

Department of Labour
TE TARI MAHI



EMPLOYMENT CASES SUMMARY

July 2007

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

Employment Cases Summary

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

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

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

Brief Summaries

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

FULL-TEXT OF DETERMINATIONS

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Under the Employment Relations Act 2000

Farmdirect Ltd v Southfuels Ltd and Ors

CIV 2006-409-002858

Heard: 14 Dec 2006, Christchurch

Judgment Date: 15 Dec 2006

Court/Authority/Tribunal: Fogarty, J

Appearances: J V Ormsby and P Whiteside ; J M Appleyard, V E Donaghy, S Kaminski, T McGinn, N S Elsmore

HIGH COURT – INTERIM INJUNCTIONS – Misuse of confidential information – Conspiracy to defraud – Breach of Statutory duty – Breach of duty of fidelity – Breach of contract – Plaintiff alleged first defendant venture begun in breach of duties by other defendants – Plaintiff applied for interim injunctions against all defendants – Application amended to interim injunction restraining only first defendant from continuing to trade while certain others involved including non-party – HELD – Arguable case against third defendant – Not clear whether there was serious question to be tried in respect of non-party – Third defendant should not be restrained from taking up shares in first defendant nor be restrained from being involved in its management – Was appropriate that third defendant file written undertaking promising return and/or destruction of all plaintiff data he might be holding – Application largely dismissed – Manager/Territory managers/Marketing consultant

This was a largely unsuccessful application for interim injunctions in the High Court.

The plaintiff ran a business of rural fuel supply. The first defendant was a new business and a competitor of the plaintiff, staffed by former territory managers of the plaintiff (the fourth, fifth, sixth, and seventh defendants (“the territory managers”)).

The third defendant was a former manager of the plaintiff operating through a company (“the second defendant”) in a management agreement rather than as an employee. The third defendant was expected to take up a shareholding in the first defendant as soon as his restraint of trade expired. The eighth defendant was a marketing consultant for the first defendant and former marketing consultant for the plaintiff.

In 2003 the plaintiff engaged the third and/or second defendants to provide a feasibility study on a new business model. To that end the third defendant had access to spreadsheets containing the trading data of the plaintiff.

The plaintiff alleged that in August 2005 the third defendant advised it that the new business

model was not feasible. However, at that time the second defendant was considering a business model which added to that. It further alleged that the third defendant was exploring a competing business venture with other business people. As part of those discussions the third defendant was having direct discussions and sharing business information with those other business people. The eighth defendant was also involved in discussions examining the prospect of the new venture and was possibly involved in working on logos. During those discussions the third defendant indicated that the territory managers of the plaintiff were likely to be attracted over to a new company. Those discussions resulted in the creation of the first defendant's competing rural fuel supply venture. Around September 2006 the territory managers resigned from the plaintiff and then began working for the first defendant.

The plaintiff originally applied for injunctions restraining all the defendants from (i) being involved in any business activity concerning rural fuel supply, and (ii) using and communicating intellectual property of the plaintiff including trade secrets and confidential information. The plaintiff also sought an injunction restraining the second to eighth defendants from participating in the first defendant's business.

In the course of the proceedings the plaintiff sought that the first defendant, until further order, be restrained from any business activity in the rural fuel industry so long as the third defendant (and presumably the second defendant) wanted to participate and the eighth defendant and one of the other business people or any company entities associated with them or any other family connections whether as by shareholder, director or otherwise.

Concerning the injunction against the other business person who was not yet a party to the proceedings, the plaintiff submitted that confidential information which belonged to the plaintiff was wrongfully used by the third defendant. He had communicated it to the other business person and that person should be restrained from participating in the business of the plaintiff because if he did he would be using the confidential information which was the property of the plaintiff.

