

Department of Labour  
TE TARI MAHI



# **EMPLOYMENT CASES SUMMARY**

**September 2007**

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

# Employment Cases Summary

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

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

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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 August 2007- 31 August 2007

## Employment Relations Act 2000

*Skinner and Anor v Stayinfront Inc and Ors*

CA 18/07

**Heard:** 16 Apr 2007, Wellington

**Judgment Date:** 24 Apr 2007

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

**Appearances:** RD Wallis ; RL Towner

COURT OF APPEAL – Practice and procedure – Application for leave to appeal Employment Court decision – Employment Court issued preliminary judgment concerning nature and extent of applicants’ challenge under s179 Employment Relations Act 2000 – Employment Court held challenge limited to preliminary issue of whether settlement agreements precluded applicants from raising personal grievances – Applicant alleged question of law of general importance was: whether, where the Authority had determined a preliminary issue, the “matter” before the Employment Court on appeal was that preliminary issue or the substantive claim – Respondent alleged appeal did not raise question of law and had no prospect of success – HELD – Logical and sensible for Employment Court to only determine preliminary issue because litigation concluded if resolved in respondents favour – No question of law raised – Employment Court decision was matter of case management – Application dismissed

This was an unsuccessful application for leave to appeal a decision of the Employment Court (see: 8 December 2006, AC 70/06).

The applicants entered into settlement agreements with the respondents. The applicants brought personal grievance proceedings in the Employment Relations Authority alleging that the settlement agreements were invalid more than two years after receiving the settlement payments.

The Authority heard the preliminary issue of whether the applicants’ personal grievance claims were precluded by the settlement agreements and found that the applicants’ claims were defeated. The applicants challenged that determination.

The Employment Court held that the Authority had only determined the preliminary issue and that was the extent of the challenge to the Court. Both the Authority and Court agreed that the “matter” before them was the determination of the preliminary issue and not the personal grievances as a whole.

The applicants submitted that an important question of law was whether, in a situation where the Authority had determined a preliminary issue, the “matter” before the Employment Court was that preliminary determination or the substantive claim. The respondents submitted that the

Employment Court's finding that the Authority had only determined the preliminary issue was correct. Further, the appeal did not raise a question of law and had no prospect of success.

Held

(1) It was logical and sensible for the Authority, and the Employment Court on appeal, to determine as a preliminary question whether the personal grievances of the applicants were precluded by the settlement agreements into which they had previously entered with the respondents. Such an issue is often determined as a preliminary question, because if resolved in favour of the party relying upon the earlier agreement the litigation is brought to an end without putting the parties to the expense of a full hearing. (para 10)

(2) The Court of Appeal did not read the Employment Court judgment as laying down any inflexible rule as to how the Employment Court should determine matters coming to it from the Authority. The decision of the Employment Court was no more than a decision as to how the present litigation was to be managed before it. As such, it could not be said to raise any question of law. (para 14)

(3) At the conclusion of the litigation in the Employment Court, the applicants would have the right to appeal by leave to the Court of Appeal on any issue if they could satisfy the statutory requirements for the grant of leave. (para 16)

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

**Statutes considered:**

ERA s187(1)(a)

**Other workers/site names etc:** Tobin

**Pages:** 2

[973689]

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***Credit Consultants Debt Services NZ Ltd v Wilson & Anor***

WC 12B/07

**Heard:** 16 Apr 2007, Wellington

**Judgment Date:** 1 May 2007

**Court/Authority/Tribunal:** Shaw J

**Appearances:** L Taylor & M Richards ; G Taylor

PROCEEDINGS REMOVED FROM EMPLOYMENT RELATIONS AUTHORITY  
– Applications for injunctions, compliance order and penalties against first defendant  
– Application for penalties against second defendant – First defendant's employment agreement contained six month restraint of trade clause and non-solicitation and confidentiality clauses – First defendant made redundant – Took documents containing client information and contact details – Commenced employment with competitor (second defendant) three months later – Contacted and solicited former clients – Whether first defendant had breached employment agreement and second defendant had aided and abetted breaches – Section 134(2) Employment Relations Act 2000 – HELD – Restraint of trade reasonable and imposed to protect plaintiff's

proprietary interests – First defendant breached restraint of trade, confidentiality and non-solicitation clauses – Second defendant aided and abetted breaches of restraint of trade and non-solicitation clauses – Injunctions and compliance order necessary to prevent further breaches – Penalties imposed against first and second defendants – Applications granted – General manager

These were successful applications by the plaintiff for injunctions, a compliance order, and penalties.

The plaintiff provided debt recovery and credit related services. The first defendant was employed by the plaintiff as a general manager. The first defendant's employment agreement contained a six-month restraint of trade clause, a nonsolicitation clause, and a confidentiality clause. The restraint of trade prevented the first defendant from working for an opposition company or business involved in the same or substantially the same business as the plaintiff within New Zealand.

The first defendant was made redundant in December 2006. Before he left his employment he sent a number of emails to his brother-in-law and his own personal email account containing the contact details of existing and prospective clients of the plaintiff. He also took all his existing and prospective clients' business cards.

Upon hearing of the first defendant's redundancy the managing director of the second defendant (a direct competitor of the plaintiff) approached the first defendant. The second defendant raised the restraint of trade issue with the first defendant, but did not seek legal advice or request to view the clause. In February 2007, the first defendant accepted an offer of employment with the second defendant in the role of New Zealand corporate sales manager.

The second defendant advertised the first defendant's appointment emphasising his knowledge and contacts. When he began his new role the first defendant contacted at least ten former clients and sent out contract documents to two or three. He secured the custom of at least one former client for the second defendant. The managing director of the second defendant was aware that the first defendant had contacted former clients and personally followed up some contacts.

The plaintiff alleged that the first defendant had breached his employment agreement by working for an opposition company, by misusing confidential information, and by soliciting its customers and prospective customers. The plaintiff sought injunctions restraining the first defendant from breaching his employment agreement, an order requiring the first defendant to comply with his employment agreement, penalties for breaches of the employment agreement, and damages for loss of business caused by the first defendant's actions. The plaintiff also submitted that the second defendant aided and abetted the first defendant's breaches and sought a penalty under s134(2) of the Employment Relations Act 2000 ("ERA")

The first defendant submitted that the terms of the restraint of trade were unreasonable, but accepted he had acted improperly in some regards. The first defendant invited the Court to modify the clause so as to allow his employment with the second defendant to continue in areas other than debt recovery including providing terms of trade and employment contracts. The second defendant denied it had done anything wrong to warrant a penalty.

Held

(1) The first defendant admitted (i) he took employment with a company that was in the same business as the plaintiff within the 6-month restraint period; (ii) he had used confidential

information from the plaintiff in the form of business cards, client lists, and other documents which he had sent by e-mail before his employment terminated or received after; and (iii) he had solicited both existing clients and at least one prospective client of the plaintiff with a view to moving their business the second defendant within the 6-month period. All of these were prima facie in breach of his employment agreement with the plaintiff. (paras 43, 44)

(2) In *Debtor Management (NZ) Ltd v Quail* (cited below), the Court found that the same geographic restriction in relation to a similar debt collection business was reasonable given that in that case the Auckland based company had customers who in turn had debtors who were spread throughout New Zealand. For the same reasons the Court found that in terms of geography the restraint of trade was reasonable. (para 52)

(3) The duration of 6 months of the restraint was reasonable. To the extent that it restricted the first defendant's freedom to take up employment, it was reasonable given the quality and extent of proprietary information belonging to the plaintiff that was in his command when his employment with the company ended. The reason for the restraint of trade was to protect that information from potential misuse. (para 53)

(4) The plaintiff's reasons for imposing the 6-month term of the restraint of trade were reasonable. It was not imposed arbitrarily but after legal advice and in the light of direct experience and for the purpose of protecting the company's proprietary interests. (para 55)

(5) The fact that the restraint prevented the first defendant from working for an opposition company in the same or substantially the same business was reasonable and justified by the plaintiff's need to protect its proprietary interest. Because they were closely related to the second defendant's client base the work of providing terms of trade and even employment contracts was substantially the same business. No modification was necessary to make the restraint of trade clause reasonable. (para 59)

(6) The public interest is about the impact of the restraint of trade on the wider public market rather than on the private rights of individuals who are governed by the restraint. It is also the case that the public interest in the administration of justice is not served by not enforcing rational agreements between individuals. The plaintiff established that the terms of the restraint of trade clause were reasonably necessary to the parties in order to protect the proprietary interests of the plaintiff and they did not offend against the public interest. (paras 62, 63)

(7) The first defendant breached the restraint of trade clause by commencing and continuing employment with the second defendant and contacting the plaintiff's clients in order to solicit, endeavour to entice away, or discourage any client of the plaintiff from remaining as one of their clients. (para 64)

(8) The materials e-mailed and taken by the first defendant were clearly in the realm of confidential information as was the reconstructed client list he made and used in his employment at the second defendant. The first defendant breached the confidentiality provisions. (paras 66, 68)

(9) All of the terms of the non-solicitation clause were reasonable. The prohibition on soliciting existing and prospective clients was for a period of 6 months imposed to protect the proprietary interests of the plaintiff. The evidence clearly established that the first defendant actively solicited the plaintiffs' clients. He had therefore breached the non-solicitation clause of his employment agreement. (paras 71, 72)

(10) To warrant the imposition of a penalty under s134(2) ERA, the plaintiff had to establish that

there was an act of incitement, instigation, aiding, or abetting and that is act was wilful. (para 75)

(11) An analogy with the tort of interference with contractual relations is an appropriate standard of wilfulness for the purpose of evaluating whether a person was a party to a breach of an employment agreement under s134(2) ERA. The defendant must have known of the contract and deliberately intended to interfere with it although that knowledge need not be of the exact terms of the contract. It is sufficient if the defendant knew of the general contractual situation or practice in a particular field. (para 76)

(12) The managing director of the second defendant was quite aware of the existence of the restraint of trade clause in the first defendant's employment agreement and, although he had not seen it, chose to make no proper inquiry about it. He also knew that his company relied on such clauses. He was reckless as to the consequences of a breach of the restraint of trade when faced with being able to employ the first defendant who had brought a significant market advantage to him as a result of his knowledge and experience accumulated while working for the plaintiff. (para 77)

(13) In spite of his knowledge of the restraint of trade clause, managing director of the second defendant took active steps to intentionally employ the first defendant in his opposition company. He was aware of and took no steps to stop the deliberate solicitation of the plaintiff's clients. The advertisement was an express assistance to that solicitation. Although it was possible that he knew of and encouraged the use of client confidential information that the first defendant had at his disposal, there was no direct evidence of this. By the actions of its managing director the second defendant aided and abetted two breaches of the first defendant's employment agreement: employment by an opposition company and solicitation of the plaintiff's clients and potential clients. (paras 79, 80)

