

Department of Labour
TE TARI MAHI



EMPLOYMENT CASES SUMMARY

September 2008

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

Employment Cases Summary

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

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

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Significant Judgments/Decisions

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

Brief Summaries

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

FULL-TEXT OF DETERMINATIONS

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

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1 August 2008 - 31 August 2008

Under the Employment Relations Act 2000

*New Zealand Amalgamated Engineering Printing and Manufacturing Union v
Marley New Zealand Ltd*

AC 22/08

Heard: 8 Apr 2008, Auckland

Judgment Date: 3 Jun 2008

Court/Authority: Travis J

Appearances: JA Wilton ; RL Towner, C Abaffy

POINT OF LAW CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS
AUTHORITY – Multi-union multi-employer collective agreement (“meca”) –
Interpretation – Factual Matrix – Employees who worked overtime not paid
shift allowance – Whether an extra 8-hour period of work paid at overtime rate
was a shift – Whether “traditional view” that time paid for at overtime rates did
not attract payment of shift allowance was appropriate starting point for
interpretation of meca – Whether proper construction of meca meant that shift
allowance payable to shift employee who worked extra shift notwithstanding
that extra shift payable at overtime rates – Plaintiff submitted that extra 8-
hour period of work was a shift and therefore attracted shift allowance –
Defendant submitted that traditional view should apply and therefore shift
allowance not payable – HELD – Extra 8-hour period was a shift –
Interpretation of meca demonstrated shift allowance not payable to employees
who worked 8-hour overtime shift – Previous case law an aid to interpretation
– Challenge dismissed – Plastics workers

This was an unsuccessful point of law challenge to a determination of the Employment Relations Authority which held that union members who worked an extra 8-hour period paid at overtime were not entitled to a shift allowance under the collective agreement

The plaintiff and defendant were parties to a multi-union multi-employer collective agreement (“the meca”). Clause 19.10 of the meca provided that a shift employee would be paid a shift allowance in addition to the “appropriate rate”. The meca did not define “shift”. Clause 50 contained the skill-pay matrix which provided that an employee’s minimum rate of pay would be determined once his or her skills had been fully and formally assessed.

The defendant’s plants normally operated five days a week. When demand required it, the defendant would operate its plants over all or part of the weekend, which required volunteers to work extra 8-hour periods. Employees were paid overtime for that work.

A dispute arose as to whether an employee covered by the meca who, having already worked five 8-hour shifts during the week, and worked a further 8-hour period on a sixth or seventh day during the weekend was entitled to receive a shift allowance.

The plaintiff contended that a shift allowance was payable. The defendant submitted that

extra 8-hour shifts did not attract such an entitlement.

The Authority found that the meca did not express a clear intention that overtime work also attracted the payment of the shift allowance.

In *Carter Holt Harvey Limited v Parkes* (cited below) the collective agreement provided a shift allowance was payable in addition to the employee's "ordinary rate". The Court held "ordinary rate" excluded work done at overtime rates and that periods of work paid at overtime rates were not "shifts". In *Radio New Zealand v Clark* (cited below), the Court of Appeal held that reliance on interpretation of clauses in collective agreements in earlier cases would seldom help and reference to previous cases would only help if they were directly on point and when the words used were said to have been used in a technical or specialised sense based on previous authority.

The plaintiff submitted that (i) these extra 8-hour periods were "shifts" under the meca and therefore attracted the shift allowance; (ii) cl 19.10 anticipated that some shifts would be payable at different rates from other shifts because it referred to the shift allowance being paid "in addition to the appropriate rate" which distinguished it from the "ordinary rate" used in *Carter Holt Harvey v Parkes* (cited below); and (iii) *Radio New Zealand v Clark* (cited below) supported the plaintiff's argument that the Authority was distracted by previous authorities because they were not directly on point and did not involve words which had been used in a technical or specialised sense. Therefore, standard contractual interpretation should apply.

The defendant submitted that (i) the present case was in line with earlier case law which held that shift allowances were not payable to shift workers who undertook overtime work in addition to their rostered shifts for which they had received overtime; (ii) there was no difference in substance between "appropriate rate" and "ordinary rate"; (iii) the state of the law can aid construction within the factual matrix; (iv) "appropriate rate" was a reference to the pay rate matrix in cl 50; (v) *Radio New Zealand v Clark* (cited below) made no difference to the proper interpretation of cl 19.10 because the law had developed since that decision to the point that the accepted approach to the interpretation of contracts could include reference to the state of the law as part of the factual matrix; and (vi) even without reference to any previous authorities, the proper construction of cl 19.10 and the words "appropriate rate" demonstrated that there was no entitlement to payment of a shift allowance under the meca when employees were already paid overtime.

Held

(1) A person working a voluntary 8-hour period on the weekend could be said to be working a shift. This, however, was not the end of the matter for the Court must still determine whether the overtime shifts during the weekends were shifts for the purposes of clause 19.10 and therefore attracted the shift allowance in addition to overtime rates. (para 44)

2) The onus of establishing an entitlement for its members under the meca rested with the plaintiff. The interpretations advanced by the plaintiff and by the defendant were both possible and the position was not expressed with clarity. This clarity could have been achieved by the simple addition in clause 19.10, at the end of the first sentence, of the words "including overtime", if the parties had intended the payment of both overtime and shift allowances. Instead a more abstract term "appropriate rate" was used. Although the matter was somewhat finely balanced, because the onus rested on the plaintiff, even had there been no other factors in this case, the Court would have concluded that the entitlement to both overtime and shift allowances had not been established. The absence of such clarity supported the defendant's position. (para 54)

(3) The Court considered the present proceeding was one where reference to past decisions was of help in determining the intention of the parties. The earlier decisions were directly on point because they covered virtually identical provisions in both awards and agreements and may be said to have defined words used in a technical or specialised sense. *Radio New Zealand Ltd v Clark* (cited below) was also distinguishable in that,

unlike the situation there, the context of those previous decisions was virtually identical to the words used in the present case. They were therefore of considerable assistance. (para 55)

(4) The Court accepted the submissions made on behalf of the defendant, based on the cases cited, that the legal background of the earlier decisions, against which the meca was entered into, may be taken into account as an aid to the interpretation of the meca, which would otherwise be ambiguous. The meca was ambiguous in not clearly defining whether the overtime shifts were to include payment for the shift allowance. (para 56)

(5) Whilst the Court accepted the plaintiff counsel's submission that the word "appropriate" was not synonymous with the word "ordinary", the Court did not find that that was a sufficient distinction to disregard the line of authority which had dealt with precisely the same issue on very similar provisions in the same context. For these reasons, the Court accepted the defendant counsel's submissions and agreed with the conclusion of the Authority that the meca did not provide that 8-hour periods of overtime shifts attracted the payment of the shift allowance.

Result: Challenge dismissed ; No order for costs

Cases referred to in judgment:

Bank of Credit and Commerce International SA (in liquidation) v Ali [2001] 1 All ER 961

Board Park Limited v Hutchinson [1999] 2 NZLR 74

Carter Holt Harvey Limited v Parkes [2004] 2 ERNZ 1

Dwyer v Air New Zealand Ltd (No 2) [1996] 2 ERNZ 435

Gibbons Holdings Ltd v Wholesale Distributors Ltd [2008] 1 NZLR 277

Inspector of Awards v Caxton Printing Works 75 BA 6445

Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 All ER 98

NZ Labourers etc IUOW v Joint Venture Zublin Williamson [1986] ACJ 468

NZ (with exceptions) Food Processing, Chemical and Related Products Factory

Employees' IUOW v Skeggs Foods Ltd [1984] ACJ 85

New Zealand Waterfront Workers Union v Ports of Auckland Limited [1994] 1 ERNZ 604

Radio New Zealand Ltd v Clark [1993] 1 ERNZ 270

Sealed Air (New Zealand) v New Zealand Amalgamated Engineering Printing & Manufacturing Union Inc WC 8/08, 19 May 2008

Wellington Caretakers IUOW v Armourguard Security Limited [1989] NZILR 117

Pages: 4

[975031]

Arrears - Employment Relations Act 2000

Birch v Passage Software Ltd

13 Jun 2008, Y S Oldfield, AA 206/08, (7 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - UNJUSTIFIED DISADVANTAGE - Applicant gave one week notice of resignation - Had been employed for two months and still within probationary period - Claimed constructively dismissed, or alternatively, suffered unjustified disadvantage - Employment agreement allowed for either party to terminate agreement with one week notice during probationary period - Employer could pay employee pay in lieu of notice and not require employee to work out notice period - Applicant took Friday before final week of work off - Employer believed applicant would not return to work out notice period - Applicant told had choice whether to work out notice period or not, and that holiday pay already paid - Applicant not encouraged to stay, and not told about notice clause or that would receive week's pay for notice period even if did not work - Applicant indicated wished to work out notice period as believed would not be paid if did not work - Several incidents made applicant feel uncomfortable - Informed employer no longer wished to work out notice period - Applicant's handbag checked for company property - Authority found respondent would have found it easier had applicant not returned to work - Found applicant's impression not welcome in workplace reasonable and accurate - Initially applicant not paid pay in lieu of notice, however had since been paid - Authority satisfied applicant suffered disadvantage as respondent's conduct unjustified and made workplace uncomfortable - However, conduct not sufficiently serious to give rise to constructive dismissal - Unjustified disadvantage - Remedies - Employment relationship problem not overly serious - Respondent partly rectified wrong by paying pay in lieu of notice - Only nominal award required - Compensation of \$500 appropriate - No other remedies awarded - COUNTERCLAIM - Respondent claimed applicant misrepresented computer skills - Sought damages for costs incurred in additional training - Applicant claimed had "good" computer skills - Respondent provided no benchmark to compare skills to, therefore subjective assessment - In such circumstances unable to find applicant misrepresented herself - Even if had, respondent effectively reaffirmed employment agreement by continuing employment and providing further training after realised skills not at required level - Counterclaim dismissed - Telemarketer

Result: Application granted (Unjustified disadvantage) ; Application dismissed (Constructive dismissal) ; Compensation for humiliation etc (\$500) ; Costs reserved

Bourke v Bunnik

23 Jul 2008, V Campbell, AA 266/08, (6 pages)

UNJUSTIFIED DISMISSAL – Poor performance – Applicant employed on fixed term agreement to work on respondent's farm - Respondent claimed applicant incompetent despite supervision and instructions - Applicant claimed no proper training and unrealistic expectations – Applicant given dismissal letter containing instances where failed to meet requirements - Authority found no notice or warnings given which expressed dissatisfaction with performance so applicant could respond and improve – Procedurally unfair – Dismissal unjustified – Remedies – Applicant sought reimbursement of wages from date of dismissal until end of agreement – Found alternative employment one week after dismissal – Awarded one week's lost wages (\$398.47) plus interest – Applicant claimed compensation for hurt and humiliation – Considering short tenure of employment and fact applicant took job knowing would be difficult, award of \$1,500 compensation appropriate - ARREARS OF WAGES – Not disputed applicant not paid for two weeks of employment – Respondent claimed waiting for applicant to provide timesheets – Authority not satisfied applicant aware of obligation to provide timesheets – Applicant entitled to payment of wages of \$796.95 plus interest – Farm Assistant

Result: Application granted (dismissal) ; Reimbursement of lost wages (\$398.47)

; Compensation for humiliation etc (\$1,500) ; Arrears of wages (\$796.95)(2 weeks) ; Costs reserved

Brown v Five Star Pork (NZ) Ltd & Anor

23 Jun 2008, R Arthur, AA 216/08, (12 pages)

UNJUSTIFIED DISMISSAL - Abandonment - Applicant dismissed after absent from work for three days - Applicant claimed informed operations manager ("OM") of reasons for absence on at least one of days absent - Applicant received summons to appear at District Court - Applicant absent day before hearing, for unrelated reason, day of hearing, and for three days after hearing - On third day applicant absent OM sent applicant dismissal letter - Applicant claimed did not receive letter - Clause in employment agreement allowed for termination of employment if employee absent for three days without consent or good cause - Authority preferred OM's evidence that applicant had not contacted respondents - No consent for absences - However, at time of termination, respondents had not established no good cause for absences - Authority found OM's attempts to establish applicant's whereabouts not sufficient - Applicant should have been given opportunity to provide explanation before decision to terminate employment made - Second respondent may still have made decision to terminate but Authority could not preclude possibility that it would not have - Dismissal unjustified - Remedies - Authority did not accept applicant spoke to OM prior to absences or showed him copy of Court summons - Applicant had adequate opportunity to make arrangements for absences and chose not to - Court summons not sole reason for absences; applicant stopped going to work and made no real attempt to return - Applicant's conduct sufficiently blameworthy that remedies to be reduced by 100 percent - 100 percent contributory conduct - ARREARS - Applicant sought return or reimbursement for personal equipment not returned at end of employment - As personal items could not be identified Authority found money suitable remedy - Second respondent to pay applicant \$358 for cost of replacing items - COSTS - Applicant did not seek award of costs as representation provided free of charge, however, sought disbursements - Respondents to pay applicant's reasonable disbursements in full - Packer and Trimmer

Result: Application granted ; Arrears (\$358) ; Disbursements in favour of applicant (Quantum to be determined)

Hunt & Anor v Erceg

1 Apr 2008, R Arthur, AA 123/08, (6 pages)

ARREARS OF WAGES - Two applicants lodged separate statements of problem - Authority directed matters be heard together as of same type and involved same respondent - No appearance by one applicant - No appearance for respondent - Applicant had previously worked for company respondent was director of - Respondent offered applicant work on yacht - Applicant to make own way to Australia to board yacht but return flight provided - Applicant flew to Australia and began work - Had "run in" with another employee and asked to leave - Skipper agreed, and directed applicant arrange flight back to New Zealand and contact company's secretary to organise pay - Applicant not paid and discussions with respondent did not resolve issue - Issue of whether employer was respondent personally or respondent as representative of another party - Respondent may not have intended to employ applicant in own name, however, if acting for another party did not disclose fact to applicant - Authority found rule regarding undisclosed principal applied - Respondent applicant's employer personally - No written employment agreement - Authority satisfied New Zealand law and Authority's jurisdiction applied to employment relationship - Found applicant owed arrears of wages in sum of \$3,200 plus interest and reimbursement for airfare in sum of \$735 - Deck hand

Result: Application granted ; Arrears of wages (\$3,200) ; Interest (10.84%) ; Recovery of monies (\$735)(Airfare) ; Disbursements in favour of applicant (\$70)(Filing fee)