Held

(1) Although the details at the present stage of the case were not particularly clear, there was no doubt that the third defendant did tell the other business people who were exploring the new venture that the territory managers were likely to be attracted over to the new company. Certainly, there seemed to be a real likelihood that the third defendant was the reason why the first defendant knew and was able to obtain the services of these territory managers for the new business. There was a serious question to be tried, being in respect of the conduct of the third defendant. (paras 21, 22, 24)

(2) The plaintiff's amendment to its application excluding the territory managers was prudent in the circumstances because at the time the application was initially brought it was under the impression that the territory managers were under contracts with restraint of trade clauses in them, in fact the contracts they signed did not have those restraints. Secondly, the affidavits filed offered a reasonably compelling argument that the territory managers were dissatisfied with two decisions of the plaintiff. (paras 24-30)

(3) It was not clear at the present stage whether there was a serious question to be tried in respect of the business person. It was of no importance that he was not included yet in the present proceedings. In applications for interim injunctions proceedings the statement of claim was understood to be tentative and capable of amendment and that included the addition of parties. (para 31)

(4) The eighth defendant was certainly not, at the material times, a direct employee. It appeared

she was on a three months management contract. The Court had no initial impression at all as to what extent she was under obligations to have total loyalty to the plaintiff and/or when they ceased and/or to what extent that she was aware that some of her thinking might be directed to a new venture. (para 23)

(5) There was a strong likelihood that the business person did gain an up to date insight into the plaintiff's business in meetings that he had with the third defendant. However, there was some doubt as to whether or not the business person would have obtained any significant advantage from that position. The Court lacked confidence that there was a serious question as to whether the business person brought any significant confidential information to the first defendant. (paras 34, 35)

(6) It was not likely that there were any business secrets in the business model developed by the third defendant at the request of the plaintiff. Essentially, the question in the present sort of business was to either contract for the distribution of fuels with a company offering specialist tankers and staff for that purpose or to own your own fuel fleet. That was a common enough business issue. (para 35)

(7) The data that the third defendant had could well be of great assistance in forming a judgment as to how much business could be obtained from the plaintiff. It needed to be kept in mind that the fuel provider would have given to the first defendant full information as to the full provider's customer base that it wanted the first defendant to take over. (para 36)

(8) One needed to keep taking into account that the territory managers had shifted from the plaintiff to the first defendant. They knew their customers, territory by territory. They might not have, and certainly if they did, they could not use, the hard data from the plaintiff as to the precise quantities their customers were taking. But, having been in the job for some time and knowing the job, they would have a very good feel for the customers. They would know how many customers they had, who were likely to remain loyal to the plaintiff, and who were capable of being won over to the new venture, and if so what sort of business they could bring. That was simply part of their industry knowledge and in that respect was not on the normal authorities confidential information of the plaintiff. (para 37)

(9) The business person already had expertise in the area. He would have a good deal of knowledge about the plaintiff's business, whether he had had the meetings with the third defendant or not, and he was involved in a company which had secured the territory managers of the plaintiff, who themselves had quite profound knowledge of the potential of winning customers away from the plaintiff to the first defendant. All in all, the Court was uncertain as to whether or not there would, at the end of the day, be a serious argument against the business person. (para 39)

(10) The third defendant should not be restrained from taking up shares in the first defendant, if that was what he intended to do, nor should he be restrained from being involved in the management of the first defendant. In the circumstances it was appropriate that he file in the present proceedings a written undertaking, in terms to be settled by counsel, promising the return and/or destruction of all of the plaintiff's data that he might be holding. (para 43)

(11) It was still open for the plaintiff to proceed with the statement of claim seeking relief by way of injunction against the third defendant (and the others of course) in which case he would have to be extracted from the first defendant and/or pursuing the case by way of damages. (para 44)

(12) There was not any basis for obtaining or requiring any undertakings or other binding covenants from the territory managers. They could not use any hard data that they had received

and the Court was sure that they would be advised by their counsel as to their responsibilities in that regard and accordingly any risks that might flow from that. It was sufficient, at the present stage, that they had been exposed to the present litigation and, the Court was sure, understood the significance of it and of course they would continue as parties in the present proceedings so there would be a judgment no doubt in due course after having looked at the evidence as to whether they were to stay or not. (para 45)

Result: Application dismissed (injunctions) ; Third defendant ordered to return/destroy data ; Costs in favour of first, fourth, fifth, sixth, seventh and eighth defendants ; Quantum reserved

Cases referred to in judgment:

Aquaculture Corporation v NZ Green Mussel Co Ltd [1990] 3 NZLR 299

Pages: 4

[973784]

