

Department of Labour
TE TARI MAHI



EMPLOYMENT CASES SUMMARY

January/February 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.

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

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

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

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

CONTENTS

Significant Judgments/Decisions

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

Brief Summaries

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

FULL-TEXT OF DETERMINATIONS

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

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

Fax: 04-9154727

Email: wprequests@dol.govt.nz

Crown Copyright

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

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

ISSN: 1171-8560

Contents

Contents	3
Table of Cases Noted in This Issue	4
Full Summaries of Significant Cases	9
Brief Summaries of Court Judgments, Authority Determinations —	
• Arrears	24
Holiday Pay	26
• Bargaining	27
• Breach of Contract	28
• Compliance Order	29
• Costs	30
• Dispute	34
• Good Faith	36
• Injunction	38
• Jurisdiction	39
• Parental Leave	41
• Penalty	42
• Personal Grievance	
Dismissal	44
Dismissal - Misconduct	47
Dismissal - Poor Performance	51
Dismissal - Redundancy	52
Raising of Personal Grievance	53
Unjustified Disadvantage	55
• Practice & Procedure	56
Consent Orders	59

Cases Noted in this issue

Case Name	Page
Afuie v Fyran Marine Ltd (AA 300A/07, 13 Dec 2007, Y Oldfield)	30
Air New Zealand Ltd v Cliff and Anor (CA 200/06, 8 May 2007, Hammond, Chambers, Arnold JJ)	9
Aumau & 22 Ors v Transportation Auckland Corporation Ltd and Anor (AA 370/07, 28 Nov 2007, R Arthur)	59
Bolton v The Rathbone Clinic Ltd (AA 275A/07, 13 Dec 2007, Y Oldfield)	30
Bradshaw v James Pascoe Ltd (AA 226/07, 3 Aug 2007, V Campbell)	34
Bradshaw v James Pascoe Ltd (AA 226A/07, 14 Dec 2007, V Campbell)	30
Brown v Port Taranaki Ltd (WA 155/07, 27 Nov 2007, GJ Wood)	59
Buksh v Home Investment Group Ltd (AA 273/07, 4 Sep 2007, J Scott)	24
Chief Executive of the Department of Corrections v Imo (AC 57/07, 14 Nov 2007, Shaw J)	16
Chitty v Hills Hats Ltd (AA 295/07, 24 Sep 2007, D King)	28,52
Cooper v Mars New Zealand Ltd t/a Mars Petcare (WA 163/07, 6 Dec 2007, D Asher)	55
Coy v Commissioner of Police (CC 23/07, 19 Nov 2007, Colgan CJ)	18
Craig v Carter Holt Harvey Ltd (AA 9/08, 15 Jan 2008, A Dumbleton)	44
Currie v Zelko New Zealand Ltd (CA 150/07, 12 Dec 2007, P Cheyne)	59
D v M (CA 128/07, 1 Nov 2007, P Montgomery)	26,47

Devi v M Manhaas & Manhaas Industries Ltd & Anor (WA 128/07, 13 Sep 2007, PR Stapp)	56
Flynn v Classic Cuts Ltd t/a The Bacon Barn (AA 169A/07, 11 Dec 2007, D King)	30
Gowans v Marshall Projects Nelson Ltd (CA 67/07, 21 Jun 2007, P Cheyne)	29
Green and Ors v Rendezvous Hotels (NZ) Ltd (AA 235A/07, 10 Dec 2007, M Urlich)	30
Hand v Hayson (AA 243/07, 13 Aug 2007, Y Oldfield)	31,44
Harrison v BlackMagic Composite Company NZ Ltd (AA 311/07, 5 Oct 2007, D King)	29
Havenleigh Global Services Ltd v Toeikrathok and Ors (CA 7/08, 23 Jan 2008, J Crichton)	39
Heremia v Wilding International Ltd (AA 237/07, 8 Aug 2007, V Campbell)	47
Horn v TC Painting Ltd & Anor (AA 315/07, 11 Oct 2007, V Campbell)	24
Houston v Oldco PTI Ltd (AA 184A/07, 10 Dec 2007, M Urlich)	31
Jack v Duratcech Wholesale Ltd (CA 96/07, 9 Aug 2007, J Crichton)	39
Jeffries v Adis International Ltd (CA 81/07, 21 May 2007, William Young P, Glazebrook, Wilson JJ)	56
Johnson v Salamander Enterprises Ltd (WA 175/07, 20 Dec 2007, GJ Wood)	59
Ka'ai v Vice Chancellor, University of Otago (CA 157/07, 19 Dec 2007, J Crichton)	39,56
Khamsisavatdy v Sealed Air (New Zealand) Ltd (WA 157/07, 30 Nov 2007, PR Stapp)	59
Khodabandeh v TC Painting Ltd (AA 317/07, 12 Oct 2007, V Campbell)	24
Kiwikiwi v Maori Television Service (AC 55/07, 2 Nov 2007, Shaw J)	12

Kora v Weymouth Intermediate School (AA 376/07, 30 Nov 2007, A Dumbleton)	31
Kurene and Anor v United Group Rail (NZ) Ltd (WA 21A/07, 10 Aug 2007, D Asher)	48
Lee v Air New Zealand Ltd (AA 347/07, 5 Nov 2007, A Dumbleton)	34
Lyons v Toll Logistics (NZ) Ltd (formerly t/a JD Lyons & Co (WA 161/07, 5 Dec 2007, GJ Wood)	59
Macbeth v Cookie Time Ltd (CA 149/07, 7 Dec 2007, P Montgomery)	56
Maritime Union of New Zealand Inc & Ors v TLNZ Ltd & Anor (AC 51A/07, 21 Dec 2007, Colgan CJ)	20
Maxwell v Thomas (AA 287/07, 17 Sep 2007, Y Oldfield)	44
McGarry v Wharekauhau Holdings Ltd (WA 172/07, 18 Dec 2007, D Asher)	59
McKenzie v Extensions to Life Ltd (CA 6/08, 21 Jan 2008, H Doyle)	45
McMillen v Pilate Plus Ltd (CA 109A/07, 20 Dec 2007, P Cheyne)	31
McVey v Atlas Securities Ltd (CA 66/07, 20 Jun 2007, J Crichton)	38
Metcalf (Labour Inspector) v Mr Sparkel Ltd (AA 241/07, 9 Aug 2007, L Robinson)	42
Mikara and Ors v Crusader Meats New Zealand Ltd (AA 22/08, 24 Jan 2008, D King)	45
Monahan v Lister's Pioneer Services Ltd (AA 156/07, 22 May 2007, YS Oldfield)	48
Moreton v Acantech Ltd (CA 98/07, 9 Aug 2007, J Crichton)	40
Morgan v Maxon Building Contractors Ltd (WA 95/07, 2 Jul 2007, G J Wood)	49
Ms X v Bay of Plenty District Health Board (AA 372/07, 29 Nov 2007, M Urlich)	57

The New Zealand Airline Pilots' Association Industrial Union of Workers Inc v Air New Zealand Ltd (SC 91/2006, 14 Nov 2007, Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ)	13
NZ Engineering Printing & Manufacturing Union Inc v Terry Young Ltd (t/a Yunca Heating & Gas) (CA 32/07, 28 Mar 2007, P Cheyne)	27
O'Connor v Sungalss Hut New Zealand Ltd (AA 183/07, 19 Jun 2007, M Urlich)	60
O'Neil v Super Butcher (Thames) Ltd (AA 383/07, 4 Dec 2007, V Campbell)	46
Okada v Hardy & Ors (WA 162/07, 6 Dec 2007, D Asher)	60
Olsen v Carter Holt Harvey IT Ltd (AA 391/07, 13 Dec 2007, M Urlich)	57
Petersons Global Sales Ltd & Anor v Peterson & Anor (AA 173/07, 11 Jun 2007, D King)	38
Pilkington New Zealand Ltd v Kamphaug (AA 252/07, 17 Aug 2007, L Robinson)	60
Pritchard v EC Credit Control Ltd (WA 174/07, 18 Dec 2007, G Wood)	60
Safeway Scaffolding (NZ) Ltd v Kiwara (AA 371/07, 29 Nov 2007, J Scott)	24
Seaso v New Zealand Post Ltd (WA 13A/07, 13 Dec 2007, PR Stapp)	32
Service and Food Workers Union Nga Ringa Tota Inc v Air New Zealand Ltd (AA 338/07, 29 Oct 2007, A Dumbleton)	37
Service and Food Workers' Union Nga Ringa Tota Inc v Air New Zealand Ltd (AA 338A/07, 12 Dec 2007, A Dumbleton)	57
Service and Food Workers Union Nga Ringa Tota Inc v McCain Foods (NZ) Ltd (WA 164/07, 11 Dec 2007, D Asher)	34
Siita & Anor v Jett Jett Ltd t/a Rakino (AA 333/07, 23 Oct 2007, M Urlich)	32,57
Smith v Masterprint Ltd (WA 92/07, 8 Jun 2007, GJ Wood)	29
Soen v Cosmos Hantec Investment (NZ) Ltd	

(AA 143/07, 10 May 2007, M Urlich)	58
Stevens v Nelson Marlborough Institute of Technology (CA 131/07, 7 Nov 2007, P Montgomery)	58
Stiekema v Centurion Management Services Ltd (AA 377/07, 3 Dec 2007, M Urlich)	49,55
Stubbings v Ministry of Social Development (AA 264/07, 28 Aug 2007, M Urlich)	35,53
Talleys Fisheries Ltd v Lewis & Anor (CIV 2005-485-1750, 14 Jun 2007, France, J ; S Ineson ; A Trlin)	10
Taylor v AFU Finance Ltd (CA 114A/07, 18 Dec 2007, J Crichton)	32
Toroa v Department of Labour (WA 148/07, 2 Nov 2007, PR Stapp)	41
Turdeich v Dale Fibreglass Ltd (AA 222/07, 30 Jul 2007, V Campbell)	51,53
Urlwin McDonald and Clients Ltd v Boyle (CA 92/07, 6 Aug 2007, P Montgomery)	38
Urquhart v Aviation Security & Anor (AA 234/07, 6 Aug 2007, V Campbell)	40
Wade v Hume Pack N Cool Ltd (AA 322A/07, 17 Dec 2007, V Campbell)	32
Waikaremoana Te Kohanga v Anderson (WA 130/07, 17 Sep 2007, D Asher)	25
Waipouri v Rightside Properties Ltd (AA 268A/07, 28 Nov 2007, L Robinson)	32
Williams v Camira Furniture Ltd (AA 269A/07, 13 Dec 2007, Y Oldfield)	32
Williams v Napier Motors Ltd t/a Dunedin City Ford (CA 106A/07, 20 Dec 2007, J Crichton)	33
Wynne v The Order of St John Midland Regional Trust Board (AA 200/07, 3 Jul 2007, R A Monaghan)	33,54

Significant Judgments/Decisions added to the Employment Law Database 1 January 2008 - 31 January 2008

Air New Zealand Ltd v Cliff and Anor

CA 200/06

Heard: 19 Feb 2007, Wellington

Judgment Date: 8 May 2007

Court/Authority: Hammond, Chambers, Arnold JJ

Appearances: AH Waalkens QC, KM Thompson ; RE Harrison QC, J Roberts, GJ Luen

COURT OF APPEAL – Application for leave to appeal against an Employment Court Decision – HELD – None of the grounds of appeal gave rise to questions of law – Factual findings open to Employment Court – Employment Court erred in calculation of remedies but error did not justify appeal – Application dismissed

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

The Employment Court found that the applicant had unjustifiably dismissed the two respondents and awarded the respondents remedies. The applicant sought leave to appeal that decision.

The applicant submitted that the Employment Court set too high a standard for the investigation, that it had failed to consider that the applicant had relied on two distinct reasons for dismissal, and that the Employment Court failed to give individual consideration to the respondents' claims. Further, that the Employment Court incorrectly assessed remedies and compensated one of the respondents for loss he had not sought.

Held

(1) None of the grounds of appeal gave rise to questions of law meeting the statutory criteria. (para 29)

(2) The Employment Court should not have compensated for loss not sought. Although the Court was clear there was an error in this regard, it did not give rise to a question which should properly trouble the Court. The restricted right of appeal will mean that Employment Court errors go uncorrected from time to time. (paras 25-26)

Comment

(1) In *Waitemata District Health Board v New Zealand Public Service Association* (cited below), the Court held that, on applications for leave to appeal from Employment Court decisions, it was incumbent on the applicant to identify the precise questions of law which the applicant asserted met the statutory criteria. The applicant did not do that in the present case. It is an important discipline on counsel and the bench, and helps ensure the Court does not exceed its limited jurisdiction under s214 Employment Relations Act 2000.

Result: Application dismissed (leave to appeal) ; Costs in favour of respondents (\$2000 each plus disbursements)

Statutes considered:

ERA s103A
ERA s124
ERA s214
ERA s214(3)
Court of Appeal (Civil) Rules 2005 R27(3)

Cases referred to in judgment:

Cliff v Air New Zealand Ltd [2006] 1 ERNZ 694
Northern Distribution Union v BP Oil New Zealand Ltd [1992] 3 ERNZ 483 (CA)
Waitemata District Health Board v New Zealand Public Service Association [2005] ERNZ 1058 (CA)
W & H Newspapers Ltd v Oram [2001] 3 NZLR 29 (CA)

Other workers/site names: Groom

Pages: 2
[973650]

Talleys Fisheries Ltd v Lewis & Anor

CIV 2005-485-1750
Heard: 28 Feb 2007, Wellington
Judgment Date: 14 Jun 2007
Court/Authority: France, J ; S Ineson ; A Trlin
Appearances: G Malone ; C Rodgers , J Ryan

HIGH COURT – Sex discrimination – Victimisation – ss 22, 66 Human Rights Act 1993 – Whether woman appointed to lower paid position on basis of gender – Whether higher and lower paid positions substantially similar – Whether woman’s partner victimised because of woman’s complaint – HELD – Positions were substantially similar – First respondent discriminated against – Second respondent victimised – Fish trimmer

This was a partially successful appeal and successful cross-appeal of a Human Rights Review Tribunal decision which held that two positions were not substantially similar. However, the first respondent was appointed to the lower paid position on the basis of gender and her partner had been victimised.

The first respondent was employed by the appellant as a fish trimmer in 1999 and 2000. Women were predominantly employed as fish trimmers and men as fish filleters, which was a higher paid position.

Filleting involved: making two filleting cuts in a whole fish; using and maintaining two or more knives; and, putting an average of 30kg of fish in a bin which was then lifted onto a belt. Filleters’ conditions involved exposure to cold running water and the position was less sociable than trimmers’. A trimmer’s task was to remove imperfections in the fillet and put the perfected fillets in bins of about 7.5kg which were then lifted. The work environment was cold but had less exposure to cold running water.

The first respondent alleged she was appointed a fish trimmer rather than a filleter because she was a woman. After that allegation was made, the first respondent’s partner (the second respondent) was not re-employed by the appellant for the 2001 season.

The Human Rights Commission bought a case before the Human Rights Review Tribunal submitting the first respondent suffered gender discrimination relying on s22(1)(b) Human Rights Act 1993 (“HRA”) and the second respondent was victimised in terms of s66 HRA.

The Tribunal held that: (i) filleters and trimmers were not doing substantially the same work as the term was used in s22(1)(b) HRA; (ii) the first respondent was allocated to be a trimmer rather than a filleter on the basis of gender in breach of s22(1)(a) HRA; and, (iii) the second respondent suffered victimisation.

The appellant appealed the second and third findings. The appellant submitted the Tribunal's finding for separate liability on job allocation could not stand as it was not pleaded as a stand-alone breach under s22(1)(a) HRA.

The respondents submitted the positions were substantially similar, the first respondent had suffered discrimination and that the second respondent had been victimised.