Robertson Turnbull Ltd t/a Queenstown Night 'N Day Foodstore v Labour Inspector

8 May 2008, P Cheyne, CA 61/08, (10 pages)

ARREARS OF WAGES AND HOLIDAY PAY – Objection by applicant employer to demand notice issued by Labour Inspector - Demand notice required payment to employee for sum allegedly due under Minimum Wage Act 1983 (“MWA”) and Holidays Act 2003 (“HA”) – Applicant claimed calculated and paid wages and holiday pay owing but employee forfeited four weeks wages under employment agreement (“EA”) by failing to work out notice period – Respondent argued forfeiture provision unenforceable because employee lacked proper consent when agreement signed – Employee advised entitled to and given reasonable opportunity to seek independent advice on EA – Employee gave evidence forfeiture provision not explained and did not read agreement because friends advised employment agreements all same – Authority found employee able to understand advice despite English being second language - Found elected to sign agreement without obtaining specific advice – Employee resigned and gave four weeks written notice as required – Employee’s three final wage payments written as cheques and left on notice board – Employee stated knew nothing of cheques because usually paid by direct credit – Cheques not banked – Authority accepted employee not aware of cheques and change in payment method - Applicant claimed met obligations by calculating contractual wages due for three pay periods and placed cheques on notice board for employee, then deducted monies under forfeiture clause in EA – Authority found applicant breached s6 and s11 MWA because employee received no payment for three pay periods, so applicant defaulted in paying minimum wages due to her – Contractual obligation to pay wages by direct credit – Applicant stopped doing this without employee’s consent, to control when applicant received wages – Applicant could not rely on contractual provision about retaining wages during notice period nor widely worded consent to deduction clause, as both defeated by s11 MWA – Section 11 MWA entitled employee to recover minimum payments despite express agreement to contrary – Employee absent for four shifts during four week notice period - Only absences for shifts during notice period considered relevant to claim relating to forfeiture provision – Applicant told employee must make up for shift absences at conclusion of notice period – Employee declined, claiming unfit for work – Authority found under HA prevented applicant from validly extending notice period without agreement – No evidence of agreement – On face of EA, employee to forfeit four weeks wages due and absences during notice period – Authority noted breach of contract principle that is unconscionable to recover sum out of proportion to loss incurred – Found intention of contractual provision to secure performance of contract by imposing fine for breach – Found applicant’s evidence of cost to recruit and train new employee was irrelevant – No evidence of loss of sales, but accepted probably some inconvenience in organising replacements at late notice – Damage suffered by applicant for failure to work four shifts during four week notice period was negligible at best – Forfeiture of four weeks wages extravagant and unconscionable in comparison to loss likely to arise from breach – Provision amounted to penalty and unenforceable – Employee not paid holiday pay despite entitlement – Objection to demand notice not upheld – Employee entitled to sums specified in demand notice – Applicant to pay sum to Labour Inspector for employee’s benefit

Result: Application dismissed ; Arrears of wages (\$1,819.04) ; Costs reserved

Soo Han v Ko & Won Ltd t/a Kino Sushi

21 Jul 2008, V Campbell, AA 264/08, (7 pages)

UNJUSTIFIED DISMISSAL – Applicant claimed unjustifiably dismissed - Respondent argued applicant failed to provide documents requested to show legally entitled to work in New Zealand and therefore dismissal justified – Applicant undertook voluntary unpaid training with respondent, then employed permanently – Applicant began working longer hours than agreed so asked

respondent to revert to agreed hours - Also raised issues over food safety – Authority satisfied respondent said issues not applicant’s business – Respondent declined applicant’s request for pay rise – Applicant claimed respondent dismissed him, was given one week’s notice, and that four days later respondent asked for keys and told applicant not to come to work next day – Respondent argued made written request for immigration documents prior to dismissal – Authority found postmark showed applicant could not have received letter until days after dismissal – Authority satisfied applicant showed respondent copy of work permit from passport on first day of paid employment – Finding supported by that day being transition from voluntary unpaid training to paid employment and day respondent revealed recipes and secrets to applicant as had said would not do so until applicant officially employed – Respondent had assisted applicant in work permit application – Letter of offer of employment included in work permit application – Authority found respondent dismissed applicant when asked for keys and said not to come to work next day – Found dismissal carried out without procedural fairness or justification – Dismissal unjustified – Remedies – Applicant claimed lost wages for period until found alternative employment – Claimed did not consider respondent’s offers that job available to him if produced documentation to be genuine offers, so took no steps to meet those demands – Authority found respondent’s letters not genuine so applicant entitled to lost wages for period until found alternative employment (\$6,346) – Applicant claimed difference between wage with respondent and replacement employment for two year period – Based claim on letter of appointment which stated two year fixed term employment – However, could not rely on letter as being effective fixed term agreement as did not comply with s66 Employment Relations Act 2000 – Claim failed – Applicant sought compensation for humiliation – Authority found job important to applicant as tied to work permit – Distress to applicant and family exacerbated by respondent’s attempts to portray dismissal as applicant’s fault – No contributory conduct – Compensation of \$3,000 appropriate - ARREARS OF WAGES – Authority found applicant not paid for final two weeks of employment – Applicant entitled to arrears (\$1,153) - Chef

Result: Application granted (Unjustified dismissal) ; Reimbursement of lost wages (\$6,346.15) ; Arrears of wages (\$1,153.84)(2 weeks) ; Compensation for humiliation etc (\$3,000) ; Costs reserved

Wallbank v Lewthwaite Engineering Ltd

30 Jul 2008, V Campbell, AA 269/08, (8 pages)

JURISDICTION – Respondent argued never employed applicant - Applicant did casual work for respondent during holiday period of prior employment – Applicant claimed discussed what job would entail at length and was offered job – No written employment agreement – Respondent argued if had offered applicant job, would have provided written employment agreement – Argued salary claimed not possible due to company profit and as applicant did not have a particular qualification – Authority found conceivable that offered claimed salary given similar salary and role of another employee of respondent – Applicant given access to pooled company vehicle – Respondent paid for applicant to undertake safety competence course as representative of respondent – Respondent conceded applicant undertook some work for respondent – Applicant paid twice by cheque - Authority satisfied that fortnightly salary payment for salary claimed, net of PAYE, equated to amount paid in cheque – Found more likely than not that applicant employed by respondent – Authority had jurisdiction - ARREARS OF WAGES AND HOLIDAY PAY – Applicant employed four and a half weeks – Received two payments during employment – Shortfall in what was paid and what ought to have been paid outstanding (\$1,406.25) – Authority satisfied holiday pay outstanding (\$375) - UNJUSTIFIED DISMISSAL – Respondent travelled overseas – On return, discovered information had given applicant had been passed on to applicant’s wife, then to respondent’s wife – Applicant claimed respondent told him was dismissed – Respondent claimed told applicant off for discussing personal business, and applicant not

returned to work since conversation – Authority found respondent dismissed applicant by telephone – Dismissal carried out with no procedural fairness and no basis for justification – Dismissal unjustified – Remedies – Applicant found new employment after three weeks – Authority found applicant entitled to reimbursement of three weeks lost wages (\$2,812.50) – Applicant provided little evidence to support claim for compensation for distress and humiliation – Authority considered levels of awards for similar circumstances – \$1,500 compensation appropriate – No contributory conduct - PENALTY – Applicant claimed penalties for respondent withholding wages and holiday pay and failing to provide written employment agreement – Authority found respondent breached Wages Protection Act by failing to pay applicant entire amount of wages as they became payable – Having regard to circumstances and interests of justice, Authority declined to order penalty – Authority found respondent aware of obligation to provide written employment agreement – Found likely that had recorded relationship, problem may not have occurred – Penalty of \$250 to be paid to Crown – Costs reserved - Building site supervisor

Result: Application granted ; Arrears of wages (\$1,406.25) ; Holiday pay (\$375) ; Reimbursement of lost wages (\$2,812.50)(3 weeks) ; Compensation for humiliation etc (\$1,500) ; Penalty (\$250)(Payable to Crown) ; Costs reserved

Arrears – Holiday Pay - Employment Relations Act 2000

Robertson Turnbull Ltd t/a Queenstown Night 'N Day Foodstore v Labour Inspector

8 May 2008, P Cheyne, CA 61/08, (10 pages)

ARREARS OF WAGES AND HOLIDAY PAY – Objection by applicant employer to demand notice issued by Labour Inspector - Demand notice required payment to employee for sum allegedly due under Minimum Wage Act 1983 (“MWA”) and Holidays Act 2003 (“HA”) – Applicant claimed calculated and paid wages and holiday pay owing but employee forfeited four weeks wages under employment agreement (“EA”) by failing to work out notice period – Respondent argued forfeiture provision unenforceable because employee lacked proper consent when agreement signed – Employee advised entitled to and given reasonable opportunity to seek independent advice on EA – Employee gave evidence forfeiture provision not explained and did not read agreement because friends advised employment agreements all same – Authority found employee able to understand advice despite English being second language - Found elected to sign agreement without obtaining specific advice – Employee resigned and gave four weeks written notice as required – Employee’s three final wage payments written as cheques and left on notice board – Employee stated knew nothing of cheques because usually paid by direct credit – Cheques not banked – Authority accepted employee not aware of cheques and change in payment method - Applicant claimed met obligations by calculating contractual wages due for three pay periods and placed cheques on notice board for employee, then deducted monies under forfeiture clause in EA – Authority found applicant breached s6 and s11 MWA because employee received no payment for three pay periods, so applicant defaulted in paying minimum wages due to her – Contractual obligation to pay wages by direct credit – Applicant stopped doing this without employee’s consent, to control when applicant received wages – Applicant could not rely on contractual provision about retaining wages during notice period nor widely worded consent to deduction clause, as both defeated by s11 MWA – Section 11 MWA entitled employee to recover minimum payments despite express agreement to contrary – Employee absent for four shifts during four week notice period - Only absences for shifts during notice period considered relevant to claim relating to forfeiture provision – Applicant told employee must make up for shift absences at conclusion of notice period – Employee declined, claiming unfit for work – Authority found under HA prevented applicant from validly extending notice period without agreement – No evidence of agreement – On face of EA, employee to forfeit four weeks wages due and absences during notice period – Authority noted breach of contract principle that is unconscionable to recover sum out of proportion to loss incurred – Found intention of contractual provision to secure performance of contract by imposing fine for breach – Found applicant’s evidence of cost to recruit and train new employee was irrelevant – No evidence of loss of sales, but accepted probably some inconvenience in organising replacements at late notice – Damage suffered by applicant for failure to work four shifts during four week notice period was negligible at best – Forfeiture of four weeks wages extravagant and unconscionable in comparison to loss likely to arise from breach – Provision amounted to penalty and unenforceable – Employee not paid holiday pay despite entitlement – Objection to demand notice not upheld – Employee entitled to sums specified in demand notice – Applicant to pay sum to Labour Inspector for employee’s benefit

Result: Application dismissed ; Arrears of wages (\$1,819.04) ; Costs reserved

Wallbank v Lewthwaite Engineering Ltd

30 Jul 2008, V Campbell, AA 269/08, (8 pages)

JURISDICTION – Respondent argued never employed applicant - Applicant did casual work for respondent during holiday period of prior employment – Applicant claimed discussed what job would entail at length and was offered job – No written employment agreement – Respondent argued if had offered

applicant job, would have provided written employment agreement – Argued salary claimed not possible due to company profit and as applicant did not have a particular qualification – Authority found conceivable that offered claimed salary given similar salary and role of another employee of respondent – Applicant given access to pooled company vehicle – Respondent paid for applicant to undertake safety competence course as representative of respondent – Respondent conceded applicant undertook some work for respondent – Applicant paid twice by cheque - Authority satisfied that fortnightly salary payment for salary claimed, net of PAYE, equated to amount paid in cheque – Found more likely than not that applicant employed by respondent – Authority had jurisdiction - ARREARS OF WAGES AND HOLIDAY PAY – Applicant employed four and a half weeks – Received two payments during employment – Shortfall in what was paid and what ought to have been paid outstanding (\$1,406.25) – Authority satisfied holiday pay outstanding (\$375) - UNJUSTIFIED DISMISSAL – Respondent travelled overseas – On return, discovered information had given applicant had been passed on to applicant’s wife, then to respondent’s wife – Applicant claimed respondent told him was dismissed – Respondent claimed told applicant off for discussing personal business, and applicant not returned to work since conversation – Authority found respondent dismissed applicant by telephone – Dismissal carried out with no procedural fairness and no basis for justification – Dismissal unjustified – Remedies – Applicant found new employment after three weeks – Authority found applicant entitled to reimbursement of three weeks lost wages (\$2,812.50) – Applicant provided little evidence to support claim for compensation for distress and humiliation – Authority considered levels of awards for similar circumstances – \$1,500 compensation appropriate – No contributory conduct - PENALTY – Applicant claimed penalties for respondent withholding wages and holiday pay and failing to provide written employment agreement – Authority found respondent breached Wages Protection Act by failing to pay applicant entire amount of wages as they became payable – Having regard to circumstances and interests of justice, Authority declined to order penalty – Authority found respondent aware of obligation to provide written employment agreement – Found likely that had recorded relationship, problem may not have occurred – Penalty of \$250 to be paid to Crown – Costs reserved - Building site supervisor

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Bargaining - Employment Relations Act 2000

Norske Skog Tasman Ltd v Pulp & Paper Industry Council of the Manufacturing & Construction Workers Union

21 Aug 2008, A Dumbleton, AA 303/08, (2 pages)

BARGAINING – Reference for facilitation – Applicant sought reference for facilitation under s50C(1)(b) Employment Relations Act 2000 (“ERA”) – Section 50C(1)(b) required bargaining for collective employment agreement (“CEA”) to be unduly protracted and that extensive efforts, including mediation, had failed to resolve difficulties preventing parties from concluding CEA - Respondent neither consented to or opposed application – Authority found bargaining taken place between parties over 46 days – Satisfied frequent and determined attempts to conclude agreement made – Parties had engaged mediator and industrial relations facilitator – Found relative to other bargaining carried on between same parties and parties associated in industry, negotiation of this particular CEA protracted unduly - Bargaining between parties not only prolonged but excessively so therefore meeting threshold test in ERA – Reference for facilitation ordered