Credit Consultants Ltd v Wilson and Anor

WC 12A/07

Heard: 28 Mar 2007, Wellington

Judgment Date: 5 Apr 2007

Court/Authority/Tribunal: Colgan CJ, Travis, Shaw JJ

Appearances: L Taylor, M Richards ; T Kennedy, MJ Brewer

PRACTICE AND PROCEDURE – Proceedings removed from Employment Relations Authority – Jurisdiction – Injunctions – Sections 134(2), 161, 162 Employment Relations Act 2000 (“ERA”) – Plaintiff alleged first defendant breached restraint of trade, confidentiality and non solicitation covenants – Alleged second defendant incited, instigated, aided or abetted alleged breaches – Plaintiff sought injunctions, compliance order, penalties and damages – Extent Employment Relations Authority and Court could hear and determine matters – HELD – Authority could not make interlocutory compliance order – Authority could not issue compliance order against second defendant – Plaintiff could not claim damages against second defendant in Authority or Employment Court because it did not have a cause of action in breach of an employment agreement – Damages claim against second defendant would be in tort or equity and not related to an employment agreement under s161 ERA – Authority could grant injunctions under s162 ERA against first defendant in relation to alleged breaches of contract – Injunction was “rule of law relating to contracts” – Section 162 ERA was remedial and did not confer substantive jurisdiction – Authority and Court had no jurisdiction to grant interlocutory injunctive relief against second defendant pending hearing of claim under s134 ERA – Question of Court’s original jurisdiction to grant injunction against first defendant reserved – General manager

This was a matter removed from the Employment Relations Authority. The Court held that the Authority was empowered to grant injunctions against the first defendant for alleged breaches of contract but did not have jurisdiction to grant injunctions against the second defendant.

The plaintiff provided credit and debt management services throughout New Zealand and Australia. The first defendant was the plaintiff’s general manager. His employment agreement

contained a 6 month restraint of trade clause, a confidentiality clause and a non solicitation covenant. Following restructure of the plaintiff, the first defendant was made redundant. Two months later the plaintiff noticed that the first defendant had began working for a competitor company (“the second defendant”) and had contacted a number of the plaintiff’s clients.

The plaintiff alleged that the first defendant had breached his employment agreement and claimed that the second defendant had incited, instigated, aided or abetted those alleged breaches. It sought from the Authority interlocutory, interim and permanent injunctions. Other relief sought included a compliance order, damages for loss of business attributable to the defendants’ actions, and penalties under s134 of the Employment Relations Act 2000 (“ERA”).

The Employment Relations Authority removed the entire matter to the Court to determine the extent of the Authority’s jurisdiction. The jurisdictional matter was set before a full Court.

In the interim, a single Employment Court judge restrained the first defendant from soliciting the plaintiff’s clients and employees, misusing confidential information, and required him to return certain property. The Judge declined to make any injunctive orders against the second defendant.

The issues before the full Court were: (i) whether the Authority and the Employment Court, either derivatively or originally, could entertain the causes of action against the second defendant; (ii) whether the Authority and the Employment Court (derivatively or originally) could grant injunctive relief (interlocutory and permanent) to enforce contractual constraints in economic activity and to enforce other contractual obligations. There was no dispute that the plaintiff could bring actions against the first defendant for penalty and compliance and damages for breach of contract, and penalty against the second defendant, in the Authority and on removal in the Employment Court.

The plaintiff submitted the Authority had the jurisdiction to grant the injunctions sought. In particular, the plaintiff argued that it was open to it to obtain an interlocutory injunction restraining the second defendant from further breaches (as a party) of the employment agreement until the Authority or the Court could determine the substantive claim for a penalty against it under s134 ERA relying on *Land Transport Safety Authority v McNeil* (cited below).

Held

(1) There was no power for the Authority to make an interlocutory compliance order in the same way that interlocutory injunctive relief may be granted by courts having the jurisdiction to do so to preserve a position pending a substantive hearing. The Authority may investigate the complaint of breach and if it found a breach, must specify a time within which a compliance order was to be obeyed: s137(3) ERA. (para 10)

(2) The Authority was not empowered to make a compliance order against a former employee’s new employer (the second defendant) or other legal entity requiring that person to comply with the employment agreement between the former employer and the former employee. Section 137 ERA, which set out the circumstances in which a compliance order may be made, did not encompass that situation. A new employer or legal entity in the circumstances of the second defendant could not be said, under subs (1), to have not observed or complied with any provision of the first defendant’s employment agreement with the plaintiff. (para 11)