Held

(1) The core task of the filleter and the trimmer was to turn whole fish into saleable fillets. Each played a role using a knife; both tasks required minimal initial training, and were performed more expertly with experience. The evidence left little doubt that at busy times both worked under pressure. The variations in the roles did not alter the essential similarity. In terms of s 22(1)(b) HRA the tasks were essentially similar. (para 43)

(2) The plaintiff was not required to prove the existence of other available positions at the time the first respondent was appointed. Without such evidence the first respondent's claim was harder to prove, but the Court was satisfied that the evidence discharged that onus. It was open to the Tribunal to conclude that first respondent was allocated to a trimmer job because she was a woman. (paras 48, 51)

(3) The jobs were substantially similar, and the reason the first respondent was receiving less money was because she was allocated to the lesser paying one because she was a woman. The appellant did not directly pay her less because she was a woman, but discrimination need not be deliberate. The first respondent had suffered disadvantage, namely, she received less money for similar work to that undertaken by filleters. The reason she received less money was because she was made a trimmer, and the reason she was made a trimmer was because she was a woman. (para 52)

(4) The first respondent's partner had worked the previous two seasons and there was no criticism of his efforts. A change in 2001 to being unable to be re-employed was very difficult to understand, and the Tribunal's conclusions, with respect, were almost inevitable. The appellant had not persuaded the Court that different inferences should be drawn from the evidence. (para 60)

(5) There should not have been a separate finding on job allocation, but it was pyrrhic given the above conclusions. (para 68)

Result: Appeal granted in part ; Cross-appeal granted ; Costs in favour of respondents (quantum to be fixed by Registrar)

Statutes considered:

Human Rights Act 1993 s22
Human Rights Act 1993 s22(1)(a)
Human Rights Act 1993 s22(1)(b)
Human Rights Act 1993 s66
Human Rights Act 1993 s123

Cases referred to in judgment:

Director of Human Rights Proceedings v New Zealand Thoroughbred Racing Inc [2002] 3 NZLR 333; (2002) 6 HRNZ 713 (CA)
Nais v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 80 ALJR 367; (2005) 223 ALR 171 (HCA)

Other workers/site names: Edwards

Pages: 3

[973794]

Kiwikiwi v Maori Television Service

AC 55/07

Heard: 24, 25 Sep 2007, Auckland

Judgment Date: 2 Nov 2007

Court/Authority: Shaw J

Appearances: J Minto ; J Latimer, B Edwards

APPLICATION FOR DECLARATION OF EMPLOYMENT STATUS – Jurisdiction – Whether employee or independent contractor – No written agreement – Plaintiff worked fluctuating rostered hours – HELD – Plaintiff not independent contractor – Absence of written agreement critical to decision – Fluctuating rostered hours did not alone deprive plaintiff of employee status – Teleprompter

This was a successful application for a declaration as to employment status.

The plaintiff was employed as a teleprompter by oral agreement working fluctuating rostered hours. He was paid an hourly rate and submitted invoices setting out the hours worked. He supplied his IRD and bank account numbers but was not registered for GST. There was no discussion about the nature of the agreement. When not working as a teleprompter he was, at times, requested to perform other administrative duties. He worked between 30 and 40 hours sometimes 6 or 7 days a week. He worked only for the defendant apart from some shearing over the summer when there was little rostered work available. After a number of months the plaintiff was given a role description but no written contract.

The plaintiff sought a declaration as to his employment status. He submitted he was an employee.

The defendant submitted he was a contractor. The defendant alleged the plaintiff was free to attend to his tasks as he saw fit according to the flexible rostering system and was not subject to control by the defendant.

Held

(1) The plaintiff was required to comply with set rosters and was not a free agent to come and go as he pleased. The role profile he was given was prescriptive both as to function and to standards. When the plaintiff's standards allegedly slipped, the defendant required him to undergo re-training. (para 35)

(2) The invoices the plaintiff rendered for payment each fortnight were not conclusive of employment status. The plaintiff presented as a person of considerable naivety about taxation and other business matters. The invoices could not be taken as his acquiescence to being a freelancer or self-employed contractor. (para 39)

(3) The plaintiff brought no experience or skill to the position. He learned on the job. He used only the equipment supplied by the defendant. The plaintiff took no financial risk with his own capital in the course of his engagement and could not alter his profits by changing his work habits. (para 40)

(4) Teleprompters were a small but important cog in the larger wheel of television

production. If there was no teleprompter there was no script for a presenter to read. The position was not an adjunct which the television station could do without. It was an integral part of the production process. (para 42)

(5) It could not be said that in the industry it was such common knowledge that all teleprompters were engaged as freelancers that when the parties entered into a relationship they could be taken to have agreed that the plaintiff would be a freelancer. Industry practice did not assist in the determination of status. (paras 45, 46)

(6) The plaintiff was not an independent contractor. The absence of a written agreement was critical to that conclusion. If an organisation was entering into an agreement with an independent entity it was to be reasonably expected that such an agreement would be formalised in writing to acknowledge and name the contractor and to set the parameters of the contractual arrangements being entered into. (para 47)

(7) Many employees were employed on shift work or rostered hours and were subject to fluctuations in their hours of work by seasonal requirements or fluctuations in production demand. That factor alone did not deprive them of their employee status and deprive them of all of the protections and responsibilities of the employment relationship which are embodied in the Employment Relations Act 2000 and associated legislation. (para 48)

Result: Application granted ; Declaration accordingly ; Costs reserved

Statutes considered:

ERA s6
ERA s6(2)

Cases referred to in judgment:

Bryson v Three Foot Six (No 2) [2005] ERNZ 372
McGreal v Television New Zealand Ltd AC 3/07, 5 February 2007

Pages: 2
[974197]

The New Zealand Airline Pilots' Association Industrial Union of Workers Inc v Air New Zealand Ltd

SC 91/2006

Heard: 13 Jun 2007 - 14 Jun 2007 (2 days) Wellington

Judgment Date: 14 Nov 2007

Court/Authority: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Appearances: RE Harrison QC, R McCabe ; CH Toogood QC, KM Thompson, TP Cleary, JL Verbiesen

SUPREME COURT – Collective employment agreement – Statutory interpretation – Holiday entitlement – Appeal against Court of Appeal Decision – Whether Court of Appeal had erred in holding that an agreement under s 44(2) Holidays Act 2003 transfers public holiday to another day – Whether under collective agreement pilots rostered to work on days defined as public holidays under s 44(1) Holidays Act 2003 must be paid at time and a half – Cross-appeal – Whether Court of Appeal had erred in holding that s 44(2) required, in relation to any transferred public holidays, observance of specified public holiday on particular identifiable day – HELD – Not a valid s 44(2) agreement – Pilots entitled to time and a half if work on public holiday – Appeal and cross-appeal dismissed - Pilots

This was an unsuccessful appeal and cross-appeal against a Court of Appeal decision (*Air New Zealand Ltd v New Zealand Airline Pilots' Association IUOW Inc* [2006] ERNZ 956) which held that (i) if an employer agreed to a request to swap a specific public holiday for another day Parliament had not intended to impose an obligation to pay the employee time-and-a-half on the public holiday; and (ii) An agreement under s44(2) Holidays Act 2003 referred to a specified public holiday being observed on another day thus transferring the rights arising from a public holiday.

The parties had agreed to a collective employment agreement ("the CEA") in August 2002 thus predating the Holidays Act 2003 ("the 2003 Act"). The CEA provided that pilots employed by the respondent airline were rostered to work on some, but not all, of the 11 public holidays per year specified in s 44(1) of the 2003 Act. In return, the pilots received 11 days' additional leave regardless of the number of public holidays they actually worked. A dispute arose over whether the CEA complied with the 2003 Act.

The respondent submitted that pilots who worked on a public holiday had agreed to observe the public holiday on one of the eleven additional days leave. Therefore, the additional day was substituted for the public holiday and those who worked on the public holiday were not entitled to payment of time and a half. The appellant submitted that there was no such transfer and the alternative holiday provisions under s 56 of the 2003 Act applied.

Held

(1) (per Blanchard, Tipping and McGrath JJ) The principal question was whether s 44(2) should be read as having a definitional effect. If Parliament had meant to achieve that outcome it made its point (an important one at that) most elusively. If Parliament was intending to set up two materially different consequences for those who work on a s 44(1) day, it would have done so more clearly and directly. The answer must be that Parliament did not intend to achieve the outcome which the respondent's argument ascribed to it. In short, the scheme of the Act did not suggest that a s 44(2) agreement removed public holiday status from a s 44(1) day. (para 55)

(2) It seemed most unlikely that Parliament meant to set up a regime under s 44(2) whereby employers who obtained the agreement of their employees to observe the public holiday on another day could thereby avoid paying time and half for work on a s 44(1) day. This would be a surprising method of effectively allowing pro tanto 'contracting out'. (para 56)

(3) The favoured approach is of greater simplicity and certainty than the alternative. Acceptance of the respondent's argument could well lead to practical difficulties. (para 59)

(4) (per Elias CJ) The collective agreement between the respondent and its pilots was not an agreement under s 44(2) that the employee would observe the public holiday on another day. Such an agreement is one which redefines the public holiday itself. The collective agreement was not such an agreement. It provided for work on a day that was a public holiday. Pilots who work on a public holiday do so either because they have been directed to work under the power given to the employer in the employment agreement or because they agree to do so. In either case they are entitled to the compensation provided by the legislation for loss of the public holiday. (para 5)

(5) Confining 'public holidays' to those identified in s 44(1) is contrary to the scheme and meaning of the Act. It makes s 44(2) redundant unless the strained view is taken that it is necessary to empower the parties to agree if working on s 44(1) days is to be unlawful. It leads to contorted explanations of the legislative scheme. Construing s 44(2) to allow employer and employee to substitute another day as a public holiday for one identified subs (1) is the least artificial and most convenient meaning. (para 15)

(6) (per Anderson J) Section 44(2) is clearly definitional in character. Its purpose is to substitute a day defined in s 44(1) with a day defined by agreement. When an employee agrees to observe a s 44(1) public holiday on another day then as between the employer

and employee it ceases to be a public holiday and the observed day becomes the public holiday instead. There is, in effect, a deeming. This conclusion is entirely consistent with the view of the Select Committee that the Bill gave employers and employees the flexibility to observe alternative days as public holidays. (paras 107-109)

(7) The work was not carried out pursuant to a s 44(2) agreement. His Honour identified six implied requirements of a valid agreement pursuant to s 44(2) of the 2003 Act. The collective agreement in the present case did not meet all those requirements. (paras 110, 116-117)

Comment

(1) (per Anderson J) The Employment Court was of the same view as those expressed in this decision. It is a view that employers, employees and the Department of Labour accept is suitable to the needs of all and consistent with the Act. The contrary view favoured by the majority in this case will cause some concern amongst those who would be affected by such an interpretation. Employment agreements relating to shift work may not be acceptable to employers in the future, because of the additional cost to them. (para 115)

Result: Appeal dismissed ; Cross-appeal dismissed ; Order of Court of Appeal remitting the proceeding to the Employment Court stands ; Costs in favour of appellant (\$25,000) plus disbursements ; Order for costs made by Court of Appeal stands.

Statutes considered:

Factories Act 1908 s35
Holidays Act 1981 s7A
Holidays Amendment Act 1991
Holidays Act 2003 s3
Holidays Act 2003 s 5
Holidays Act 2003 s6
Holidays Act 2003 s6(3)
Holidays Act 2003 s43
Holidays Act 2003 s43(a)
Holidays Act 2003 s43(b)
Holidays Act 2003 s44(1)
Holidays Act 2003 s44(1)(i)
Holidays Act 2003 s44(1)(k)
Holidays Act 2003 s44(2)
Holidays Act 2003 s44(3)
Holidays Act 2003 s44(4)
Holidays Act 2003 s48(2)(b)
Holidays Act 2003 s48(2)(b)(i)
Holidays Act 2003 s50(1)
Holidays Act 2003 s56(1)(b)
Holidays Act 2003 s56(2)(b)
Holidays Act 2003 s81(2)
Holidays Act 2003 s44
Holidays Act 2003 s46
Holidays Act 2003 s47
Holidays Act 2003 s48
Holidays Act 2003 s49
Holidays Act 2003 s50
Holidays Act 2003 s56
Holidays Act 2003 s57
Holidays Act 2003 s58
Holidays Act 2003 s59
Holidays Act 2003 s81
Industrial Conciliation and Arbitration Amendment Act 1965
Interpretation Act 1999 s5(1)
Labour Relations Act 1987 s173

Public Holidays Act 1910 s2
Public Holidays Act 1955
Supreme Court Act 2003 s13

Words and phrases: Public holiday

Cases referred to in judgment:

Air New Zealand Ltd v New Zealand Airline Pilots' Association IUOW Inc [2006] ERNZ 956 (CA)
Dew v Ryan (1911) 30 NZLR 704 (SC)
Heinz Wattie's Ltd v National Distribution Union Inc [2005] 1 ERNZ 12.
New Zealand Airline Pilots Association Inc v Air New Zealand Ltd [2005] 1 ERNZ 180 (EC)
Telecom Networks and Operations Ltd v Vevers [1993] 3 NZLR 425.

Pages: 4
[974223]

Chief Executive of the Department of Corrections v Imo

AC 57/07
Heard: 10 Sep 2007 - 11 Sep 2007 (2 days) Wellington
Judgment Date: 14 Nov 2007
Court/Authority: Shaw J
Appearances: K Elkin, N Belton ; B Quarrie

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS
AUTHORITY – Unjustified dismissal – Poor performance – Serious misconduct – Defendant disclosed own drinking and driving and frustration towards employer to offenders – Plaintiff alleged statements caused loss of trust and confidence warranting dismissal – HELD – Statements inappropriate but not serious misconduct – Defendant entitled to have acknowledged performance issues addressed rather than being summarily dismissed – Dismissal unjustified – Challenge dismissed – Criminogenic facilitator

This was an unsuccessful challenge to a determination of the Employment Relations Authority which held that the defendant's dismissal was unjustified.

The defendant was employed by the plaintiff as a facilitator of intervention programs for offenders. The defendant initially received largely positive feedback but, after a change in supervisor, his new supervisor expressed concerns to the regional program delivery manager about aspects of the defendant's performance. The manager arranged a meeting with the defendant. On the morning of the intended meeting the defendant, during facilitation of the program, disclosed to offenders that he had consumed alcohol and then driven home ("the first statement"). This was not known or discussed at the afternoon meeting which focused on the supervisor's previous criticisms of the defendant. The following morning the defendant, during facilitation of the program, expressed frustration at the plaintiff ("the second statement").

When both statements came to light a disciplinary investigation was commenced which resulted in the plaintiff dismissing the defendant for serious misconduct.

The defendant brought a successful personal grievance in the Employment Relations Authority alleging unjustified dismissal. The plaintiff challenged that determination.

The plaintiff alleged that the defendant did not accept any wrongdoing, that the defendant had failed to accept correction and, because of the breakdown of trust and

confidence, he could no longer be employed by the plaintiff in any capacity.

The defendant submitted that although the statements he made were inappropriate they were not such as to cause a serious erosion of trust and confidence.

Held

(1) The present case was a case where the line between poor performance and serious misconduct was far from clear. The question of where any particular behaviour by an employee falls on the spectrum between the two extremes of poor performance and serious misconduct will depend on a number of factors. These include but are not limited to whether the employee's acts were deliberately inimical to the employer's interests; the effect of the employee's actions on the employer's business; and whether an employee could reasonably have been given an opportunity to mend his ways and show that he can do the job. All of these aspects must be examined in the light of the circumstances of the parties at the time. (paras 48-50)

(2) Although the first statement was inappropriate, the defendant wrongly believed that an honest disclosure of his personal lapses could assist the offenders. That behaviour could not be classified as serious misconduct. It was not deliberately intended to undermine. The defendant misconducted himself in revealing in the second statement his anger with his employer about the criticisms it had made of him. However, those remarks were not so serious as to justify the plaintiff's belief that there was a complete breakdown in the relationship between them. (paras 53, 57)

(3) A fair and reasonable employer: (i) would have made inquiries about the basis for the supervisor's concerns and the reason for the changes in the defendant's performance; and (ii) would have investigated whether there was need for an independent supervisor to assess the situation. It was incumbent upon the plaintiff to openly air those concerns with the defendant and reasonably expect his performance to improve. If it had taken that step when alerted to the performance concerns, it was quite possible that the tensions which rapidly grew between the supervisor and the defendant could have been diffused before the defendant reached the state of high stress which he was in by the time he made the statements. (paras 68-70)

(4) The defendant had a good record of previous service to the plaintiff. He had a lapse in judgment and performance resulting from a change of supervisor and her requirement of different and (to him) unexplained standards. The defendant was entitled to have his acknowledged performance issues addressed rather than being summarily dismissed. His dismissal was unjustified. (paras 75, 76)

(5) The defendant had a good and harmonious relationship with his colleagues except for his supervisor. He was more than willing to work with her although he accepted some work may have to be done on building their relationship. Given the size of the plaintiff and the defendant's previous experience, reinstatement to a position no less favourable than that which he held at the time of his dismissal would not be impracticable. That was not to say that the defendant should necessarily be reinstated to precisely the same position in the same location. (paras 80, 82)

(6) The defendant was entitled to any loss of wages since the date of his dismissal until the date of his reinstatement. However, he contributed to a considerable extent to the position he found himself in by his unwise and intemperate comments whatever the motivation for them. For that reason there would be no order for compensation. (paras 84, 86)

Result: Challenge dismissed ; Reinstatement ordered ; Reimbursement of lost wages (quantum to be determined by parties) ; Compensation for humiliation declined to reflect contributory conduct ; Costs reserved

Statutes considered:

ERA s103A

ERA s125

Cases referred to in judgment:

Air New Zealand v Hudson [2006] 1 ERNZ 415

Honda New Zealand Ltd v New Zealand Shipwrights Union [1990] 3 NZILR 23

Polkey v A E Dayton Services Ltd [1987] 3 ALL ER 974 (HL)

W & H Newspapers Ltd v Oram [2000] 2 ERNZ 448

Pages: 3

[974241]

Coy v Commissioner of Police

CC 23/07

Heard: 14 Nov 2007, Christchurch

Judgment Date: 19 Nov 2007

Court/Authority: Colgan CJ

Appearances: JS Fairclough ; A Martin, L Fong

PRACTICE AND PROCEDURE – Application by defendant to strike out parts of statement of claim – Application by plaintiff for leave to extend time to raise personal grievances – Defendant sought to strike out claims and evidence concerning events outside 90 day periods and dating back to 1994 – When plaintiff raised personal grievance – HELD – Historical evidence relevant to justiciable grievances admissible – Plaintiff required to re-plead certain matters – Plaintiff raised grievance in second communication not through later detailed submissions – Applications dismissed – Police constable

This was an unsuccessful application by the defendant to have certain claims and evidence struck out of the statement of claim. This was an unsuccessful application by the plaintiff to extend the time to raise certain grievances.