Result: Application granted ; Costs reserved

Breach of Contract - Employment Relations Act 2000

The Consultancy Group Christchurch Ltd v Cullen

3 Aug 2007, P Montgomery, CA 90/07, (8 pages)

BREACH OF CONTRACT – Restraint of trade – Applicant withdrew proceedings against second co-worker – Respondent casual employee – Applicant claimed respondent breached restraint of trade clauses in employment agreement (“EA”) and implied duties of fidelity and good faith – Applicant sought loss of profit reasonably expected from service contract for balance of restraint of trade period set in EA – Respondent denied breached agreement and duties to applicant – Applicant offered contract to provide security services to bar (“B”) – Applicant appointed respondent security manager at B – Applicant claimed had been advised by some staff that other staff had offered manager of B to take over respondent’s security services – Applicant claimed also advised that respondent attempting to recruit respondent’s other existing staff – Manager of B claimed while happy with service provided by applicant, was concerned would lose efficient security team if did not accept new security arrangements – Manager of B told applicant’s manager that if security staff did not stay with applicant then would switch to new security arrangements in best interests of bar – Applicant claimed respondent primary organiser of group attempting to take over security arrangements – Respondent claimed was approached by two other employees of applicant who believed better security arrangements could be provided by third party – Respondent argued was aware of clauses in EA but did not believe applied in circumstances – Authority should view found restraint in context including casual status of employee, pricing strategies and protection of trade secrets – No breach of non-competition clause as involved undertaking further employment with employer in competition with applicant – Authority found one year non-solicitation clause in EA excessive given respondent’s casual status – Also found restraint provision prohibiting employee from accepting employment with “former client” oppressive – One year term also unnecessarily harsh in respect of “current clients” – Authority accepted initiative to secure security contract from B made by other employees and not respondent – However, respondent aware of proposal and was central to practical implementation of plan – Authority cited *Peninsula Real Estate Ltd v Harris* [1992] 2 NZLR 216 as providing useful summary of current legal position regarding restraint of trade – Authority saw question not whether respondent ring leader but whether participated in process in breach of obligations to applicant – Despite excessive restraint period applicant engaged in planning takeover of contract while still employed with applicant – Authority further found respondent failed to fulfil obligations of fidelity and good faith – REMEDIES – Applicant provided evidence of expected loss of gross profit had relationship continued with applicant over 12 month period – Authority found difficult to assess remedies as no written contract between applicant and B – Found difficult to assess how long applicant would have retained security work with B – Matter further complicated by withdrawal of proceedings against second respondent which meant respondent faced burden of remedies alone – Matters on quantum of remedies reserved – Parties to lodge submissions on quantum at later date
Result: Application granted ; Damages (Quantum reserved) ; Costs reserved

PPCS Ltd v Loughlin

6 Aug 2007, D Asher, WA 108/07, (9 pages)

BREACH OF CONTRACT – Respondent employed as chief executive of Richmond Ltd (“R Ltd”) – Applicant acquired sizeable interest in R Ltd over five year period – When apparent applicant would takeover R Ltd termination agreement reached with respondent – Respondent agreed to variation of redundancy clause in Chief Financial Officer (“CFO”) of R Ltd’s employment agreement (“EA”) – Respondent argued acted on directions from Chairman of the Board (“Chairman”) of R Ltd and purpose of variation to ensure retention of CFO during period of uncertainty – Respondent had financial cap to delegated authority with approval of R Ltd’s Board or Remuneration Committee (“RC”) required for amounts over cap -

Applicant claimed by agreeing to variation greater than cap applicant acted outside authority – Applicant argued RC had no knowledge respondent sought approval for variation – Respondent resigned – CFO resigned and sought redundancy in accordance with variation of EA – Applicant sought legal advice and then made payment in accordance with variation – Legal advice suggested damages could be recoverable from respondent for acting outside authority – R Ltd and applicant amalgamated after respondent and CFO resigned – Respondent argued agreed with Chairman to increase CFO's redundancy entitlement and prepared draft paper for RC - Chairman confirmed had asked respondent to put mechanism in place to retain CFO but could not recall particulars - Authority did not accept applicant's claim that but for respondent's actions in entering into variation, R Ltd would not have made payment and so respondent liable for damages - Authority did not accept applicant had proven respondent acted outside authority or responsible for payment or that suffered damage – Extent of damage suffered by applicant unclear – Evidence provided to Authority provided no fair and reasonable certainty that no benefit to respondent in CFO's continued employment – Applicant's record keeping less than comprehensive – In absence of evidence Authority not prepared to conclude RC not consulted about variation and did not sanction it, or would have voted down variation – Found on evidence likely RC was not consulted about variation - Authority satisfied respondent fairly and reasonably relied on Chairman's direction to offer and implement variation to CFO's EA – No reason for respondent to challenge direction or question Chairman's apparent authority - No evidence respondent acted in matter without equity and good conscience or otherwise than in best interests of applicant - Applicant's claim for damages against respondent dismissed

Result: Application dismissed ; Costs reserved

Rudolph & Anor v Christchurch City Council

9 Aug 2007, P Montgomery, CA 99/07, (11 pages)

BREACH OF CONTRACT – First applicant employed in permanent full-time position – Respondent consulted applicants on restructuring – Respondent disestablished position and offered first applicant fixed term position – Letter of appointment stated previous contractual terms and conditions to continue, and redundancy compensation payable at expiry of fixed term – Respondent decided not to continue position when fixed term position expired, but rather establish new permanent position – Roles different, with new role requiring higher technical skill - First applicant not appointed to new position – Fixed term position expired – Second applicant claimed given no notice of impending redundancy when restructuring disestablished position, in breach of Collective Employment Agreement (“CEA”) – Second applicant claimed first applicant was permanent employee in fixed term role - Authority found first applicant aware that position was fixed term, and signed letter accepting terms and conditions – Found letter set out that if first applicant unable to obtain alternative employment with respondent at expiry of fixed term, would receive redundancy compensation – Noted first applicant's status under CEA changed from permanent employee to fixed term employee – Found foreseeable to applicants that the role would have limited duration – In circumstances, no need to notify second applicant of expiry of fixed term agreement – Found argument that first applicant permanent employee in fixed term role legally, conceptually, and factually wrong – Found no entitlement to have fixed term service included in calculation of redundancy compensation under CEA's terms, but that respondent fulfilled additional undertaking to do so regardless – Found fixed term position agreement constituted agreement that redundancy compensation payment deferred until expiry of fixed term – Found respondent did not breach CEA as position was always fixed term, not disestablished - First applicant could have no expectations of ongoing employment unless redeployed or successfully applied for new position - Reorganisation provisions of CEA not applicable – No breach of CEA – UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE – Found employment status changed from permanent employee to fixed term employee

in accepting appointment to fixed term position – Termination of employment came about by expiration of fixed term and no other reason – No personal grievances – Field Support Officer

Result: Applications dismissed ; Costs reserved

Costs - Employment Relations Act 2000

Bell v Harrison & Whiting

12 Aug 2008, P Montgomery, CA 117/08, (2 pages)

COSTS - Unsuccessful personal grievance - Length of investigation meeting not specified - Applicant submitted financial circumstances needed to be taken into account when considering costs and award should be \$500 or costs should lie where they fall - Respondent sought reasonable contribution to costs which were reasonably incurred - Authority weighed applicant's financial situation with requirement for respondent to prepare detailed submissions - Costs to follow event - Respondent entitled to \$1,800 as contribution to costs

Result: Costs in favour of respondent (\$1,800)

Birch v Passage Software Ltd

14 Jul 2008, Y S Oldfield, AA 206A/08, (1 pages)

COSTS - Successful personal grievance - Less than ½ day investigation meeting - Applicant sought contribution to costs of \$1,000 - Applicant legally aided - Respondent argued investigation meeting extended by unnecessary questioning by applicant - Submitted costs award should be no more than 7 percent of costs claimed as compensation award only 7 percent of original claim - Authority relied on tariff based approach and considered narrowness of issues and brevity of meeting in determining costs award - Applicant entitled to \$500 contribution to costs

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

Edmonds v Adlyn's Cleaning Services Ltd

28 Jul 2008, V Campbell, AA 202A/08, (2 pages)

COSTS - Successful personal grievance - One day investigation meeting - Applicant sought full costs of \$3,150 - Matter not complex and costs incurred by applicant reasonable - Respondent to contribute to applicant's costs

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

Evans v Gibbston Valley Wines Ltd

1 Jul 2008, H Doyle, CA 54A/08, (2 pages)

COSTS - Unsuccessful personal grievance - ½ day investigation meeting - Respondent sought contribution to costs of \$1,093 - Applicant submitted legitimate case to be determined by Authority and in interest of justice for costs to lie where they fall - Respondent successful party and therefore entitled to contribution to costs

Result: Costs in favour of respondent (\$600)

Faith v Taonga Imports Ltd

2 Jul 2008, M Ulrich, AA 226/08, (5 pages)

COSTS - Unsuccessful raising of personal grievance - Length of investigation meeting not specified - Respondent sought contribution to costs citing exceptional circumstances warranting departure from usual rule that costs against legally aided person limited - Argued applicant's preliminary and substantive claims were unmeritorious and applicant did not progress claim in timely manner - Applicant denied claims by respondent amounted to exceptional circumstances - Authority found no exceptional circumstances so no order for costs would be made exceeding amount of applicant's contribution to legal aid grant - Had applicant not been legally aided then costs award would have been made in favour of respondent relating to leave application - As applicant made no contribution to amount of legal aid no order for costs could be made

Result: No order for costs

Gray v The Chief Executive Department of Corrections

31 Jul 2008, P R Stapp, Wa 103/08, (2 pages)

COSTS - Unsuccessful personal grievance - Length of investigation not specified - Respondent sought costs of \$11,992 - Applicant submitted costs should lie where they fall - Costs to follow event - Costs not punitive - Respondent's costs reasonably incurred - Respondent entitled to contribution to costs as successful party

Result: Costs in favour of respondent (\$3,000) ; Disbursements (\$660)

Henry v The Chief Executive of the Manukau Institute of Technology

2 Jul 2008, L Robinson, AA 92A/08, (3 pages)

COSTS - Unsuccessful personal grievance - Two day investigation meeting - Authority declined consent order request by parties - Respondent sought award of \$10,000 out of \$27,712 total costs on basis was successful party - Applicant argued not clear claim was going to fail and matter required proper consideration - Submitted more suitable costs award between \$6,500 to \$7,500 - Authority an equity and good conscience jurisdiction and costs awards generally modest - Applicant only had modest means and income and higher costs award would have punitive effect - Respondent entitled to \$3,000 contribution to costs

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

Hill v Tasman Insulation New Zealand Ltd

11 Aug 2008, H Doyle, CA 67A/08, (3 pages)

COSTS - Unsuccessful redundancy payment claim - ½ day investigation meeting - Respondent sought costs of \$3,500 deemed as appropriate and fair contribution - Applicant submitted \$1,000 fair and reasonable contribution to costs - Parties disagreed on length of investigation meeting - Matter not factually complex, however several interesting legal issues - Appropriate award of costs \$2,000

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

Johnson v Gilligan Business School Ltd

7 Jul 2008, A Dumbleton, AA 66A/08, (2 pages)

COSTS - Unsuccessful personal grievance - One day investigation meeting - No costs submission received from applicant - Respondent sought \$10,118 being two thirds of actual costs, or alternatively \$9,000 being daily tariff of \$3,000, for reasonable preparation time and attendance at investigation meeting - Authority found award of either amount would be punitive - Nothing out of ordinary in case that would lead to higher costs award - Respondent entitled to reasonable contribution to costs of \$3,750

Result: Costs in favour of respondent (\$3,750)

Miller v Swazi Apparel Ltd

23 Jun 2008, J Crichton, WA 23A/08, (4 pages)

COSTS - Unsuccessful personal grievance - One day investigation meeting - Respondent sought \$8,000 as contribution to total costs of \$21,172 - Applicant submitted not in position to make any contribution to costs and was applying for legal aid so any costs award would be capped - Also argued case was a test case - Respondent submitted no evidence applicant unable to meet costs and matter was not test case - Argued could not apply for legal aid retrospectively - Authority did not accept matter was test case - Matter was straightforward personal grievance, therefore daily tariff approach entirely appropriate - Authority accepted applicant in no position to make contribution to costs - Costs to lie where they fall

Result: Costs to lie where they fall

NZ Meat Workers & Related Trades Union Inc v Whakatu Wool Scour Ltd

23 Jul 2008, P R Stapp, WA 97/08, (2 pages)

COSTS - Dismissed dispute claim - ½ day investigation meeting and site visit - Applicant submitted no costs award should be made - Respondent sought \$2,500 as contribution to total costs of \$2,983 - Case not out of the ordinary - Costs to follow event - Respondent entitled to contribution to costs

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

Reading v Civil Engineering Solutions Ltd

8 Jul 2008, V Campbell, AA 128A/08, (2 pages)

COSTS - Unsuccessful personal grievance - One day investigation meeting - Respondent sought full costs award of \$7,352 - Submitted applicant's claim was unscrupulous and opportunistic attempt to pervert true nature of relationship and extort money - Argued claim vexatious and dishonest resulting in unnecessary and unreasonable costs to respondent - Costs not punitive in nature, however, Authority took respondent's submissions into account - Matter was not complex but costs incurred by respondent reasonable given preparation required - Respondent entitled to contribution to costs

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

Roberts v Converting Technology (NZ) Ltd

7 Jul 2008, A Dumbleton, AA 70A/08, (2 pages)

COSTS - Unsuccessful personal grievance - Length of investigation meeting not specified - Respondent sought \$3,000 contribution to total costs of \$7,897 - Applicant argued suffered trauma from dismissal and unable to pay any costs award - Also reminded Authority of unusual circumstances that surrounded employment relationship - Costs to reflect both parties had enjoyed mutually advantageous working relationship until actions of both parties caused loss of trust and confidence - Due to unusual circumstances award of \$800 deemed appropriate

Result: Costs in favour of respondent (\$800)

Schollum v Orange Wood Ltd

19 Aug 2008, M Ulrich, AA 234A/08, (3 pages)

COSTS - Unsuccessful breach of contract claim - Less than one day investigation meeting - Respondent's total costs were \$26,810 plus disbursements - Submitted contribution of \$3,000 to costs warranted as wholly successful party - Argued further submissions were required and applicant failed to respond to costs offer made - Applicant submitted costs to lie where they fall - Argued respondent's costs high given nature of case and applicant had genuine belief was right in claim - Costs to follow event - Degree of complexity with matter as events spanned number of years, key dispute in evidence had to be tested and resolved and distinct legal issues canvassed in submissions - Complexities put respondent to additional cost - Costs set at \$2,000 plus disbursements

Result: Costs in favour of respondent (\$2,000) ; Disbursements (\$300)

Scoles v Nga Clarke's Ltd t/a Black Swan Tea Rooms and Motels

10 Jul 2008, P Montgomery, CA 97/08, (2 pages)

COSTS - Partially successful personal grievance - Less than ½ day investigation meeting - Respondent submitted costs to lie where they fall as both parties partially successful - Authority found costs to follow event - Applicant entitled to reasonable contribution to costs

Result: Costs in favour of applicant (\$1000)

Watson v Canterbury District Health Board

25 Jun 2008, J Wilson, CA 85/08, (5 pages)

COSTS - Withdrawal of application prior to determination following one day investigation meeting - Respondent filed late costs submission due to oversight by respondent's representation - Argued applicant already on notice that costs would be sought and matter already drawn out so further debate on issue would further delay final resolution - Applicant argued that as no costs submission was received by designated date the Authority was 'functus officio' - Also argued respondent's failure to remedy lateness meant application fatally flawed - Authority dismissed applicant's argument, accepting respondent's costs submission but allowed for additional costs incurred by lateness of costs submission - Respondent sought full indemnity costs of \$11,700 as applicant acted in vexatious and unreasonable manner - Applicant argued costs should lie where they fall - Argued in absence of substantive determination would be impossible to determine costs - Submitted respondent's conduct contributed to level of costs incurred - Applicant also in dire financial position expending money in effort to retain employment - Respondent entitled to usual modest costs award - Applicant to pay contribution of \$1,500 to respondent's costs