(3) The plaintiff could not claim damages against the second defendant in the Authority or the Employment Court because it did not have a cause of action in breach of an employment agreement against the second defendant. It was not a party to that agreement or indeed in any contractual relationship with the plaintiff. There was no privity of contract between the two

parties. Any claim for damages against the second defendant would be in tort or in equity but would not be founded on the employment agreement. Parliament had not altered the law in that regard since the judgment of the Court of Appeal under the Employment Contracts Act 1991 (“ECA”) in *Methodist Church v Gray* (cited below). Any claim for damages by the plaintiff against the second defendant would have to be brought in the courts of ordinary jurisdiction. (paras 16, 62)

(4) Parliament had carved out the powers to grant injunctions which had previously been exercised by the Employment Court and conferred them on the Authority by enacting s162 ERA. Parliament’s intention was to give the Authority the power to grant injunctions. (paras 40, 48-58)

(5) Section 162 ERA was a remedial section and did not confer substantive jurisdiction. The words “relating to contracts” in s162 ERA were not to be read down. An injunction was a form of relief which might be granted in order to preserve rights under a contract, it was a rule of law relating to contracts. (paras 41-46)

(6) The Court rejected the argument that the express inclusion in the ERA of the remedies of interim reinstatement in s127 which required the Authority to apply the law relating to interim injunction when considering interim reinstatement; and compliance (s137) and penalties (s133) provided an exhaustive code of the remedies and powers able to be exercised by the Authority. (para 59)

(7) The only justiciable claim against the second defendant in the Authority or the Employment Court was a claim for a penalty for being a party to the ex-employee’s breach under s134 ERA. While accepting the principles expounded in *Land Transport Safety Authority v McNeil* (cited below) the circumstances of the present case were not so exceptional as to warrant interlocutory injunctive relief pending a hearing of a claim for penalty for breach as a party. (para 62)

(8) Section 134 ERA did not constitute a statutory obligation to not breach employment agreements. Rather, it provided for a statutory penalty for what the common law considers to be breach of contract (employment agreement). Even if it could be said that there was a substantive cause of action open to the second defendant, its remedy could only be in tort for the civil wrong of breach of statutory duty. A breach of statutory duty (a tort) was not justiciable in the Authority or the Employment Court. If the plaintiff sought more than a penalty against the second defendant, it would have to issue proceedings against it in the courts of ordinary jurisdiction. (paras 63-64)

Comment

(1) The Court reserved the question of the Court’s original jurisdiction, that was other than its derivative jurisdiction under s190 ERA on a matter removed to it under s178 ERA, for a later judgment between the present parties.

Result: Questions answered ; Costs reserved

Statutes considered:

Employment Relations Bill 2000 c1172

Employment Relations Bill 2000 c1197

ECA s104(1)(g)

ECA s104(1)(h)

ECA s104(2)

ERA s127

ERA s133

ERA s134
ERA s137
ERA s134(1)
ERA s134(2)
ERA s137
ERA s137(1)
ERA s137(1)(a)
ERA s137(3)
ERA s138(6)
ERA s161
ERA s161(1)(b)
ERA s162
ERA s178
ERA s178(2)(a)
ERA s190
LRA s207

Words and phrases: Interlocutory injunction ; Interim injunction ; Permanent injunction ;
Enactment or rule of law relating
to contracts ; founded on ; relating to

Cases referred to in judgment:

AC Neilsen (NZ) Ltd v Pappafloratos [2003] 1 ERNZ 363
Anstiss v Works Civil Construction Ltd [1996] 2 ERNZ 649
Axiom Rolle PRP Valuations Services Ltd v Kapadia (2006) 3 NZELR 390
BDM Grange Ltd v Parker [2005] 1 ERNZ 343
Bongard v Universal Business Directories Ltd [1995] 1 ERNZ 393
Conference of the Methodist Church of New Zealand v Gray [1996] 1 ERNZ 48
Credit Consultants Debt Services NZ Ltd v Wilson unreported, Travis J, 16 March
2007, WC 12/07
Diamond Advertising v Brunton [1993] 1 NZLR 168
Dillon v Chep Handling Systems Ltd [1995] 2 ERNZ 282
Evans v Amatel Holdings Ltd unreported, Travis J, 29 July 1997, AEC 82/97
Greenlea Premier Meats Ltd v New Zealand Meat & Related Trade Union Inc
unreported, Colgan CJ, 8 May 2006, AC 27/06
Grove v Archibald unreported, Travis J, 29 July 1997, WEC 39/97
Hobday v Timaru Girls' High School Board of Trustees [1993] 2 ERNZ 146
Hurford v International Insurance Brokers [1992] 2 ERNZ 449
Jerram v Franklin Veterinary Services (1977) Ltd [2001] ERNZ 157
Land Transport Safety Authority v McNeil [1998] 1 NZLR 622
Medic Corp v Barrett [1992] 2 ERNZ 1048
Nitsceh v Classic Air Ltd unreported, Colgan J, 5 February 1996, WEC 4/96
NZ Air Line Pilots Assn IUOW v Labour Court and Air NZ Ltd [1988] NZILR 1677
NZ Air Line Pilots Assn IUOW v Air New Zealand Ltd [1987] NZILR 685
NZ Harbours IUOW & Ors v Auckland Harbour Board [1988] NZILR 154
New Zealand Public Service Association v Design Power New Zealand Ltd [1992] 1
ERNZ 669
Sears v A-G [1995] 2 ERNZ 121
Turner v Ogilvy & Mather [1992] 3 ERNZ 94
TV3 Network Ltd v Eveready New Zealand Ltd [1993] 3 NZLR 435
Watkins v Bacica [1996] 1 ERNZ 594
X v Y Ltd and NZ Stock Exchange 1992] 1 ERNZ 863

Other workers/site names etc: EC Credit Control Ltd

Pages: 5

[973559]

Cuttriss v Carter Holt Harvey Ltd

AC 19/07

Heard: 24 Aug 2006, Auckland

Judgment Date: 27 Apr 2007

Court/Authority/Tribunal: Travis J

Appearances: M Hammond & P Dawson ; P Kiely & D France

MATTER REMOVED FROM EMPLOYMENT RELATIONS AUTHORITY – Personal grievance – Unjustified disadvantage – Whether discontinued retirement policy was term of employment agreement – Plaintiff alleged policy was express or implied term – Alleged legitimate expectation defendant would comply with policy – Alleged policy fundamental term which could not be unilaterally varied – PRACTICE AND PROCEDURE – Application for leave to file second amended statement of claim at end of hearing – Plaintiff sought to add claim that failure to consult rendered discontinuance of policy ineffective – HELD – Policy never offered to plaintiff and existence of its predecessors not initially known to him – Policy not an express term – Not incorporated by reference – Agreement expressly provided that policies might be unilaterally varied – Fact policy provided a financial benefit did not mean it formed part of remuneration and was so fundamental it could not be unilaterally changed – Policy not an implied term – No legitimate expectation – No unjustified disadvantage – Unlikely that consultation would produce different result – Amendment to claim not in interests of justice – Amendment not necessary to deal with key issue – Application dismissed – Mill employee

This was an unsuccessful unjustified disadvantage grievance removed from the Employment Relations Authority concerning entitlement to a retirement policy.

The plaintiff was employed by the defendant and its predecessors since 1970. During the plaintiff's employment the defendant and its predecessors had a retirement policy ("the retirement policy") contained in a site policy manual. The retirement policy provided a financial benefit and required no contributions from employees and was calculated on years of service. The plaintiff's letter of appointment in 1970 contained no reference to a retirement benefit. The other letters of appointment, following promotions the plaintiff received in June 1986 and October 1987, did not refer to a retiring benefit.

In 1992 the plaintiff signed an employment contract which did not refer to a retiring benefit. The contract contained a clause indicating company policies may be changed from time to time.

In September 2003 the defendant advised that the retirement policy was being discontinued and replaced at the plaintiff's work site with the retirement plan that was already in use at the defendant's other work sites. The plaintiff raised concerns over this with his manager as the replacement plan was less advantageous to him. In November 2003 the plaintiff was offered a new employment agreement. The agreement referred to a retirement plan that was not the same as the retirement policy. The agreement indicated that the company's policies, guidelines and procedures formed part of the terms of employment but that they may be changed from time to

time and could not override the terms set out in the agreement without the employee's consent ("clause 16"). The plaintiff raised concerns over the wording of the contract but then signed it without amendment.