Between 1993 and 2003 the plaintiff alleged she was unjustifiably disadvantaged in her employment as a constable. In early December 2002 she told an Inspector she was "going ahead" with a personal grievance. On 22 December 2002 the plaintiff sent the defendant a letter stating "I wish to formally advise you that I intend to proceed with personal grievance". The grievance was to be based on a number of stated grounds including harassment and victimisation. The letter concluded: "My submission is currently being prepared and I anticipate it will be forwarded to you...after...professional advice has been obtained".

In March 2003 the plaintiff sent the defendant a 14-page letter detailing her alleged grievances dating back to 1994. Another Inspector then wrote to the plaintiff noting that certain matters raised fell outside the 90 day period. The plaintiff raised a further grievance on 8 May 2003 before she disengaged from the police and raised a further personal grievance (unjustified constructive dismissal) in November 2003.

The defendant sought to strike out a number of claims in the statement of claim alleged to fall outside the relevant 90 day periods.

The plaintiff submitted that the defendant had consented to the late raising of her grievances. Shortly before the present hearing she applied for leave to extend time for raising her grievances to the extent the Court may conclude they were out of time.

Held

(1) Events going back even to 1994 may be relevant to the establishment of a case of constructive dismissal. So while the plaintiff was not entitled to rely upon events that occurred prior to 90 days before she raised the relevant personal grievances as independent disadvantage grievances, neither should she be prevented from adducing any evidence at all about these events to support her justiciable grievances. Such evidence of events at that time will have to be relevant to the grievances that remain alive. (para 6)

(2) Read in conjunction with the oral statements to the Inspector in early December 2002 about her intended personal grievance, the letter to the defendant of 22 December 2002 met the test in s114(2) Employment Relations Act 2000 ("ERA") for the raising of a personal grievance. It followed that the plaintiff was entitled to raise as grievances only events that had occurred in the previous 90 days. (para 15)

(3) The defendant, having been notified of the plaintiff's concerns including recent maltreatment, was obliged to deal with the plaintiff's prospective welfare as a serving police officer. That did not amount to consent to the raising of grievances that were otherwise statute barred. (para 20)

(4) The events that were referred to in the plaintiff's memorandum dated 8 May 2003 that occurred within the 90 days preceding that date may be the subject of a personal grievance. Likewise, the plaintiff was entitled to bring as an unjustified constructive dismissal grievance claim, the complaints she raised with the defendant in November 2003. Although the Court declined to strike out causes of action or potential evidence, the plaintiff must nevertheless re-plead her claims within the parameters outlined. (paras 24, 26)

(5) The events to which the plaintiff deposed did not meet the exceptional circumstances test. The application for leave to raise personal grievances out of time under s114(3) ERA was refused. (paras 23, 27)

Result: Applications dismissed ; No order for costs

Statutes considered:

- ERA s114
- ERA s114(2)
- ERA s114(3)
- ERA s114(4)
- ERA s115
- Employment Court Regulations 2000

Cases referred to in judgment:

- Auckland Shop Employees Union v Woolworths (NZ) Ltd [1985] 2 NZLR 372
- Creedy v Commissioner of Police [2006] 1 ERNZ 517
- Jacobsen Creative Surfaces Ltd v Findlater [1994] 1 ERNZ 35
- Jeffries v Adis International Ltd AC 69/06, 7 December 2006
- Phillips v Net Tel Communications [2002] 2 ERNZ 340

Pages: 2
[974248]

Maritime Union of New Zealand Inc & Ors v TLNZ Ltd & Anor

AC 51A/07

Heard: 10, 11, 12, 13, 14, 19 Sep 2007, Auckland

Judgment Date: 21 Dec 2007

Court/Authority: Colgan CJ

Appearances: S Mitchell, H White ; CH Toogood QC & N Dines,

PROCEEDINGS REMOVED FROM EMPLOYMENT RELATIONS AUTHORITY – Application for declarations and permanent injunction – Drug and alcohol testing policy – Applied to all staff – Unilateral introduction of policy – Good faith – Whether intended policy would breach collective agreement – Whether intended policy would breach consultation obligations in collective agreement – Whether requirement to participate in policy would be a lawful and reasonable direction – Employers duty under Health and Safety in Employment Act 1992 to take all practicable steps to eliminate potential hazards – Safety sensitive work – Sampling methodologies – HELD – Intended introduction of policy did not breach collective or individual agreements or consultation obligations – Requirement of union members to participate in policy a lawful and reasonable direction – Applications dismissed – Stevedores

This was an application by the plaintiffs removed from the Employment Relations Authority for a permanent injunction and declarations against the defendants, seeking to restrain it from implementing aspects of its recently announced policy on drug and alcohol testing.

The first and second defendants were associated stevedoring companies operating at ports in Tauranga and Auckland respectively. The first plaintiff had as members many of the first and second defendants' employees including the second plaintiffs at Auckland and the third plaintiffs in Tauranga.

The defendants' intended to introduce a drug and alcohol policy ("the policy") which was to apply to all staff. The policy aimed to improve safety and to ensure that staff were not exposed to unacceptable workplace risks. It provided for testing in various circumstances and mandatory rehabilitation following a positive result. The relevant collective agreements also dealt with the use of drugs and alcohol. Extensive consultations progressed between the first plaintiff and the defendants with each side tabling its own policy. The defendants considered and in some cases included union suggestions in the policy. The first plaintiff was anxious to secure a degree of union 'ownership' of the policy in light of its own pre-existing policy. There was disagreement over the accuracy of oral fluid testing for drugs compared with urine testing. The parties were unable to agree upon a policy and the first plaintiff advised its members to refuse to cooperate with the defendants' policy.

Following this, the first plaintiff union proceeded to belatedly include a claim in the bargaining for the policy to be bargained over and agreed between the parties. The first defendant however intended to introduce the policy unilaterally. This impasse had delayed collective bargaining and led to the present proceedings.

The plaintiffs argued that the defendants had failed to abide by the legal principles established in *NZ Amalgamated Engineering Printing and Manufacturing Union v Air New Zealand* (cited below; "the Air New Zealand case"), that circumstances had changed since the Air New Zealand case, that new principles should be established or that the policy was unreasonable despite the Air New Zealand case. Second, that drug testing did not reliably determine impairment, the policy failed to take into account available expertise regarding workplace detection and that more reliable methods of risk identification were overlooked by the defendants. Third, that the unilateral introduction of the policy breached the obligations of consultation under the collective agreements and good faith under statute. Fourth, that the collective agreement covering the workers at Tauranga required health

and safety rules and procedures to form part of the agreement. Fifth, that the reasonableness of the policy should be determined by s 103A of the Employment Relations Act 2000. Finally, that the failure to obtain union approval for the policy would compromise its purpose because such a policy could only be truly effective if all parties "bought into" it.

The defendants argued the issues raised were questions of managerial prerogative.

Held

(1) The policy did not allow for any scientific assessment of impairment per se but it did provide for an assessment of signs of impairment, albeit by human, as opposed to scientific, means. Common-sensically, supervisors and work colleagues would be expected to be alert to manifest symptoms that may indicate impairment of functioning. Testing alone may not be a completely reliable assessment of impairment, either as to its degree or causation. But preceded by and combined with human observations and appropriate inquiries, testing would assist in an assessment of the fact and degree of impairment and, most importantly, a probable reason for it and a prognosis for future impairment. (para 60)

(2) Ultimately, in law and by contract, the obligation for implementing such policies and their contents rested with the employer. Put bluntly, it was the employer that would stand figuratively in the dock in a prosecution for a breach of the Health and Safety in Employment Act. So it was the party that would bear ultimate responsibility for compliance with the legislation that must also be responsible ultimately for doing what it must and can to ensure statutory compliance not to mention to attempt to ensure its freedom from liability. (para 74)

(3) The plaintiffs' real complaints of non-compliance with the consultation obligations at issue in the present case were ones of refusal of agreement rather than of consultation. The length of the consultative process, the numbers of meetings, the discussions of the object and content of the intended policy, the correspondence between the parties on these topics, and the employers' preparedness to alter aspects of the policy as suggested by the union, all pointed together to a sufficient consultation, both statutory and contractual. The initial formulation of the policy by the employers did not mean there was a failure of consultation. The test was not the provenance of the proposal but, rather, in these circumstances, the preparedness of the proposer to consider open-mindedly alternatives and to articulate reasonably disagreements with those. (para 75)

(4) The union proposal for oral fluid screening for drugs was based soundly on independent scientific evidence. The employers' reasons for refusing to agree to the union's position included that they wished to have a single policy applicable to their entire diverse workforces irrespective of location, union membership, or job classification. An employer was entitled to a consistent policy across all staff, union, non-union and other-union staff. It was a valid consideration for the employer. The defendants' reasons for rejecting a policy owned (solely or jointly) by the first plaintiff were sound and reasonable. Having consulted about this issue, the defendants were entitled in law to decline to agree with the union's proposal for ownership of the policy. (paras 77 – 79)

(5) The employers' preferred method of achieving their objectives was by urine testing for drugs. Urine testing is governed by the relevant Australia/New Zealand Standards and the drug testing methods in the policy complied with this. The Standard had cut-off levels for urine testing that had been mathematically designed to minimise false positives and false negatives. Urine screening and confirmatory testing conducted under the Standard in an accredited laboratory was reliable to a high degree producing results that would, all else being equal, withstand legal challenge. The employers rejected oral fluid testing on the basis of expert advice and its own research that were substantially confirmed in evidence. (paras 89-93)

(6) In principle, common law tests change over time and reflect current situations and practices. However, the statutory test addressing justification for dismissals and

disadvantages in employment in s 103A Employment Relations Act 2000 did not apply to other considerations that were non-statutory. This did not necessarily create a double standard with different tests applying to declaratory relief before a personal grievance may arise and to ex post facto justification. The implementation of a work policy and its procedures was not the same thing as, and did not necessarily connote that there would be, a personal grievance or personal grievances. The reasonableness of the common law test was an amalgamation of factors, some of which may have been similar to, or even the same as, those for assessment in justification of a personal grievance but were broader than that. (para 98)

(7) So-called “buy in” must, if not amounting to agreement to a proposed policy, come close to it. It was often the case that such “buy in” could only be achieved over a period of time after implementation so that the policy could be seen and evaluated in practice (and, if necessary, amended), as opposed to theory. Conservatism and resistance to change were natural human traits and no less in employment relations. However, employee agreement to such a policy was best practice rather than pivotal. Taken together the company’s decision to implement the policy without universal advance “buy in”, was both reasonable and justified. Ultimately, employer initiatives may be, and must be, taken. (paras 107 – 108, 112, 114)

(8) The obligations of good faith in s4 of the Employment Relations Act 2000 and consultation under the collective agreements in respect of the content and process of introduction of the drug and alcohol policy had also been met. The agreements, as informed by the Health and Safety in Employment Act 1992, and the legislation itself, permitted and indeed mandated the introduction of health and safety policies ultimately unilaterally. Although there were requirements to consult with employees and relevant unions and to do so in a sufficient and open-minded manner as was consistent with the nature and effect of the intended policy, agreement was not required and consultation was not without reasonable temporal limits. (para 121)

(9) Having reserved expressly to the employer the right to make health and safety rules and procedures as may be reasonable and not inconsistent with the collective agreement for the maintenance of good conduct by its employees, it was difficult conceptually to see how, in the absence of agreement, such procedures could be a part of a collective agreement. If drugs and alcohol policies and procedures had been bargained for and incorporated into collective agreements it would not be open to the Court to assess their reasonableness. Where, however, a policy was implemented unilaterally, directions given to employees pursuant to such a policy must meet the twin tests of lawfulness and reasonableness. These were not issues of managerial prerogative. (paras 18, 125–127)

Comment

(1) There has been very little litigation in New Zealand about the reasonableness of drug and alcohol testing regimes in employment. Apart from the Air New Zealand case in 2003 – 2004, this was only the second head-on challenge to the reasonableness of testing procedures of which the Court is aware. In spite of this, the evidence established that drug and alcohol policies including testing regimes were now widespread in New Zealand including within unionised workforces. Although not the subject of this case, the evidence tended to suggest that pre-employment drug and alcohol testing during employment was now widespread, perhaps even standard in many sector or enterprises. (para 73)

Result: Applications dismissed ; Costs reserved

Words and phrases: ERA s 4 ; ERA s4(1) ; ERA s4(1)A ; ERA s4(1)A(a) ; ERA s4(1)A(b) ; ERA s4(1)A(c) ; ERA s4(1)A(c)(i) ; ERA s4(1)A(c)(ii) ; ERA s4(2) ; ERA s4(3) ; ERA s4(4) ; ERA s4(5) ; ERA s53 ; ERA s103A ; HSE s2 ; HSE s2A ; HSE s6 ; HSE s19 ; Human Rights Act 1993 ; Privacy Act 1993

Cases referred to in judgment:

BHP Iron Ore Ltd v CMETSWU, WA Brach (1998) 82 IR 162
Cammish v Parliamentary Services [1996] 1 ERNZ 404
Makeham v New Plymouth District Council [2005] ERNZ 49
NZ Amalgamated Engineering Printing and Manufacturing Union v Air New Zealand Ltd [2004] 1 ERNZ 614.
Pioneer Construction Materials Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (2003) WAIRC 10049
Simpsons Farms Ltd v Aberhart [2006] 1 ERNZ 825
Tranz Rail Ltd v Department of Labour [1997] ERNZ 316

Other workers/site names: Nee Nee, Toleafoa, Smart ; TLNZ (Auckland) Ltd

Pages: 44
[974385]

Arrears - Employment Relations Act 2000

Buksh v Home Investment Group Ltd

4 Sep 2007, J Scott, AA 273/07, (4 pages)

ARREARS OF WAGES AND HOLIDAY PAY – Applicant initially treated as casual employee and not paid on public holidays – Parties subsequently entered into written employment agreement – Received pay increase and paid for public holidays – Applicant received further pay increase and advised entitled to four weeks annual leave – Applicant not paid for last month of work and resigned – Withdrew resignation when received two lump sums as part payment of wages – Applicant received no further wages and later abandoned employment – Authority determined applicant permanent part-time employee from commencement of employment – Entitled to be paid for all public holidays that fell on what would otherwise have been working days – At investigation meeting, parties agreed respondent would make payment to applicant to settle claim – However, respondent did not abide by agreement – Labour Inspector commenced investigation into applicant's claim and calculated arrears – Arrears due and owing – Interest 10 percent - Office worker

Result: Application granted ; Arrears of wages and holiday pay (\$3,738.80) ; Interest (10%) ; Disbursements (\$70)(Filing fee)