(14) On the basis of his past behaviour the plaintiff was justified in having little confidence that the first defendant would not continue to act in breach of his contract without a permanent injunction preventing it. The Court concluded injunctions should issue until the expiry of the first defendant's restraint of trade. (paras 85, 86)

(15) The plaintiff established that a compliance order was necessary to protect against misuse of confidential information. (para 90)

(16) The penalty breaches should be dealt with globally. The breaches were either repetitive (soliciting clients) or arose out of a single course of conduct (sending the emails). The Court also had regard to the totality principle. (para 92)

(17) The three causes of action which were made out related to three separate acts or series of transactions. In setting the penalty the Court took into account the wilfulness of the first defendant. Each of those warranted a penalty to mark the seriousness of the actions of the first defendant. In all the circumstances, a penalty of \$2,000 for each of the global breaches was imposed making a total of \$6,000. (paras 94-96)

(18) The Court treated the second defendant's involvement in the employment and advertising as one global breach and in the soliciting as the other. For each of those breaches the company was ordered to pay \$2,500 making a total penalty of \$5,000. (para 100)

(19) It was appropriate that the full amount of the penalties imposed against both defendants was to be paid to the plaintiff because the breaches were not breaches of a statutory obligation such as payment of wages or holiday pay but a matter solely between the parties. (para 102)

(20) The question of damages was to be the subject of a further hearing. (para 103)

**Result:** Applications granted ; Orders accordingly ; Penalty against first defendant (\$6,000) (payable to the plaintiff) ; Penalty against second defendant (\$5,000) (payable to the plaintiff) ; Damages reserved ; Non-publication order ; Costs reserved

**Statutes considered:**

ERA s134(2)

ERA s135(2)

ERA s139(3)

**Cases referred to in judgment:**

Airgas Compressor Specialists Ltd v Bryant [1998] 2 ERNZ 42

Credit Consultants Debt Services Ltd v Wilson unreported, Judge Travis, 16 March 2007, WC 12/07

Credit Consultants Debt Services Ltd v Wilson unreported, Chief Judge Colgan, Judges Travis and Shaw, 5 April 2007, WC 12A/07

Debtor Management (NZ) Ltd v Quail [1993] 2 ERNZ 498

Faccenda Chicken Ltd v Fowler [1986] 1 All ER 617 (CA)

Fuel Espresso Ltd v Hsieh [2007] 2 NZLR 651

Gallagher Group v Walley [1999] 1 ERNZ 490

McIntyre v Bianchi [1992] 3 ERNZ 1057

NZ Baking Trades IUOW v Quik Bake Products Ltd (in receivership) & Cormack [1990] 2 NZILR 284

Ravensdown Corp Ltd v Groves [1998] 3 ERNZ 947

Xu v McIntosh [2004] 2 ERNZ 448

**Other workers/site names etc:** EC Credit Control Ltd

**Pages:** 5

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***An Employee v An Employer***

CC 8/07

**Heard:** 19 Feb 2007, Christchurch

**Judgment Date:** 15 May 2007

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

**Appearances:** DG Beck ; CR French

PRACTICE AND PROCEDURE – Application for leave to challenge out of time – 75 day delay – Applicant alleged delay caused by episode of depression – Alleged further delays due to difficulty finding suitable lawyer and Christmas holiday period – Respondent alleged it would be prejudiced by extension of time because of prolongation of negative effects of litigation on school where parties worked – HELD – Delay of more than 2 months very substantial and even gross – Depressive episode only impaired applicant’s decision-making abilities for a few weeks – Applicant could have filed proceedings much earlier – Delay not adequately explained – Respondent would be prejudiced if extension granted – No significant error of law or reasoning in Authority determination that justified leave – Not in interests of justice

to extend time – Application dismissed – Secondary school teacher

This was an unsuccessful application for leave to file a challenge out of time against the substantive and costs determinations of the Employment Relations Authority.

The respondent employed the applicant as a secondary school teacher. The applicant alleged that her employment had been affected to her disadvantage by unjustifiable actions by the respondent. The Authority issued a determination on 21 October 2005 dismissing the applicant's claims ("the substantive determination"). The Authority ordered the applicant pay the respondent costs in a determination dated 27 January 2006. The employment relationship between the parties was ongoing.

The applicant initially took no action when she received the substantive determination. Over a month later, after discussing the determination with her sister, the applicant engaged a lawyer to challenge the determination and act for her in relation to the issue of costs in the Authority. The applicant alleged the lawyer engaged did not know if there was a mechanism for appealing a determination out of time and that she was advised to contact the Registrar of the Employment Court. She was informed of the challenge process by a letter from the Registrar on 21 December 2005. The applicant engaged a different lawyer in mid-January 2006 and filed the application for leave to challenge out of time on 2 February 2006.

The application for extension of time was made 75 days after the expiry of the 28 day period for a challenge prescribed in s179(2) of the Employment Relations Act 2000 ("ERA").

The applicant submitted that the principal reason for the delay was that the receipt of the substantive determination had triggered an acute episode of a depressive illness caused by her employment relationship problems. This had rendered her unable to make the necessary decisions to initiate a challenge until she received support from her sister. The applicant submitted that further delays were caused by the need to find a suitable lawyer and the closure of law offices during the Christmas holiday period.

The respondent submitted that it would be prejudiced by an extension of time because the negative effects of the litigation on the school would be more prolonged than if the challenge had been filed within time.

Held

(1) The Court's jurisdiction to extend time to file a challenge is conferred by s219(1) ERA. The discretion conferred by s219 is not subject to any statutory criteria. However, it must be exercised judicially and in accordance with established principles. The fundamental principle which must guide the Court in the exercise of its discretion is the justice of the case. (paras 7-9)

(2) Given that the time within which the applicant could initiate a challenge as of right expired well before the period specified in reg 74B of the Employment Court Regulations 2000, the regulation had no direct application to the present case. However, the Court considered whether the policy underlying it should be applied by regarding the length of the delay as being shorter. In terms of the final outcome, it did not matter under which heading this aspect of the evidence was considered but it seemed more natural to discuss it in the context of the reasons for delay than to regard it as truncating the period of delay which actually occurred. On any view of it, a delay of more than 2 months must be regarded as very substantial or even gross. (paras 14, 15)

(3) The expert evidence did not establish that the applicant's delay in taking steps to challenge the Authority's determination was fully explained by any psychiatric condition she may have

experienced. At most, the receipt of the substantive determination triggered a depressive episode which impaired the applicant's decision-making ability for a few weeks. Even viewing the expert evidence in the light most favourable to the applicant, it only provided an explanation for her failure to take steps within the statutory 28-day time period and, perhaps, for a week or so after that. From late November 2005 at the latest, the applicant was aware of the significance of the Authority's determination, aware of her rights with respect to a challenge and capable of making the decisions necessary to exercise those rights. (paras 36-38)

(4) Where an extension of time is sought, the onus is on the applicant to provide the evidence necessary to explain the delay as fully as possible. With respect to the period from the end of November 2005 onwards, the applicant did not do this. The evidence supporting reasons for the delay other than her mental illness was sparse and, in many respects, vague. Even making generous allowance for the Christmas and New Year period, the evidence fell well short of an adequate explanation for the very substantial delay which occurred. (para 39)

(5) Where a party fails to comply with s179(2) ERA, the merits of the proposed challenge become a significant factor in the exercise of the Court's discretion whether to grant an extension of time. A party seeking such an extension of time must persuade the Court that the proposed challenge has a realistic prospect of success. If there is a significant error of law or reasoning apparent on the face of the determination, that may suffice. Otherwise, there will almost always need to be evidence which persuades the Court that the proposed challenge has a reasonable prospect of success. There was no such evidence in the present case. (paras 52-53, 59)

(6) The respondent had been prejudiced by being led to believe for more than 2 months that the matter was at an end. While the Court took this factor into account, it did not place great weight on it. If the extension of time sought was granted, the prejudice to the school community as a whole arising from the prolongation of the dispute would be significant. (paras 57, 58)

(7) It was not in the interests of justice to extend the time for filing a challenge to the substantive determination. The application was refused. (para 60)

(8) The applicant could have challenged the costs determination as of right on 2 February 2006 when the application for extension of time was made. Assuming that the applicant was properly advised, the only sensible construction was that the applicant wished to challenge the costs determination only in conjunction with a challenge to the substantive determination. If that was incorrect and the applicant would wish to challenge the costs determination alone, it was not in the interests of justice to grant the extension of time now necessary for her to do so. (paras 61-62)

**Result:** Application dismissed (leave to file challenge out of time) ; Costs in favour of respondent (quantum reserved)

**Statutes considered:**

ERA s179

ERA s179(1)

ERA s179(2)

ERA s219

ERA s219(1)

Employment Court Regulations 2000 r74B

**Cases referred to in judgment:**

Avery v No 2 Public Service Appeal Board [1973] 2 NZLR 86

Bilderbeck v Brighouse Ltd [1993] 2 ERNZ 74

Day v Whitcoulls Group Ltd [1997] ERNZ 541

Otago Taxis Limited v Strong unreported, Judge Couch, 2 March 2007, CC 6/07  
Peoples v Accident Compensation Corporation [2007] 1 ERNZ 26  
Ratnam v Cumarasamy [1964] 3 All ER 933 (PC)  
Stevenson v Hato Paora College Trust Board [2002] 2 ERNZ 103  
**Pages:** 3  
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## Arrears - Employment Relations Act 2000

### *Carter v Turnaround Managers Ltd*

14 Dec 2006, YS Oldfield, AA 378/06, (7 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Triangular employment - Applicant claimed owed wages for accounting work done for respondent's clients - Respondent argued accounting work performed by applicant on own account and not as employee - Applicant unaware accounting work expressly excluded from respondent's contract with first client - In absence of instruction to change or cease what doing, work done on respondent's behalf and in capacity as employee - Employment agreement made wage payments conditional on respondent having contracted to provide services to clients and on client having made payment - Respondent submitted bore no liability as conditions not met - Applicant accepted payment conditional but considered respondent had responsibility to invoice clients and pursue payment vigorously - Essentially "commission only" arrangement - Authority did not accept respondent did not have contracts with clients - However, accepted payment not received and could not accept respondent failed to adequately pursue payment - Applicant knew high risk environment meant risk of non-payment - Condition not met - However, Minimum Wage Act 1983 and Wages Protection Act 1983 applied - Applicant not paid for nine weeks - Entitled to arrears of wages based on minimum wage - Respondent accepted holiday pay due and owing

**Result:** Application granted : Arrears of wages (\$810) ; Arrears of holiday pay (\$4,271.06) ; Interest (8%) ; Costs to lie where they fall