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

Yang v Liu

14 Jul 2008, Y S Oldfield, AA 176A/08, (2 pages)

COSTS - Successful personal grievance - Length of investigation meeting not specified - Applicant sought \$2,000 contribution to costs in relation to investigation meeting and additional costs incurred dealing with respondents numerous, unnecessary and unsubstantiated allegations after investigation meeting - Respondent argued no grounds for applicant to seek additional costs - Suggested in accordance with equity and good conscience, award should be at lower end for costs - Authority found nothing in case to warrant award outside normal range, straightforward case without factual or legal complexities - Applicant entitled to reasonable contribution to costs

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

Jurisdiction - Employment Relations Act 2000

Burns & Ors v Reliance Transport Ltd

10 Aug 2007, P Montgomery, CA 101/07, (5 pages)

PRACTICE AND PROCEDURE – JURISDICTION – Applicants agreed to lodge consolidated personal grievance actions – Applicants claimed unjustifiably dismissed – Identity of employer preliminary issue – Respondent argued not party to any employment agreement with applicants – Argued applicants employed by third party (“BCT”) who utilised respondent’s goods service licence – Applicants claimed BCT trading name for division of respondent – Respondent held 50 percent shareholding in BCT and remaining shares held by third party – Authority concluded BCT registered company in own right – Applicants claimed BCT work invoiced through respondent which indicated BCT operating as subsidiary – Respondent argued not uncommon for associated businesses to utilise each others’ administration systems and personnel – Authority noted BCT faced considerable hurdles in establishing operations in region due to first applicant’s involvement in BCT – First applicant previously controlled two failed companies which left large number of regional community unpaid – Respondent argued result that regional business community reluctant to deal on credit basis with BCT – Argued pragmatic approach to make purchases for benefit of BCT through respondent – Authority found at time grievances raised applicants knew identity of employer to be BCT – Found attempt to involve respondent when extreme financial position of BCT became apparent – Authority satisfied on evidence provided BCT not merely trading name of respondent and was complete separate entity – Authority also satisfied applicants employees of BCT as no evidence of wages paid by respondent – Applicants failed to establish employment agreement existed with respondent – No jurisdiction

Result: Application dismissed ; Orders accordingly ; Costs reserved

Wallbank v Lewthwaite Engineering Ltd

30 Jul 2008, V Campbell, AA 269/08, (8 pages)

JURISDICTION – Respondent argued never employed applicant - Applicant did casual work for respondent during holiday period of prior employment – Applicant claimed discussed what job would entail at length and was offered job – No written employment agreement – Respondent argued if had offered applicant job, would have provided written employment agreement – Argued salary claimed not possible due to company profit and as applicant did not have a particular qualification – Authority found conceivable that offered claimed salary given similar salary and role of another employee of respondent – Applicant given access to pooled company vehicle – Respondent paid for applicant to undertake safety competence course as representative of respondent – Respondent conceded applicant undertook some work for respondent – Applicant paid twice by cheque - Authority satisfied that fortnightly salary payment for salary claimed, net of PAYE, equated to amount paid in cheque – Found more likely than not that applicant employed by respondent – Authority had jurisdiction - ARREARS OF WAGES AND HOLIDAY PAY – Applicant employed four and a half weeks – Received two payments during employment – Shortfall in what was paid and what ought to have been paid outstanding (\$1,406.25) – Authority satisfied holiday pay outstanding (\$375) - UNJUSTIFIED DISMISSAL – Respondent travelled overseas – On return, discovered information had given applicant had been passed on to applicant’s wife, then to respondent’s wife – Applicant claimed respondent told him was dismissed – Respondent claimed told applicant off for discussing personal business, and applicant not returned to work since conversation – Authority found respondent dismissed applicant by telephone – Dismissal carried out with no procedural fairness and no basis for justification – Dismissal unjustified – Remedies – Applicant found new employment after three weeks – Authority found applicant entitled to reimbursement of three weeks lost wages (\$2,812.50) – Applicant provided little evidence to support claim for compensation for distress and humiliation – Authority considered levels of awards for similar circumstances – \$1,500

compensation appropriate – No contributory conduct - PENALTY – Applicant claimed penalties for respondent withholding wages and holiday pay and failing to provide written employment agreement – Authority found respondent breached Wages Protection Act by failing to pay applicant entire amount of wages as they became payable – Having regard to circumstances and interests of justice, Authority declined to order penalty – Authority found respondent aware of obligation to provide written employment agreement – Found likely that had recorded relationship, problem may not have occurred – Penalty of \$250 to be paid to Crown – Costs reserved - Building site supervisor

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Penalty - Employment Relations Act 2000

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Personal Grievance - Dismissal - Employment Relations Act 2000

Birch v Passage Software Ltd

13 Jun 2008, Y S Oldfield, AA 206/08, (7 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - UNJUSTIFIED DISADVANTAGE - Applicant gave one week notice of resignation - Had been employed for two months and still within probationary period - Claimed constructively dismissed, or alternatively, suffered unjustified disadvantage - Employment agreement allowed for either party to terminate agreement with one week notice during probationary period - Employer could pay employee pay in lieu of notice and not require employee to work out notice period - Applicant took Friday before final week of work off - Employer believed applicant would not return to work out notice period - Applicant told had choice whether to work out notice period or not, and that holiday pay already paid - Applicant not encouraged to stay, and not told about notice clause or that would receive week's pay for notice period even if did not work - Applicant indicated wished to work out notice period as believed would not be paid if did not work - Several incidents made applicant feel uncomfortable - Informed employer no longer wished to work out notice period - Applicant's handbag checked for company property - Authority found respondent would have found it easier had applicant not returned to work - Found applicant's impression not welcome in workplace reasonable and accurate - Initially applicant not paid pay in lieu of notice, however had since been paid - Authority satisfied applicant suffered disadvantage as respondent's conduct unjustified and made workplace uncomfortable - However, conduct not sufficiently serious to give rise to constructive dismissal - Unjustified disadvantage - Remedies - Employment relationship problem not overly serious - Respondent partly rectified wrong by paying pay in lieu of notice - Only nominal award required - Compensation of \$500 appropriate - No other remedies awarded - COUNTERCLAIM - Respondent claimed applicant misrepresented computer skills - Sought damages for costs incurred in additional training - Applicant claimed had "good" computer skills - Respondent provided no benchmark to compare skills to, therefore subjective assessment - In such circumstances unable to find applicant misrepresented herself - Even if had, respondent effectively reaffirmed employment agreement by continuing employment and providing further training after realised skills not at required level - Counterclaim dismissed - Telemarketer

Result: Application granted (Unjustified disadvantage) ; Application dismissed (Constructive dismissal) ; Compensation for humiliation etc (\$500) ; Costs reserved

Brown v Five Star Pork (NZ) Ltd & Anor

23 Jun 2008, R Arthur, AA 216/08, (12 pages)

UNJUSTIFIED DISMISSAL - Abandonment - Applicant dismissed after absent from work for three days - Applicant claimed informed operations manager ("OM") of reasons for absence on at least one of days absent - Applicant received summons to appear at District Court - Applicant absent day before hearing, for unrelated reason, day of hearing, and for three days after hearing - On third day applicant absent OM sent applicant dismissal letter - Applicant claimed did not receive letter - Clause in employment agreement allowed for termination of employment if employee absent for three days without consent or good cause - Authority preferred OM's evidence that applicant had not contacted respondents - No consent for absences - However, at time of termination, respondents had not established no good cause for absences - Authority found OM's attempts to establish applicant's whereabouts not sufficient - Applicant should have been given opportunity to provide explanation before decision to terminate employment made - Second respondent may still have made decision to terminate but Authority could not preclude possibility that it would not have - Dismissal unjustified - Remedies - Authority did not accept applicant spoke to

OM prior to absences or showed him copy of Court summons - Applicant had adequate opportunity to make arrangements for absences and chose not to - Court summons not sole reason for absences; applicant stopped going to work and made no real attempt to return - Applicant's conduct sufficiently blameworthy that remedies to be reduced by 100 percent - 100 percent contributory conduct - ARREARS - Applicant sought return or reimbursement for personal equipment not returned at end of employment - As personal items could not be identified Authority found money suitable remedy - Second respondent to pay applicant \$358 for cost of replacing items - COSTS - Applicant did not seek award of costs as representation provided free of charge, however, sought disbursements - Respondents to pay applicant's reasonable disbursements in full - Packer and Trimmer

Result: Application granted ; Arrears (\$358) ; Disbursements in favour of applicant (Quantum to be determined)

Chamberlain v ASB Bank Ltd

18 Aug 2008, R Arthur, AA 297/08, (15 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant claimed felt forced to resign and that respondent failed to honour offer to pay gratuity for 36 years of service – Respondent argued applicant refused offer and resigned – Applicant 8 months from retirement when resigned – Respondent concluded applicant mishandled fraud investigation of client – Manager (“W”) met with applicant to express concerns about handling of client – Next day applicant told W happy with way handled client, would do same again and conduct no different to any other file – W concerned applicant could not see mistake or obstructive by failing to apologise - W told applicant had option of retirement with gratuity payment of up to one year's salary due to long service, or disciplinary process where dismissal possible outcome – Applicant alleged unjustifiably disadvantaged by W's investigation – Applicant requested apology and offer of gratuity rather than disciplinary action, and said would use W's comments to claim constructive dismissal if resigned – Applicant took 6 weeks sick leave claiming distressed by W's comments – Applicant wrote in further letter that return to work unrealistic, claimed gratuity, lost earnings until planned retirement date and compensation for hurt and humiliation – Respondent sought to convene disciplinary meeting for date applicant to return to work – Applicant submitted notice of resignation, claiming W forced him to leave 8 months earlier than intended – Applicant consistently denied errors in handling client's case - Authority found applicant overlooked important basic step in inquiry and rushed to judgement of client's actions – Found applicant provided no explanation of why omitted to contact local bank officer when required – Found weight added to conclusion that applicant's enquiries deficient by applicant's admission to co-worker – Fair and reasonable employer would be concerned employee maintained would act same way again after mistake properly identified – W legitimately concerned effect disciplinary process could have on gratuity, so opted for compassionate solution – Found applicant risked choosing to seek more by raising personal grievance – Respondent's apology to client did not mean predetermined – Considering length of service, proximity to retirement and obvious mistake in handling of client, fair and reasonable employer would have given employee opportunity to resign and receive full gratuity – Respondent's offer justified – Respondent entitled to initiate disciplinary action when offer rejected and personal grievance raised – Applicant's decision to resign rather than pursue issues through disciplinary process did not amount to constructive dismissal – Applicant claimed that having resigned, now entitled to gratuity payment offered at outset – Authority found applicant's counter-offer rejected respondent's offer – Applicant could not rely on original gratuity offer - Bank fraud investigator

Result: Application dismissed

Cleverly v United Corporation Ltd

3 Aug 2007, L Robinson, AA 233/07, (8 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Parties accepted employment agreement (“EA”) reflected terms and conditions of employment despite different company name on EA – Authority found applicant must be taken to have accepted conditions in signed EA – Respondent alleged applicant used tape recorder to record conversations with co-workers to use information to “take down” respondent and other employees – Applicant conceded making recordings but denied threatening behaviour – Respondent also alleged applicant threatened co-worker (“C”) – Disciplinary meeting scheduled to discuss allegations – Applicant suspended on pay until meeting – Applicant denied allegations of threatening behaviour towards co-worker – Respondent argued unhappy applicant secretly recording conversations as behaviour made staff feel unsafe – Respondent argued staff scared as understood applicant recording conversations for two months – Applicant told could not work for respondent because staff felt threatened – Respondent claimed due process followed and applicant treated fairly through investigation – Respondent suggested that applicant move to alternative store – Following adjournment applicant declared did not feel comfortable working for respondent – Respondent advised applicant as did not want to return to work in circumstances employment terminated – Applicant claimed did not accept offer at alternative site because would appear to be admitting to allegations – Respondent alleged received phone call from C claiming applicant threatened staff – Respondent argued presented applicant with signed statement from C – Applicant claimed never received statement until commencement of Authority investigation – Authority preferred applicant’s evidence – Authority found respondent’s alleged dates of events incorrect – Found respondent’s evidence in answer to applicant’s claim unreliable – Authority did not agree that allegations by C were properly and fairly put to applicant – Applicant not informed of particulars of threats – Authority also found nothing in written complaint could be considered objective threat regardless of C’s reaction – Unjustified constructive dismissal – Decision to relocate applicant to alternative site unfair because contrary to duty of good faith owed to applicant – Breach by respondent so serious reasonable for applicant to conclude employment repudiated – Remedies – No contributory conduct – Authority found applicant suffered hurt, humiliation, anxiety and embarrassment as result of grievance – \$3000 compensation appropriate – Video store assistant

Result: Application granted ; Reimbursement of lost wages (\$4,620.00) ; Compensation for humiliation etc (\$3,000)

Dudley v Sub Five Private Security Ltd

18 Jul 2008, J Crichton, CA 103/08, (7 pages)

UNJUSTIFIED DISADVANTAGE – Respondent altered roster, significantly changing applicant’s shift rotation, without informing applicant – New roster did not suit applicant - Applicant claimed unjustifiably disadvantaged by roster change - Claimed employed in permanent position at specific location and so did not have to accept changes – Authority found employment agreement said, and custom in industry confirmed, applicant permanent security guard for respondent but shift patterns and locations of work able to be altered – However, found change to shift pattern sudden and no prior notification – Respondent admitted changes communicated inadequately - Authority satisfied applicant unjustifiably disadvantaged by way respondent managed roster change - UNJUSTIFIED DISMISSAL – Applicant claimed unjustifiably constructively dismissed by respondent unilaterally changing shift pattern leaving him no opportunity but to consider employment at end – Respondent argued applicant abandoned employment after respondent made every effort to retain him – Applicant rejected other options offered by respondent – Authority found that by time applicant said would work new roster for old shift, respondent legitimately found replacement – Found respondent did everything could reasonably have done to meet applicant’s needs when original shift roster no longer possible –

Found applicant resistant to change and erroneously thought shift was permanent – Applicant employed as security guard and nothing more with no set duties or location – Respondent entitled to move applicant as needs of business dictated – Respondent went out of way to retain applicant – Applicant abandoned employment – Not constructively dismissed - Remedies – When respondent breached obligations by failing to alert applicant of upcoming roster change, conceded error and did everything in power to rectify situation – Found applicant’s behaviour contributed to breakdown in employment relationship to greatest extent possible – Applicant not cooperative and fixed on belief promised full time job on shift roster that suited him, which was not true legal position – 100 percent contributory conduct – No remedies appropriate – Security Guard
Result: Application granted (Unjustified disadvantage) ; Application dismissed (Unjustified dismissal) ; Costs to lie where they fall