Horn v TC Painting Ltd & Anor

11 Oct 2007, V Campbell, AA 315/07, (3 pages)

ARREARS OF WAGES – No appearance by respondent - In initial statement of problem applicant cited both respondents as unsure which company she worked for – At investigation meeting applicant acknowledged employed by first respondent and withdrew claims against second respondent – In response to statement of problem, respondent gave Authority cheque for sum claimed - However, cheque not honoured – On morning of investigation meeting respondent indicated to applicant would pay sum owed by instalments - Applicant later informed Authority had received part payment – Remainder of outstanding wages due and owing

Result: Application granted ; Arrears of wages (\$203.62) : Disbursements (\$70)(Filing fee)

Khodabandeh v TC Painting Ltd

12 Oct 2007, V Campbell, AA 317/07, (4 pages)

ARREARS OF WAGES – Applicant sought arrears of wages – No appearance by respondent – Respondent advised Authority going into liquidation, however registered company at time of investigation meeting – Applicant produced timesheets in support of claim – Claimed respondent previously agreed it owed \$6,900, a sum including an amount for interest, and agreed to a payment schedule - No payments received – Respondent ordered to pay \$6,900 to applicant – Comment from Authority on enforcement of judgment

Result: Application granted ; Arrears of wages (\$6,900) ; Disbursements (\$70)(Filing fee)

Safeway Scaffolding (NZ) Ltd v Kiwara

29 Nov 2007, J Scott, AA 371/07, (2 pages)

RECOVERY OF MONIES – Applicant sought to recover money spent training former employee and cost of vest he did not return when he left – No appearance by respondent – Employment agreement contained clause requiring company property to be returned, and any debts to be repaid, before final wages would be paid – Respondent signed agreement to repay company for training course if left employment within two years – Applicant claimed respondent abandoned employment – Applicant witness credible and documentation supported claim – Respondent directed to pay sum sought by applicant

Result: Application granted ; Recovery of monies (\$2,925.73) ; No order for

costs

Waikaremoana Te Kohanga v Anderson

17 Sep 2007, D Asher, WA 130/07, (5 pages)

RECOVERY OF MONIES – Record of oral determination - Applicant alleged overpaid respondent and asked that she be directed to repay amount by weekly instalments – No appearance by respondent – Applicant’s evidence accepted – Administrative oversight meant respondent continued to be paid for three weeks after left employment – Respondent had previously advised in receipt of domestic purposes benefit and would have difficulty making repayments – Authority did not accept respondent’s claim payment represented her holiday pay as wage and time records showed separate holiday payment – Appropriate for respondent to repay money by weekly instalments of \$50

Result: Application granted ; Recovery of monies (\$690.54) ; Costs reserved

Arrears - Holiday Pay - Employment Relations Act 2000

Buksh v Home Investment Group Ltd

4 Sep 2007, J Scott, AA 273/07, (4 pages)

ARREARS OF WAGES AND HOLIDAY PAY – Applicant initially treated as casual employee and not paid on public holidays – Parties subsequently entered into written employment agreement – Received pay increase and paid for public holidays – Applicant received further pay increase and advised entitled to four weeks annual leave – Applicant not paid for last month of work and resigned – Withdrew resignation when received two lump sums as part payment of wages – Applicant received no further wages and later abandoned employment – Authority determined applicant permanent part-time employee from commencement of employment – Entitled to be paid for all public holidays that fell on what would otherwise have been working days – At investigation meeting, parties agreed respondent would make payment to applicant to settle claim – However, respondent did not abide by agreement – Labour Inspector commenced investigation into applicant's claim and calculated arrears – Arrears due and owing – Interest 10 percent - Office worker

Result: Application granted ; Arrears of wages and holiday pay (\$3,738.80) ; Interest (10%) ; Disbursements (\$70)(Filing fee)

D v M

1 Nov 2007, P Montgomery, CA 128/07, (13 pages)

UNJUSTIFIED DISMISSAL – Serious misconduct - Summary dismissal - Applicant lived and worked on respondent's farm - No written employment agreement - Respondent's son claimed applicant sexually abused him – Respondent also claimed applicant removed daughter's nappies at respondent's home - Respondent called Police about allegations, and told applicant to leave farm immediately – Applicant denied allegations but said would have done same thing – Respondent claimed did not intend to dismiss, rather sole concern safety of children – Son did not disclose any sexual abuse during Police investigation – Insufficient evidence to support prosecution – Respondent called applicant and told him was "off the hook" – Applicant told respondent was "going to get him" – Likely applicant referring to pursuing employment rights - Applicant subjected to verbal abuse and physical assault when allegations revealed in community – Non-trespass order served on applicant – Absence of documentation covering terms of employment agreement and alleged warnings raised significant difficulties for Authority - Respondent claimed employment fixed term and to end after lambs sold - No evidence fixed term complied with requirements of s66 Employment Relations Act 2000 - Employment not fixed term - Authority found applicant left farm at direction of respondent, and solely because of untested allegations – Failed to address employment situation at all – No investigation carried out – Police investigation meant substantive basis for sending away eroded significantly – Respondent took no steps to address applicant on how inevitable termination could be resolved, or to reach settlement when was open to it – Applicant's statement would have done same thing did not absolve respondent of its obligations – In circumstances, relationship irretrievable – However, respondent not relieved of obligations to do whatever fair and reasonable for applicant – Dismissal unjustified – Remedies - Interest 9.5 percent on lost wages - ARREARS OF HOLIDAY PAY - Holiday pay due and owing - Interest 9.5 percent - Permanent name suppression of parties and witnesses ordered

Result: Application granted ; Reimbursement of lost wages (\$6,571)(4 months) ; Arrears of holiday pay (\$917.30) ; Interest (9.5%) ; Compensation for humiliation etc (\$12,000) ; Costs reserved

Bargaining - Employment Relations Act 2000

NZ Engineering Printing & Manufacturing Union Inc v Terry Young Ltd (t/a Yunca Heating & Gas)

28 Mar 2007, P Cheyne, CA 32/07, (13 pages)

BARGAINING - GOOD FAITH - Applicant claimed respondent advised and attempted to induce union members not to be involved in bargaining for collective employment agreement ("CEA") in breach of s4(6) Employment Relations Act 2000 ("ERA") - Following visit by union representative, 16 workers joined applicant - Some later resigned - Applicant alleged series of actions by respondent breached s4(6) - Respondent relied on s4(3) ERA that duty of good faith did not prevent communication of reasonably held statement of fact or opinion - Whether s4(3) permitted conduct otherwise in breach of s4(6) - Section 4(6) modified s4(3) to extent of inconsistency - Party to employment relationship may communicate reasonably held opinion but must not amount to advising or doing anything with intention of advising employee not to be involved in bargaining for CEA - Alleged actions occurred before notice commencing bargaining given - Section 4(4) stipulates duty of good faith applies to bargaining for CEA "including matters relating to initiation of bargaining" - If application of ss4(1) and 4(6) restricted to events occurring after notice given, would have been unnecessary to include that phrase - Application of s4 to matters before date of notice better achieved object of Act - Was clear to respondent EPMU and members were preparing to initiate bargaining - Whether conduct breached s4(6) - Authority found in meetings with employees, respondent advised and intended to induce employees not to be involved in collective bargaining - Respondent distributed credit union proposal to non-union members - Intended message that employees did not need to join union or bargain collectively - Respondent posted memo on notice board of union fee increase - Increase published to make point of its magnitude - Could only have been for intention of encouraging resignation and dissuading non-members from joining applicant - Respondent moved applicant member ("K") moved to another work area - Respondent of view K spent too much time on union activities and wanted to maintain productive work - K not moved with intention of inducing him or other employees not to be involved in bargaining - Duty of good faith breached in respect of meetings, distribution of credit union proposal, and memo - Also alleged union representative denied access to speak with union members collectively at workplace - Authority noted dispute arose from respondent's reading of s21 ERA - Respondent claimed representative could speak to only one employee at a time during work hours - Position tenable if simply read words of ERA - Context of ERA did not require different interpretation - Under s20 ERA, discussions not limited to one employee at a time - However, position not adopted in breach of s4(6) ERA - Penalty not appropriate - JURISDICTION - Whether Authority could impose penalty for breach of good faith - ERA s4A renders parties liable to penalty, but does not say jurisdiction lay in Authority - Omission appeared to be drafting error - Authority had exclusive jurisdiction to make determinations about employment relationship problems including whether good faith obligations complied with - Jurisdiction for recovery of penalties for breach of s4A lay in Authority not in Court - PENALTY - Respondent's actions deliberate and serious and in breach of s4A - About one third new union members resigned and influenced to do so by respondent's actions - Penalty appropriate for breaches in respect of meetings, distribution proposal, and memo

Result: Question answered in favour of applicant ; Penalty (\$6,000)(To Crown) ; Application dismissed (Compliance order) ; Costs reserved

Breach of Contract - Employment Relations Act 2000

Chitty v Hills Hats Ltd

24 Sep 2007, D King, AA 295/07, (8 pages)

UNJUSTIFIED DISMISSAL – Redundancy – No written employment agreement – Applicant claimed made it clear when recruited if he moved to respondent it would have to match or better existing terms – However, respondent only saw previous employment agreement when applicant filed claim – Applicant could not contend respondent would agree to equal or better terms of agreement to which it had never been privy - Applicant believed parties agreed service with former employer would be carried over for purpose of redundancy – Redundancy not mentioned in respondent's offer of employment – Applicant mistaken to think informal conversations with respondent's general manager before offer of employment constituted terms of employment – Respondent considered restructuring due to financial position – After consultation, applicant informed position redundant – Applicant claimed respondent failed to follow process outlined to employees at start of restructuring – Process required meetings, but instead conducted via conference calls as applicant in different town to head office – While would have been more humane for applicant to have option of meeting if preferred, failure to meet in person did not vitiate process – Dismissal justified – BREACH OF CONTRACT - Applicant sought reimbursement of office expenses – No agreement for reimbursement of items claimed

Result: Application dismissed ; Costs reserved

Kurene and Anor v United Group Rail (NZ) Ltd

10 Aug 2007, D Asher, WA 21A/07, (11 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Summary dismissal - First applicant ("K") dismissed for alleged failure to follow reasonable instruction of supervisor ("S") – During first investigation meeting, respondent conceded K would be reinstated on interim basis - At substantive investigation meeting, respondent conceded dismissal unjustified, and agreed to permanently reinstate K - BREACH OF CONTRACT - Damages - Applicants claimed respondent breached implied term of employment agreement by failing to ensure supervisor ("M") did not engage in intimidating/threatening conduct towards S as witness - S gave evidence at investigation meetings K complied with instruction – S later claimed M approached him after interim investigation meeting regarding evidence – S informed applicant but asked she keep it confidential - Respondent claimed no loss to K arose out of M's actions - M's actions perilously close to deliberate threats and intimidation – Authority prepared to accept M did not intend to persuade S to change his evidence - M's actions would have intimidated any reasonable person – Actions not sanctioned by respondent - Authority satisfied K damaged by actions - Damages appropriate - Applicants' also alleged contempt of court - Actions did not happen within "the face of the Authority" as required by s196 Employment Relations Act 2000 ("ERA") - Actions did not amount to contempt of Authority - No need to adopt referral to Employment Court procedure under s196 - Because of seriousness of M's actions, Authority referred determination and copies of submissions to Solicitor-General - Remedies - Respondent claimed K contributed to grievance by intending not to follow S's instruction - No contributory conduct found - Authority took into account respondent's concessions and offers of compensation and costs in award of compensation

Result: Applications granted ; Compensation for humiliation etc (\$14,000) ; Breach of contract (\$6,000)(Damages) ; Costs reserved

Compliance Order - Employment Relations Act 2000

Gowans v Marshall Projects Nelson Ltd

21 Jun 2007, P Cheyne, CA 67/07, (3 pages)

COMPLIANCE ORDER - Applicant sought compliance with record of settlement - No appearance by respondent - Under settlement respondent to pay weekly sum until agreed amount paid in full - Not fully complied - Respondent accepted money owed - Claimed not in financial position to pay full amount owed - No evidence given in support - Record of settlement enforceable - Applicant entitled to compliance order - Respondent to comply with record of settlement

Result: Compliance ordered ; Disbursements (\$70)(Filing Fee)

Harrison v BlackMagic Composite Company NZ Ltd

5 Oct 2007, D King, AA 311/07, (2 pages)

COMPLIANCE ORDER - Applicant sought order respondent comply with obligation to repay money as set out in earlier consent determination - Amounts not paid - Respondent ordered to pay monies - Applicant sought interest on monies - Authority's jurisdiction did not extend to ordering payment of interest on monies which compliance order concerned

Result: Compliance ordered ; Disbursements (\$70)(Filing fee)

Smith v Masterprint Ltd

8 Jun 2007, GJ Wood, WA 92/07, (2 pages)

COMPLIANCE ORDER - Applicant sought compliance with determination of Authority - No appearance by respondent - Authority satisfied respondent had not complied with determination - Applicant did not want to put respondent into liquidation - Respondent ordered to pay in instalments - Compliance ordered - Respondent warned of consequences of failure to comply - Given circumstances no application for costs made

Result: Compliance order granted

Costs - Employment Relations Act 2000

Afuie v Fyran Marine Ltd

13 Dec 2007, Y Oldfield, AA 300A/07, (4 pages)

COSTS - Unsuccessful personal grievance - 2½ day investigation meeting - Respondent sought contribution at higher end of scale to total costs of \$10,284 - Submitted holiday pay claim raised during investigation meeting caused additional expense and extended length of investigation as well as applicant's representatives lack of co-operation - Applicant argued respondents costs high and investigation meeting could have been avoided if respondent resolved problem at mediation - Also argued unable to meet costs award - Authority took into account respondent's costs high through no fault of their own - Late notice of arrears claim and requirement for Authority to respond to applicant's refusal to advise if legally aided extended investigation meeting unnecessarily - Balanced against applicant's ability to pay - Respondent entitled to contribution to costs

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

Bolton v The Rathbone Clinic Ltd

13 Dec 2007, Y Oldfield, AA 275A/07, (3 pages)

COSTS - Unsuccessful jurisdiction case - One day investigation meeting - Respondent sought contribution to total costs of \$12,376 - Applicant submitted costs should lie where they fall or any costs awarded should be modest - Straightforward case - Respondent entitled to reasonable contribution to costs

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

Bradshaw v James Pascoe Ltd

14 Dec 2007, V Campbell, AA 226A/07, (2 pages)

COSTS - Unsuccessful dispute - Less than one day investigation meeting - Respondent incurred costs of \$2,867 plus disbursements and sought contribution to those costs - Costs considered reasonable in circumstances - Respondent entitled to contribution to costs

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

Flynn v Classic Cuts Ltd t/a The Bacon Barn

11 Dec 2007, D King, AA 169A/07, (2 pages)

COSTS - Unsuccessful personal grievance - Length of investigation meeting not specified - Respondent sought full costs of \$5,242 - Applicant claimed poor financial position, however no supporting evidence provided - Not a complex matter therefore no reason for full costs - Respondent entitled to reasonable contribution to costs

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

Green and Ors v Rendezvous Hotels (NZ) Ltd

10 Dec 2007, M Ulrich, AA 235A/07, (4 pages)

COSTS - Successful personal grievance - 2½ day investigation meeting - Four applicants sought costs - First applicant's total costs were \$10,026 plus disbursements and sought full indemnity costs - Applicant argued settlement offer rejected by respondent should be considered when awarding costs - Daily tariff approach not appropriate given settlement offer by first applicant - Respondent ordered to pay first applicant \$8,270 in costs - Other applicants' costs totalled \$70,000 and sought contribution of \$15,000 each plus full disbursements of \$1,652 - Respondent argued costs excessive as they tried to settle matter - Settlement offer by respondent came after significant costs incurred by applicants' given no weight - Daily tariff approach appropriate for other applicants - Contribution to costs awarded to applicants' of \$7,000 each plus disbursements of \$500

Result: Costs in favour of applicants' (\$8,000 - First applicant), (\$7,000 - each

to remaining three applicants'); Disbursements (\$720)

Hand v Hayson

13 Aug 2007, Y Oldfield, AA 243/07, (4 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - No appearance by respondent - Claimed threatened and assaulted by supervisor while at work - Told respondent he would no longer work with supervisor - Respondent considered might have another role but applicant declined it as not full time - Paid final wages and left - Conduct of supervisor amounted to serious breach of respondent's obligations to provide safe workplace - Once aware of assault respondent obliged to take steps to ensure no further risk to applicant - Failure to do so meant applicant constructively dismissed - Remedies - Applicant young and relatively new to work force - Entitled to substantial award of compensation - Given labour shortage, Authority not satisfied applicant made real effort to mitigate loss - No award of lost earnings - COSTS - Less than one day investigation meeting - Applying tariff approach \$500 contribution appropriate - Cleaner