### *Jose v Barter Exchange Ltd t/a Victoria Motor Services*

15 Dec 2006, P Stapp, WA 176/06, (17 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Applicant sought arrears of wages, holiday pay and other monies owed under alleged employment agreement - Credibility finding in favour of respondent - Authority satisfied terms and conditions of employment not represented by letter - Claims for accommodation and airfares not made out - Deductions by respondent breached Wages Protection Act 1983 - However, respondent reasonably believed had authority given applicant's complicity - Final pay and holiday pay owing - DAMAGES - Applicant's claim for damages misconceived and without sufficient details and support - COUNTERCLAIM - BREACH OF CONTRACT - Applicant resigned without notice - Reasonable notice would have been two weeks - No award for damages as no direct evidence of loss - PENALTY - Deliberate failure to give reasonable notice - Penalty not raised in statement in reply - Given lack of proper notice and quasi criminal nature of penalties Authority declined to impose penalty on applicant - RECOVERY OF MONIES - Respondent sought to recover money for parts and tools applicant bought on account during employment - Applicant denied sums owed - Both parties denied having items - Amounts directly related to employment - Applicant ordered to pay entire sum claimed and to reimburse respondent cost of towing away his car - Sums to be offset - Mechanic

**Result:** Application granted (Arrears) ; Arrears of wages and holiday pay (\$1,296.05) ; Application dismissed (Damages) ; Counterclaim granted (Recovery of monies) ; Monies owed (\$821.17) ; Counterclaim dismissed (Breach of contract, penalty) ; Costs reserved

### *Osborne v J A Ramsay Transport Ltd*

21 Dec 2006, G Wood, WA 181/06, (13 pages)

RAISING PERSONAL GRIEVANCE - Whether grievance raised within 90 days - Applicant alleged constructive dismissal - No written employment agreement - Respondent belatedly offered written agreement - Applicant declined to sign, rightly noting it contained three month probationary period even though already employed longer than that - Applicant

alleged raised grievance in letter to respondent - Respondent denied receiving letter - Objected to application for leave to raise grievance out of time and proceeded under protest to jurisdiction - Significant alleged letter not referred to in statement of problem and never referred to until 90-day issue raised - On balance of probabilities, more likely than not letter not sent - Other scenarios did not explain why no follow up action taken - Applicant submitted exceptional circumstances existed based on poor health and ignorance of law - Ignorance of law could not apply as applicant took legal advice very soon after resigned - No medical evidence to support claim unable to properly consider raising grievance - In any event, applicant's evidence sent letter and took advice negated exceptional circumstances claim - In event Authority wrong, would find no constructive dismissal - Two issues better dealt with as arrears claim - Other claims not cause of applicant's resignation - ARREARS OF WAGES - Applicant to be paid for four trips - Wages due and owing - Driver  
**Result:** Application dismissed (Personal grievance) ; Application granted (Arrears) ; Arrears of wages (\$162) ; Costs reserved

***Ploszaj v Rush Security Services Ltd***

*26 Jul 2007, Y Oldfield, AA 220/07, (7 pages)*

ARREARS OF WAGES AND HOLIDAY PAY – Employment relationship lasted 6 days – Respondent relied on provision in individual employment agreement (“IEA”) to withhold all wages and holiday pay – Authority found applicant’s command of English not sufficient to understand obligations in IEA – Applicant claimed was told would be working mixture of day and night shifts – Resigned after being rostered mostly night shifts – Respondent accepted resignation, and did not remind applicant of contractual obligations - Respondent not provided copy of IEA – Authority found applicant genuinely misunderstood type of shifts offered by respondent – Respondent asked Authority to determine whether IEA provisions enforceable – IEA provided for applicant to give one weeks notice and failure to do so would incur forfeiture of weeks pay in lieu of notice - Provisions enforceable – However, Respondent’s failure to provide IEA meant applicant unable to check notice provisions – Without copy of IEA applicant not responsible for mistake – Respondent erred in withholding applicants final pay - Respondent ordered to pay wages

**Result:** Application granted; Arrears of wages (\$523.13) ; Arrears of holiday pay (\$31.39)(Arrears less security licence (\$20))

# Arrears - Holiday Pay - Employment Relations Act 2000

## *BVR Operations Ltd t/a Brinkley Village v Baker (Labour Inspector)*

20 Oct 2006, H Doyle, CA 149/06, (9 pages)

ARREARS OF HOLIDAY PAY - Objection to demand notice issued by respondent Labour Inspector - Demand notice required payment of annual and public holiday pay to former employee ("S") - Applicant disputed notice on grounds S's employment intermittent and irregular, annual holiday pay included in hourly rate, and S knew and agreed to payment in that manner - Also objected on ground respondent incorrectly determined six public holidays otherwise working days - No written employment agreement - Payment in such manner only permitted in two circumstances in s28 Holidays Act 2003 - Not fixed term employment - Authority considered pattern of work to determine whether intermittent or irregular - Hours varied - Schedule indicated features of regularity and predictability of work patterns - Three weeks annual leave practicable - Although finding resolved issue, Authority considered s28 requirements - Authority not satisfied on balance of probabilities S agreed holiday pay included in hourly rate - No evidence in wage and time records and no payslips showing holiday pay as identifiable component - No deduction under s23(2) given applicant not entitled to pay holiday pay in advance - Annual holiday pay due and owing - Reasonable expectation S would have worked when restaurant open - Each public holiday fell on or transferred to otherwise working day - Fact restaurant closed for Christmas and Easter periods not relevant - Given variance in hours, and no other rate specified in any employment agreement, formula in s9(3) appropriate method of calculation of relevant daily pay - Authority agreed with respondents calculations - Public holiday pay due and owing - COMPLIANCE ORDER - Objection not upheld - Compliance with demand notice ordered  
**Result:** Application dismissed (Objection to demand notice) ; Arrears of holiday pay (\$297.45)(Annual holiday pay), (\$319.62)(Public holiday pay) ; Orders accordingly ; Costs reserved

## *Carter v Turnaround Managers Ltd*

14 Dec 2006, YS Oldfield, AA 378/06, (7 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Triangular employment - Applicant claimed owed wages for accounting work done for respondent's clients - Respondent argued accounting work performed by applicant on own account and not as employee - Applicant unaware accounting work expressly excluded from respondent's contract with first client - In absence of instruction to change or cease what doing, work done on respondent's behalf and in capacity as employee - Employment agreement made wage payments conditional on respondent having contracted to provide services to clients and on client having made payment - Respondent submitted bore no liability as conditions not met - Applicant accepted payment conditional but considered respondent had responsibility to invoice clients and pursue payment vigorously - Essentially "commission only" arrangement - Authority did not accept respondent did not have contracts with clients - However, accepted payment not received and could not accept respondent failed to adequately pursue payment - Applicant knew high risk environment meant risk of non-payment - Condition not met - However, Minimum Wage Act 1983 and Wages Protection Act 1983 applied - Applicant not paid for nine weeks - Entitled to arrears of wages based on minimum wage - Respondent accepted holiday pay due and owing  
**Result:** Application granted : Arrears of wages (\$810) ; Arrears of holiday pay (\$4,271.06) ; Interest (8%) ; Costs to lie where they fall

***Horn (Labour Inspector) v B W Murdoch Ltd***

*18 Jun 2007, J Scott, AA 180/07, (11 pages)*

ARREARS OF HOLIDAY PAY - Applicant Labour Inspector sought public holiday pay on behalf of H – Respondent claimed not entitled to payment because casual employee not offered work on public holidays – Employment agreement stated employment casual - Usually worked regular days and hours - Four public holidays occurred over period of employment - Applicant's evidence preferred, except evidence entitled to accept or reject work as saw fit - Employment consistent with that contemplated under s66 Employment Relations Act 2000 ("ERA") – Although agreement did not conform to s66(4) ERA and respondent could not have relied on it as valid s66 agreement if dispute had arisen, it provided best description of employment – Not casual employment - Respondent entitled to dictate no work on public holidays but did not follow was relieved of paying applicant if public holiday fell on otherwise working day – Only Mondays applicant did not work were public holidays when directed not to – Respondent claimed rate of pay consistent with casual work and applicant accepted would not be paid for public holidays – Factors not relevant to determination of problem – Fact applicant continued working could not be taken as agreement in matter, and in any event, agreement excluding, restricting or reducing statutory entitlements had no effect – No question public holidays in question were otherwise working days – Respondent breached HA – Arrears of holiday pay due and owing - Interest 9 percent  
**Result:** Application granted ; Arrears of holiday pay (\$826.20) ; Interest (9%) ; Costs reserved

***Jose v Barter Exchange Ltd t/a Victoria Motor Services***

*15 Dec 2006, P Stapp, WA 176/06, (17 pages)*

ARREARS OF WAGES AND HOLIDAY PAY - Applicant sought arrears of wages, holiday pay and other monies owed under alleged employment agreement - Credibility finding in favour of respondent - Authority satisfied terms and conditions of employment not represented by letter - Claims for accommodation and airfares not made out - Deductions by respondent breached Wages Protection Act 1983 - However, respondent reasonably believed had authority given applicant's complicity - Final pay and holiday pay owing - DAMAGES - Applicant's claim for damages misconceived and without sufficient details and support - COUNTERCLAIM - BREACH OF CONTRACT - Applicant resigned without notice - Reasonable notice would have been two weeks - No award for damages as no direct evidence of loss - PENALTY - Deliberate failure to give reasonable notice - Penalty not raised in statement in reply - Given lack of proper notice and quasi criminal nature of penalties Authority declined to impose penalty on applicant - RECOVERY OF MONIES - Respondent sought to recover money for parts and tools applicant bought on account during employment - Applicant denied sums owed - Both parties denied having items - Amounts directly related to employment - Applicant ordered to pay entire sum claimed and to reimburse respondent cost of towing away his car - Sums to be offset - Mechanic  
**Result:** Application granted (Arrears) ; Arrears of wages and holiday pay (\$1,296.05) ; Application dismissed (Damages) ; Counterclaim granted (Recovery of monies) ; Monies owed (\$821.17) ; Counterclaim dismissed (Breach of contract, penalty) ; Costs reserved

***Ploszaj v Rush Security Services Ltd***

*26 Jul 2007, Y Oldfield, AA 220/07, (7 pages)*

ARREARS OF WAGES AND HOLIDAY PAY – Employment relationship lasted 6 days – Respondent relied on provision in individual employment agreement (“IEA”) to withhold all wages and holiday pay – Authority found applicant’s command of English not sufficient to understand obligations in IEA – Applicant claimed was told would be working mixture of day and night shifts – Resigned after being rostered mostly night shifts – Respondent accepted resignation, and did not remind applicant of contractual obligations - Respondent not provided copy of IEA – Authority found applicant genuinely misunderstood type of

shifts offered by respondent – Respondent asked Authority to determine whether IEA provisions enforceable – IEA provided for applicant to give one weeks notice and failure to do so would incur forfeiture of weeks pay in lieu of notice - Provisions enforceable – However, Respondent’s failure to provide IEA meant applicant unable to check notice provisions – Without copy of IEA applicant not responsible for mistake – Respondent erred in withholding applicants final pay - Respondent ordered to pay wages