Ghanem v South Pacific Meats Ltd

8 Jul 2008, J Crichton, CA 95/08, (7 pages)

UNJUSTIFIED DISMISSAL - RAISING PERSONAL GRIEVANCE - Applicant claimed unjustifiably dismissed - Respondent claimed applicant abandoned employment and personal grievance not raised within time - Applicant charged with criminal offence and granted bail - Applicant’s co-worker (“E”) received call from production supervisor (“PS”) - E believed PS told him applicant had been replaced and so informed applicant had been dismissed - Applicant then moved to another city as part of bail conditions - After numerous attempts applicant successful in contacting PS - Applicant raised issue of dismissal and claimed PS confirmed job had gone - Applicant claimed telephone call raised personal grievance - One year after alleged dismissal, having been acquitted, applicant sought to raise personal grievance - PS no longer at respondent and respondent had no record of personal grievance - Respondent argued PS had no authority to dismiss and applicant’s employment records showed file still open - E credible witness, and no reason to believe lied about telephone conversation with PS - Authority found was telephone conversation between E and PS which resulted in E believing applicant had been dismissed - Possible E misunderstood nature of conversation - Authority accepted respondent’s submission that purpose of PS’s call was to establish E’s whereabouts - More likely PS mentioned applicant in passing conveying that job being covered in meantime rather than was dismissed - Authority found applicant not dismissed by PS in telephone conversation with E - No personal grievance - Found had there been a dismissal, conversation between applicant and PS sufficient to raise personal grievance - Authority satisfied employment agreement ended through frustration when applicant bailed to another city as bail conditions made it impossible for applicant to perform job - Halal slaughterman

Result: Application dismissed ; Costs reserved

Gipson v Entertainment Publications Ltd

3 Jul 2008, R Arthur, AA 230/08, (15 pages)

UNJUSTIFIED DISADVANTAGE – Applicant claimed written warning for poor performance not justified or fairly given – Applicant given sales script, week training conference, workshop and “role play” sessions, and client visits with other staff – Regional manager (“B”) accompanied applicant to client meeting and disappointed with presentation – Sales results showed applicant only salesperson failing sales goals – When B raised concerns, applicant blamed poor communication and support from administrative staff – Applicant given performance improvement plan noting concerns and identifying future requirements and support – Applicant told B doctor diagnosed stress causing high blood pressure and anxiety attacks – Illness caused by personal and work pressures – After applicant met with Australian based general manager (“H”), H gave applicant letter stating reasons for performance problems inadequate and probationary period extended for further three months – B conducted role play assessment and found applicant performed inadequately – B gave applicant letter outlining performance and verbal bullying concerns and arrangements for

disciplinary meeting, including support person and offer of paid leave until meeting - Authority satisfied applicant given adequate opportunity, training and support to perform properly – Respondent entitled to raise concerns about performance and did so in fair way – Written warning regarding performance was necessary and open given comparative poor sales and steps already taken by respondent – Performance warning justified – Applicant claimed written warning for misconduct in relations with co-workers not justified or fairly given - Applicant complained that administrative staff rude, uncooperative and deliberately undermining work – When questioned by B, administrative staff accused applicant of aggressive, unprofessional behaviour – B spoke to witnesses and found applicant’s version of events may not be truthful, and that applicant’s frustration from disciplinary meeting likely taken out on co-worker – Authority found fair and reasonable employer would not have formed conclusion without hearing applicant’s version – Found B gave little weight to contributions of administrative staff to poor office relations – Found respondent unduly magnified issue of office relationships due to performance concerns – Respondent’s inquiry and conclusion of misconduct superficial and undocumented – Fair and reasonable employer would not have come to conclusion that complaints solely fault of applicant to extent that final written warning warranted – Misconduct written warning unjustified – UNJUSTIFIED DISMISSAL – Serious misconduct – While respondent considering disciplinary action regarding performance and office conduct, B discovered applicant used remote email access to send several company documents marked “highly confidential and commercially sensitive” and to be shredded after use to personal email address – Respondent argued breached trust, confidence, and contractual obligations, amounting to serious misconduct and justifying dismissal – Authority found fair and reasonable employer would not have concluded that remote access was serious misconduct in circumstances – Found applicant accessed email to prepare for disciplinary meeting, which was company-related business so not in breach of internet policy – Allegations that remote access was “theft” and “without a legitimate reason” inaccurate – Respondent accepted that documents routinely kept for later use – Found contents not disclosed to anyone so no actual breach of confidentiality – Applicant undertook to provide statutory declaration that files deleted after process concluded – Respondent already permitted applicant further three months to reach performance standards – Dismissal was heated overreaction – Dismissal unjustified – Remedies – Applicant claimed reimbursement for lost wages for seven months until reemployed - Authority found applicant’s anxiety attacks made finding reemployment difficult – Applicant entitled to wait for suitable position, but took no interim work so had no earnings for seven months, despite demand in industry – Applicant did not adequately mitigate loss, so respondent not responsible for full period – Awarded three months lost wages – Earnings level for lost wages disputed – Applicant claimed maximum commission – Given findings on performance, Authority accepted respondent’s submission to calculate lost wages as most applicant could have earned – Applicant claimed humiliated and distressed by termination of employment after only three months – Found respondent aware of vulnerability due to work-related stress – \$6,000 compensation appropriate – Found applicant never satisfactorily explained performance issues nor acknowledged personal responsibility – Applicant’s approach to return and deletion of emails contributed to overheated atmosphere - Remedies to be reduced by one third for contributory conduct - Merchant service manager

Result: Application granted (Unjustified dismissal) ; Application granted (Unjustified disadvantage) ; Application dismissed (Unjustified disadvantage) ; Reimbursement for lost wages (3 moths reduced to 2 months) ; Compensation for humiliation etc (\$6,000 reduced to \$4,000) ; Costs reserved

Gouw v Wakefields of Sumner Ltd

28 Jul 2008, P Montgomery, CA 109/08, (8 pages)

UNJUSTIFIED DISMISSAL – Applicant claimed respondent extended probationary period without agreement and was then unjustifiably dismissed – No written employment agreement, however letter of appointment set out proposed conditions of appointment – Respondent concerned applicant working longer hours than agreed, and had worked public holiday without consent – Wrote to applicant asking him to work only agreed hours as business could not sustain longer hours - Respondent asked applicant to extend trial period while overseas – Applicant agreed to maintain status quo until respondent returned – On return, respondent issued dismissal letter – Authority found respondent entitled to extend probationary period as put proposal to applicant and applicant had reluctantly agreed - Authority found sale or closure inevitable – Found respondent made decision to terminate without engaging applicant on how employment relationship to end – Respondent issued notice of dismissal prior to discussing whether applicant would leave or stay on reduced hours until sale, and under what terms – Dismissal unjustified - Remedies – Applicant claimed disheartened by dismissal and unemployed for three months – Attempted career change unsuccessful – Authority found applicant failed to mitigate loss – Respondent not responsible for applicant's decision not to seek employment within hospitality industry – Found both parties aware at onset of employment that each taking risks on failing business – Applicant's contribution to circumstances not so serious as to warrant reduction of remedies – Given finding that employment relationship to have ended within three months, applicant entitled to four weeks wages (\$2,520) – Compensation of \$1,000 appropriate in circumstances – Declined to impose penalty for failure to provide written employment agreement because while letter of appointment fell short of requirements, was attempt to clarify basic terms of employment relationship – Head chef

Result: Application granted ; Reimbursement of lost wages (\$2,520)(4 weeks) ; Compensation for humiliation etc (\$1,000) ; Disbursements in favour of applicant (\$70)(Filing fee)

McDonald v Allen Motors Northland Ltd

8 Aug 2007, R A Monaghan, AA 238/07, (10 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant claimed constructively dismissed – Respondent claimed applicant resigned - Applicant had poor relationship with subordinate employee ("T") – Applicant felt had been threatened and intimidated by T in altercation about workplace accident - Applicant requested assistance in dealing with matter from managing director ("A") – A suggested address problem upon applicant's return from two weeks planned leave – Applicant unhappy with suggestion and contacted respondent's accountant, who faxed suggested letter of warning – Further altercation occurred when applicant gave T written warning - Applicant told temporary holiday replacement ("B") that T dismissed – Applicant claimed believed T dismissed because warning letter stated that if behaviour was repeated, employment would be terminated – Authority found T never dismissed and applicant aware not authorised to dismiss staff – While on holiday leave B told applicant that T still employed - Applicant said would resign if T not dismissed – B suggested applicant enjoy leave and address matter on return – Applicant wrote letter of resignation, where expressed position untenable due to lack of authority, lack of written job description, and abuse by two staff members – A took legal advice on letter and accepted applicant's resignation – Informed applicant resignation accepted and assumed from no notice period and tone of letter that termination already occurred – Applicant claimed astonished by A's response as did not intend letter to be full resignation because did not include statement of when employment would end – Authority preferred respondent's evidence that applicant had not left any messages with staff for A to contact him – Issue was whether acceptance of resignation amounted to constructive dismissal – No dispute A aware applicant very distressed by incidents with T –

Authority found nothing inappropriate in A suggesting applicant take planned leave to calm down before addressing problem – If applicant had resigned on day of incident, possibility resignation not to be taken at face value – Applicant ignored several suggestions to use leave to cool down – Applicant accepted gave great deal of thought to resignation - Conduct not equivalent to outburst of frustration not intended to be taken literally – Not obvious that applicant sought further discussion by not including termination date in letter – Found nothing in circumstances reasonably capable of conveying to respondent that applicant did not mean to resign – Found if applicant changed mind, should have been more active in contacting respondent – Lack of notice did not render letter incapable of being treated as binding resignation, but rather raised question of whether in circumstances it could be treated as one – In circumstances, could be treated as binding resignation - No dismissal - Branch manager

Result: Application dismissed ; Costs reserved

McEnaney v Eustruct Ltd

28 Jul 2008, P Montgomery, CA 108/08, (6 pages)

UNJUSTIFIED DISMISSAL – No appearance by respondent – Applicant given employment agreement but did not sign it as wished to discuss matters with respondent’s directors – On third rostered work period, applicant’s manager (“F”) failed to collect applicant for work as arranged – Applicant telephoned head office and was told by General Manager (“C”) that F had been delayed – When F still did not arrive applicant telephoned co-worker who said he had heard applicant had been fired – Applicant unable to contact respondent further – F gave applicant letter of dismissal and final cheque later same day – Applicant’s children witnessed dismissal – Applicant claimed some reasons for dismissal given in letter previously raised with applicant and resolved at time, and some never brought to his attention – Next day C attempted to persuade applicant to sign prior employment agreement, saying could work in alternative position – Respondent cancelled final cheque, alleging applicant might owe money – Respondent laid complaint with Police alleging theft - Later withdrew complaint - Respondent claimed applicant casual employee until contract signed – Applicant claimed casual status not raised with him until second rostered work period - Authority found position offered and accepted was permanent full-time position – Applicant’s evidence preferred over respondent’s unsigned and unsworn statements – Authority found applicant unjustifiably dismissed - Remedies – Authority found applicant suffered financial loss as result of dismissal – Awarded \$2,800 lost wages – Found considerable hurt and humiliation exacerbated by post-dismissal behaviour of respondent’s directors – Awarded \$5,000 compensation – No contributory conduct – Applicant’s costs increased by respondent’s lack of cooperation, such as failure to attend agreed mediation – Applicant awarded \$1,500 as reasonable contribution to costs – Application for penalty declined - Foreman carpenter

Result: Application granted ; Reimbursement of lost wages (\$2,800) ; Compensation for humiliation etc (\$5,000) ; Costs in favour of applicant (\$1,500)

Rudolph & Anor v Christchurch City Council

9 Aug 2007, P Montgomery, CA 99/07, (11 pages)

BREACH OF CONTRACT – First applicant employed in permanent full-time position – Respondent consulted applicants on restructuring – Respondent disestablished position and offered first applicant fixed term position – Letter of appointment stated previous contractual terms and conditions to continue, and redundancy compensation payable at expiry of fixed term – Respondent decided not to continue position when fixed term position expired, but rather establish new permanent position – Roles different, with new role requiring higher technical skill - First applicant not appointed to new position – Fixed term position expired – Second applicant claimed given no notice of impending redundancy when restructuring disestablished position, in breach of Collective Employment Agreement (“CEA”) – Second applicant claimed first applicant was permanent

employee in fixed term role - Authority found first applicant aware that position was fixed term, and signed letter accepting terms and conditions – Found letter set out that if first applicant unable to obtain alternative employment with respondent at expiry of fixed term, would receive redundancy compensation – Noted first applicant's status under CEA changed from permanent employee to fixed term employee – Found foreseeable to applicants that the role would have limited duration – In circumstances, no need to notify second applicant of expiry of fixed term agreement – Found argument that first applicant permanent employee in fixed term role legally, conceptually, and factually wrong – Found no entitlement to have fixed term service included in calculation of redundancy compensation under CEA's terms, but that respondent fulfilled additional undertaking to do so regardless – Found fixed term position agreement constituted agreement that redundancy compensation payment deferred until expiry of fixed term – Found respondent did not breach CEA as position was always fixed term, not disestablished - First applicant could have no expectations of ongoing employment unless redeployed or successfully applied for new position - Reorganisation provisions of CEA not applicable – No breach of CEA – UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE – Found employment status changed from permanent employee to fixed term employee in accepting appointment to fixed term position – Termination of employment came about by expiration of fixed term and no other reason – No personal grievances – Field Support Officer
Result: Applications dismissed ; Costs reserved