Result: Application granted ; Compensation for humiliation etc (\$10,000) ; Costs in favour of applicant (\$500)

Houston v Oldco PTI Ltd

10 Dec 2007, M Ulrich, AA 184A/07, (3 pages)

COSTS - Successful personal grievance, dispute arrears claim - Three day investigation meeting - Applicant sought contribution of \$9,270 to actual to costs of \$11,898 - Argued costs were reasonable and necessarily incurred and respondent unreasonable and raised irrelevant issues - Respondent submitted costs should lie where they fall as no longer trading with no funds, case unusual and applicant culpable for respondent's collapse - Applicant entitled to costs as successful party as no findings as to culpability made - Applicant awarded reasonable contribution to costs of \$8,000

Result: Costs in favour of applicant (\$8,000); Disbursements (\$270)

Kora v Weymouth Intermediate School

30 Nov 2007, A Dumbleton, AA 376/07, (3 pages)

COSTS - Unsuccessful personal grievance - Investigation meeting cancelled - Case withdrawn by applicant one day prior to investigation meeting without good reason - Respondent sought contribution of \$8,000 to total costs of \$20,000 - Applicant pursued claim up until last minute even though aware respondent had witness evidence that was detrimental to her case - Respondent entitled to award of costs - Costs not assessed as if applicant had lost at investigation meeting

Result: Costs in favour of respondent (\$5,000)

McMillen v Pilate Plus Ltd

20 Dec 2007, P Cheyne, CA 109A/07, (2 pages)

COSTS - Successful personal grievance - Unsuccessful counterclaim - Length of investigation meeting not specified - Applicant sought contribution to costs - Applicant submitted costs estimate of \$6,000 for 18 hours, which Authority found high - Respondent is principal, drew very small salary from business and ran at a loss with no other source of income - Financial means justified departure from daily tariff approach - Respondent offered realistic \$1,000 lump sum contribution to applicant's costs - Respondent to pay applicant \$1,000 as contribution to costs

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

Seaso v New Zealand Post Ltd

13 Dec 2007, PR Stapp, WA 13A/07, (3 pages)

COSTS - Successful dispute in favour of applicant - Half day investigation meeting - Applicant sought contribution of \$3,200 to total costs of \$4,700 - Respondent submitted no costs should be awarded as case involved dispute - Authority found employment relationship problem entirely avoidable and fair and reasonable employer would have dealt with issues without need for investigation meeting by Authority - Costs to follow event - Genuine issue about consultation answered - Entirely reasonable for applicant to obtain legal representation - Applicant entitled to reasonable contribution to costs

Result: Costs in favour of applicant (\$2,633); Disbursements (\$33.75); (\$70) Filing fee

Siita & Anor v Jett Jett Ltd t/a Rakino

23 Oct 2007, M Ulrich, AA 333/07, (2 pages)

PRACTICE AND PROCEDURE - No appearance by applicants - When Authority contacted applicants' representative he sought adjournment as unable to attend - Claimed made other commitments as believed investigation meeting already adjourned - No reasonable basis for belief - Application for adjournment declined - Substantive application dismissed - COSTS - Respondent sought contribution to costs - Appropriate to award \$200 costs, applicants to pay \$100 each

Result: Orders accordingly ; Costs in favour of respondent (\$200)

Taylor v AFU Finance Ltd

18 Dec 2007, J Crichton, CA 114A/07, (3 pages)

COSTS - Successful personal grievance - Half day investigation meeting - Applicants costs were \$4,330 - Submitted limited means and child to support - Argued significant contribution to costs should be made by respondent - Respondent submitted matter unusual and costs should lie where they fall, or award modest costs of \$800-\$1,000 - Authority did not accept respondent's argument matter unique, or that award made was at top end of scale - Costs should follow event - Applicant entitled to contribution to costs - Tariff approach appropriate

Result: Costs in favour of applicant (\$1,350)

Wade v Hume Pack N Cool Ltd

17 Dec 2007, V Campbell, AA 322A/07, (2 pages)

COSTS - Unsuccessful compliance application - Length of investigation meeting not specified - Nothing in case to derogate from principle costs follow event - Respondent sought contribution to costs of \$1,500 - Amount sought appropriate

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

Waipouri v Rightside Properties Ltd

28 Nov 2007, L Robinson, AA 268A/07, (2 pages)

COSTS - Successful personal grievance - Less than one day investigation meeting - Applicant sought contribution to costs - Applicant submitted invoice for costs totalling \$5,204 which Authority found excessive for 45 minute investigation meeting - Decision regarding costs difficult due to complete lack of assistance given to Authority and unreasonableness of costs claim - Appropriate in circumstances to follow tariff based approach - Applicant entitled to contribution to costs

Result: Costs in favour of applicant (\$750)

Williams v Camira Furniture Ltd

13 Dec 2007, Y Oldfield, AA 269A/07, (3 pages)

COSTS - Partially successful personal grievance, successful cross counterclaim - Length of investigation meeting not specified - Respondent sought costs as applicant only partially successful in claim - Total costs were \$5,761 - Applicant

submitted costs should lie where they fall as there were no winners - Both parties successful in recovering modest sums and both incurred moderate costs
- Costs to lie where they fall

Result: Costs to lie where they fall

Williams v Napier Motors Ltd t/a Dunedin City Ford

20 Dec 2007, J Crichton, CA 106A/07, (5 pages)

COSTS - Successful personal grievance - Three day investigation meeting - Applicant sought significant contribution to costs of \$14,557 plus disbursements - Argued significant contribution needed in order for applicant to enjoy fruits of victory - Submitted \$20,000 settlement offer rejected by respondent - Length of investigation meeting extended by respondent adding new witnesses to list - Respondent denied it behaved improperly and referred to significant number of claims applicant made, of which only two successful - If investigation meeting had only focused on those two claims investigation meeting would have been less than one day - Respondent alleged had to defend itself from raft of claims that were unsustainable and number of witnesses they produced was response to variety and extent of applicant's allegations - Authority found neither party blameless in case - Applicant entitled to contribution to costs

Result: Costs in favour of applicant (\$5,500)

Wynne v The Order of St John Midland Regional Trust Board

3 Jul 2007, R A Monaghan, AA 200/07, (4 pages)

RAISING PERSONAL GRIEVANCE - COSTS – Applicant had sought urgent determination from Authority – Application very specific and apparently aimed to secure applicant's attendance at work-related social function while on suspension – During conference call applicant advised no longer sought orders in respect of attendance at function – Authority treated matter as withdrawn and call abandoned – Authority subsequently received letter of withdrawal purporting to withdraw urgent order but leaving general grievance before Authority – Statement of problem and accompanying letter not adequate to alert Authority and respondent to raising of wider grievance in relation to suspension – Withdrawal of urgent application meant nothing before Authority - Circumstances caused considerable waste of time for both respondent and Authority – Respondent entitled to award of costs – Sought indemnity costs of \$2,322 – Authority accepted costs avoidable – However, applicant had subsequently been dismissed and planned to raise personal grievance – Significant outstanding matters between parties – Appropriate for costs to remain reserved pending final resolution of matter

Result: Orders accordingly ; Costs reserved

Dispute - Employment Relations Act 2000

Bradshaw v James Pascoe Ltd

3 Aug 2007, V Campbell, AA 226/07, (4 pages)

DISPUTE – Applicant claimed entitled to receive proportion of manager’s bonus at end of employment for period of financial year she work – Applicant had previously received proportion of bonus when took temporary assignment and provided evidence from another employee who received pro rata bonus when left employment – Respondent denied applicant entitled to bonus and submitted payment of bonuses discretionary – Employment agreement silent on payment of bonuses – Respondent had previously issued policy stating bonus discretionary, which applicant had not challenged – Bonus payment discretionary policy, not contractual obligation – Respondent entitled to exercise discretion not to pay applicant bonus - Manager

Result: Question answered in favour of respondent ; Costs reserved

Lee v Air New Zealand Ltd

5 Nov 2007, A Dumbleton, AA 347/07, (13 pages)

DISPUTE – Restraint of trade – Applicant sought declaration regarding interpretation, application, and operation of employment agreement – Applicant senior marketing manager at respondent – Non-competition clause stated could not be employed or involved in any business in competition with respondent for three months in NZ or Australia following termination of employment – Applicant accepted general manager marketing position based in Australia with airline – Employment to commence before expiry of purported non-competition period - Agreement also contained confidentiality clause – Applicant claimed restraint unnecessary given bound by ongoing confidentiality provisions, and new employer's assertions would observe restrictions in giving applicant work, and would not require her to breach confidentiality obligations to respondent – Applicant clearly had access to, and regularly received highly confidential information – Involved in respondent’s strategic planning to defend its business against new airlines in domestic market – New employer identified by respondent as highly likely to compete for airline business – Respondent had “trade secrets” in form of highly sensitive confidential information - Secrets known to applicant in course of her work – Respondent demonstrated reasonableness of clause at time agreement entered into - Applicant believed position would be available at end of non-competition period, and her skills and experience made applicant highly employable even outside aviation industry - Difficult for Authority and respondent to police “ring fencing” arrangements and undertakings, and not practicable in circumstances – Notwithstanding confidentiality provisions and undertakings to comply with them, was reasonable non-competition clause applied – Applicant prevented from becoming employed or involved in any capacity with any business competing with respondent until end of non-competition period

Result: Question answered in favour of respondent ; Costs reserved

Service and Food Workers Union Nga Ringa Tota Inc v McCain Foods (NZ) Ltd

11 Dec 2007, D Asher, WA 164/07, (10 pages)

DISPUTE - Applicant union sought access to respondent’s workplace to recruit members – Respondent not opposed to union access, however, strongly objected to access by member organisers who were employees of main competitor – Refused access on grounds member organisers, who were not employees of union, not “representatives of a union” under ss20 and 21 Employment Relations Act 2000 (“ERA”) – Also claimed justified in denying access on grounds of potential damage to business by way of loss of valuable commercial information, and access sought not reasonable and did not comply with existing reasonable security procedures – ERA not to be read down so as to deny access to union representatives who were paid employees of competitor –

ERA did not expressly exclude such members from acting as union representatives – Supported by plain meaning of “representative” – Reasonable for member organisers to exercise entitlement to access because respondent enjoyed safeguards in ERA and obligations on member organisers to act in good faith – No reason to believe member organisers would not be responsible when exercising right to enter respondent’s workplace or would not comply with safety and security procedures – Respondent directed to allow reasonable access by union member organisers - Non-publication order in respect of specified documents to be continued - Penalty not appropriate as dispute was test case
Result: Question answered in favour of applicant ; Orders accordingly ; Costs reserved

Stubbings v Ministry of Social Development

28 Aug 2007, M Ulrich, AA 264/07, (4 pages)

DISPUTE - Applicant applied for early retirement on medical grounds - Initially told entitled to medical retiring leave and retiring leave - Later told entitled to medical retiring leave only - Applicant sought payment of retiring leave - Respondent submitted applicant received all payments entitled to - Claimed mistaken advice given in good faith and corrected it when discovered error - Plain words of employment agreement provided for retirement leave on either medical or age related grounds - Applicant retired on medical grounds only - Not entitled to additional payment - RAISING PERSONAL GRIEVANCE - At investigation meeting issue of whether personal grievance had been raised in relation to mistaken advice discussed - Applicant's letter concerning entitlement did not make it readily apparent to respondent he wished to raise disadvantage grievance

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

Good Faith - Employment Relations Act 2000

NZ Engineering Printing & Manufacturing Union Inc v Terry Young Ltd (t/a Yunca Heating & Gas)

28 Mar 2007, P Cheyne, CA 32/07, (13 pages)

BARGAINING - GOOD FAITH - Applicant claimed respondent advised and attempted to induce union members not to be involved in bargaining for collective employment agreement ("CEA") in breach of s4(6) Employment Relations Act 2000 ("ERA") - Following visit by union representative, 16 workers joined applicant - Some later resigned - Applicant alleged series of actions by respondent breached s4(6) - Respondent relied on s4(3) ERA that duty of good faith did not prevent communication of reasonably held statement of fact or opinion - Whether s4(3) permitted conduct otherwise in breach of s4(6) - Section 4(6) modified s4(3) to extent of inconsistency - Party to employment relationship may communicate reasonably held opinion but must not amount to advising or doing anything with intention of advising employee not to be involved in bargaining for CEA - Alleged actions occurred before notice commencing bargaining given - Section 4(4) stipulates duty of good faith applies to bargaining for CEA "including matters relating to initiation of bargaining" - If application of ss4(1) and 4(6) restricted to events occurring after notice given, would have been unnecessary to include that phrase - Application of s4 to matters before date of notice better achieved object of Act - Was clear to respondent EPMU and members were preparing to initiate bargaining - Whether conduct breached s4(6) - Authority found in meetings with employees, respondent advised and intended to induce employees not to be involved in collective bargaining - Respondent distributed credit union proposal to non-union members - Intended message that employees did not need to join union or bargain collectively - Respondent posted memo on notice board of union fee increase - Increase published to make point of its magnitude - Could only have been for intention of encouraging resignation and dissuading non-members from joining applicant - Respondent moved applicant member ("K") moved to another work area - Respondent of view K spent too much time on union activities and wanted to maintain productive work - K not moved with intention of inducing him or other employees not to be involved in bargaining - Duty of good faith breached in respect of meetings, distribution of credit union proposal, and memo - Also alleged union representative denied access to speak with union members collectively at workplace - Authority noted dispute arose from respondent's reading of s21 ERA - Respondent claimed representative could speak to only one employee at a time during work hours - Position tenable if simply read words of ERA - Context of ERA did not require different interpretation - Under s20 ERA, discussions not limited to one employee at a time - However, position not adopted in breach of s4(6) ERA - Penalty not appropriate - JURISDICTION - Whether Authority could impose penalty for breach of good faith - ERA s4A renders parties liable to penalty, but does not say jurisdiction lay in Authority - Omission appeared to be drafting error - Authority had exclusive jurisdiction to make determinations about employment relationship problems including whether good faith obligations complied with - Jurisdiction for recovery of penalties for breach of s4A lay in Authority not in Court - PENALTY - Respondent's actions deliberate and serious and in breach of s4A - About one third new union members resigned and influenced to do so by respondent's actions - Penalty appropriate for breaches in respect of meetings, distribution proposal, and memo

Result: Question answered in favour of applicant ; Penalty (\$6,000)(To Crown) ; Application dismissed (Compliance order) ; Costs reserved

Service and Food Workers Union Nga Ringa Tota Inc v Air New Zealand Ltd
29 Oct 2007, A Dumbleton, AA 338/07, (25 pages)

GOOD FAITH – Applicant alleged respondent attempted to undermine parties' collective employment agreement ("CEA") by inducing members to resign from applicant in breach of s4(6) Employment Relations Act 2000 ("ERA") – Also claimed members misled about consequences of retaining union membership with applicant – Respondent adopted "In-house" Solution as alternative to outsourcing work – Applicant and its members did not agree to change CEA terms to align with Solution – Respondent distributed letter about Solution to staff believed members of applicant - Letter advised could resign from applicant and sign up to Solution on individual basis or join another union - Letter emphasised only staff participating in Solution to receive benefits, and members ineligible - Letter intended to entice employees into resigning membership and induce members not to be covered by CEA, in breach of s4(6) ERA - Respondent's claim sole purpose of letter to communicate Solution and confirm staff still union members rejected - Goal was to reduce number of employees covered by CEA – By encouraging resignation, respondent intended to completely undermine employment relationship between member and applicant - Advice non-participants in Solution not eligible for new roles not misleading or deceptive – Rather, advice put forward to persuade resignation – Respondent telephoned members and non-members regarding Solution - Not satisfied telephone calls breached s4(1) ERA obligations or dominant purpose was to advise or induce employees not to be covered by CEA – COMPLIANCE ORDER – Given breach a "one-off", compliance not necessary and unavailable – PENALTY – Applicant sought penalty for every breach - Letter sole ground for remedies – Although respondent's breach deliberate and serious, penalty under s4A(a) unavailable given no sustained breach – Penalties under ss4A(b)(ii) and 4A(b)(iii) could be imposed – Sending of letter could attract multiple penalties, depending on number of recipients - Scale of communications went to gravity of breach, and relevant in determining total penalty – Penalty aimed at existence of bad faith intentions – Scale to which bad faith intentions present relevant to quantum – Leave reserved for parties to make submissions on quantum of penalties