**Result:** Application granted; Arrears of wages (\$523.13) ; Arrears of holiday pay (\$31.39)(Arrears less security licence (\$20))

### ***Samson v K & T Renata Transport Ltd***

*13 Dec 2006, M Ulrich, AA 377/06, (5 pages)*

UNJUSTIFIED DISMISSAL – Constructive dismissal – Respondent claimed applicant dismissed because persistently failed to perform duties – Respondent proposed change from salary to hourly rate – Applicant rejected proposal and claimed meeting became hostile when raised issue of deductions from pay – Filed assault charges with police over actions of director’s father but matter not prosecuted – Director denied being hostile towards applicant and alleged he threw cell phone – Authority satisfied some form of altercation occurred – Respondent submitted not responsible for actions of director’s father as not employee – Argument did not stand as father worked part time for company and to objective observer represented respondent at meeting – For director to allow father to assault applicant amounted to serious failure by respondent to maintain obligations to provide safe workplace – Applicant's doctor placed him on stress leave – Respondent denied receiving medical certificate but Authority found applicant made reasonable efforts to send it – After representative raised personal grievance and deductions issue, applicant received dismissal letter – Reasonable for applicant to form view respondent would not abide by terms of employment agreement - Constructive dismissal – In event Authority wrong, actual dismissal unjustified as no reasonable basis for it – Remedies – Although tossing cell phone unwise, not blameworthy conduct which contributed to dismissal, reaction not proportionate – PENALTY – Applicant alleged unauthorised deductions from wages – Although agreed to deductions no evidence of written consent – Respondent failed to comply with Wages Protection Act 1983 – Penalty appropriate - ARREARS OF HOLIDAY PAY - Calculation of holiday pay referred to Labour Inspectorate – Authority had not yet received Inspector’s report – Claim stayed pending further information - Length of service seven months - Driver

**Result:** Application granted ; Reimbursement of lost wages (\$3,588)(23 days) ; Compensation for humiliation etc (\$4,000) ; Penalty (\$200)(Payable to Crown) ; Costs reserved

### ***Tatom v Duffield***

*16 May 2007, H Doyle, CA 55/07, (11 pages)*

JURISDICTION - Whether employee or independent contractor - No written employment agreement - Parties did not put minds to nature of relationship - Authority unable to conclude common intention - Factors indicative of employment relationship outweighed factors indicative of independent contractor - Real nature of relationship employment - Employee - UNJUSTIFIED DISMISSAL - Applicant made statements to government department relating to respondent's partner, an employee of that department - Partner subsequently dismissed - Probable respondent knew of statements and likely would have been angry and raised them - Authority found respondent said words to effect of "X is fired so you're fired" - Fair and reasonable employer would have met or at least written to applicant and explained difficulties of continuing working together - Should have negotiated notice period - Instead, summarily dismissed and applicant's partner threatened - Unjustified dismissal - Remedies - Fact employment short, and applicant unlikely could have continued working, relevant to award of lost wages and compensation - ARREARS OF HOLIDAY PAY - No details of earnings provided - Leave reserved for applicant to return to Authority if wished holiday pay to be calculated - Counterclaim - Respondent counterclaimed against

applicant for slander and defamation of character, and sought lost earnings and compensation - Argued statements about to government department false - Respondent seeking damages flowing from dismissal of his partner by her employer - Authority did not have jurisdiction - Counterclaim dismissed - COSTS - One ½ hour investigation meeting - Costs of \$1,000 appropriate - Length of service two months - Hammer hand  
**Result:** Application granted (Jurisdiction, unjustified dismissal) ; Reimbursement of lost wages (\$2,720) ; Compensation for humiliation etc (\$5,000) ; Counterclaim dismissed ; Costs in favour of applicant (\$1,000)

# Breach of Contract - Employment Relations Act 2000

## *Farley v Nugget Point Resort Ltd*

20 Nov 2006, H Doyle, CA 158/06, (18 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Resignation attributable to actions of respondent - Whether course of conduct with dominant purpose of coercing applicant to resign - Disciplinary meeting held over allegation applicant misused leave - Director advised applicant to consider matter over and move on - Applicant read draft of letter directors intended to give him on computer - Likely accessed director's personal folder - Applicant invited to further disciplinary meeting - Advised unable to attend as on stress leave - Start of email exchange - Communications from director not designed to maintain productive relationship - Director advised had spoken to applicant's doctor and police involved - When stress leave ended director advised not required to work - Resigned later that week - Emails unfair in terms of process and demonstrated lack of understanding of boundaries of employment relationship and applicant's right to privacy - Applicant young and emails designed to concern him - Behaviour capable of seriously damaging parties' relationship - Potential for applicant's relationship with doctor to be seriously undermined - Not fair to reopen investigation - Failure to continue to pay wages and subsequent communications suggested element of predetermination - Emails could be seen as having deliberate and dominant purpose of attempting to coerce applicant to resign - Respondent breached obligation not to act in manner likely to destroy trust and confidence between parties - Breach of contract and good faith as failed to pay applicant while on stress leave yet expected him to attend disciplinary meeting - Also breaches as failed to explain reasons for stopping payment when asked - Breaches serious and so undermining of employment relationship applicant entitled to treat contract as repudiated and resignation reasonably foreseeable - Fair and reasonable employer would have considered warning - Constructive dismissal - Remedies - Unlikely employment would have continued much longer - Authority had regard to notice period when setting lost wages - Applicant to bear some responsibility for police becoming involved - No compensation for police involvement or humiliation resulting from reading draft letter - BREACH OF CONTRACT - Counterclaim - Applicant breached obligations of trust and confidence by accessing director's folder without authorisation - Computer expert's charges were loss suffered as result of breach - However, putting allegation to applicant may have made expert unnecessary - Specialist advice not contemplated by parties as probable result of breach when employment agreement made - Respondent not entitled to recover damages - Manager

**Result:** Application granted (Unjustified dismissal) ; Reimbursement of lost wages (Four weeks) ; Compensation for humiliation etc (\$10,000) ; Arrears of holiday pay (Half a lieu day) ; (One day sick leave) ; Application granted in part (Counterclaim) ; Costs reserved

## *Jose v Barter Exchange Ltd t/a Victoria Motor Services*

15 Dec 2006, P Stapp, WA 176/06, (17 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Applicant sought arrears of wages, holiday pay and other monies owed under alleged employment agreement - Credibility finding in favour of respondent - Authority satisfied terms and conditions of employment not represented by letter - Claims for accommodation and airfares not made out - Deductions by respondent breached Wages Protection Act 1983 - However, respondent reasonably believed had authority given applicant's complicity - Final pay and holiday pay owing - DAMAGES - Applicant's claim for damages misconceived and without sufficient details and support - COUNTERCLAIM - BREACH OF CONTRACT - Applicant resigned without notice - Reasonable notice would have been two weeks - No award for damages as no direct evidence of loss - PENALTY - Deliberate failure to give reasonable notice - Penalty not raised in statement in reply - Given lack of proper notice and quasi criminal nature of penalties Authority declined to impose penalty on applicant - RECOVERY OF MONIES -

Respondent sought to recover money for parts and tools applicant bought on account during employment - Applicant denied sums owed - Both parties denied having items - Amounts directly related to employment - Applicant ordered to pay entire sum claimed and to reimburse respondent cost of towing away his car - Sums to be offset - Mechanic

**Result:** Application granted (Arrears) ; Arrears of wages and holiday pay (\$1,296.05) ; Application dismissed (Damages) ; Counterclaim granted (Recovery of monies) ; Monies owed (\$821.17) ; Counterclaim dismissed (Breach of contract, penalty) ; Costs reserved

***Rooney Earthmoving Ltd v McTague & Ors***

*16 Nov 2006, P Montgomery, CA 156/06, (13 pages)*

BREACH OF CONTRACT - Applicant (REL) sought damages from three individual employees ("T"), ("W") and ("B") for alleged breaches of contractual terms - REL claimed first respondent ("T") established company (BMW) in competition with REL while still employed by REL - REL claimed T established BMW while serving notice period - T employed under oral employment agreement - Respondent's evidence preferred - T bound by common law requirement to give reasonable notice - T's written resignation gave over three months notice - T's meeting with REL ended badly - REL ceased paying T - No attempt made by applicant to persuade T to work out remainder of notice - Applicant claimed T used financial information that belonged to REL - Applicant took over three weeks to call T to a meeting - T unimpeded by any restraint of trade, but needed to observe implied duties to REL - Authority found no probative evidence T used information confidential to REL that was obtained during employment - By setting up BMW, T simply put company in marketplace to compete with other earth moving contractors - No breach of obligations to REL - W and B supervisors of contracts undertaken by REL in Canterbury area - W resigned and consented to act as a director of BMW - W aware that in event of BMW obtaining finance would then be in competition with REL - W breached duty to REL by consenting to act as a director of BMW while still employed by REL - W breached implied obligation not to act in manner as to compete with employer while still employed - Authority satisfied W did not use confidential information or business opportunities for personal advantage during course of employment with REL - W had extensive and detailed knowledge of potential customer base in region was not stockpiling work which could later be uplifted by BMW - B gave required notice for resignation - REL alleged B contacted other employees to persuade them to join BMW - B breached implied obligation while still employed by REL, not to act on behalf of BMW, which was about to compete with REL - Also breached duty to REL by attempting to persuade another REL employee to join BMW while still employed by REL - Insufficient evidence to conclude B undermined REL's business relationships with view of transferring potential customers to BMW - Authority did not accept B and T deleted information from REL computer to benefit BMW - B not dismissed for serious misconduct - REL had not even implemented rudimentary process to determine issue - REL claimed proprietary rights over ongoing clients of REL - Cold reality in competitive market any entity could seek services wherever it chose - Issue finely balanced - Considerable degree of loss sustained by REL due to high impact advertising by BMW - Authority found no breaches by T - DAMAGES - No financial loss caused to REL through breach by W - B unsuccessful in persuading REL employee to join BMW, no loss to REL established - REL failed to establish causal link between breaches and alleged losses

**Result:** Application partially granted (Breach of contract)(W and B) ; Application dismissed (Damages) ; Costs reserved