Soo Han v Ko & Won Ltd t/a Kino Sushi

21 Jul 2008, V Campbell, AA 264/08, (7 pages)

UNJUSTIFIED DISMISSAL – Applicant claimed unjustifiably dismissed - Respondent argued applicant failed to provide documents requested to show legally entitled to work in New Zealand and therefore dismissal justified – Applicant undertook voluntary unpaid training with respondent, then employed permanently – Applicant began working longer hours than agreed so asked respondent to revert to agreed hours - Also raised issues over food safety – Authority satisfied respondent said issues not applicant's business – Respondent declined applicant's request for pay rise – Applicant claimed respondent dismissed him, was given one week's notice, and that four days later respondent asked for keys and told applicant not to come to work next day – Respondent argued made written request for immigration documents prior to dismissal – Authority found postmark showed applicant could not have received letter until days after dismissal – Authority satisfied applicant showed respondent copy of work permit from passport on first day of paid employment – Finding supported by that day being transition from voluntary unpaid training to paid employment and day respondent revealed recipes and secrets to applicant as had said would not do so until applicant officially employed – Respondent had assisted applicant in work permit application – Letter of offer of employment included in work permit application – Authority found respondent dismissed applicant when asked for keys and said not to come to work next day – Found dismissal carried out without procedural fairness or justification – Dismissal unjustified – Remedies – Applicant claimed lost wages for period until found alternative employment – Claimed did not consider respondent's offers that job available to him if produced documentation to be genuine offers, so took no steps to meet those demands – Authority found respondent's letters not genuine so applicant entitled to lost wages for period until found alternative employment (\$6,346) – Applicant claimed difference between wage with respondent and replacement employment for two year period – Based claim on letter of appointment which stated two year fixed term employment – However, could not rely on letter as being effective fixed term agreement as did not comply with s66 Employment Relations Act 2000 – Claim failed – Applicant sought compensation for humiliation – Authority found job important to applicant as tied to work permit – Distress to applicant and family exacerbated by respondent's attempts to portray dismissal as applicant's fault – No contributory conduct – Compensation of

\$3,000 appropriate - ARREARS OF WAGES – Authority found applicant not paid for final two weeks of employment – Applicant entitled to arrears (\$1,153) - Chef

Result: Application granted (Unjustified dismissal) ; Reimbursement of lost wages (\$6,346.15) ; Arrears of wages (\$1,153.84)(2 weeks) ; Compensation for humiliation etc (\$3,000) ; Costs reserved

Wallbank v Lewthwaite Engineering Ltd

30 Jul 2008, V Campbell, AA 269/08, (8 pages)

JURISDICTION – Respondent argued never employed applicant - Applicant did casual work for respondent during holiday period of prior employment – Applicant claimed discussed what job would entail at length and was offered job – No written employment agreement – Respondent argued if had offered applicant job, would have provided written employment agreement – Argued salary claimed not possible due to company profit and as applicant did not have a particular qualification – Authority found conceivable that offered claimed salary given similar salary and role of another employee of respondent – Applicant given access to pooled company vehicle – Respondent paid for applicant to undertake safety competence course as representative of respondent – Respondent conceded applicant undertook some work for respondent – Applicant paid twice by cheque - Authority satisfied that fortnightly salary payment for salary claimed, net of PAYE, equated to amount paid in cheque – Found more likely than not that applicant employed by respondent – Authority had jurisdiction - ARREARS OF WAGES AND HOLIDAY PAY – Applicant employed four and a half weeks – Received two payments during employment – Shortfall in what was paid and what ought to have been paid outstanding (\$1,406.25) – Authority satisfied holiday pay outstanding (\$375) - UNJUSTIFIED DISMISSAL – Respondent travelled overseas – On return, discovered information had given applicant had been passed on to applicant's wife, then to respondent's wife – Applicant claimed respondent told him was dismissed – Respondent claimed told applicant off for discussing personal business, and applicant not returned to work since conversation – Authority found respondent dismissed applicant by telephone – Dismissal carried out with no procedural fairness and no basis for justification – Dismissal unjustified – Remedies – Applicant found new employment after three weeks – Authority found applicant entitled to reimbursement of three weeks lost wages (\$2,812.50) – Applicant provided little evidence to support claim for compensation for distress and humiliation – Authority considered levels of awards for similar circumstances – \$1,500 compensation appropriate – No contributory conduct - PENALTY – Applicant claimed penalties for respondent withholding wages and holiday pay and failing to provide written employment agreement – Authority found respondent breached Wages Protection Act by failing to pay applicant entire amount of wages as they became payable – Having regard to circumstances and interests of justice, Authority declined to order penalty – Authority found respondent aware of obligation to provide written employment agreement – Found likely that had recorded relationship, problem may not have occurred – Penalty of \$250 to be paid to Crown – Costs reserved - Building site supervisor

Result: Application granted ; Arrears of wages (\$1,406.25) ; Holiday pay (\$375) ; Reimbursement of lost wages (\$2,812.50)(3 weeks) ; Compensation for humiliation etc (\$1,500) ; Penalty (\$250)(Payable to Crown) ; Costs reserved

Ward v Southern Cleaning Services

11 Aug 2008, J Crichton, CA 115/08, (4 pages)

UNJUSTIFIED DISMISSAL - Applicant claimed unjustifiably dismissed by respondent - No appearance for respondent - Employment agreement stated applicant to work five hours per week plus other times as notified at specified rate - Applicant required to purchase shoes and trousers as part of agreement - Applicant unwell on day due to start employment - Unsuccessfully attempted to contact respondent to notify could not attend work - Respondent then contacted

applicant and applicant explained was sick - Applicant unwell again next day - Again attempts to contact respondent unsuccessful - Respondent again contacted applicant and applicant explained still sick - Next working day applicant spoke to respondent and was informed was dismissed as was considered unreliable, and to be lying about illness - Authority satisfied respondent knew applicant was sick and so absent on grounds of ill health - Authority found applicant summarily dismissed and decision was unjustified - Unjustified dismissal - Remedies - Applicant awarded three months lost wages (\$734.50) - Compensation of \$2,000 awarded - Respondent to reimburse applicant \$150 for purchase of shoes and trousers - COSTS - Respondent to pay \$1,000 towards applicant's costs - Custodian

Result: Application granted ; Reimbursement of lost wages (\$734.50) ; Reimbursement for expenses (\$150) ; Compensation for humiliation etc (\$2,000) ; Costs in favour of applicant (\$1,000) ; Disbursements in favour of applicant (\$70)(Filing fee)

Williamson v New Zealand Institute of Science & Technology Ltd

7 Aug 2008, L Robinson, AA 282/08, (10 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Fixed term employment – Applicant alleged unfounded allegations including being “labelled a racist and work performance” – Applicant sought compensation for “wrongful allegations” and “defamation of character” – Respondent’s manager (“C”) approached by students with complaints about applicant’s tutoring – On day complaints received, applicant called to meeting and told complaints received from students that not teaching grammar, played too many games, student felt racially discriminated against and treated unfairly – Applicant wrote to respondent refuting allegations and stated raising personal grievance – C replied with invitation to attend meeting next day – Applicant presented with “deed of indemnity” where asked to agree to termination of employment subject to conditions, including not bringing personal grievance – Applicant argued would accept deed if paid for afternoon classes and provided with positive reference – Respondent refused to accept applicant’s counter offer – Applicant resigned claiming work conditions intolerable due to false allegations “in particular being called a racist” – Authority had no jurisdiction to hear “defamation of character” allegation – Authority found doubtful whether applicant’s letter to respondent sufficient to raise personal grievance, however, respondent’s subsequent conduct indicated had no issue with form of notification – Authority considered true situation that employment came to end without applicant’s concurrence – Authority found applicant’s reference to “intolerable working conditions” a reference to respondent’s failure to discuss changes to classes and to tell applicant about meetings – Authority found applicant never called a racist, however, agreed with objection to suggestion that applicant responsible for students feeling “racial discrimination” – Respondent should have put specific statements made by students to applicant for explanation or response – Authority concluded respondent took for granted students allegations that had been “racially discriminated” against and not interested in applicant’s response to allegations – Only input sought from applicant was view on how to resolve situation – Authority found applicant entitled to have allegation verified and investigated properly – Respondent’s actions not in accordance with statutory duty of good faith owed to applicant – Very serious to allege someone a racist or discriminated against others and failure to investigate allegation fully and fairly very serious breach – Authority concluded substantial risk of resignation being reasonably foreseeable having regard to seriousness of breach – Unjustified constructive dismissal – No contribution – Applicant gave no evidence of significant hurt and humiliation – Authority found however, must have been distressing to have been accused unfairly of having “racially discriminated” against students – Compensation of \$2000 appropriate – English tutor

Result: Application granted ; Compensation for humiliation etc (\$2,000) ; No order for costs

Wu v Jireh Restaurants Ltd

1 Aug 2007, J Wilson, AA 224/07, (8 pages)

UNJUSTIFIED DISMISSAL – Applicant claimed unjustifiably dismissed – Respondent argued applicant given numerous warnings regarding misconduct and quality of food – Argued confrontation between applicant and manager resulted in applicant refusing to return to work – Respondent argued genuine efforts made to resolve difficulties and when offer of alternative employment refused decision made to terminate employment – Respondent produced signed written warning which alleged given to applicant prior to dismissal – Applicant claimed had never seen letter or received any written warnings – Claimed letter had been written post dismissal to justify dismissal – Applicant claimed no confrontation with manager occurred – Claimed received call asking to return to work in evening – Claimed when asked why attendance required, received second call that employment terminated and to collect pay – Applicant refused to take pay until given reasons for dismissal – Respondent alleged misunderstanding at meeting where believed applicant had resigned – Authority found establishment of facts problematic since evidence given via translator – Authority found by piecing together witness evidence able to establish reasonable understanding of probable events – Authority found if any warning given to applicant likely given without due process – Authority found likely misunderstanding between applicant and manager – Respondent believed conduct confrontational and insubordinate while applicant felt conduct inconsequential given 10 years of service – Authority concluded words conveyed to applicant gave impression that dismissed – Warning letter evidence that respondent predetermined dismissal – Dismissal unjustified – REMEDIES – Authority accepted applicant's dignity wounded and entitled to believe not wanted by respondent – Applicant contributed to situation giving rise to grievance by failing to be fully open to respondents suggestions to salvage employment – Contribution nullified any entitlement to reimbursement of lost wages – Applicant's entitlement to compensation not affected by contribution – Award of \$5000 appropriate – Chef

Result: Application granted ; Reimbursement of lost wages (Reduced to \$0) ; Compensation for humiliation etc (\$5000)

Personal Grievance - Dismissal - Misconduct - Employment Relations Act 2000

G v General Distributors Ltd

18 Aug 2008, L Robinson, AA 177A/08, (18 pages)

UNJUSTIFIED DISMISSAL – Summary dismissal – Applicant, old duty manager, commenced sexual relationship with “W”, 16 year old subordinate employee – Manager (“H”) learned of relationship - Human resources specialist (“K”) advised H to put conflict of interest policy (“policy”) to applicant and W – H told applicant and W policy required them to disclose personal relationship – Applicant irate, denied relationship and argued no right to ask question – Applicant sent K vehement email – K informed respondent’s area manager (“D”) - D accepted applicant’s denial of relationship so matter not pursued further – Applicant upset when W ended relationship – Applicant’s work affected and failed to report for shifts – Applicant requested K reorganise W’s shifts – Applicant suggested to W that should resign – Disciplinary investigation commenced – Applicant admitted to sexual relationship with W – Respondent concluded two acts of serious misconduct – Firstly, lied about true nature of relationship with W and secondly encouraged W to resign – Respondent also concluded respondent absent without authority and disobeyed instruction to maintain reasonable behaviour amounted to misconduct – Applicant rejected relocation offer – Applicant’s employment terminated - Authority found policy not known to applicant, W or H prior to K informing them – However, found applicant made aware of policy and continued relationship – Authority found policy that of parent company, PEL, not of respondent employer - No evidence that policy formally adopted by respondent - Although allegations of breach of policy factually established, policy not applicable to applicant’s employment – Unnecessary to determine whether breach constituted grounds for summary dismissal – Authority accepted lying to employer may be grounds for summary dismissal as serious breach of duty of good faith – Respondent entitled to expect higher standards from managerial personnel – Authority found allegation of lying not formally put to applicant – Found applicant was heard in relation to policy compliance, but not given opportunity to explain whether or why had lied – Essential enquiry into lies did not occur before summary dismissal – Not actions of fair and reasonable employer – Not necessary to comment on other allegations of misconduct – Unjustifiably dismissed – REMEDIES – Found applicant adamantly refused to accept respondent had legitimate concern in applicant’s relationships with employees he supervised – Authority rejected applicant’s explanation that did not know what respondent asking – Found applicant deliberately lied to H, K and D – Applicant ultimately sought respondent’s assistance to maintain work relationship with W, despite original disdain for policy – Respondent unable to manage situation properly due to applicant’s lies – Blameworthy conduct directly linked to situation that led to personal grievance – Noted maxim that no person should profit from own wrong – No remedies awarded - Duty manager

Result: Application granted

McPherson v Olivers Central Otago Ltd

8 Aug 2007, J Crichton, CA 95/07, (7 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant appointed as general manager of respondent with intention would ensure viability of business – Respondent argued almost immediately began having second thoughts about appointment due to employment issues that arose – Applicant claimed respondent’s owner (“L”) raised employment issues in general way during drive home – Applicant claimed told by L that resignation best way to resolve issues – Applicant claimed when got home told partner had been fired – Respondent argued sought applicant’s impressions of “how things were going” and informed applicant “had some concerns” which happy to discuss – Respondent alleged told applicant employment not being terminated, however, number of issues to discuss on formal basis – Respondent suggested applicant take time off as

observed applicant upset – Applicant sent email to L early next morning claiming resignation was sought during drive home – Succession of emails followed which eventuated in applicant being called to disciplinary meeting – Authority satisfied allegations properly put to applicant at meeting – Authority satisfied applicant given fair opportunity to respond to allegations – Authority also satisfied applicant accepted allegations true and apologised because thought doing good work – Authority put all allegations again to applicant – Applicant accepted all allegations true except allegation that abused owner – Applicant called to further meeting where respondent told applicant had lost trust and confidence in ability and dismissed applicant – Authority satisfied no dismissal constructive or otherwise during drive home – Applicant's behaviour inconsistent with claim that constructively dismissed – Applicant pestering L to discuss concerns inconsistent with notion that already dismissed – Authority found difficult to understand why applicant would attend two disciplinary meetings if already dismissed – No constructive dismissal – Authority satisfied dismissal process adopted by respondent fair in circumstances – Authority concluded respondent justified in dismissing applicant for misconduct at second meeting – Restaurant general manager