Result: Question answered in favour of applicant ; Leave reserved for parties to make submissions on quantum of penalties ; No order for costs

Injunction - Employment Relations Act 2000

McVey v Atlas Securities Ltd

20 Jun 2007, J Crichton, CA 66/07, (6 pages)

INJUNCTION - Interim reinstatement - Applicant employed on fixed term agreement to complete opening of bar - Initial term three months, then extended as project not finished - Genuine reason for fixed term - Whether applicant offered and accepted permanent position - Documentary evidence suggested permanent position contemplated in future - Evidence enough to meet low threshold of arguable case test - Balance of convenience favoured respondent - Applicant in other employment - No clear role to return to - Respondent would have to effectively create position - Overall justice did not favour applicant - Untested evidence suggested dysfunctional working relationship between applicant and respondent's only employee, and stakeholders - Reinstatement would require resolution of relationship problem - Interim reinstatement declined - Substantive matter transferred to another Authority member who could offer parties earlier dates - Hospitality Director
Result: Application dismissed ; Costs reserved

Petersons Global Sales Ltd & Anor v Peterson & Anor

11 Jun 2007, D King, AA 173/07, (2 pages)

INTERIM INJUNCTION - Record of oral determination - Restraint of trade - Application for injunctions preventing respondents from displaying prototype saw at Hamilton Field Days - Applicants claimed respondents took confidential information and trade secrets and used them to develop prototype - Respondents claimed entitled to information and to develop prototype - Clearly arguable case - Applicants stood to lose rights to develop and market saw permanently - Applicants would suffer temporary setback - Overall justice of case favoured applicants - Injunctions ordered
Result: Application granted ; Orders accordingly ; Costs reserved

Urlwin McDonald and Clients Ltd v Boyle

6 Aug 2007, P Montgomery, CA 92/07, (4 pages)

INJUNCTION – Applicant alleged respondent solicited business of three significant clients for his own company while still an employee – Respondent denied breaching obligations to applicant – Both parties gave undertaking as to damages – Respondent conceded arguable case – Submitted would be prevented from earning living if injunction granted, and failure to hold status quo ran risk of causing demise of his business – Appeared clients recently acquired by applicant, so any financial loss predominantly future loss – Any loss to applicant could be easily identified and damages would be sufficient remedy – Loss could be constrained by setting prompt fixture for substantive hearing – Balance of convenience favoured respondent – Respondent's defence appeared relatively strong, while applicant's affidavits indicated some inconsistencies – Overall justice favoured respondent – Application for interim relief declined – Parties directed to mediation
Result: Application dismissed ; Parties directed to mediation ; No order for costs

Jurisdiction - Employment Relations Act 2000

Havenleigh Global Services Ltd v Toeikrathok and Ors

23 Jan 2008, J Crichton, CA 7/08, (10 pages)

JURISDICTION - Respondents Thai nationals employed by applicant to work in New Zealand vineyards - Applicant sought declaration various allegations made by respondents had no legal basis, and direction wage overpayment be returned - Respondents allegedly raised personal grievance in letter - Did not supply further and better particulars when requested - Applicant sought declarations as not able to obtain clarification of respondents' claims and wanted matter resolved - Respondents said unjustifiably dismissed, unjustifiably disadvantaged and subject to unlawful duress - Also sought reimbursement of lost wages and denied overpayment - In terms of s158 Employment Relations Act 2000 ("ERA"), only matter before Authority was statement of problem filed by applicant - No initiating application by Thai workers - Applicant's statement of problem had to be genesis of Authority's consideration of matter - Despite Authority's wide power in ERA, unable to act ultra vires governing statute - Applicant sought to conclude dispute through Authority's processes - Abuse of process to allow such an outcome - Authority lacked jurisdiction to make declaration sought by applicant - Unable to offer applicant any other order or decision which could properly address concerns - Not persuaded respondents legitimately and properly raised personal grievance with applicant - Defect in personal grievance not perfected by evidence given to Authority - Authority not able to assist parties in resolution of employment relationship problem - Authority dismayed parties difficulties have been subject of comment in news media - Authority directed copy determination be made available to Secretary of Labour in order that Immigration Division be made aware of Authority's concerns about Thai workers paying significant sums money to agencies in home country to obtain employment in New Zealand - Vineyard workers

Result: Application dismissed ; Costs reserved

Jack v Duratcech Wholesale Ltd

9 Aug 2007, J Crichton, CA 96/07, (6 pages)

JURISDICTION – Whether person intending to work - Applicant claimed unjustifiably dismissed when respondent withdrew offer of employment after she accepted it – Respondent accepted parties discussed employment but claimed withdrew offer before applicant accepted it – Respondent arranged for applicant and another to travel to head office – Described purpose of meeting as “getting to know” potential employees – Applicant claimed told respondent her fear of flying meant she would only attend if had employment with respondent - Alleged respondent told her to book her ticket – Submitted this constituted offer and acceptance - Respondent later sent formal offer of employment – Applicant advised respondent she had made non-negotiable changes to offer based on legal advice – Respondent claimed withdrew offer as changes extensive and amounted to unacceptable counter-offer - No offer capable of acceptance before formal offer sent by respondent - Offer not accepted by applicant - Applicant not employed by respondent

Result: Application dismissed ; Costs reserved

Ka'ai v Vice Chancellor, University of Otago

19 Dec 2007, J Crichton, CA 157/07, (4 pages)

PRACTICE AND PROCEDURE - JURISDICTION - Interim determination - Applicant alleged unjustified disadvantage and unjustified dismissal - Matter set down for investigation meeting - Applicant proposed Authority hear evidence of post-termination-of-employment conduct of respondent at investigation meeting – Sought to introduce evidence that respondent acted in bad faith - Not relevant to grievance per se but to show respondent breached good faith obligations – Alleged deprived of opportunity to be heard in respect of bullying allegations made against her as consequence of actions respondent took - Alleged

representative of respondent spoke disrespectfully at a meeting thus potentially damaging reputation - Employer's action must be judged at time taken, not subsequently - Not persuaded conduct relevant to complaint – Relevant or not Authority had no jurisdiction to consider such material - Damage to reputation not a matter for employment institutions – Post-termination conduct of respondent not to be considered in substantive hearing
Result: Orders accordingly ; No order for costs

Moreton v Acantech Ltd

9 Aug 2007, J Crichton, CA 98/07, (2 pages)

JURISDICTION – Whether employee or independent contractor – Applicant incurred expenditure in his own name and sought reimbursement from respondent – Respondent had no control over applicant and he could work for other parties – No arrangement to deal with PAYE – Independent contractor - No jurisdiction - Builder

Result: Application dismissed ; No order for costs

Urquhart v Aviation Security & Anor

6 Aug 2007, V Campbell, AA 234/07, (4 pages)

JURISDICTION - Matter dealt with on papers - Applicant worked for first respondent ("AS") as commercial pilot until resigned following conflict - Applicant received conditional employment offer from second respondent ("ANZ") subject to reference check - Applicant gave specific instructions to HR manager at AS that contents of his file should not be revealed to anyone - Company subsequently contacted AS and ANZ withdrew offer as result of information obtained - Applicant alleged AS breached employment agreement by breaching Privacy Act 1993 ("PA") - Authority had no jurisdiction to determine personal grievance based on alleged breach of PA - Claims against ANZ properly being dealt with by Privacy Commissioner - Claims relating to AS's other alleged breaches of employment agreement and internal policies able to be heard by Authority - Parties directed to mediation

Result: Question answered ; Orders accordingly ; Costs reserved

Parental Leave - Employment Relations Act 2000

Toroa v Department of Labour

2 Nov 2007, PR Stapp, WA 148/07, (6 pages)

PARENTAL LEAVE – Applicant sought determination on respondent's ruling deeming applicant ineligible for paid parental leave – Applicant took legal guardianship of child through Parenting and Guardianship Orders – Applicant granted 52 weeks parental leave by employer – Given leave for full time guardians not provided for in Parental Leave and Employment Protection Act 1987 ("PLEPA"), leave was wider application of parental leave - Under s71CA(2) PLEPA rights and benefits to non-statutory parental leave ignored when considering whether person eligible employee – Sections 7 and 8 PLEPA restricted entitlement to statutory parental leave to pregnancy and adoptions under Adoption Act 1955 – Legal guardianship not deemed as one of methods by which child taken into care for adoption under PLEPA – Applicant not adopting child – No evidence supporting s33 criteria met – Applicant not entitled to paid parental leave

Result: Application dismissed ; Costs reserved

Penalty - Employment Relations Act 2000

Metcalf (Labour Inspector) v Mr Sparkel Ltd

9 Aug 2007, L Robinson, AA 241/07, (4 pages)

ARREARS OF HOLIDAY PAY - Applicant Labour Inspector sought to recover holiday pay on behalf of TW – Respondent did not file statement in reply but granted leave to defend application at investigation meeting – Respondent accepted arrears due and owing – Interest 10 percent – PENALTY – Respondent failed to provide wage and time records when requested – Penalty of \$2,000 appropriate

Result: Application granted ; Arrears of Holiday pay (\$1,377.52) ; Interest (10%) ; Penalty (\$2,000)(\$1,000 to Crown, \$1,000 to Applicant) ; Disbursements (\$70)(Filing fee)

NZ Engineering Printing & Manufacturing Union Inc v Terry Young Ltd (t/a Yunca Heating & Gas)

28 Mar 2007, P Cheyne, CA 32/07, (13 pages)

BARGAINING - GOOD FAITH - Applicant claimed respondent advised and attempted to induce union members not to be involved in bargaining for collective employment agreement ("CEA") in breach of s4(6) Employment Relations Act 2000 ("ERA") - Following visit by union representative, 16 workers joined applicant - Some later resigned - Applicant alleged series of actions by respondent breached s4(6) - Respondent relied on s4(3) ERA that duty of good faith did not prevent communication of reasonably held statement of fact or opinion - Whether s4(3) permitted conduct otherwise in breach of s4(6) - Section 4(6) modified s4(3) to extent of inconsistency – Party to employment relationship may communicate reasonably held opinion but must not amount to advising or doing anything with intention of advising employee not to be involved in bargaining for CEA – Alleged actions occurred before notice commencing bargaining given – Section 4(4) stipulates duty of good faith applies to bargaining for CEA "including matters relating to initiation of bargaining" – If application of ss4(1) and 4(6) restricted to events occurring after notice given, would have been unnecessary to include that phrase – Application of s4 to matters before date of notice better achieved object of Act – Was clear to respondent EPMU and members were preparing to initiate bargaining - Whether conduct breached s4(6) – Authority found in meetings with employees, respondent advised and intended to induce employees not to be involved in collective bargaining - Respondent distributed credit union proposal to non-union members – Intended message that employees did not need to join union or bargain collectively - Respondent posted memo on notice board of union fee increase – Increase published to make point of its magnitude – Could only have been for intention of encouraging resignation and dissuading non-members from joining applicant – Respondent moved applicant member ("K") moved to another work area - Respondent of view K spent too much time on union activities and wanted to maintain productive work - K not moved with intention of inducing him or other employees not to be involved in bargaining - Duty of good faith breached in respect of meetings, distribution of credit union proposal, and memo - Also alleged union representative denied access to speak with union members collectively at workplace - Authority noted dispute arose from respondent's reading of s21 ERA - Respondent claimed representative could speak to only one employee at a time during work hours - Position tenable if simply read words of ERA - Context of ERA did not require different interpretation - Under s20 ERA, discussions not limited to one employee at a time - However, position not adopted in breach of s4(6) ERA - Penalty not appropriate - JURISDICTION - Whether Authority could impose penalty for breach of good faith – ERA s4A renders parties liable to penalty, but does not say jurisdiction lay in Authority – Omission appeared to be drafting error – Authority had exclusive jurisdiction to make determinations about employment relationship problems including whether good faith obligations complied with – Jurisdiction for recovery of penalties for breach of s4A lay in Authority not in

Court – PENALTY – Respondent’s actions deliberate and serious and in breach of s4A – About one third new union members resigned and influenced to do so by respondent's actions - Penalty appropriate for breaches in respect of meetings, distribution proposal, and memo

Result: Question answered in favour of applicant ; Penalty (\$6,000)(To Crown) ; Application dismissed (Compliance order) ; Costs reserved

Personal Grievance - Dismissal - Employment Relations Act 2000

Craig v Carter Holt Harvey Ltd

15 Jan 2008, A Dumbleton, AA 9/08, (11 pages)

UNJUSTIFIED DISMISSAL – Serious misconduct – Manager supplied with new mobile phone – Applicant started using phone after manager reverted to old phone – Without authority applicant allocated personal number to phone – Claimed phone belonged to third party, not respondent – Respondent concluded applicant's actions amounted to theft – Applicant claimed respondent not justified in viewing actions as theft – Also claimed respondent did not consider whether actions product of innocent mistake rather than deliberate intention to dishonestly take – Applicant also suggested more convenient for respondent to dismiss rather than continue restructuring negotiations – Implied term of agreement that employee will not use employer's property for own purposes without permission – Term included property controlled and owned by employer – Applicant knew property controlled by respondent as part of own duties to administer control of phones – Full and fair inquiry conducted – Reasonable for respondent to conclude applicant deliberately set out to breach rule – No substantial grounds for applicant to conclude dismissal motivated by restructuring issues – Dismissal justified – Receptionist

Result: Application dismissed ; Costs reserved

Hand v Hayson

13 Aug 2007, Y Oldfield, AA 243/07, (4 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - No appearance by respondent - Claimed threatened and assaulted by supervisor while at work - Told respondent he would no longer work with supervisor - Respondent considered might have another role but applicant declined it as not full time - Paid final wages and left - Conduct of supervisor amounted to serious breach of respondent's obligations to provide safe workplace - Once aware of assault respondent obliged to take steps to ensure no further risk to applicant - Failure to do so meant applicant constructively dismissed - Remedies - Applicant young and relatively new to work force - Entitled to substantial award of compensation - Given labour shortage, Authority not satisfied applicant made real effort to mitigate loss - No award of lost earnings - COSTS - Less than one day investigation meeting - Applying tariff approach \$500 contribution appropriate - Cleaner

Result: Application granted ; Compensation for humiliation etc (\$10,000) ; Costs in favour of applicant (\$500)

Maxwell v Thomas

17 Sep 2007, Y Oldfield, AA 287/07, (4 pages)

UNJUSTIFIED DISMISSAL - No appearance by applicant - Authority determined matter on basis of evidence taken at previous meeting - Agreement between parties initially expressed to be casual - However, applicant began working long hours every week and Authority satisfied employment effectively became permanent - Applicant advised needed to travel overseas urgently for family reasons - Respondent offered to pay applicant his holiday pay to help him in circumstances - Told applicant no pressure to return quickly as relief driver engaged - Respondent expected applicant would advise when would return to work - Claimed did not hear from applicant until received letter seeking wage records and reason for dismissal - Respondent replied stating employment not terminated and told Authority would be glad to have applicant return to work - Appeared applicant drew incorrect conclusion from payment of holiday pay and engagement of relief driver - No dismissal - Driver

Result: Application dismissed ; No order for costs

McKenzie v Extensions to Life Ltd

21 Jan 2008, H Doyle, CA 6/08, (16 pages)

UNJUSTIFIED DISMISSAL – Misconduct – Employment ended after two weeks – Applicant employed as care coordinator for first respondent's disabled son "D" – "D" required full time care after serious car accident – Other staff raised complaints and concerns of applicant – Witness claimed applicant made inappropriate comments about resuscitating "D" and told other staff D's file "made for good reading" – First respondent claimed could not trust applicant to properly care for "D" – Summary dismissal – Viewed objectively comments not in good taste, however, not misconduct that fair and reasonable employer would decide should lead to dismissal – Applicant not advised of nature of allegations – Not advised employment could be terminated or entitled to representative – First respondent claimed had to take immediate action to protect "D" – Applicant not provided with real opportunity to explain – First respondent had made up mind to terminate prior to disciplinary meeting – Fair and reasonable employer would have approached allegations with open mind – Applicants failure to return file when asked not what fair and reasonable employer would consider misconduct that justified summary dismissal – No proper investigation – Fair and reasonable employer could not have reached view on serious allegations without further investigation – Process unfair – Procedural and substantive respects in case inseparable – Dismissal procedurally and substantively unjustified – Applicants inappropriate comment contributed to situation that gave rise to grievance – Contributory conduct 10 percent – Care coordinator
Result: Application granted ; Reimbursement of lost wages (\$5,334.92 reduced to \$4,801.43) ; Compensation for humiliation etc (\$7,000 reduced to \$6,300) ; Penalty (\$300)(Payable to applicant) ; Costs reserved