# Compliance Order - Employment Relations Act 2000

## ***BVR Operations Ltd t/a Brinkley Village v Baker (Labour Inspector)***

*20 Oct 2006, H Doyle, CA 149/06, (9 pages)*

ARREARS OF HOLIDAY PAY - Objection to demand notice issued by respondent Labour Inspector - Demand notice required payment of annual and public holiday pay to former employee ("S") - Applicant disputed notice on grounds S's employment intermittent and irregular, annual holiday pay included in hourly rate, and S knew and agreed to payment in that manner - Also objected on ground respondent incorrectly determined six public holidays otherwise working days - No written employment agreement - Payment in such manner only permitted in two circumstances in s28 Holidays Act 2003 - Not fixed term employment - Authority considered pattern of work to determine whether intermittent or irregular - Hours varied - Schedule indicated features of regularity and predictability of work patterns - Three weeks annual leave practicable - Although finding resolved issue, Authority considered s28 requirements - Authority not satisfied on balance of probabilities S agreed holiday pay included in hourly rate - No evidence in wage and time records and no payslips showing holiday pay as identifiable component - No deduction under s23(2) given applicant not entitled to pay holiday pay in advance - Annual holiday pay due and owing - Reasonable expectation S would have worked when restaurant open - Each public holiday fell on or transferred to otherwise working day - Fact restaurant closed for Christmas and Easter periods not relevant - Given variance in hours, and no other rate specified in any employment agreement, formula in s9(3) appropriate method of calculation of relevant daily pay - Authority agreed with respondents calculations - Public holiday pay due and owing - COMPLIANCE ORDER - Objection not upheld - Compliance with demand notice ordered

**Result:** Application dismissed (Objection to demand notice) ; Arrears of holiday pay (\$297.45)(Annual holiday pay), (\$319.62)(Public holiday pay) ; Orders accordingly ; Costs reserved

## Costs - Employment Relations Act 2000

### *Callen v Marie's Early Childhood Learning Centre Ltd*

4 Jul 2007, K Raureti, AA 158A/07, (3 pages)

COSTS - Successful personal grievance - Partially successful arrears claim - Two day investigation meeting - Applicant's actual costs amounted to \$5,684 plus unbilled time totalling \$1,400 - Sought \$3,500 as contribution to costs - Respondent submitted both parties partially successful - Indicated had no financial resources and neither herself nor company in position to negotiate costs - Argued would be unfair if costs awarded to applicant - No substantiating evidence provided to Authority of financial situation of respondent - Applicant was successful in personal grievance claim, therefore no reason to depart from rule that costs to follow to event - Respondent to pay contribution to costs

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

### *Field v AB Equipment Ltd*

15 Dec 2006, P R Stapp, WA 178/06, (3 pages)

PRACTICE AND PROCEDURE - Quantum of remedies - Authority had reserved leave on calculation of lost benefit if parties could not agree on sum - Parties unable to resolve issue - Applicant sought respondent's contribution to superannuation scheme - Whether applicant could reasonably have expected to obtain benefit if personal grievance had not arisen - Payment of employer's contribution discretionary - Respondent's policy recommended payment to members who belonged to scheme for more than five years - Applicant dismissed after two years eight months - No evidence intended to leave employment or retire - More than likely applicant would have worked for some time if not dismissed - No reason to disregard submission respondent did not pay out other than under terms of scheme - Even if applicant remained for required time would only have prospect of qualifying and amount claimed would be speculative - Authority declined to award applicant employer contribution - COSTS - Successful personal grievance - Length of investigation meeting not specified - Applicant sought contribution of \$6,000 to total costs of \$9,000, including \$2,000 for second mediation directed by Authority - Claim reasonable except for inclusion of mediation costs - No good reason to depart from usual practice not to award costs for mediation

**Result:** Orders accordingly ; Costs in favour of applicant (\$4,000) ; Disbursements (\$430) ; (\$70)(Filing fee)

### *Kernahan v Review Publishing Co Ltd*

6 Jun 2007, L Robinson, AA 152A/07, (2 pages)

COSTS - Successful personal grievance - One and ½ day investigation meeting - Applicant sought costs of \$2,250 - Total amount owed to Legal Services for legal aid was \$3,250 - Respondent submitted costs to lie where they fall or a small award of \$500 or \$700 - Respondent argued Meeting time was just over half a day and applicant inappropriately questioned witness - Submitted no complex issues involved - Costs to follow event with reasonable contribution to costs for applicant

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

### *Main v Interior Developments Ltd*

18 Jul 2007, K Raureti, AA 161A/07, (2 pages)

COSTS - Successful personal grievance - Length of investigation meeting not specified - Applicant sought \$5,200 reasonable contribution to total costs of \$6,550 - No submissions received from respondent - Relatively straightforward uncomplicated matter - Appropriate for costs to follow event - Respondent to pay contribution to costs

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

***Rarere v Electrotech Controls Ltd***

*24 Jul 2007, G J Wood, WA 19A/07, (3 pages)*

COSTS - Partially successful personal grievance - Length of investigation meeting not specified - Applicant claimed full costs of \$14,119, of which legal aid constituted \$3,857 - Respondent submitted because applicant not successful with many of her claims, Respondent's costs of \$7,729.85 should be met by applicant - Also claimed because substantive determination was being challenged costs should be held in abeyance - No reason to stay costs - Applicant entitled to contribution to costs for success in main claim, however, must be offset against her claim for costs for preliminary investigation into exceptional circumstances - Amount of investigation meeting time and preparation also taken into consideration on unsuccessful claims - Discount for mediation and preliminary investigation meeting costs needed - Appropriate sum \$2,000 - Respondent to pay contribution to costs

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

***Sajjad v Ticketek New Zealand Ltd***

*6 Aug 2007, L Robinson, AA 198A/07, (2 pages)*

COSTS - Unsuccessful personal grievance - Half day investigation meeting - Respondent sought full costs of \$2,500 - Respondent argued applicant's claim frivolous - Respondent entitled to fair and reasonable contribution to costs - No reason to depart from conventional tariff - No submission lodged by applicant, therefore unable to have regard to his ability to pay - Award of \$1,500 appropriate contribution to respondent's costs

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

***Tatom v Duffield***

*16 May 2007, H Doyle, CA 55/07, (11 pages)*

JURISDICTION - Whether employee or independent contractor - No written employment agreement - Parties did not put minds to nature of relationship - Authority unable to conclude common intention - Factors indicative of employment relationship outweighed factors indicative of independent contractor - Real nature of relationship employment - Employee - UNJUSTIFIED DISMISSAL - Applicant made statements to government department relating to respondent's partner, an employee of that department - Partner subsequently dismissed - Probable respondent knew of statements and likely would have been angry and raised them - Authority found respondent said words to effect of "X is fired so you're fired" - Fair and reasonable employer would have met or at least written to applicant and explained difficulties of continuing working together - Should have negotiated notice period - Instead, summarily dismissed and applicant's partner threatened - Unjustified dismissal - Remedies - Fact employment short, and applicant unlikely could have continued working, relevant to award of lost wages and compensation - ARREARS OF HOLIDAY PAY - No details of earnings provided - Leave reserved for applicant to return to Authority if wished holiday pay to be calculated - Counterclaim - Respondent counterclaimed against applicant for slander and defamation of character, and sought lost earnings and compensation - Argued statements about to government department false - Respondent seeking damages flowing from dismissal of his partner by her employer - Authority did not have jurisdiction - Counterclaim dismissed - COSTS - One ½ hour investigation meeting - Costs of \$1,000 appropriate - Length of service two months - Hammer hand

**Result:** Application granted (Jurisdiction, unjustified dismissal) ; Reimbursement of lost wages (\$2,720) ; Compensation for humiliation etc (\$5,000) ; Counterclaim dismissed ; Costs in favour of applicant (\$1,000)

***Tauhore v Farmers Trading Company Ltd***

*16 Jul 2007, G J Wood, WA 84A/07, (2 pages)*

COSTS - Unsuccessful personal grievance - Length of investigation meeting not specified - Applicant submitted was on legal aid and any award of costs be limited to \$50 contribution to Legal Services Agency - Respondent submitted entitled to costs after being put to unnecessary expense defending matter - Incurred costs of \$9,000 plus disbursements and in normal course of events would be entitled to award of at least \$1,500 - Authority agreed respondent would have received higher award had applicant not been legally aided, however, costs award can only be sum of contribution to Legal Services Agency

**Result:** Costs in favour of applicant (\$50)

## Dispute - Employment Relations Act 2000

### *New Zealand Educational Institute Te Riu Roa Inc v Lyman, Acting as the Commissioner of Linwood Intermediate School & Ors*

2 Nov 2006, D Asher, WA 152/06, (8 pages)

DISPUTE - Other respondents required to act with Secretary for Education on matter - Secretary claimed collective employment agreement ("CEA") not intended to apply in circumstances - Alternatively, submitted Insufficient evidence to show requirements of CEA met - CEA provided where sickness traced directly to conditions or circumstances of work, paid sick leave not to be debited from teacher's sick leave balance, instead to be "disregarded sick leave" - Applicant claimed member's illness directly traceable to severely dysfunctional working environment and employer's inadequate attempts to address matters - Secretary argued provision intended to cover physical disability arising out of physical conditions or circumstances, e.g. infectious illnesses - Provision in response to 1919 influenza pandemic - Claimed no justification for extending entitlement to employment relationship problems and unnecessary and inappropriate to attempt to pursue grievance through strained interpretation of CEA - Dictionary definition of "sick" included mental illness - Authority did not accept original 1919 provisions reliable indicators of terms and conditions agreed in recent versions of CEA - Inconceivable respondents, as good employers, could justify applying provisions by way of questionable, if not spurious, distinction to those suffering physiological illness, while depriving those afflicted with "psychological unwellness" - If person "psychologically unwell" it inevitably followed they were deemed to be sick - Provision to be available without distinction as to physiological or psychological sickness - Whether cause of sickness "can be traced directly to the conditions or circumstances under which the employee is working" separate matter to be determined case by case - If agreement not reached, could take matter further as arrears or lieu claim, or as personal grievance - Prudent for parties to take claim to further mediation in event could not reach prompt agreement

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

# Jurisdiction - Employment Relations Act 2000

## ***Berghan v Canterbury International Institute Ltd***

20 Dec 2006, K Raureti, AA 382/06, (7 pages)

JURISDICTION - Whether employee or independent contractor - No appearance by respondent, although did provide some evidence to Authority - No dispute applicant previously engaged by respondent as contractor - Negotiations for last engagement led applicant to draw up contract for service between his company and respondent - Applicant claimed significant change to duties and role - Alleged thought of himself as employee but respondent required him to be paid through company - Submitted unheard of in education industry for principal to be anything but employee - Respondent alleged during period in question applicant carried on other business - Applicant a businessman and drew up contract from relatively equal bargaining position - Parameters applicant had to work within consistent with sound business practice and did not translate into control - Not unheard of to have private training establishments run by management structure or director - Industry practice did not assist applicant - Independent contractor - No jurisdiction - Principal  
**Result:** Application dismissed ; No order for costs

