding for creation of one - Respondent believed applicant felt could not return to work environment - Authority found applicant desired to return to work - Also respondent had been on notice applicant seeking reinstatement for some time - Applicant's career likely to be ended if not reinstated as no other position available - Reinstatement intended to be primary remedy - Right to remedy outweighed inconvenience to respondent - Reinstatement ordered - Applicant suffered humiliation, loss of dignity and mana, and injury to feelings - Suffered significant financial hardship - Having regard to evidence, length of service and nature of personal grievance compensation of \$25,000 appropriate - Lecturer

Result: Application granted ; Reinstatement ordered ; Compensation for humiliation etc (\$25,000) ; No order for costs

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

Brinkman v Versatile Buildings Ltd

5 Jun 2007, L Robinson, AA 164/07, (20 pages)

RAISING PERSONAL GRIEVANCE – Final written warning given for communicating untruthful position of accounts – Applicant claimed warning unreasonable – At time warning given applicant did not raise grievance – Authority declined to investigate justifiability of warning and no case to permit investigation out of time – UNJUSTIFIED DISMISSAL – Respondent claimed lost trust and confidence in applicant – Applicant received email directing him to attend meeting – At meeting applicant given documents outlining respondents concerns – Applicant suspended following meeting – Dismissal letter failed to outline reasons and findings justifying dismissal – Respondent claimed applicant hired new staff without senior management authorisation – Applicant never advised of senior managers role or how that role related to him – Respondent wrong to conclude applicant chose to ignore procedure – Respondent claimed applicant authorised claim for staff dinner outside level of authority – Alleged, claim constructed to avoid authorisation from senior manager – Lack of transparency led respondent to conclude serious misconduct – Authority found allegation on own could not justify dismissal, however, relevant to issue of loss of trust and confidence – Allegation of incorrect information provided to debtors not proven by respondent – Allegations never put to applicant for response – Respondent also raised concerns over applicant's email correspondence with co-worker – Evidence brought by respondent showed theme of disrespectful and unprofessional attitude towards senior manager – Matter more serious than simple personality conflict – Applicant acted to deliberately exclude senior manager – Also fostered environment with subordinate staff which was derogatory and divisive towards senior manager – Significant applicant steward of respondent's assets and funds – Respondent's loyalties misplaced – E-mail correspondence with co-worker evidence of unfaithful service – Respondent correct to have concluded that lost trust and confidence in applicant – Dismissal justified – UNJUSTIFIED DISADVANTAGE – Claimed suspension raised for first time at investigation meeting – No discussion with applicant before suspension – Suspension unjustified – Applicant suffered anxiety and embarrassment as result of suspension – BREACH OF CONTRACT – Applicant claimed bonus unreasonably withheld – Bonus discretionary – Bonus revoked due to applicant's performance – Claim dismissed – Branch manager

Result: Application dismissed (Unjustified dismissal and Breach of contract) ;
Application granted (Unjustified disadvantage) ; Compensation for
humiliation etc (\$2000)(Unjustified disadvantage) ; Costs reserved

Personal Grievance - Unjustified Disadvantage - Employment Relations Act 2000

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Authority found deductions of money, suggestion if found another job debt would be wiped, and unilateral variation of job were sufficiently serious as to make it reasonably foreseeable applicant not be prepared to continue to work under those conditions - Applicant constructively dismissed - Dismissal unjustified - Deductions to wages caused applicant unjustified disadvantage - Events relating to both personal grievances overlapped - Not appropriate to make distinct awards - Compensation to be considered on global basis - Respondent submitted finding of 100 per cent contributory conduct should be made - Authority found no contributory conduct - REMEDIES - Applicant attempted to mitigate loss - However, no evidence provided applicant could not have applied for more positions - In circumstances appropriate to limit reimbursement to three months lost wages - Dismissal had serious effect on applicant - Suffered humiliation, loss of interest in socialising, and general lethargy - Appropriate case to make global award of compensation - In all circumstances award of \$8,000 appropriate - PENALTIES - Applicant not supplied with written employment agreement - In circumstances penalty of \$300, payable to Crown, appropriate - Breach of Wages Protection Act 1983 - Unauthorised deductions serious matter, however, money refunded, respondent conceded breach, and unfamiliar with New Zealand law - But for those factors higher penalty would have been awarded - Penalty of \$500 appropriate with \$250 payable to Crown, \$250 payable to applicant - Windscreen repairer

Result: Application granted ; Reimbursement of lost wages (\$6069.44)(3 months) ; Compensation for humiliation etc (\$8,000) ; Penalty (\$300)(Failure to provide written employment agreement)(Payable to Crown) ; Penalty (\$500)(Unlawful deductions to wages)(\$250)(Payable to Crown)(\$250)(Payable to Applicant) ; Costs reserved