In December 2003 the plaintiff was advised that after receiving employee feedback it had decided to delete the retirement policy.

The plaintiff submitted the retirement policy was in the nature of a substantial financial benefit which could not be unilaterally deleted. As a matter of law, the retirement policy provided a benefit that was so fundamental, and such a substantial element of the plaintiff's remuneration package, that it could not lawfully be deleted unilaterally. The plaintiff relied on *NZEPMU v The Christchurch Press* (cited below).

The plaintiff submitted that if the retirement policy was not an express term of the contract then it was an implied term. The plaintiff further submitted that he had a legitimate expectation of receiving the benefit of the retirement policy when he became eligible, which was of such value to him that it could not properly be treated as a policy item.

The defendant submitted the retirement policy was not an express term of the contract and not contractually binding, citing *Carter Holt Harvey v Pawson* (cited below). Unless such policies were incorporated by reference into the employment contract, they were not contractually binding. The defendant submitted there was no rule of law requiring the retirement policy to be a contractual term of employment and it could not be implied. The defendant submitted that in order to establish a legitimate expectation the plaintiff must first demonstrate the retirement policy was offered as part of his terms and conditions of employment. The defendant also submitted the grievance was brought out of time.

At the conclusion of the hearing, the plaintiff sought to amend the pleadings and introduce a new cause of action which alleged that the defendant was contractually required to consult with the plaintiff before it decided to delete the policy and had not consulted. The plaintiff argued that either the defendant could not delete the policy without his consent or that the defendant should pay a penalty to him pursuant to ss 134 and 135 of the Employment Relations Act 2000 ("ERA"). The application was opposed and it was agreed that the substantive judgment would deal with the issue.

Held

(1) The facts of *NZEPMU v The Christchurch Press* (cited below) case were not analogous. The retirement policy was never offered to the plaintiff and the existence of its predecessors was not even known to him for some years. It was therefore not part of the initial bargain and none of the contractual documents included either the retirement policy or its predecessors. The 1992 contract and the 2003 agreement both provided that the defendant's policy may be amended from time to time. The plaintiff was therefore on notice that his employer could change its policy. The retirement policy was changed over the years although it was clear that whilst it was in operation it was not regarded as discretionary and the defendant made payments according to its terms. That however was consistent with the way the Courts over the years have viewed company policies, as being binding upon the employer but, in the absence of contractual provisions or incorporation into the contractual agreement, they were not binding upon the employee. They might however, form the basis of binding directions and affect the performance of the employment relationship. (para 34)

(2) As a general proposition unless a policy document such as the retirement policy was incorporated by reference in the applicable employment agreement, it was not expressly binding.

(para 40)

(3) Certainly matters contained in policy manuals, which were fairly and reasonably promulgated, could form the basis of lawful and reasonable instructions and govern the practices of the workplace. They could also be determinative of the actions taken by the employer if those actions were inconsistent with the promulgated policy. That did not however, automatically raise them to the status of contractual terms, in the absence of agreement expressed or implied or by incorporation of the policies into the employment agreement. In the present case the policies were to form part of the terms of employment by clause 16 of the 2003 agreement, but the defendant had reserved to itself the right to change those policies to meet operational needs or changed circumstances, providing that did not override the terms expressly set out in the agreement. The retirement policy was not one of such terms. (para 42)

(4) The Court was not persuaded that because the retirement policy provided a financial benefit, it somehow formed part of the remuneration and was therefore so fundamental that it could not be unilaterally changed. Nor did the Court accept that allowing the placement of retirement benefits into a policy manual would provide a licence for employers to place into non-binding policies core terms of the contract. As *NZEPMU v The Christchurch Press* (cited below) demonstrated, these were likely to be found to be contractual in effect because they would have been held out to the employee as part of the offer of employment. Here the employment agreement expressly provided that those policies might be unilaterally varied by the employer. Until they were altered those policies would have contractual effect according to the agreement, but when deleted would have no further contractual consequences. The retirement policy was not an express term of the employment agreement. (paras 43, 45)