## ***Service & Food Workers Union Nga Ringa Tota & Ors v New Zealand Racing Board***

8 May 2007, J Crichton, WA 74/07, (6 pages)

JURISDICTION – Members of first applicant union made redundant by respondent – Argued dismissals unjustified and respondent misconstrued its functions under s9(1)(a) Racing Act 2003 (“RA”) by making decision to terminate on improper basis – Respondent argued claim did not fall within examples of employment relationship problems (“ERP”) in s161 Employment Relations Act 2000 (“ERA”) – Authority found s161 ERA examples not exclusive and wide meaning allowed in s5 ERA – In any event, applicant did not rely exclusively on interpretation of RA – It alleged unjustified dismissal, which on its face meant could lodge personal grievance - Claims within s161(e) ERA – Respondent claimed Authority had no jurisdiction to interpret RA provision and claim not personal grievance or dispute – Applicant asserted Authority had jurisdiction by reason of s113 and s194A ERA - Original statement of problem did not explicitly refer to personal grievance – Authority found, however, it plainly fell with terms of s194A ERA as sought to advance ERP by using ERA problem solving provisions – Amended statement of problem referred to unjustified dismissals, bringing matter within s113 ERA – Authority satisfied claim concerned an ERP – Even so, Authority had power to reach conclusions on actual nature of claim – Authority had jurisdiction to hear matter based on proper interpretation of statements of problem – If had found otherwise, no other redress possible given effect of s194A(2) which precluded recourse to High Court - Respondent also contended s9(1)(a) RA “non-justiciable” as no statutory duty created giving rise to judicial enforcement – Issue for determination exclusively whether Authority had jurisdiction - Not necessary to hear evidence whether respondent misdirected itself in relation to its functions

## ***Tatom v Duffield***

16 May 2007, H Doyle, CA 55/07, (11 pages)

JURISDICTION - Whether employee or independent contractor - No written employment agreement - Parties did not put minds to nature of relationship - Authority unable to conclude common intention - Factors indicative of employment relationship outweighed factors indicative of independent contractor - Real nature of relationship employment - Employee - UNJUSTIFIED DISMISSAL - Applicant made statements to government department relating to respondent's partner, an employee of that department - Partner subsequently dismissed - Probable respondent knew of statements and likely would have been angry and raised them - Authority found respondent said words to effect of "X is fired"

so you're fired" - Fair and reasonable employer would have met or at least written to applicant and explained difficulties of continuing working together - Should have negotiated notice period - Instead, summarily dismissed and applicant's partner threatened - Unjustified dismissal - Remedies - Fact employment short, and applicant unlikely could have continued working, relevant to award of lost wages and compensation - ARREARS OF HOLIDAY PAY - No details of earnings provided - Leave reserved for applicant to return to Authority if wished holiday pay to be calculated - Counterclaim - Respondent counterclaimed against applicant for slander and defamation of character, and sought lost earnings and compensation - Argued statements about to government department false - Respondent seeking damages flowing from dismissal of his partner by her employer - Authority did not have jurisdiction - Counterclaim dismissed - COSTS - One ½ hour investigation meeting - Costs of \$1,000 appropriate - Length of service two months - Hammer hand

**Result:** Application granted (Jurisdiction, unjustified dismissal) ; Reimbursement of lost wages (\$2,720) ; Compensation for humiliation etc (\$5,000) ; Counterclaim dismissed ; Costs in favour of applicant (\$1,000)

## Penalty - Employment Relations Act 2000

### *Jose v Barter Exchange Ltd t/a Victoria Motor Services*

15 Dec 2006, P Stapp, WA 176/06, (17 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Applicant sought arrears of wages, holiday pay and other monies owed under alleged employment agreement - Credibility finding in favour of respondent - Authority satisfied terms and conditions of employment not represented by letter - Claims for accommodation and airfares not made out - Deductions by respondent breached Wages Protection Act 1983 - However, respondent reasonably believed had authority given applicant's complicity - Final pay and holiday pay owing - DAMAGES - Applicant's claim for damages misconceived and without sufficient details and support - COUNTERCLAIM - BREACH OF CONTRACT - Applicant resigned without notice - Reasonable notice would have been two weeks - No award for damages as no direct evidence of loss - PENALTY - Deliberate failure to give reasonable notice - Penalty not raised in statement in reply - Given lack of proper notice and quasi criminal nature of penalties Authority declined to impose penalty on applicant - RECOVERY OF MONIES - Respondent sought to recover money for parts and tools applicant bought on account during employment - Applicant denied sums owed - Both parties denied having items - Amounts directly related to employment - Applicant ordered to pay entire sum claimed and to reimburse respondent cost of towing away his car - Sums to be offset - Mechanic

**Result:** Application granted (Arrears) ; Arrears of wages and holiday pay (\$1,296.05) ; Application dismissed (Damages) ; Counterclaim granted (Recovery of monies) ; Monies owed (\$821.17) ; Counterclaim dismissed (Breach of contract, penalty) ; Costs reserved

### *Samson v K & T Renata Transport Ltd*

13 Dec 2006, M Ulrich, AA 377/06, (5 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Respondent claimed applicant dismissed because persistently failed to perform duties – Respondent proposed change from salary to hourly rate – Applicant rejected proposal and claimed meeting became hostile when raised issue of deductions from pay – Filed assault charges with police over actions of director's father but matter not prosecuted – Director denied being hostile towards applicant and alleged he threw cell phone – Authority satisfied some form of altercation occurred – Respondent submitted not responsible for actions of director's father as not employee – Argument did not stand as father worked part time for company and to objective observer represented respondent at meeting – For director to allow father to assault applicant amounted to serious failure by respondent to maintain obligations to provide safe workplace – Applicant's doctor placed him on stress leave – Respondent denied receiving medical certificate but Authority found applicant made reasonable efforts to send it – After representative raised personal grievance and deductions issue, applicant received dismissal letter – Reasonable for applicant to form view respondent would not abide by terms of employment agreement - Constructive dismissal – In event Authority wrong, actual dismissal unjustified as no reasonable basis for it – Remedies – Although tossing cell phone unwise, not blameworthy conduct which contributed to dismissal, reaction not proportionate – PENALTY – Applicant alleged unauthorised deductions from wages – Although agreed to deductions no evidence of written consent – Respondent failed to comply with Wages Protection Act 1983 – Penalty appropriate - ARREARS OF HOLIDAY PAY - Calculation of holiday pay referred to Labour Inspectorate – Authority had not yet received Inspector's report – Claim stayed pending further information - Length of service seven months - Driver

**Result:** Application granted ; Reimbursement of lost wages (\$3,588)(23 days) ; Compensation for humiliation etc (\$4,000) ; Penalty (\$200)(Payable to Crown) ; Costs reserved

# Personal Grievance - Dismissal - Employment Relations Act 2000

## *Farley v Nugget Point Resort Ltd*

20 Nov 2006, H Doyle, CA 158/06, (18 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Resignation attributable to actions of respondent - Whether course of conduct with dominant purpose of coercing applicant to resign - Disciplinary meeting held over allegation applicant misused leave - Director advised applicant to consider matter over and move on - Applicant read draft of letter directors intended to give him on computer - Likely accessed director's personal folder - Applicant invited to further disciplinary meeting - Advised unable to attend as on stress leave - Start of email exchange - Communications from director not designed to maintain productive relationship - Director advised had spoken to applicant's doctor and police involved - When stress leave ended director advised not required to work - Resigned later that week - Emails unfair in terms of process and demonstrated lack of understanding of boundaries of employment relationship and applicant's right to privacy - Applicant young and emails designed to concern him - Behaviour capable of seriously damaging parties' relationship - Potential for applicant's relationship with doctor to be seriously undermined - Not fair to reopen investigation - Failure to continue to pay wages and subsequent communications suggested element of predetermination - Emails could be seen as having deliberate and dominant purpose of attempting to coerce applicant to resign - Respondent breached obligation not to act in manner likely to destroy trust and confidence between parties - Breach of contract and good faith as failed to pay applicant while on stress leave yet expected him to attend disciplinary meeting - Also breaches as failed to explain reasons for stopping payment when asked - Breaches serious and so undermining of employment relationship applicant entitled to treat contract as repudiated and resignation reasonably foreseeable - Fair and reasonable employer would have considered warning - Constructive dismissal - Remedies - Unlikely employment would have continued much longer - Authority had regard to notice period when setting lost wages - Applicant to bear some responsibility for police becoming involved - No compensation for police involvement or humiliation resulting from reading draft letter - BREACH OF CONTRACT - Counterclaim - Applicant breached obligations of trust and confidence by accessing director's folder without authorisation - Computer expert's charges were loss suffered as result of breach - However, putting allegation to applicant may have made expert unnecessary - Specialist advice not contemplated by parties as probable result of breach when employment agreement made - Respondent not entitled to recover damages - Manager

**Result:** Application granted (Unjustified dismissal) ; Reimbursement of lost wages (Four weeks) ; Compensation for humiliation etc (\$10,000) ; Arrears of holiday pay (Half a lieu day) ; (One day sick leave) ; Application granted in part (Counterclaim) ; Costs reserved

## *Hiddleston v Watty (NZ) Ltd*

24 Nov 2006, P Cheyne, CA 163/06, (7 pages)

UNJUSTIFIED DISMISSAL - Dismissal on medical grounds - Applicant required surgery after injured at work - Before surgery, suffered heart attack and absent 3½ months - Returned to work but surgery rescheduled for that week - After surgery applicant required five months off to recuperate - Respondent asked if applicant would consider early retirement but no agreement reached - Applicant left work with respondent knowing would be away five months - Manager concerned about applicant's attendance and work ethic and intention to work until well after retirement age, which Manager found totally unacceptable - Upon discharge from hospital applicant received letter detailing respondent's concerns and asking him to put forward information to be considered as part of decision about ongoing employment - Letter advised not possible to hold position open for five months and probable

employment would be terminated on medical grounds - Applicant rang supervisor, who was unaware of letter - Also faxed medical certificate to manager - Applicant subsequently received dismissal letter - Respondent failed to raise concerns about applicant's alleged general poor state of health with him - Also failed to advise applicant in timely way job could not be kept open - Dismissal unjustified - Remedies - Unable to find alternative employment - Applicant sought lost remuneration from time medically fit until age 66 on basis would have kept working - Appropriate to award future loss - Limiting award until age 65 made allowance for unexpected - Length of service nearly 20 years - Storeman

**Result:** Application granted ; Reimbursement of lost wages and benefits (9 months) ; Future loss of remuneration and benefits (5 months) ; Compensation for humiliation etc (\$12,500) ; Costs reserved