Dams v Powerbeat International Ltd

22 Aug 2007, A Dumbleton, AA 256/07, (20 pages)

UNJUSTIFIED DISMISSAL – Applicant granted leave to raise grievance out of time – Applicant rang office and advised co-workers would be taking day off to arrange vehicle repairs – Co-worker reported applicant’s absence to manager – Applicant returned to work next day and requested meeting with manager – Meeting ended after ten minutes and applicant left premises – Applicant never returned to workplace – Parties did not communicate for three months until respondent received letter of notice raising personal grievance – Respondent claimed applicant abandoned employment – Claimed when questioned about absence applicant gave dishonest answer and stormed out of meeting – Respondent also claimed that applicant said “easier to be on dole” – Applicant claimed respondent did not accept reason for absence – Applicant claimed respondent said “did not want to see him anymore” and “would not be paying any further wages” – Inconsistent evidence given by respondent – During investigation respondent acknowledged that had suggested applicant inadequate as could not fix car – Authority satisfied respondent dominated meeting and spoke without too much thought – Applicant took respondent’s remarks as suggesting incompetence and was an unsuitable employee – Respondent’s denial that nothing said about ceasing to pay applicant rejected – Authority recognised importance of job to applicant – Applicant had previously experienced trauma of redundancy – After dismissal made sacrifice to be away from family in order to be employed – Fact respondent made no effort to contact applicant after dismissal indicated sending away – Respondent satisfied no contact made because applicant no longer employee – Likely respondent did send applicant away and applicant led to believe had been dismissed – Respondent also alleged attempt at extortion through grievance process – Dismissal unjustified – No deceit involved in absence – Authority also determined fixed term ineffective – Parties expressly agreed employment would end at expiry of three month period – Fixed term intended to measure whether applicant suitable for job – Under s66(3)(c) Employment Relations Act 2000 measuring applicants’ suitability for job not permissible reason for fixed term – Remedies – No contributory conduct - Compensation appropriate for humiliation caused by respondent’s comments

that applicant preferred life on dole and incompetent to fix car – Research and development electronics engineer

Result: Application granted ; Reimbursement of lost wages (3 months) ;
Compensation for humiliation etc (\$8,500) ; Costs reserved

Personal Grievance - Practice & Procedure - Employment Relations Act 2000

New Zealand Airline Pilots Association Inc v Air Nelson Ltd

17 Apr 2008, Y S Oldfield, AA 143/08, (4 pages)

PRACTICE AND PROCEDURE - Application for removal to Employment Court - Applicant had sought declaration as to lawfulness and effect of notice of intention to strike - Urgency sought and granted - Respondent applied to have matter removed - Removal not opposed - Respondent argued two important questions of law arose and Court should determine matter - First question whether notice of intention to strike met notice requirements of s90(3) Employment Relations Act 2000 - Second question whether pilot's failure to be "in position" at conclusion of specified period amounted to strike action - Authority satisfied questions raised were important questions of law - Respondent argued Court should determine issues as likely to be recurring, of importance to all parties, of wider significance, regardless of outcome likely to be challenged, and removal would expedite final determination of issues - Both grounds of removal made out - Matter removed to Court
Result: Application granted ; Matter removed to Court ; Costs reserved

Singh and Anor v W Ltd and Ors

28 Feb 2008, R Arthur, AA 65/08, (12 pages)

PRACTICE AND PROCEDURE - Respondents applied for stay or adjournment of applicants' employment relationship problems - Applicants alleged incident occurred day resigned - Incident subject of criminal proceedings - Matter would proceed to trial in High Court later in year or early the next year - Names of respondents subject to non-publication orders in District and High Courts - Authority made similar orders for present proceedings - Authority determined could not deal with compensation claims until after trial - In effect partial stay on claim for compensation - Whether Authority could continue to investigate aspects of claims not related to criminal charges - Respondents agreed to consent order requiring security deposit - Authority needed to hear evidence from people involved in criminal proceedings but requiring them to give evidence, and any findings as to credibility Authority made, could prejudice right to fair trial - Respondents argued any disadvantage to applicants from delay of less weight than risk of disadvantage and prejudice of right to fair trial - Applicants argued Authority had statutory obligation to conduct investigation - Also claimed criminal charges did not relate to subject of pay claims and already "partial stay" on compensation claim, also concerns about credibility findings too speculative - Authority persuaded incident's factual background more likely than not part of evidence at trial - From information available credibility findings almost certainly required - Any credibility findings in Authority could create real risk of prejudice - Right to fair trial paramount consideration - Finely balanced case, provision of security deposit decisive factor - If applicants successful could receive amounts entitled to - Justice delayed but not denied - Could not say same if Authority investigation prejudiced respondents' right to fair trial - Approach accorded with principles of natural justice and reasonable with regard to Authority's investigative role - Postponement application granted, on conditions - Cooks
Result: Application granted ; Orders accordingly ; No order for costs

Practice & Procedure - Consent Orders - Employment Relations Act 2000

Chrichton v Squires Manufacturing Co Ltd

22 Apr 2008, P R Stapp, WA 48/08, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to remain confidential to parties - 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

Erueti v Te Runanga O Wharekauri Rekohu Inc

18 Apr 2008, P R Stapp, WA 45/08, (2 pages)

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

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

Garrett and Anor v Garrett and Anor

10 Apr 2008, L Robinson, AA 134/08, (2 pages)

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

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

Department of Labour
TE TARI MAHI