(5) The tests for implication of terms were set out in *Attorney-General v NZ Post Primary Teachers' Assn* (cited below). There was no relevant industry custom on the facts of the present case and payments pursuant to the retirement policy were not made as a matter of custom but in accordance with the policy which the company regarded as binding on itself before it was deleted. There was no need to imply such a term in order to give business efficacy to the agreement. The five criteria the Court of Appeal needed to be met, namely: (i) the term to be implied must be reasonable and equitable; (ii) be necessary to give business efficacy to the agreement and would not be implied if the agreement was effective without it; (iii) the term must be so obvious that it "goes without saying"; (iv) it must be capable of clear expression; and (v) not contradict any express term of the contract. The policy did not meet all those requirements and in particular would be inconsistent with the express terms of the agreement which allowed the company to vary or delete policies from time to time. (paras 47, 48)

(6) The burden of proving the representation, inducement or promise creating a legitimate expectation was on the plaintiff. However, the plaintiff was not aware of the retirement policy when he commenced employment in 1970 and the additional letters of appointment in 1986 and 1987 did not refer to the entitlement. The employment contract signed in 1992 did not refer to it but referred to the policy manual which could be amended by the defendant and the same situation prevailed under the 2003 employment agreement. Any expectation of the plaintiff was merely a perception on his part and was in conflict with the contractual terms of his employment, including the 1992 employment contract and the 2003 employment agreement and was inconsistent with his own email in which the plaintiff took issue with the defendant's intention to delete the retirement policy but said he could not argue with the assertion that the new plan should take it over. He also protested the wording of clause 16 of the 2003 agreement yet went ahead and signed it. The plaintiff could have had no expectation of the policy continuing in view of the response he received. In these circumstances the plaintiff had failed to establish a legitimate expectation that the benefit would be retained. (para 51)

(7) Although the retirement policy was expressed in unequivocal terms, the 2003 employment agreement and its predecessor in 1992 made it clear that the defendant was only bound to honour its terms while it was still contractually binding and before it was varied or deleted. As a policy item it was so recognised in the employment agreement and, in accordance with the case law, would not otherwise be contractually binding. (para 52)

(8) A penalty for breach of an employment contract, for the failure to consult, needed to be commenced within 12 months after the cause of action had arisen: s135(5) ERA. That remedy was therefore barred by the provisions of the Act and was unavailable to the plaintiff. (para 55)

(9) Even if the plaintiff was to succeed on the consultation point, the remedy available was a compliance order. After consultation, it was highly likely that the decision would be the same. No other affected employees appeared to have brought claims, and, in view of the retirement benefit presently available to the plaintiff, the end result did not appear to be unreasonable. To impose any absolute prohibition preventing deletion of the policy would be to vary a term of the employment agreement and the Court would be unlikely to be satisfied under s190 ERA that such a change would be absolutely necessary. The Court was not persuaded that allowing the amendment would do justice between the parties, nor was it necessary to deal with the key issue in controversy between them, which the present judgment had resolved. The amendment was therefore declined. (para 62)

(10) The policy could be unilaterally deleted and even if that disadvantaged the plaintiff, the defendant's actions were justifiable in all the circumstances. The plaintiff's unjustified disadvantage grievance failed. There was therefore no need to deal with the issue of whether the disadvantage grievance was brought out of time, although the failure on the part of the defendant to take that point prior to the trial of the matter, after having filed a statement in reply and attending mediation, might well have amounted to a waiver. (para 63)

Result: Applications dismissed ; Costs reserved

Statutes considered:

Employment Court Regulations 2000 r6
ERA s61
ERA s114(3)
ERA s134
ERA s135
ERA s135(5)
ERA s190

Cases referred to in judgment:

Alliance Freezing Company (Southland) Ltd v NZ Amalgamated Engineering etc IOUW [1989] 3 NZILR 785 ; [1990] 1 NZLR 533 ; (1989) ERNZ Sel Cas 575 (CA)
Alton-Lee v Victoria University of Wellington [2000] 2 ERNZ 152
ANZ National Bank Ltd v Doidge [2005] 1 ERNZ 518 (EC)
Attorney-General v NZ Post Primary Teachers Assn [1992] 1 ERNZ 1163
Carter Holt Harvey Ltd v Pawson [1998] 2 ERNZ 1 (EC)
Corrections Association of New Zealand Inc v Chief Executive in Respect of the Dept of Corrections [2004] 2 ERNZ 277
Elders Pastoral Ltd v Marr (1987) 2 PRNZ 383 (CA)
Elston v State Services Commission (No 3) [1979] 1 NZLR 218
Leitman v Air NZ Limited and Airline Stewards and Hostesses of NZ IUOW [1989] 3 NZILR 434
Mackintosh v Carter Holt Harvey Ltd unreported, Travis J, 11 July 2001, AC 2A/01