### ***McKay v Woodend Preschool & Nursery Ltd t/a Minnies Preschool***

*30 Nov 2006, P Montgomery, CA 166/06, (6 pages)*

UNJUSTIFIED DISMISSAL - Whether dismissed or resigned - Applicant employed on fixed term while permanent employee ("KR") on parental leave - Respondent claimed applicant resigned and later changed her mind - Applicant alleged director became angry and threatened her - Respondent's evidence preferred - Applicant had previously signalled would leave early if found new position - In circumstances, brief conversation with director about resignation adequate - Communication from applicant not ambiguous and director did not seize upon unintended words capable of amounting to resignation - Written notice not required - No onus on employer to determine if resigning employee had alternative employment - Open to respondent to contact KR and once she agreed to return, balance of original agreement unavailable to applicant - Applicant had not asked to withdraw resignation but appeared to think just had to notify respondent intended to stay - Withdrawal of resignation could not be made unilaterally - Applicant resigned - No personal grievance - Length of service 10 months - Early childhood educator

**Result:** Application dismissed ; Costs reserved

### ***Samson v K & T Renata Transport Ltd***

*13 Dec 2006, M Ulrich, AA 377/06, (5 pages)*

UNJUSTIFIED DISMISSAL – Constructive dismissal – Respondent claimed applicant dismissed because persistently failed to perform duties – Respondent proposed change from salary to hourly rate – Applicant rejected proposal and claimed meeting became hostile when raised issue of deductions from pay – Filed assault charges with police over actions of director's father but matter not prosecuted – Director denied being hostile towards applicant and alleged he threw cell phone – Authority satisfied some form of altercation occurred – Respondent submitted not responsible for actions of director's father as not employee – Argument did not stand as father worked part time for company and to objective observer represented respondent at meeting – For director to allow father to assault applicant amounted to serious failure by respondent to maintain obligations to provide safe workplace – Applicant's doctor placed him on stress leave – Respondent denied receiving medical certificate but Authority found applicant made reasonable efforts to send it – After representative raised personal grievance and deductions issue, applicant received dismissal letter – Reasonable for applicant to form view respondent would not abide by terms of employment agreement - Constructive dismissal – In event Authority wrong, actual dismissal unjustified as no reasonable basis for it – Remedies – Although tossing cell phone unwise, not blameworthy conduct which contributed to dismissal, reaction not proportionate – PENALTY – Applicant alleged unauthorised deductions from wages – Although agreed to deductions no evidence of written consent – Respondent failed to comply with Wages Protection Act 1983 – Penalty appropriate - ARREARS OF HOLIDAY PAY - Calculation of holiday pay referred to Labour Inspectorate – Authority had not yet received Inspector's report – Claim stayed pending further information - Length of service seven months - Driver

**Result:** Application granted ; Reimbursement of lost wages (\$3,588)(23 days) ;

Compensation for humiliation etc (\$4,000) ; Penalty (\$200)(Payable to Crown) ;  
Costs reserved

***Tatom v Duffield***

*16 May 2007, H Doyle, CA 55/07, (11 pages)*

JURISDICTION - Whether employee or independent contractor - No written employment agreement - Parties did not put minds to nature of relationship - Authority unable to conclude common intention - Factors indicative of employment relationship outweighed factors indicative of independent contractor - Real nature of relationship employment - Employee - UNJUSTIFIED DISMISSAL - Applicant made statements to government department relating to respondent's partner, an employee of that department - Partner subsequently dismissed - Probable respondent knew of statements and likely would have been angry and raised them - Authority found respondent said words to effect of "X is fired so you're fired" - Fair and reasonable employer would have met or at least written to applicant and explained difficulties of continuing working together - Should have negotiated notice period - Instead, summarily dismissed and applicant's partner threatened - Unjustified dismissal - Remedies - Fact employment short, and applicant unlikely could have continued working, relevant to award of lost wages and compensation - ARREARS OF HOLIDAY PAY - No details of earnings provided - Leave reserved for applicant to return to Authority if wished holiday pay to be calculated - Counterclaim - Respondent counterclaimed against applicant for slander and defamation of character, and sought lost earnings and compensation - Argued statements about to government department false - Respondent seeking damages flowing from dismissal of his partner by her employer - Authority did not have jurisdiction - Counterclaim dismissed - COSTS - One ½ hour investigation meeting - Costs of \$1,000 appropriate - Length of service two months - Hammer hand  
**Result:** Application granted (Jurisdiction, unjustified dismissal) ; Reimbursement of lost wages (\$2,720) ; Compensation for humiliation etc (\$5,000) ; Counterclaim dismissed ; Costs in favour of applicant (\$1,000)

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

## *Kernahan v Review Publishing Co Ltd*

17 May 2007, L Robinson, AA 152/07, (7 pages)

UNJUSTIFIED DISMISSAL - Misconduct - Summary dismissal - Applicant allegedly threatened another employee ("F") during meeting - Employment agreement ("IEA") stated contract for 12 weeks with performance reviews, contract would then be renegotiated or terminated - Also contained trial period - F made written complaint applicant threatened her on two occasions - Applicant summarily dismissed for "gross misconduct" at subsequent meeting with decision-maker ("M") - M told applicant received complaint and eventually disclosed F's identity - Applicant requested details but told did not have to provide them - Agreement completely failed to meet s66 Employment Relations Act 2000 requirements - At applicant's election, employment was indefinite - Authority found complaint forced applicant's termination - Employment not fixed term - Applicant given no prior notice of matters to be discussed at dismissal meeting - Fair and reasonable employer would have told applicant matter serious and could lead to dismissal, given opportunity to take advice and have support person present - Not given particulars of complaint - M gave conflicting evidence whether had F's complaint at dismissal meeting - Unfair not in position to know precise allegations - Fair and reasonable employer would have given applicant opportunity to defend herself as matter of natural justice - M's notes of meeting suggested predetermination and corroborated evidence applicant given no time to object to dismissal decision - Not actions of fair and reasonable employer - Dismissal unjustified - Remedies - Applicant acted unprofessionally, aggressively and in hostile way towards F - Hostile behaviour led to grievance - Contributory conduct 25% - Period of alleged loss not restricted to any fixed term, and probationary period not relevant to question of reimbursement - Because of failure to mitigate loss and contribution, Authority declined reimbursement - Applicant in receipt of legal aid - Length of service 20 days - Account manager  
**Result:** Application granted ; Compensation for humiliation etc (\$3,000 reduced to \$2,250) ; Costs reserved

## *Ottulugia v Roy Morgan New Zealand Ltd*

7 Dec 2006, M Urlich, AA 373/06, (5 pages)

UNJUSTIFIED DISMISSAL - Whether fixed term employment - Collective employment agreement stated employment fixed term on "as and when required" basis, with each weekly engagement a separate period of employment - Section 66 Employment Relations Act 2000 obligations not met - Permanent employee - Serious misconduct - Summary dismissal - Applicant dismissed for hanging up on phone calls, and calling back a caller asking why had hung up on a call - At dismissal meeting Field Coordinator claimed told applicant she hung up on a caller, and handed applicant dismissal letter - Applicant claimed was called into meeting, handed dismissal letter, and was left to read it - By either account dismissal failed to meet accepted standards of a fair dismissal - Not given fair opportunity to answer allegation, give explanation, or have representative present - Not advised prior to meeting of its purpose, or told what allegations were or their factual basis - Evidence showed decision to dismiss made prior to disciplinary meeting - Dismissal unjustified - Remedies - Applicant did not deny allegations, and knew interviewers could not end calls without being authorised - Monitoring records showed conduct occurred - Blameworthy conduct - Serious flaws in disciplinary process denied applicant opportunity to provide explanation, which may have mitigated penalty received - Contributory conduct 50 percent - Length of service over two years - Call centre interviewer  
**Result:** Application granted ; Reimbursement of lost wages (Two months)(Quantum to be determined, reduced by 50 percent) ; Compensation for humiliation etc (\$2,000 reduced to \$1,000) ; Costs reserved

***Tandy v Hubert***

*19 Dec 2006, V Campbell, AA 381/06, (6 pages)*

UNJUSTIFIED DISMISSAL - Misconduct - No appearance by respondent - Dismissed for allegedly failing to collect and transport goods - Applicant submitted respondent told him truck not running over weekend and to return to work on Monday - Claimed respondent rang on Saturday and asked him to wash truck - Applicant refused - Authority satisfied request for driver to wash truck and attend work on day off out of ordinary - Next day received message saying dismissed on notice for not collecting goods about two weeks earlier - Applicant denied leaving goods behind - In absence of investigation respondent in no position to determine misconduct occurred - Complete failure to adhere to procedural fairness - Respondent's actions not those of fair and reasonable employer - Dismissal unjustified - Remedies - Lack of procedure meant not possible to ascertain contributory conduct - Length of service one year four months - Driver

**Result:** Application granted ; Reimbursement of lost wages (\$4,500)(6 weeks) ; Compensation for humiliation etc (\$2,500) ; Costs reserved

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

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

*15 Dec 2006, V Campbell, AA 379/06, (13 pages)*

UNJUSTIFIED DISMISSAL - Redundancy - Respondent and union agreed to set of principles when redundancies proposed - Applicant made redundant and raised issues regarding quality of consultation - Parties undertook mediation and any irregularities during initial consultation dealt with by way of mediated settlement agreement - Agreement re-convened consultation process - Applicant made redundant and offered temporary employment in accordance with agreement - Applicant declined offer on basis matter before Authority - Fair and reasonable employer would have made applicant redundant - Insufficient evidence to draw conclusion respondent had closed mind during consultation process - Respondent did not breach obligations under collective agreement or Employment Relations Act 2000 - Both applicant and union had full opportunity to be involved in consultation process and process after settlement agreement met requirements of respondent's redundancy policy and principles - Dismissal justified - Comment on "last on, first off" principle - Length of service more than 14 years - Cleaner  
**Result:** Application dismissed ; No order for costs

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

## *Osborne v J A Ramsay Transport Ltd*

21 Dec 2006, G Wood, WA 181/06, (13 pages)

RAISING PERSONAL GRIEVANCE - Whether grievance raised within 90 days - Applicant alleged constructive dismissal - No written employment agreement - Respondent belatedly offered written agreement - Applicant declined to sign, rightly noting it contained three month probationary period even though already employed longer than that - Applicant alleged raised grievance in letter to respondent - Respondent denied receiving letter - Objected to application for leave to raise grievance out of time and proceeded under protest to jurisdiction - Significant alleged letter not referred to in statement of problem and never referred to until 90-day issue raised - On balance of probabilities, more likely than not letter not sent - Other scenarios did not explain why no follow up action taken - Applicant submitted exceptional circumstances existed based on poor health and ignorance of law - Ignorance of law could not apply as applicant took legal advice very soon after resigned - No medical evidence to support claim unable to properly consider raising grievance - In any event, applicant's evidence sent letter and took advice negated exceptional circumstances claim - In event Authority wrong, would find no constructive dismissal - Two issues better dealt with as arrears claim - Other claims not cause of applicant's resignation - **ARREARS OF WAGES** - Applicant to be paid for four trips - Wages due and owing - Driver  
**Result:** Application dismissed (Personal grievance) ; Application granted (Arrears) ; Arrears of wages (\$162) ; Costs reserved