Mikara and Ors v Crusader Meats New Zealand Ltd

24 Jan 2008, D King, AA 22/08, (10 pages)

UNJUSTIFIED DISMISSAL – Applicants took other employment during period of lockout – Lockout lifted early – Respondent gave applicants opportunity to continue employment if returned on specified date – Applicant claimed requirement to return on specified date unreasonable as had to give few days notice to alternative employer – Respondent claimed actions constituted resignation, or alternatively termination when failed to attend work following lifting of lockout – Discontinuance of employment contemplated a limited cessation of employment and not an actual dismissal – While obligation suspended S96(i) and (ii) Employment Relations Act 2000 ("ERA") provided clear intention that legislation did not contemplate termination of employment during lockout – Wage/work bargain fundamental part of employment relationship discontinued during lockout – No obligation on employer to provide work or pay employee, concomitantly, employee under no obligation to work or expect to receive wages – Nothing in ERA or employment agreement prevented locked out employee taking alternative employment – Alternative employment did not interfere with obligations to respondent – Taking alternative employment during lockout not repudiation of existing agreement or resignation – Employment agreement provided employees absent from work for three consecutive working days and without contact deemed to have terminated employment – Applicants told respondent would return to work – Parties made express provision for abandonment – Failure to return to work considered pursuant to provision – Clear to respondent applicants intended to perform obligations under contract – Appropriate inquiries not made about intention to return to work and reasons for not being able to return when requested – Dismissals unjustified – Reinstatement ordered – Applicant's failure to return on specified date contributed to situation that gave rise to personal grievance – Contributory conduct 25 percent - Meat workers
Result: Application granted ; Reinstatement ordered ; Reimbursement of lost wages (Quantum to be determined between parties) ; Compensation for humiliation etc (\$3000 reduced to \$2250)

O'Neil v Super Butcher (Thames) Ltd

4 Dec 2007, V Campbell, AA 383/07, (6 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal - No appearance for respondent – Applicant 14 years old when commenced first job during school holidays at respondent – During conversation store manager (“V”) suggested applicant should go with him to USA, and asked what her parents would say if left with him – Applicant thought V joking – V later followed applicant into meat chiller, and kissed her on the cheek – Applicant shocked and scared - After short time V stepped aside and let her leave – Returned to work because thought had to stay to finish shift – Applicant left work and never returned – V acknowledged behaviour – V’s conduct egregious and constituted breach of duty to applicant, and respondent’s statutory duty of good faith – Could be no doubt breaches sufficiently serious to make it reasonably foreseeable applicant might leave employment as result – Had incident not occurred, applicant would not have left employment – Causal link established – Constructive dismissal

Result: Application granted ; Reimbursement of lost wages (\$119)(2 days) ; Compensation for humiliation etc \$3,000) ; Disbursements (\$70)(Filing fee)

Personal Grievance - Dismissal - Misconduct - Employment Relations Act 2000

D v M

1 Nov 2007, P Montgomery, CA 128/07, (13 pages)

UNJUSTIFIED DISMISSAL – Serious misconduct - Summary dismissal - Applicant lived and worked on respondent's farm - No written employment agreement - Respondent's son claimed applicant sexually abused him – Respondent also claimed applicant removed daughter's nappies at respondent's home - Respondent called Police about allegations, and told applicant to leave farm immediately – Applicant denied allegations but said would have done same thing – Respondent claimed did not intend to dismiss, rather sole concern safety of children – Son did not disclose any sexual abuse during Police investigation – Insufficient evidence to support prosecution – Respondent called applicant and told him was "off the hook" – Applicant told respondent was "going to get him" – Likely applicant referring to pursuing employment rights - Applicant subjected to verbal abuse and physical assault when allegations revealed in community – Non-trespass order served on applicant – Absence of documentation covering terms of employment agreement and alleged warnings raised significant difficulties for Authority - Respondent claimed employment fixed term and to end after lambs sold - No evidence fixed term complied with requirements of s66 Employment Relations Act 2000 - Employment not fixed term - Authority found applicant left farm at direction of respondent, and solely because of untested allegations – Failed to address employment situation at all – No investigation carried out – Police investigation meant substantive basis for sending away eroded significantly – Respondent took no steps to address applicant on how inevitable termination could be resolved, or to reach settlement when was open to it – Applicant's statement would have done same thing did not absolve respondent of its obligations – In circumstances, relationship irretrievable – However, respondent not relieved of obligations to do whatever fair and reasonable for applicant – Dismissal unjustified – Remedies - Interest 9.5 percent on lost wages - ARREARS OF HOLIDAY PAY - Holiday pay due and owing - Interest 9.5 percent - Permanent name suppression of parties and witnesses ordered

Result: Application granted ; Reimbursement of lost wages (\$6,571)(4 months) ; Arrears of holiday pay (\$917.30) ; Interest (9.5%) ; Compensation for humiliation etc (\$12,000) ; Costs reserved

Heremia v Wilding International Ltd

8 Aug 2007, V Campbell, AA 237/07, (13 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Summary dismissal - Applicant initially in relationship with respondent's manager ("P") - P subsequently involved with applicant's friend and co-worker ("C") - Relations deteriorated to point applicant asked to be separated from C - C made formal complaints applicant intimidated her and other staff - Advised to attend meeting and issue serious misconduct - Applicant requested specific information about complaints but no information provided - P conducted investigation and concluded applicant intimidated, bullied, and victimised C - Applicant believed would not receive fair hearing and asked for mediation - Applicant's explanations not accepted - P also considered applicant's refusal to agree to changes in employment agreement and alleged organising of staff union meetings serious misconduct, and dismissed applicant - In order to safely conclude applicant victimising, intimidating, or bullying C, P needed to be satisfied actions repeated, carried out with desire to gain power or exert dominance and with intention to cause fear and distress - Fact applicant took action to avoid contact with C did not mean was intimidating, victimising, or bullying C - Not satisfied P undertook full and fair investigation into allegations and P reached several firm conclusions prior to meeting - Disciplinary process dogged by bias and predetermination and investigation procedure and dismissal wholly deficient - Fair and reasonable

employer would have taken steps to resolve concerns and improve applicant and C's work relationship - Respondent's actions and how it acted not those of fair and reasonable employer - Caregiver

Result: Application granted ; Reimbursement of lost wages (\$661.50)(2 weeks) ; Compensation for humiliation etc (\$5,000) ; Costs reserved

Kurene and Anor v United Group Rail (NZ) Ltd

10 Aug 2007, D Asher, WA 21A/07, (11 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Summary dismissal - First applicant ("K") dismissed for alleged failure to follow reasonable instruction of supervisor ("S") – During first investigation meeting, respondent conceded K would be reinstated on interim basis - At substantive investigation meeting, respondent conceded dismissal unjustified, and agreed to permanently reinstate K - BREACH OF CONTRACT - Damages - Applicants claimed respondent breached implied term of employment agreement by failing to ensure supervisor ("M") did not engage in intimidating/threatening conduct towards S as witness - S gave evidence at investigation meetings K complied with instruction – S later claimed M approached him after interim investigation meeting regarding evidence – S informed applicant but asked she keep it confidential - Respondent claimed no loss to K arose out of M's actions - M's actions perilously close to deliberate threats and intimidation – Authority prepared to accept M did not intend to persuade S to change his evidence - M's actions would have intimidated any reasonable person – Actions not sanctioned by respondent - Authority satisfied K damaged by actions - Damages appropriate - Applicants' also alleged contempt of court - Actions did not happen within "the face of the Authority" as required by s196 Employment Relations Act 2000 ("ERA") - Actions did not amount to contempt of Authority - No need to adopt referral to Employment Court procedure under s196 - Because of seriousness of M's actions, Authority referred determination and copies of submissions to Solicitor-General - Remedies - Respondent claimed K contributed to grievance by intending not to follow S's instruction - No contributory conduct found - Authority took into account respondent's concessions and offers of compensation and costs in award of compensation

Result: Applications granted ; Compensation for humiliation etc (\$14,000) ; Breach of contract (\$6,000)(Damages) ; Costs reserved

Monahan v Lister's Pioneer Services Ltd

22 May 2007, YS Oldfield, AA 156/07, (3 pages)

UNJUSTIFIED DISMISSAL - Misconduct - Applicant received offence notice for failure to produce log book, and summons to appear in Court - Summons copied to respondent - Offence carried one month mandatory loss of licence - Respondent understood applicant did not intend to defend charge - Gave him notice employment would terminate on date of Court hearing - Applicant plead guilty to offence but did not lose licence - Court accepted explanation for failure to produce log book - Applicant informed respondent of outcome and asked for reimbursement of lost wages and reinstatement - Respondent offered reinstatement only - Applicant did not accept offer and raised personal grievance - Applicant offered no explanation to respondent - Grounds for summary dismissal established - However, dismissed because of possible loss of licence, not for failing to produce log book - Decision premature - Dismissal unjustified - Remedies - Failure to produce log book applicant's fault, and very serious - Failed to give respondent explanation gave to Court or mitigate loss by accepting reinstatement offer - Contributory conduct 50 percent - Truck driver

Result: Application granted ; Reimbursement of lost wages (\$3,375 reduced to \$1,687)(5 weeks) ; Compensation for humiliation etc (\$1,000 reduced to \$500) ; Costs reserved

Morgan v Maxon Building Contractors Ltd

2 Jul 2007, G J Wood, WA 95/07, (6 pages)

UNJUSTIFIED DISMISSAL – Misconduct - Applicant dismissed for failure to account for monies advanced to him to pay for parking company vehicle – Applicant responsible for driving other employees to work site – Each week, applicant given cash to cover cost of parking – However, applicant did not pay for parking everyday and took to circling streets looking for free car parks – When situation came to respondent's attention it wrote to applicant and gave driving responsibilities to another employee – No further contact between parties, each expected other to make first move – Applicant took sick leave – Although provided medical certificate, respondent doubted genuineness of sickness – Respondent determined to dismiss applicant and sent him backdated letter of dismissal – Also refused to pay applicant sick leave – Applicant met with respondent, returned extra parking money and asked for job back – Respondent declined, but paid sick pay when approached by Labour Inspector – Much later, offered applicant job back with fresh start, but he declined – Both parties responsible for failure to communicate – Respondent's actions not those of fair and reasonable employer – Applicant given no opportunity to explain parking money or respond to sick leave allegation – Dismissal unjustified – However, fair and reasonable employer entitled to conclude applicant had no reasonable explanation for retaining money when no explanation proffered, or money returned, for two weeks – Remedies – Applicant failed to mitigate loss and remained unemployed – Declined to seek work with temp agency as did not have a telephone for personal reasons – Had also refused reinstatement – Not entitled to lost wages – Applicant gave limited evidence of loss of dignity resulting from dismissal – Failure to look for work showed not too upset about not having paid employment – Requests for parking money when not required and failure to explain contributed to grievance – Behaviour inconsistent with duty to be responsive and communicative - Authority also took into account applicant wasted company and employees' time looking for free parks – Contributory conduct 50 percent – Labourer

Result: Application granted ; Compensation for humiliation etc (\$1,000 reduced to \$500) ; Costs reserved

Stiekema v Centurion Management Services Ltd

3 Dec 2007, M Ulrich, AA 377/07, (17 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant told co-worker did not think was right staff should be required to attend weekly devotional sessions and could not understand how director could preach to staff while engaging in “fraudulent transactions” – Co-worker raised concerns about allegations with director (“C”) – Directors undertook investigation and found applicant spread rumours of fraud, amounting to serious misconduct – Applicant claimed raised concerns with director (“P”), which P denied - Final warning issued with stipulation applicant undertake part-time study – Applicant went on sick leave and subsequently resigned – Applicant had not received response about personal grievance issues and had agreed to mediation - Respondent's inquiry about likely return date reasonable – Breaches of employment agreement (“IEA”) not so serious to make it reasonably foreseeable applicant would resign - No constructive dismissal - UNJUSTIFIED DISADVANTAGE – In alternative claimed disadvantaged by disciplinary process and warning – Investigation process flawed given P and C's wife's involvement in outcome and penalty – Respondent could not demonstrate explanations given unbiased consideration – Stipulation to undertake study fell outside ambit of IEA – Flaws significant and vitiated investigation process and outcome – Unjustified disadvantage – Discrimination – Applicant claimed requirement to attend weekly “devotion” meetings an unlawful discriminatory practise - IEA provided attendance compulsory but participation voluntary – Applicant initially “embraced” devotions – However, following one devotion meeting applicant upset by what she claimed director said and no longer participated – Directors told applicant had legal opinion staff could be required to attend but not to participate - On final day applicant raised concern

compulsory attendance not "right" – Respondent had no opportunity to address concerns – No disadvantage arose given applicant not required to attend devotions after raised objection – Evidential basis for unjustified action not made out – Authority commented had evidential basis been made out, would have had difficulty accepting could compel staff to attend devotions if attendance contrary to own religious beliefs – No evidence attendance contrary to applicant's religious belief – Remedies – Applicant spread rumour of improper financial transactions – Conduct inappropriate – Allegations had no reasonable basis – Contributory conduct 50 percent

Result: Application dismissed (Unjustified dismissal) ; Application partially granted (Unjustified disadvantage) ; Compensation for humiliation etc (\$6,000 reduced to \$3,000) ; Costs reserved

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

Turdeich v Dale Fibreglass Ltd

30 Jul 2007, V Campbell, AA 222/07, (8 pages)

RAISING PERSONAL GRIEVANCE - Application to raise personal grievance out of time - Respondent claimed unaware of grievance until received letter from Mediation Service - No dispute applicant failed to raise grievance within 90 days - Whether exceptional circumstances - No evidence applicant's advocate instructed to raise grievance - When advised advocate no longer at firm, was still within 90 day period - Did not contacted firm again until ten months later - Not satisfied applicant made reasonable arrangements to have grievance raised - No dispute resolution explanation as required by s65 Employment Relations Act 2000 ("ERA") in employment agreement - Applicant unaware of 90 day requirement - Absence of explanation caused delay in raising grievance and amounted to exceptional circumstances - Just to grant leave out of time - UNJUSTIFIED DISMISSAL - Poor performance - Applicant employed on fixed term agreement with probationary period - Dismissed for poor performance two weeks prior to its expiry - Given was temporary agreement with sole purpose of establishing suitability for permanent employment, respondent accepted agreement in breach of s66 ERA - Respondent unable to rely on fixed term - Agreement met requirements of s67 ERA - Applicant made aware performance short of accepted standard - However, respondent did not meet required standard for dealing with poor performance - No measures to address quality of work or reviews to assess improvements - No opportunity to provide feedback why expected outcomes not achieved - Given no indication permanent offer would not be made and not given opportunity to complete probation - Dismissal unjustified - Remedies - Applicant awarded two weeks lost wages taking into account fact unlikely would have been offered permanent position - Compensation at lower end of scale appropriate - While applicant's actions contributed to dismissal, not responsible for respondent's breaches of fair and reasonable treatment - Reduction in remedies not appropriate - Fibreglasser

Result: Applications granted ; Reimbursement of lost wages (\$1,224) ; Compensation for humiliation etc (\$2,000) ; Disbursements (\$70)(Filing fee)

Personal Grievance - Dismissal - Redundancy - Employment Relations Act 2000

Chitty v Hills Hats Ltd

24 Sep 2007, D King, AA 295/07, (8 pages)

UNJUSTIFIED DISMISSAL – Redundancy – No written employment agreement – Applicant claimed made it clear when recruited if he moved to respondent it would have to match or better existing terms – However, respondent only saw previous employment agreement when applicant filed claim – Applicant could not contend respondent would agree to equal or better terms of agreement to which it had never been privy - Applicant believed parties agreed service with former employer would be carried over for purpose of redundancy – Redundancy not mentioned in respondent's offer of employment – Applicant mistaken to think informal conversations with respondent's general manager before offer of employment constituted terms of employment – Respondent considered restructuring due to financial position – After consultation, applicant informed position redundant – Applicant claimed respondent failed to follow process outlined to employees at start of restructuring – Process required meetings, but instead conducted via conference calls as applicant in different town to head office – While would have been more humane for applicant to have option of meeting if preferred, failure to meet in person did not vitiate process – Dismissal justified – BREACH OF CONTRACT - Applicant sought reimbursement of office expenses – No agreement for reimbursement of items claimed