Result: Application dismissed ; Costs reserved

Stevens v Carter Holt Harvey Ltd

4 Jul 2008, V Campbell, AA 232/08, (10 pages)

UNJUSTIFIED DISMISSAL – Summary dismissal for serious misconduct – Senior manager (“B”) sent high importance email to all sales staff, including applicant, stating respondent to increase prices to customers - Applicant attended training session on managing price increase implementation with customers – B resent previous email, attaching timeline of proposed actions – Timeline stated sales staff to advise customers of price increase and monitor responses – Applicant contacted manager (“D”), who said client account (“S”) to be handled at local level – Applicant understood S’s answer to mean could negotiate increase with S – Applicant negotiated unwritten agreement with S to increase prices by 2 percent - Applicant informed D and remaining sales staff that negotiated deal of around 3 percent with S - D expressed approval and reported deal to B - B emailed all sales managers, including D, stating sales staff could not negotiate price increase of less than 5.5 percent without sign off from manager – D did not forward B’s email to applicant until day before dismissal – D invited applicant to disciplinary meeting for failing to comply with instruction of manager, resulting in serious financial consequences – Applicant confused at disciplinary action and contacted colleague (“R”), who confirmed applicant’s theory of authority for negotiation – Minutes of disciplinary meeting showed applicant remorseful and apologetic – Authority found D’s denial to management in disciplinary meeting that previously expressed approval for deal untruthful – Applicant dismissed by letter stating grossly negligent – Authority noted applicant consistent that when negotiated price increase with S, believed was acting in accordance with training – Authority found respondent made no effort to rule out whether applicant may have misunderstood instructions – Authority noted D expressed approval for deal, showing D considered applicant to be acting within guidelines - Authority found emails ambiguous about whether sales staff entitled to negotiate with S – However, found timeline made clear that only authorised to raise prospect of sales increase and monitor client reaction – Found emails and training stressed importance of achieving price increase as being critical to respondent – Authority found that applicant should have ignored emails at own peril since previously issued with expired warnings for not following company procedures – Found respondent’s focus in disciplinary investigation on potential consequences of negotiated deal with S was overstated – Respondent unaware at time of dismissal whether applicant’s deal would impact on other industries – Authority noted respondent did not contact S to advise that applicant negotiated outside authority – B gave evidence that S considered deal not binding – Found fair and reasonable employer would have taken ambiguity of emails into account, especially due to interpretation of B and R of emails, applicant’s apologies at

disciplinary meeting and fact S did not consider deal enforceable – Fair and reasonable employer would not have dismissed applicant – Dismissal unjustified – Remedies – No contributory conduct – Applicant 64 years old when dismissed, and eligible for guaranteed retirement income in 8 months – Authority accepted difficult to secure alternative employment given applicant's age – Applicant found temporary alternative work at lesser pay – Respondent to reimburse lost wages calculated at difference between lost earnings from respondent until retirement date and earnings from alternative employment – Respondent to reimburse loss of employer contributions to superannuation scheme until retirement date – Respondent to reimburse loss of company payments to health premiums until retirement date – Respondent to reimburse loss of use of company car for 8 month period until retirement date – Applicant claimed embarrassed to advise family, friends and clients that dismissed after 20 years employment – Authority found hurt and humiliation exacerbated as no opportunity to farewell colleagues after long employment – Authority took length of service and age of applicant into account - Compensation of \$15,000 appropriate - Sales Representative and Account Manager

Result: Application granted ; Reimbursement of lost wages (\$10,153) ; Loss of benefit (\$3,768)(contributions to superannuation) (\$379)(contributions to health premiums) (\$10,000)(use of company vehicle) ; Compensation for humiliation etc (\$15,000) ; Costs reserved

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

Bourke v Bunnik

23 Jul 2008, V Campbell, AA 266/08, (6 pages)

UNJUSTIFIED DISMISSAL – Poor performance – Applicant employed on fixed term agreement to work on respondent’s farm - Respondent claimed applicant incompetent despite supervision and instructions - Applicant claimed no proper training and unrealistic expectations – Applicant given dismissal letter containing instances where failed to meet requirements - Authority found no notice or warnings given which expressed dissatisfaction with performance so applicant could respond and improve – Procedurally unfair – Dismissal unjustified – Remedies – Applicant sought reimbursement of wages from date of dismissal until end of agreement – Found alternative employment one week after dismissal – Awarded one week’s lost wages (\$398.47) plus interest – Applicant claimed compensation for hurt and humiliation – Considering short tenure of employment and fact applicant took job knowing would be difficult, award of \$1,500 compensation appropriate - ARREARS OF WAGES – Not disputed applicant not paid for two weeks of employment – Respondent claimed waiting for applicant to provide timesheets – Authority not satisfied applicant aware of obligation to provide timesheets – Applicant entitled to payment of wages of \$796.95 plus interest – Farm Assistant

Result: Application granted (dismissal) ; Reimbursement of lost wages (\$398.47) ; Compensation for humiliation etc (\$1,500) ; Arrears of wages (\$796.95)(2 weeks) ; Costs reserved

Personal Grievance - Dismissal - Redundancy - Employment Relations Act 2000

Heap v Calibre Plastics Ltd

14 Jul 2008, R Arthur, WA 95/08, (16 pages)

UNJUSTIFIED DISMISSAL – Applicant claimed dismissal for redundancy not genuine and not fairly carried out – Applicant employed to sell particular brand of specialised medical equipment – Applicant had sold brand previously and helped respondent obtain agency for brand - Individual employment agreement not formalised, but drafts exchanged – Authority accepted latest version of draft agreement as one parties considered themselves bound by - Respondent decided not to renew agency - Employment agreement stated applicant's position redundant if agency terminated – Authority satisfied that sales below expectations for sustaining applicant's position – Found respondent entitled to make business decision – Decision to retain existing sales manager, rather than applicant, for other work was legitimate exercise of respondent's discretion – Applicant suggested decision to make position redundant was retaliation by managing director ("H") because applicant rejected sexual advances – Authority not satisfied that instances provided amounted to sexual advances - Authority satisfied genuine commercial reasons for ending agency, with inevitable consequence on applicant's position due to employment agreement provision – Authority found redundancy foregone conclusion when respondent did not renew agency agreement – Found respondent not consulting applicant about likely effect of that decision before speaking with supplier was clear breach of statutory duty of good faith regarding proposals that might impact on employee – H should also have sought applicant's approval prior to recommending to supplier that consider employing applicant directly – Found H only consulted applicant about effect of redundancy on applicant, not its fact or any consideration of alternatives – Authority found way respondent ended distribution agency, told applicant about it, and carried out redundancy of position was breach of terms on which had employed applicant and its statutory good faith obligations – Redundancy genuine but grievance arose from manner of redundancy announcement and inadequate consultation – Authority did not put weight on complaint of tension following announcement of redundancy because found neither party's version sufficiently candid or blame free –

REMEDIES – As redundancy genuine, Authority dismissed claims for lost wages and compensation for embarrassment that made redundant, difficulty in finding new job and applicant's expenses previously covered by respondent – Authority found applicant's allegation of respondent's subsequent poor conduct not proven because unable to attribute bad mouthing to respondent - Applicant's claim for return of personal property allegedly held by respondent declined as evidence did not establish any material in respondent's possession – Found that although way applicant heard about redundancy was brutal, not realistically shock due to previous discussions about financial state of company – Unchallenged evidence from applicant's psychologist of depression and anxiety – Applicant entitled to compensation for humiliation, loss of dignity and injury to feelings – Employment agreement entitled applicant to two and a half weeks redundancy compensation owing – Supplementary determination WA 95A/08 corrected arithmetical error in original calculation of redundancy compensation – One day unpaid holiday pay owing to applicant – No contributory conduct as respondent conceded low sales not applicant's fault – Sales Manager

Result: Application granted ; Redundancy compensation (2 ½ weeks) ; Arrears of holiday pay (1 day) ; Compensation for humiliation etc (\$6,000) ; Costs reserved

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

Ghanem v South Pacific Meats Ltd

8 Jul 2008, J Crichton, CA 95/08, (7 pages)

UNJUSTIFIED DISMISSAL - RAISING PERSONAL GRIEVANCE - Applicant claimed unjustifiably dismissed - Respondent claimed applicant abandoned employment and personal grievance not raised within time - Applicant charged with criminal offence and granted bail - Applicant's co-worker ("E") received call from production supervisor ("PS") - E believed PS told him applicant had been replaced and so informed applicant had been dismissed - Applicant then moved to another city as part of bail conditions - After numerous attempts applicant successful in contacting PS - Applicant raised issue of dismissal and claimed PS confirmed job had gone - Applicant claimed telephone call raised personal grievance - One year after alleged dismissal, having been acquitted, applicant sought to raise personal grievance - PS no longer at respondent and respondent had no record of personal grievance - Respondent argued PS had no authority to dismiss and applicant's employment records showed file still open - E credible witness, and no reason to believe lied about telephone conversation with PS - Authority found was telephone conversation between E and PS which resulted in E believing applicant had been dismissed - Possible E misunderstood nature of conversation - Authority accepted respondent's submission that purpose of PS's call was to establish E's whereabouts - More likely PS mentioned applicant in passing conveying that job being covered in meantime rather than was dismissed - Authority found applicant not dismissed by PS in telephone conversation with E - No personal grievance - Found had there been a dismissal, conversation between applicant and PS sufficient to raise personal grievance - Authority satisfied employment agreement ended through frustration when applicant bailed to another city as bail conditions made it impossible for applicant to perform job - Halal slaughterman

Result: Application dismissed ; Costs reserved

Personal Grievance - Unjustified Disadvantage - Employment Relations Act 2000

Birch v Passage Software Ltd

13 Jun 2008, Y S Oldfield, AA 206/08, (7 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - UNJUSTIFIED DISADVANTAGE - Applicant gave one week notice of resignation - Had been employed for two months and still within probationary period - Claimed constructively dismissed, or alternatively, suffered unjustified disadvantage - Employment agreement allowed for either party to terminate agreement with one week notice during probationary period - Employer could pay employee pay in lieu of notice and not require employee to work out notice period - Applicant took Friday before final week of work off - Employer believed applicant would not return to work out notice period - Applicant told had choice whether to work out notice period or not, and that holiday pay already paid - Applicant not encouraged to stay, and not told about notice clause or that would receive week's pay for notice period even if did not work - Applicant indicated wished to work out notice period as believed would not be paid if did not work - Several incidents made applicant feel uncomfortable - Informed employer no longer wished to work out notice period - Applicant's handbag checked for company property - Authority found respondent would have found it easier had applicant not returned to work - Found applicant's impression not welcome in workplace reasonable and accurate - Initially applicant not paid pay in lieu of notice, however had since been paid - Authority satisfied applicant suffered disadvantage as respondent's conduct unjustified and made workplace uncomfortable - However, conduct not sufficiently serious to give rise to constructive dismissal - Unjustified disadvantage - Remedies - Employment relationship problem not overly serious - Respondent partly rectified wrong by paying pay in lieu of notice - Only nominal award required - Compensation of \$500 appropriate - No other remedies awarded - COUNTERCLAIM - Respondent claimed applicant misrepresented computer skills - Sought damages for costs incurred in additional training - Applicant claimed had "good" computer skills - Respondent provided no benchmark to compare skills to, therefore subjective assessment - In such circumstances unable to find applicant misrepresented herself - Even if had, respondent effectively reaffirmed employment agreement by continuing employment and providing further training after realised skills not at required level - Counterclaim dismissed - Telemarketer

Result: Application granted (Unjustified disadvantage) ; Application dismissed (Constructive dismissal) ; Compensation for humiliation etc (\$500) ; Costs reserved

Dudley v Sub Five Private Security Ltd

18 Jul 2008, J Crichton, CA 103/08, (7 pages)

UNJUSTIFIED DISADVANTAGE – Respondent altered roster, significantly changing applicant's shift rotation, without informing applicant – New roster did not suit applicant - Applicant claimed unjustifiably disadvantaged by roster change - Claimed employed in permanent position at specific location and so did not have to accept changes – Authority found employment agreement said, and custom in industry confirmed, applicant permanent security guard for respondent but shift patterns and locations of work able to be altered – However, found change to shift pattern sudden and no prior notification – Respondent admitted changes communicated inadequately - Authority satisfied applicant unjustifiably disadvantaged by way respondent managed roster change - UNJUSTIFIED DISMISSAL – Applicant claimed unjustifiably constructively dismissed by respondent unilaterally changing shift pattern leaving him no opportunity but to consider employment at end – Respondent argued applicant abandoned employment after respondent made every effort to retain him – Applicant rejected other options offered by respondent – Authority found that by time applicant said would work new roster for old shift, respondent legitimately

found replacement – Found respondent did everything could reasonably have done to meet applicant’s needs when original shift roster no longer possible – Found applicant resistant to change and erroneously thought shift was permanent – Applicant employed as security guard and nothing more with no set duties or location – Respondent entitled to move applicant as needs of business dictated – Respondent went out of way to retain applicant – Applicant abandoned employment – Not constructively dismissed - Remedies – When respondent breached obligations by failing to alert applicant of upcoming roster change, conceded error and did everything in power to rectify situation – Found applicant’s behaviour contributed to breakdown in employment relationship to greatest extent possible – Applicant not cooperative and fixed on belief promised full time job on shift roster that suited him, which was not true legal position – 100 percent contributory conduct – No remedies appropriate – Security Guard
Result: Application granted (Unjustified disadvantage) ; Application dismissed (Unjustified dismissal) ; Costs to lie where they fall

Gipson v Entertainment Publications Ltd

3 Jul 2008, R Arthur, AA 230/08, (15 pages)

UNJUSTIFIED DISADVANTAGE – Applicant claimed written warning for poor performance not justified or fairly given – Applicant given sales script, week training conference, workshop and “role play” sessions, and client visits with other staff – Regional manager (“B”) accompanied applicant to client meeting and disappointed with presentation – Sales results showed applicant only salesperson failing sales goals – When B raised concerns, applicant blamed poor communication and support from administrative staff – Applicant given performance improvement plan noting concerns and identifying future requirements and support – Applicant told B doctor diagnosed stress causing high blood pressure and anxiety attacks – Illness caused by personal and work pressures – After applicant met with Australian based general manager (“H”), H gave applicant letter stating reasons for performance problems inadequate and probationary period extended for further three months – B conducted role play assessment and found applicant performed inadequately – B gave applicant letter outlining performance and verbal bullying concerns and arrangements for disciplinary meeting, including support person and offer of paid leave until meeting - Authority satisfied applicant given adequate opportunity, training and support to perform properly – Respondent entitled to raise concerns about performance and did so in fair way – Written warning regarding performance was necessary and open given comparative poor sales and steps already taken by respondent – Performance warning justified – Applicant claimed written warning for misconduct in relations with co-workers not justified or fairly given - Applicant complained that administrative staff rude, uncooperative and deliberately undermining work – When questioned by B, administrative staff accused applicant of aggressive, unprofessional behaviour – B spoke to witnesses and found applicant’s version of events may not be truthful, and that applicant’s frustration from disciplinary meeting likely taken out on co-worker – Authority found fair and reasonable employer would not have formed conclusion without hearing applicant’s version – Found B gave little weight to contributions of administrative staff to poor office relations – Found respondent unduly magnified issue of office relationships due to performance concerns – Respondent’s inquiry and conclusion of misconduct superficial and undocumented – Fair and reasonable employer would not have come to conclusion that complaints solely fault of applicant to extent that final written warning warranted – Misconduct written warning unjustified – UNJUSTIFIED DISMISSAL – Serious misconduct – While respondent considering disciplinary action regarding performance and office conduct, B discovered applicant used remote email access to send several company documents marked “highly confidential and commercially sensitive” and to be shredded after use to personal email address – Respondent argued breached trust, confidence, and contractual obligations, amounting to serious misconduct and justifying dismissal – Authority found fair and reasonable employer would not have concluded that

remote access was serious misconduct in circumstances – Found applicant accessed email to prepare for disciplinary meeting, which was company-related business so not in breach of internet policy – Allegations that remote access was “theft” and “without a legitimate reason” inaccurate – Respondent accepted that documents routinely kept for later use – Found contents not disclosed to anyone so no actual breach of confidentiality – Applicant undertook to provide statutory declaration that files deleted after process concluded – Respondent already permitted applicant further three months to reach performance standards – Dismissal was heated overreaction – Dismissal unjustified – Remedies – Applicant claimed reimbursement for lost wages for seven months until reemployed - Authority found applicant’s anxiety attacks made finding reemployment difficult – Applicant entitled to wait for suitable position, but took no interim work so had no earnings for seven months, despite demand in industry – Applicant did not adequately mitigate loss, so respondent not responsible for full period – Awarded three months lost wages – Earnings level for lost wages disputed – Applicant claimed maximum commission – Given findings on performance, Authority accepted respondent’s submission to calculate lost wages as most applicant could have earned – Applicant claimed humiliated and distressed by termination of employment after only three months – Found respondent aware of vulnerability due to work-related stress – \$6,000 compensation appropriate – Found applicant never satisfactorily explained performance issues nor acknowledged personal responsibility – Applicant’s approach to return and deletion of emails contributed to overheated atmosphere - Remedies to be reduced by one third for contributory conduct - Merchant service manager