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

### *Gorman v General Distributors Ltd t/a Countdown Johnsonville*

*3 Jan 2007, D Asher, WA 1/07, (10 pages)*

UNJUSTIFIED DISMISSAL - Applicant's terms of employment under collective employment agreement ("CEA") - CEA provided for warning procedure for less serious misconduct and dismissal without notice for serious misconduct - First warning issued for poor work performance - Applicant given final written warning for falsification of company documents - Subsequent multiple complaints over applicant's conduct, however, no warnings issued - Applicant called in sick at beginning of five day rostered period - Did not call in sick second day - But did on third - On fourth day dismissed - Applicant claimed not told purpose of first disciplinary meeting - Prior to termination applicant provided medical certificate - No issue as to genuineness of applicant's illness - Not calling in on second day triggered dismissal - Not accepted by Authority as applicant had support of expert union organiser - Applicant could have had meeting adjourned and obtained reasonable opportunity to consider respondent's concerns responding - Respondent claimed fair and reasonable for it to say "enough was enough" - Authority found objectively measured a number of issues clearly more serious than failure to call in sick, which constituted performance shortcoming that culminated in dismissal - Multiple misconduct for which warnings not issued all significant - Nothing exceptional about applicants failure to call in on second day - Misconduct that led to termination unprecedented - Trigger for dismissal disproportionate to matters previously tolerated - Objectively respondent failed to have proper regard to those factors - Fair and reasonable employer must have objective grounds to say "enough is enough" - Respondent failed to put to applicant was no longer prepared to accept assurances of improved performance, denying applicant opportunity to address concerns - Disproportionate reaction meant respondents standards not those of fair and reasonable employer - Remedies - Dismissal unjustified - Unlikely applicant could have brought successful personal grievance if respondent had dismissed following serious complaints for which no warnings issued - Contributory conduct 50 percent - Parties to attempt to reach agreement on lost wages - Supermarket manager

**Result:** Application granted ; Compensation for humiliation, etc (\$5,000 reduced to \$2,500)  
; Costs reserved

## Practice & Procedure - Employment Relations Act 2000

### *Association of University Staff Inc v Vice-Chancellor of the University of Auckland*

12 Jul 2007, D King, AA 209/07, (8 pages)

PRACTICE AND PROCEDURE - Application for partial strike out – Applicant alleged respondent repeated conduct previously held to be illegal by Employment Court ("EC") - Respondent claimed issues already determined and sought to strike out first and third causes of action, and certain paragraphs in statement of problem, on basis of res judicata and estoppel arguments – Alternatively claimed applicant failed to give sufficient particulars of alleged breaches of law - First and third causes of action seemed in essence identical – Authority not convinced issue in present proceedings identical to issue determined in EC case - While similarities in behaviour, circumstances different - Case law/texts stating doctrine of estoppel product of adversary litigation system, and may not be equally relevant to work of inquisitive tribunals, borne in mind – Authority's position as informal forum taken into consideration – Declined to strike out third cause of action and paragraphs, as they contained background information – Authority understood breach relied on in first cause to be breach of s4 and s32 Employment Relations Act 2000 – First cause appeared superfluous – If so, applicant should remove it - If not, applicant should amend first cause of action  
**Result:** Application dismissed ; Orders accordingly ; Costs reserved

### *The Chief Executive of the Department of Corrections v Tawhiwhirangi*

10 May 2007, Shaw, J, WC 14/07, (1 pages)

PRACTICE AND PROCEDURE – Application by plaintiff for non-publication order in relation to names and identities of non party prisoners mentioned in evidence in current proceedings and determination of Authority – Prisoner was victim of alleged assaults by defendant – HELD – Order appropriate to preserve privacy – Order made prohibiting names or identifying details of any prisoner named in documents or mentioned in evidence in current proceedings or Authority determination – In particular, order directed at prisoner who was subject of employment investigation concerning the defendant – Application granted – Corrections Officer

**Result:** Application granted (Non-publication order) ; Orders accordingly ; No order for costs

### *Crimmins v McVicar Timber Group Ltd*

21 Dec 2006, J Crichton, CA 180/06, (6 pages)

PRACTICE AND PROCEDURE - Quantum of remedies - Authority had reserved leave on calculation of redundancy compensation if parties could not agree on sum - Parties unable to resolve issue - Employment agreement recorded how compensation to be calculated - No sense Authority would be making determination about matter related to bargaining or fixing new terms and conditions of employment - Equity and good conscience jurisdiction - Not fair and equitable for applicant to be denied compensation because parties unable to agree quantum - Respondent's submission applicant should be awarded less or no compensation as offered alternative employment not taken into account as Authority had already considered offer not made in good faith - Employment agreement referred to "calculation" of redundancy compensation that "will be paid" - Authority did not believe could be interpreted to mean zero compensation - Respondent also submitted Authority should consider evidence other than statistics expressly referred to in employment agreement - Mistake as to title of statistics no more than misdescription and both parties knew what referred to - Consideration of statistics mandatory - Inappropriate to consider other material - Absence of any guidelines discouraged Authority from innovation - Quantum based on most common situation revealed by statistics - Influenced by applicant's extraordinary length of service and level of weekly wage - No evidence respondent unable to meet payment - Sawmill manager

**Result:** Quantum determined ; Redundancy compensation (\$23,566.40) ; Interest (7%) ;  
Costs reserved

***Field v AB Equipment Ltd***

*15 Dec 2006, P R Stapp, WA 178/06, (3 pages)*

PRACTICE AND PROCEDURE - Quantum of remedies - Authority had reserved leave on calculation of lost benefit if parties could not agree on sum - Parties unable to resolve issue - Applicant sought respondent's contribution to superannuation scheme - Whether applicant could reasonably have expected to obtain benefit if personal grievance had not arisen - Payment of employer's contribution discretionary - Respondent's policy recommended payment to members who belonged to scheme for more than five years - Applicant dismissed after two years eight months - No evidence intended to leave employment or retire - More than likely applicant would have worked for some time if not dismissed - No reason to disregard submission respondent did not pay out other than under terms of scheme - Even if applicant remained for required time would only have prospect of qualifying and amount claimed would be speculative - Authority declined to award applicant employer contribution - COSTS - Successful personal grievance - Length of investigation meeting not specified - Applicant sought contribution of \$6,000 to total costs of \$9,000, including \$2,000 for second mediation directed by Authority - Claim reasonable except for inclusion of mediation costs - No good reason to depart from usual practice not to award costs for mediation

**Result:** Orders accordingly ; Costs in favour of applicant (\$4,000) ; Disbursements (\$430) ;  
(\$70)(Filing fee)

***Weston v Fraser***

*27 Apr 2007, Shaw, J, WC 2A/07, (1 pages)*

PRACTICE AND PROCEDURE – Application by defendant to strike out plaintiff's challenge – Plaintiff had applied for stay of proceedings to prevent execution of charging order – Employment Court held (WC 24/06) Authority proceedings would be stayed only if plaintiff paid Authority's costs award to defendant, and balance of Authority's judgment sum was paid into Court – Court indicated failure to comply may result in challenge being struck out – Payments not made – Court held (WC 2/07) application for stay had lapsed due to failure to meet conditions – Plaintiff suggested he could lodge surety instead of money and could tender evidence to Court as to validity of surety – HELD – Strike out order generally only made where pleadings disclosed no reasonable cause of action; were likely to cause prejudice, embarrassment or delay; or otherwise an abuse of the Court – Matters giving rise to strike out application concerned conduct of plaintiff rather than the pleadings – Formal legal grounds for strike out not met – However, challenge would not progress unless and until judgment sum, including costs order, was paid – Court Registrar should not have to be responsible for ensuring surety adequate – Court left open option that surety could be sufficient if plaintiff consented – Application dismissed

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

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

## ***Cook Executive Recruitment (2205) Ltd v Lewis***

6 Jul 2007, RA Monaghan, AA 205/07, (2 pages)

CONSENT ORDER - Parties sought repayment of loan made to respondent - Parties agreed sum of \$27,666.51 outstanding on loan - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Respondent to meet costs of \$4,045 plus filing fee and pay 9 percent interest on outstanding loan amount - Application for penalty for breach of employment agreement declined

**Result:** Consent order granted ; Orders accordingly ; Costs in favour of applicant (\$4,045); Filing Fee (\$70)

## ***Cook v Complete Bathrooms Ltd***

31 Jul 2007, J Wilson, AA 223/07, (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

## ***Elwin v Barfoot & Thompson Ltd***

12 Jul 2007, M Urlich, AA 176A/07, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Earlier determination found applicant not an employee - Parties agreed applicant to pay costs to respondent of \$3,000 - Terms of costs settlement to be orders of Authority

**Result:** Consent order granted ; Orders accordingly

## ***Gomes v Ministry of Social Development***

18 Jul 2007, GJ Wood, WA 99/07, (1 pages)

CONSENT ORDER - Applicant to be reinstated on interim basis with conditions - Applicant to undertake project work for respondent and to report to specified person only - Respondent to provide specified work in specified area - Respondent not to permanently appoint any person to applicant's former position, pending determination of personal grievance - Respondent to continue paying applicant's salary until personal grievance heard

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

## ***Hannah v The Sandwich Man (2004) Ltd***

5 Jul 2007, P Cheyne, CA 76/07, (1 pages)

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

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

## ***Hodgson v Parentline Charitable Trust***

9 Jul 2007, J Scott, AA 114A/07, (1 pages)

CONSENT ORDER - Order prohibiting publication of any report on proceedings on part of

evidence given under the heading of "The Outcomes Project" - Further prohibits publication of any report on proceedings relating to alleged security breaches in relation to entry and accessing of Parentline's premises and computers in months of April and May 2006  
**Result:** Consent order granted ; Orders accordingly ; No order for costs

***Hovey v Wanganui District Council***

*20 Jul 2007, D Asher, WA 102/07, (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

***Mehana v P.D and B.J Tuisaula Ltd t/a Onerahi New World***

*5 Jul 2007, D King, AA 203/07, (1 pages)*

CONSENT ORDER - Parties reached agreement on terms of settlement at investigation meeting - Terms of settlement to be orders of Authority - Parties agreed was no personal grievance, and applicant withdrew grievance - Costs to lie where they fall  
**Result:** Consent order granted ; Orders accordingly ; No order for costs

***Ngapine Te Ao v Wanganui Incorporated***

*12 Jul 2007, G J Wood, WA 97/07, (1 pages)*

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Order prohibiting publication of terms of settlement, except fact applicant resigned  
**Result:** Consent order granted ; Orders accordingly ; No order for costs

***PRP Auckland Ltd v Field***

*27 Nov 2006, R Arthur, AA 357/06, (1 pages)*

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Respondent to pay applicant sum of \$4,860  
**Result:** Consent order granted ; Orders accordingly ; Costs to lie where they fall

Department of Labour  
TE TARI MAHI