Result: Application dismissed ; Costs reserved

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

Stubbings v Ministry of Social Development

28 Aug 2007, M Ulrich, AA 264/07, (4 pages)

DISPUTE - Applicant applied for early retirement on medical grounds - Initially told entitled to medical retiring leave and retiring leave - Later told entitled to medical retiring leave only - Applicant sought payment of retiring leave - Respondent submitted applicant received all payments entitled to - Claimed mistaken advice given in good faith and corrected it when discovered error - Plain words of employment agreement provided for retirement leave on either medical or age related grounds - Applicant retired on medical grounds only - Not entitled to additional payment - RAISING PERSONAL GRIEVANCE - At investigation meeting issue of whether personal grievance had been raised in relation to mistaken advice discussed - Applicant's letter concerning entitlement did not make it readily apparent to respondent he wished to raise disadvantage grievance

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

Turdeich v Dale Fibreglass Ltd

30 Jul 2007, V Campbell, AA 222/07, (8 pages)

RAISING PERSONAL GRIEVANCE - Application to raise personal grievance out of time - Respondent claimed unaware of grievance until received letter from Mediation Service - No dispute applicant failed to raise grievance within 90 days - Whether exceptional circumstances - No evidence applicant's advocate instructed to raise grievance - When advised advocate no longer at firm, was still within 90 day period - Did not contacted firm again until ten months later - Not satisfied applicant made reasonable arrangements to have grievance raised - No dispute resolution explanation as required by s65 Employment Relations Act 2000 ("ERA") in employment agreement - Applicant unaware of 90 day requirement - Absence of explanation caused delay in raising grievance and amounted to exceptional circumstances - Just to grant leave out of time - UNJUSTIFIED DISMISSAL - Poor performance - Applicant employed on fixed term agreement with probationary period - Dismissed for poor performance two weeks prior to its expiry - Given was temporary agreement with sole purpose of establishing suitability for permanent employment, respondent accepted agreement in breach of s66 ERA - Respondent unable to rely on fixed term - Agreement met requirements of s67 ERA - Applicant made aware performance short of accepted standard - However, respondent did not meet required standard for dealing with poor performance - No measures to address quality of work or reviews to assess improvements - No opportunity to provide feedback why expected outcomes not achieved - Given no indication permanent offer would not be made and not given opportunity to complete probation - Dismissal unjustified - Remedies - Applicant awarded two weeks lost wages taking into account fact unlikely would have been offered permanent position - Compensation at lower end of scale appropriate - While applicant's actions contributed to dismissal, not responsible for respondent's breaches of fair and reasonable treatment - Reduction in remedies not appropriate - Fibreglasser

Result: Applications granted ; Reimbursement of lost wages (\$1,224) ; Compensation for humiliation etc (\$2,000) ; Disbursements (\$70)(Filing fee)

Wynne v The Order of St John Midland Regional Trust Board

3 Jul 2007, R A Monaghan, AA 200/07, (4 pages)

RAISING PERSONAL GRIEVANCE - COSTS – Applicant had sought urgent determination from Authority – Application very specific and apparently aimed to secure applicant’s attendance at work-related social function while on suspension – During conference call applicant advised no longer sought orders in respect of attendance at function – Authority treated matter as withdrawn and call abandoned – Authority subsequently received letter of withdrawal purporting to withdraw urgent order but leaving general grievance before Authority – Statement of problem and accompanying letter not adequate to alert Authority and respondent to raising of wider grievance in relation to suspension – Withdrawal of urgent application meant nothing before Authority - Circumstances caused considerable waste of time for both respondent and Authority – Respondent entitled to award of costs – Sought indemnity costs of \$2,322 – Authority accepted costs avoidable – However, applicant had subsequently been dismissed and planned to raise personal grievance – Significant outstanding matters between parties – Appropriate for costs to remain reserved pending final resolution of matter

Result: Orders accordingly ; Costs reserved

Personal Grievance - Unjustified Disadvantage

Cooper v Mars New Zealand Ltd t/a Mars Petcare

6 Dec 2007, D Asher, WA 163/07, (7 pages)

UNJUSTIFIED DISADVANTAGE – Applicant given written warning for non-attendance because of genuine ill-health – Absent 23 days over 10 months due to illness – When sick leave exhausted used annual leave - Genuineness of absences not challenged – Warning to remain in place for 12 months – Applicant claimed disadvantaged because concerned if sick again would lose job - Respondent wrong to use misconduct process – Warning unjustified - Absences for genuine reasons and no suggestion of deliberate breach of attendance obligations – However, applicant suffered no, or negligible, disadvantage to justify remedy – Alternatively compensation would be negligible because only first warning and would not have survived scrutiny had respondent tried to act on it – Applicant accepted respondent could justifiably have raised concerns about absenteeism – Applicant would enjoy benefit of public determination – Machine operator

Result: Application granted ; Costs reserved

Stiekema v Centurion Management Services Ltd

3 Dec 2007, M Urlich, AA 377/07, (17 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant told co-worker did not think was right staff should be required to attend weekly devotional sessions and could not understand how director could preach to staff while engaging in “fraudulent transactions” – Co-worker raised concerns about allegations with director (“C”) – Directors undertook investigation and found applicant spread rumours of fraud, amounting to serious misconduct – Applicant claimed raised concerns with director (“P”), which P denied - Final warning issued with stipulation applicant undertake part-time study – Applicant went on sick leave and subsequently resigned – Applicant had not received response about personal grievance issues and had agreed to mediation - Respondent’s inquiry about likely return date reasonable – Breaches of employment agreement (“IEA”) not so serious to make it reasonably foreseeable applicant would resign - No constructive dismissal - UNJUSTIFIED DISADVANTAGE – In alternative claimed disadvantaged by disciplinary process and warning – Investigation process flawed given P and C’s wife’s involvement in outcome and penalty – Respondent could not demonstrate explanations given unbiased consideration – Stipulation to undertake study fell outside ambit of IEA – Flaws significant and vitiated investigation process and outcome – Unjustified disadvantage – Discrimination – Applicant claimed requirement to attend weekly “devotion” meetings an unlawful discriminatory practise - IEA provided attendance compulsory but participation voluntary – Applicant initially “embraced” devotions – However, following one devotion meeting applicant upset by what she claimed director said and no longer participated – Directors told applicant had legal opinion staff could be required to attend but not to participate - On final day applicant raised concern compulsory attendance not “right” – Respondent had no opportunity to address concerns – No disadvantage arose given applicant not required to attend devotions after raised objection – Evidential basis for unjustified action not made out – Authority commented had evidential basis been made out, would have had difficulty accepting could compel staff to attend devotions if attendance contrary to own religious beliefs – No evidence attendance contrary to applicant’s religious belief – Remedies – Applicant spread rumour of improper financial transactions – Conduct inappropriate – Allegations had no reasonable basis – Contributory conduct 50 percent

Result: Application dismissed (Unjustified dismissal) ; Application partially granted (Unjustified disadvantage) ; Compensation for humiliation etc (\$6,000 reduced to \$3,000) ; Costs reserved

Practice & Procedure - Employment Relations Act 2000

Devi v M Manhaas & Manhaas Industries Ltd & Anor

13 Sep 2007, PR Stapp, WA 128/07, (3 pages)

PRACTICE AND PROCEDURE - Applicant overseas and could not afford to return to New Zealand to provide evidence in person - Also difficult to meet immigration requirements before scheduled investigation meeting - Requested matter be extended to next available date - Respondent did not oppose or agree to extension - Authority satisfied date for investigation meeting should be vacated - However, in circumstances not prepared to allocate another date - Applicant's future availability uncertain - Authority not prepared to accept respondent's claim unavailable for one year period without details being provided - Investigation adjourned sine die until applicant provided certainty about availability for investigation meeting - Authority would then look more closely at respondent's availability but it was on notice needed to be prepared to proceed

Result: Orders accordingly ; No order for costs

Jeffries v Adis International Ltd

21 May 2007, William Young P, Glazebrook, Wilson JJ, CA 81/07, (1 pages)

COURT OF APPEAL – Practice and procedure – Application for leave to appeal Employment Court decision out of time – Application for adjournment – HELD – No legal issue that would warrant grant of leave to appeal – Complaints factual – Applications dismissed

Result: Application dismissed (leave to appeal out of time) ; Application dismissed (adjournment) ; Costs in favour of respondent (\$400)

Ka'ai v Vice Chancellor, University of Otago

19 Dec 2007, J Crichton, CA 157/07, (4 pages)

PRACTICE AND PROCEDURE - JURISDICTION - Interim determination - Applicant alleged unjustified disadvantage and unjustified dismissal - Matter set down for investigation meeting - Applicant proposed Authority hear evidence of post-termination-of-employment conduct of respondent at investigation meeting – Sought to introduce evidence that respondent acted in bad faith - Not relevant to grievance per se but to show respondent breached good faith obligations – Alleged deprived of opportunity to be heard in respect of bullying allegations made against her as consequence of actions respondent took - Alleged representative of respondent spoke disrespectfully at a meeting thus potentially damaging reputation - Employer's action must be judged at time taken, not subsequently - Not persuaded conduct relevant to complaint – Relevant or not Authority had no jurisdiction to consider such material - Damage to reputation not a matter for employment institutions – Post-termination conduct of respondent not to be considered in substantive hearing

Result: Orders accordingly ; No order for costs

Macbeth v Cookie Time Ltd

7 Dec 2007, P Montgomery, CA 149/07, (2 pages)

PRACTICE AND PROCEDURE – Application for removal to Employment Court – Primary question whether applicant employee or independent contractor – Parties submitted factual matrix complex and orders relating to discovery, including non-party discovery, best decided by Court – Also submitted level of quantum sought meant probable unsuccessful party would challenge any determination - Neither party opposed removal on basis would be deprived of right to challenge Authority determination – Case featured on 20/20 television programme and in public domain – “In all the circumstances” appropriate matter removed to Court

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

Ms X v Bay of Plenty District Health Board

29 Nov 2007, M Ulrich, AA 372/07, (5 pages)

PRACTICE AND PROCEDURE – Application for adjournment – Applicant had applied for compliance orders reinstating paid sick leave until returned to work or personal grievance resolved – Parties advised sick leave reinstated until further mediation – Further mediation did not occur and respondent stopped payments – Investigation of compliance application rescheduled - Respondent sought adjournment pending outcome of criminal prosecution for alleged offences against s6 Health and Safety in Employment Act 1992 – Submitted cause of applicant’s ill health squarely before Authority to determine, and was considerable factual and legal overlap between issue and issues before District Court – Respondent claimed its right to silence overridden if Authority determined issue prior to criminal proceedings – Also claimed danger of injustice as would have to disclose defence to criminal prosecution and its “right to silence” could not be adequately compensated by damages - Applicant opposed adjournment – Authority accepted further delay in resolving employment relationship problem important factor in exercising discretion to grant adjournment - Issue of causation squarely before Authority – Respondent denied applicant’s illness due to its actions and did not concede she had arguable case – Issue of causation would have to be determined by Authority - Would be entitled to investigate issue and parties would be entitled to put forward evidence in support of positions – Authority not satisfied causation issue could be cleaved from investigation, and issue central to criminal proceedings – Adjournment granted

Result: Application granted ; Costs reserved

Olsen v Carter Holt Harvey IT Ltd

13 Dec 2007, M Ulrich, AA 391/07, (3 pages)

PRACTICE AND PROCEDURE – Application for removal to Employment Court – Interpretation and application of s69OK Employment Relations Act 2000 – Applicant claimed respondent failed to accept her choice to transfer to it as successor company when her former employer was sold – Alleged unjustifiably dismissed – Question of law important to parties and concerned untested statutory provision with potential to affect large numbers of employees and employers – Matter removed to Court

Result: Application granted ; Matter removed to Court ; Costs reserved

Service and Food Workers' Union Nga Ringa Tota Inc v Air New Zealand Ltd

12 Dec 2007, A Dumbleton, AA 338A/07, (4 pages)

PRACTICE AND PROCEDURE - Respondent previously found to have breached s4(1) Employment Relations Act 2000 good faith requirements by making representations to employees with intention of inducing them not to be covered by collective employment agreement – Liable to penalty under s4A(b)(ii) and matter reserved for parties to make further submissions - However, applicant now wished to withdraw application for penalties – Considered new circumstances, arising out of successful mediation, made it unnecessary for penalties to be awarded – Parties had agreed upon form of amends to be made by respondent to meet interests of applicant and its members in making respondent accountable for breach – Application for penalties to be regarded as withdrawn – Authority commented it was of view terms of settlement squarely addressed relative seriousness of breach and remedy closely fitted breach in respect of gravity and any harm caused by it – Investigation concluded

Result: Orders accordingly ; No order for costs

Siita & Anor v Jett Jett Ltd t/a Rakino

23 Oct 2007, M Ulrich, AA 333/07, (2 pages)

PRACTICE AND PROCEDURE - No appearance by applicants - When Authority

contacted applicants' representative he sought adjournment as unable to attend
- Claimed made other commitments as believed investigation meeting already adjourned - No reasonable basis for belief - Application for adjournment declined
- Substantive application dismissed - COSTS - Respondent sought contribution to costs - Appropriate to award \$200 costs, applicants to pay \$100 each
Result: Orders accordingly ; Costs in favour of respondent (\$200)

Soen v Cosmos Hantec Investment (NZ) Ltd

10 May 2007, M Ulrich, AA 143/07, (4 pages)

PRACTICE AND PROCEDURE - Applicant raised grievance - Respondent claimed when it replied to applicant's discovery request it inadvertently disclosed privileged document - Sought order from Authority preventing applicant using or referring to document - Applicant argued document not privileged, unclear whether privilege attached to whole document, and whether copied document could attract privilege - Document recorded minutes of meeting where respondent's executives discussed how to handle applicant's employment issues in light of legal advice received - Document in entirety attracted solicitor/client privilege - Disclosure of document inadvertent - Not in interests of justice to allow applicant to use document - Authority would not be misled if document not provided - Applicant could not use or refer to document

Result: Orders accordingly ; Costs reserved

Stevens v Nelson Marlborough Institute of Technology

7 Nov 2007, P Montgomery, CA 131/07, (2 pages)

PRACTICE AND PROCEDURE - Application for removal to Employment Court - Submitted important questions of law likely to arise other than incidentally and in all circumstances Court should determine matter - Also submitted issues relating to estoppel, Contractual Remedies Act 1979, Fair Trading Act 1986, and rectification at heart of matter - Application not opposed by respondent - Criteria in s178 Employment Relations Act 2000 met - Matter removed to Court

Result: Application granted ; Costs reserved

Practice & Procedure - Consent Orders – Employment Relations Act 2000

Aumau & 22 Ors v Transportation Auckland Corporation Ltd and Anor

28 Nov 2007, R Arthur, AA 370/07, (2 pages)

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

Brown v Port Taranaki Ltd

27 Nov 2007, GJ Wood, WA 155/07, (1 pages)

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

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

Currie v Zelko New Zealand Ltd

12 Dec 2007, P Cheyne, CA 150/07, (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

Johnson v Salamander Enterprises Ltd

20 Dec 2007, GJ Wood, WA 175/07, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Respondent to pay amount of contractual redundancy compensation, less PAYE into Employment Court by specified date with proceeds paid to appropriate party - Respondent to pay accrued interest - Respondent to pursue challenge diligently and expeditiously - Stay on proceedings in relation to Authority determination pending disposition of challenge by the Court provided respondent met conditions above

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

Khamsisavatdy v Sealed Air (New Zealand) Ltd

30 Nov 2007, PR Stapp, WA 157/07, (2 pages)

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

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

Lyons v Toll Logistics (NZ) Ltd (formerly t/a JD Lyons & Co

5 Dec 2007, GJ Wood, WA 161/07, (1 pages)

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

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

McGarry v Wharekauhau Holdings Ltd

18 Dec 2007, D Asher, WA 172/07, (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

O'Connor v Sunglass Hut New Zealand Ltd

19 Jun 2007, M Ulrich, AA 183/07, (1 pages)

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

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

Okada v Hardy & Ors

6 Dec 2007, D Asher, WA 162/07, (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

Pilkington New Zealand Ltd v Kamphaug

17 Aug 2007, L Robinson, AA 252/07, (2 pages)

CONSENT ORDER - Applicant claimed damages and penalties from respondent - Respondent conceded owed applicant money, and consented to applicant seeking determination of Authority - No dispute between parties as to respondent's indebtedness - No investigation required - Respondent ordered to pay \$125,000 to applicant

Result: Consent order granted ; Orders accordingly ; Costs reserved

Pritchard v EC Credit Control Ltd

18 Dec 2007, G Wood, WA 174/07, (1 pages)

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

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

Department of Labour
TE TARI MAHI