Result: Application granted (Unjustified dismissal) ; Application granted (Unjustified disadvantage) ; Application dismissed (Unjustified disadvantage) ; Reimbursement for lost wages (3 months reduced to 2 months) ; Compensation for humiliation etc (\$6,000 reduced to \$4,000) ; Costs reserved

Rudolph & Anor v Christchurch City Council

9 Aug 2007, P Montgomery, CA 99/07, (11 pages)

BREACH OF CONTRACT – First applicant employed in permanent full-time position – Respondent consulted applicants on restructuring – Respondent disestablished position and offered first applicant fixed term position – Letter of appointment stated previous contractual terms and conditions to continue, and redundancy compensation payable at expiry of fixed term – Respondent decided not to continue position when fixed term position expired, but rather establish new permanent position – Roles different, with new role requiring higher technical skill - First applicant not appointed to new position – Fixed term position expired – Second applicant claimed given no notice of impending redundancy when restructuring disestablished position, in breach of Collective Employment Agreement (“CEA”) – Second applicant claimed first applicant was permanent employee in fixed term role - Authority found first applicant aware that position was fixed term, and signed letter accepting terms and conditions – Found letter set out that if first applicant unable to obtain alternative employment with respondent at expiry of fixed term, would receive redundancy compensation – Noted first applicant’s status under CEA changed from permanent employee to fixed term employee – Found foreseeable to applicants that the role would have limited duration – In circumstances, no need to notify second applicant of expiry of fixed term agreement – Found argument that first applicant permanent employee in fixed term role legally, conceptually, and factually wrong – Found no entitlement to have fixed term service included in calculation of redundancy compensation under CEA’s terms, but that respondent fulfilled additional undertaking to do so regardless – Found fixed term position agreement constituted agreement that redundancy compensation payment deferred until expiry of fixed term – Found respondent did not breach CEA as position was always fixed term, not disestablished - First applicant could have no expectations of ongoing employment unless redeployed or successfully applied

for new position - Reorganisation provisions of CEA not applicable – No breach of CEA – UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE – Found employment status changed from permanent employee to fixed term employee in accepting appointment to fixed term position – Termination of employment came about by expiration of fixed term and no other reason – No personal grievances – Field Support Officer
Result: Applications dismissed ; Costs reserved

Practice & Procedure - Employment Relations Act 2000

Burns & Ors v Reliance Transport Ltd

10 Aug 2007, P Montgomery, CA 101/07, (5 pages)

PRACTICE AND PROCEDURE – JURISDICTION – Applicants agreed to lodge consolidated personal grievance actions – Applicants claimed unjustifiably dismissed – Identity of employer preliminary issue – Respondent argued not party to any employment agreement with applicants – Argued applicants employed by third party (“BCT”) who utilised respondent’s goods service licence – Applicants claimed BCT trading name for division of respondent – Respondent held 50 percent shareholding in BCT and remaining shares held by third party – Authority concluded BCT registered company in own right – Applicants claimed BCT work invoiced through respondent which indicated BCT operating as subsidiary – Respondent argued not uncommon for associated businesses to utilise each others’ administration systems and personnel – Authority noted BCT faced considerable hurdles in establishing operations in region due to first applicant’s involvement in BCT – First applicant previously controlled two failed companies which left large number of regional community unpaid – Respondent argued result that regional business community reluctant to deal on credit basis with BCT – Argued pragmatic approach to make purchases for benefit of BCT through respondent – Authority found at time grievances raised applicants knew identity of employer to be BCT – Found attempt to involve respondent when extreme financial position of BCT became apparent – Authority satisfied on evidence provided BCT not merely trading name of respondent and was complete separate entity – Authority also satisfied applicants employees of BCT as no evidence of wages paid by respondent – Applicants failed to establish employment agreement existed with respondent – No jurisdiction

Result: Application dismissed ; Orders accordingly ; Costs reserved

Heap v Calibre Plastics Ltd

11 Aug 2008, R Arthur, WA 95A/08, (3 pages)

PRACTICE AND PROCEDURE - Supplementary determination – Determination recalling determination number WA 95/08 due to error in determination – Error made in calculating applicant’s entitlement to redundancy compensation under employment agreement - Correct calculation of contractual entitlement of redundancy compensation was two-and-a-half weeks, rather than three weeks as stated in determination WA 95/08

Result: Orders made ; Costs reserved

Webb and Anor v New Zealand Tramways and Public Passenger Transport Employees Union Inc.

31 Jul 2008, A Dumbleton, AA 221A/08, (4 pages)

PRACTICE AND PROCEDURE - Application to vary orders of Authority - In earlier determination Authority ordered respondent comply with its registered rules and hold elections for National Council - Authority fixed closing date for nominations for National Council - Members of respondent appointed President of New Zealand Council of Trade Unions (“CTU”) as Returning Officer - Respondent sought variation of Authority’s orders to allow nominations to close at earlier date than directed - Date needed to be varied to allow proposals for changes to Union rules to be considered by National Council at forthcoming Annual General Meeting (“AGM”) - Applicant argued earlier date did not allow time for dissemination of information to interested parties - Applicant also objected to appointment of President of CTU as Returning Officer - Authority declined to make directions in regard to appointment of Returning Officer - Respondent’s members given discretion to make appointment - Applicants’ dislike or distrust of CTU insufficient reason for interference with appointment - Authority agreed with objection to amended closing date for nominations - Revised timetable submitted by respondent much more reasonable and formed basis of Authority’s direction - Authority gave following directions - Nominations for National Council

to open 10 August and close 22 August - Ballot to open 1 September and close 13 September 2008 - Remits for AGM of National Council to open 14 September and close 30 September 2008 - AGM to be held 30 November 2008 - Relevant dates given in earlier determination amended accordingly

Result: Application granted ; Orders made

Practice & Procedure - Consent Orders - Employment Relations Act 2000

Bullock v Capital Project Management Ltd

24 Jul 2008, D Asher, WA 98/08, (2 pages)

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

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

CH Commercial Cleaning Ltd v Brown

4 Jul 2008, P Montgomery, CA 94/08, (2 pages)

CONSENT ORDER - Parties reached agreement on issues relating to applicant's application for interim injunction - Terms of settlement to be orders of Authority - Orders made without prejudice to respondent's claim - Respondent restrained from making contact with any existing customer of applicant or approaching any sub-franchises of applicant for period of six months from specified date - Respondent also restrained for six months from divulging any information relating to applicant's customers and sub-franchisees - Authority confirmed respondent not performing cleaning work for any of applicant's existing customers or sub-franchisees - Respondent will from specified date seek applicant's consent for all new advertising relating to specified companies prior to advertising being published - Applicant not to withhold consent unreasonably

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

The Estate of Mary Kay Parkes v Chief Executive of the Ministry of Social Development

14 Jul 2008, M Ulrich, AA 247/08, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement at investigation meeting - 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

Hirst v Pirtek Manawatu (2002) Ltd and Anor

22 Jul 2008, G J Wood, WA 99/08, (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

Kerkmeester v Napier Equity Ltd

13 Aug 2008, D Asher, WA 107/08, (2 pages)

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

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

Kishan v Compudigm International Ltd (in receivership & in liquidation)

5 Aug 2008, D Asher, WA 105/08, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement at investigation meeting - Terms of settlement to be orders of Authority

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

Lavea v TCI New Zealand (1995) Ltd

17 Jul 2008, A Dumbleton, AA 258/08, (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

MacDonald v Clark Products Ltd

12 Aug 2008, D Asher, WA 106/08, (2 pages)

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

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

Mitchell v Smith

24 Jul 2008, P Montgomery, CA 106/08, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Parties agreed to resolve differences regarding overpayment of wages claim - Respondent to pay applicant by instalments via automatic payment - Terms of settlement to be orders of Authority - In event orders not complied with, enforcement action to be available in District Court

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

New Zealand Institute of International Understanding v Fang

4 Aug 2008, D King, AA 274/08, (1 pages)

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

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

New Zealand Nurses Organisation & Anor v Stillwater Gardens Rest Home and Hospital Ltd

6 Aug 2008, G J Wood, CA 114/08, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Respondent agreed by specified date to sign and return confirmation form - Draw existence of bargaining to attention of employees in accordance with Act and provide copy of notice of bargaining to applicant as well as duly notify representation arrangements for purpose of MECA bargaining - Respondent acknowledged obligations under Act applied in consequence of notice initiating bargaining - Applicants to withdraw proceedings filed against respondent - Both parties agreed costs to lie where fall

Result: Consent order granted ; Orders accordingly ; Costs to lie where they fall

New Zealand Nurses Organisation Inc & Anor v Greendale Residential Care Ltd

4 Aug 2008, G J Wood, WA 104A/08, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Respondent agreed by specified date to sign and return confirmation form - Draw existence of bargaining to attention of employees in accordance with Act and provide copy of notice of bargaining to applicant as well as duly notify representation arrangements for purpose of MECA bargaining - Respondent acknowledged obligations under Act applied in consequence of notice initiating bargaining - Applicants to withdraw proceedings filed against respondent - Both parties agreed costs to lie where fall

Result: Consent order granted ; Orders accordingly ; Costs to lie where they fall

New Zealand Nurses Organisation Inc & ANor v Kaylex Care (Waipukurau) Ltd

4 Aug 2008, G J Wood, WA 104C/08, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Respondent agreed by specified date to sign and return confirmation form - Draw existence of bargaining to attention of employees in accordance with Act

and provide copy of notice of bargaining to applicant as well as duly notify representation arrangements for purpose of MECA bargaining - Respondent acknowledged obligations under Act applied in consequence of notice initiating bargaining - Applicants to withdraw proceedings filed against respondent - Both parties agreed costs to lie where fall

Result: Consent order granted ; Orders accordingly ; Costs to lie where they fall

New Zealand Nurses Organisation Inc & Anor v Marire Home Inc

4 Aug 2008, G J Wood, WA 104/08, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Respondent agreed by specified date to sign and return confirmation form - Draw existence of bargaining to attention of employees in accordance with Act and provide copy of notice of bargaining to applicant as well as duly notify representation arrangements for purpose of MECA bargaining - Respondent acknowledged obligations under Act applied in consequence of notice initiating bargaining - Applicants to withdraw proceedings filed against respondent - Both parties agreed costs to lie where fall

Result: Consent order granted ; Orders accordingly ; Costs to lie where they fall

New Zealand Nurses Organisation Inc & Anor v Nazareth Rest Home Ltd

4 Aug 2008, G J Wood, WA 104B/08, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Respondent agreed by specified date to sign and return confirmation form - Draw existence of bargaining to attention of employees in accordance with Act and provide copy of notice of bargaining to applicant as well as duly notify representation arrangements for purpose of MECA bargaining - Respondent acknowledged obligations under Act applied in consequence of notice initiating bargaining - Applicants to withdraw proceedings filed against respondent - Both parties agreed costs to lie where fall

Result: Consent order granted ; Orders accordingly ; Costs to lie where they fall

New Zealand Nurses Organisation Inc & Anor v Waverley Aged Care Ltd

4 Aug 2008, G J Wood, WA 104D/08, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Respondent agreed by specified date to sign and return confirmation form - Draw existence of bargaining to attention of employees in accordance with Act and provide copy of notice of bargaining to applicant as well as duly notify representation arrangements for purpose of MECA bargaining - Respondent acknowledged obligations under Act applied in consequence of notice initiating bargaining - Applicants to withdraw proceedings filed against respondent - Both parties agreed costs to lie where fall

Result: Consent order granted ; Orders accordingly ; Costs to lie where they fall

New Zealand Nurses Organisation Inc & Anor v Woodfall Lodge Ltd

4 Aug 2008, G J Wood, WA 104E/08, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Respondent agreed by specified date to sign and return confirmation form - Draw existence of bargaining to attention of employees in accordance with Act and provide copy of notice of bargaining to applicant as well as duly notify representation arrangements for purpose of MECA bargaining - Respondent acknowledged obligations under Act applied in consequence of notice initiating bargaining - Applicants to withdraw proceedings filed against respondent - Both parties agreed costs to lie where fall

Result: Consent order granted ; Orders accordingly ; Costs to lie where they fall

Paki v Levin Meats Ltd

26 Jun 2008, P R Stapp, WA 87/08, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement at

investigation meeting - 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

Phan v Tandarra Engineering Ltd

26 Jun 2008, R Arthur, AA 220/08, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Terms to be full, final and binding - Order prohibiting publication of terms of settlement

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

Provida Foods Ltd v Davidson & Anor

15 Jul 2008, R A Monaghan, AA 249/08, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement for interim relief between themselves - First respondent undertook to be bound in all respects with provisions of specified clauses of Policy and Procedure Manual/House Rules - Second respondent undertook not to incite, instigate, aid or abet any breach of the provisions of specified clauses of the Police and Procedure Manual/House Rules - Such undertakings without prejudice to any parties right to argue substantive issues - Costs reserved to substantive hearing - Terms of settlement to be orders of Authority

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

Roach v MTV Networks New Zealand Ltd

22 Jul 2008, A Dumbleton, AA 265/08, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement at investigation meeting - Terms of settlement to be orders of Authority - Order prohibiting publication of terms of settlement - Further order prohibiting publication of written briefs of evidence filed on behalf of parties as well as all documentary exhibits presented by both parties

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

Ross v Crane Distribution New Zealand Ltd

14 Aug 2008, P Cheyne, CA 120/08, (1 pages)

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

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

Department of Labour
TE TARI MAHI