New Zealand Amalgamated Engineering Printing & Manufacturing Union Inc v
Carter Holt Harvey Ltd [2002] 1 ERNZ 597
NZ Amalgamated Engineering Printing and Manufacturing Union Inc v The
Christchurch Press [2005] 1 ERNZ 288
NZ (except Northern etc) Food Processing etc IUOW v ICI (NZ) Ltd [1989] 3 NZILR
24
Rotorua District Council v Kameta unreported, Travis J, 6 December 1994, AEC
73/94

Other workers/site names etc: (Cuttriss)

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Eastern Equities Corporation Ltd t/a Farmers Transport Ltd v Bright

AC 26/07

Heard: 19 Mar 2007, Auckland

Judgment Date: 16 May 2007

Court/Authority/Tribunal: Perkins, J

Appearances: TM Petherick ; DJ Erickson

DE NOVO CHALLENGE AND CROSS CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Unjustified dismissal – Poor performance – Plaintiff held series of informal meetings addressing numerous management concerns and seeking defendant’s improvement – Following failure to improve plaintiff offered demotion and terminated employment when offer declined – HELD – Flexible, informal approach to appraisal appropriate for senior manager where purely performance issues being appraised – Early meetings not objectionable – Plaintiff not required to disclose identity of complainants – Serious deficiencies in defendant’s performance – By penultimate meeting plaintiff had really only completed series of appraisals – Standards required before dismissal could occur not met – No written warnings that employment was in jeopardy – Matters should have been reduced to writing – Final meeting predetermined – Defendant’s actions were obstinate and obdurate – Court awarded compensation of \$7,500 reduced by one third to reflect contribution – Awarded \$1,000 for loss of benefit (company vehicle) – Had defendant not improved continued employment unlikely beyond further three month period – Defendant awarded lost remuneration of \$3,000 – Branch Manager

This was an unsuccessful challenge and partially successful cross challenge to a determination of the Employment Relations Authority. The Court held that the defendant’s dismissal was procedurally unjustified and awarded remedies.

The defendant was employed by the plaintiff in October 2002 as a branch manager. In late 2003, problems with the branch were identified by the general manager who then conducted a number of performance reviews with the defendant. At these meetings a number of issues were discussed, including wider issues relating to the performance of the branch. Matters had not improved by March 2004 and further performance issues were discussed including the defendant’s failure to adequately manage an identified health and safety issue and alleged complaints of a confrontational and aggressive approach by the defendant. The defendant was given clear directions as to the plaintiff’s requirements. Minutes were kept of these meetings but outcomes

were not specified in writing.

Matters did not improve and the general manager met again with the defendant, informing him that the meeting was to discuss ongoing performance concerns and that he should bring a representative. At that penultimate meeting performance issues were again discussed. The general manager indicated the branch manager job was beyond the defendant's capabilities and offered the defendant an alternative lower status job. The defendant was given time to consider the offer and went on sick leave.

The defendant refused to resign or accept the offer. At a final meeting the defendant's employment was terminated.

The Employment Relations Authority determined that, while the plaintiff had genuine concerns about the defendant's performance, the dismissal was procedurally unjustified. It granted lost remuneration on the basis of the difference between the defendant's branch manager salary and the lower status job offered to the defendant. Compensation for humiliation etc was also awarded.

The defendant submitted the plaintiff had failed to follow the procedure in his contract and the relevant manuals. He alleged he was never made aware that his performance was specifically in issue and that at the relevant meetings general matters as to the branch's performance were also discussed. He alleged he was not provided with fair warnings or given opportunity to improve. He submitted he was entitled to know not only the details of complaints made against him but also the identity of the complainants. The defendant cross-challenged seeking an increase in remedies awarded.

The plaintiff alleged the dismissal was procedurally and substantively justified. The matter was determined on the law prior to the enactment of s103A Employment Relations Act 2000.

Held

(1) The employer had not carried out the formal requirements in the employer's manual in respect of the final steps taken. However, the manual and the provision in the contract meant that the employer retained some flexibility in the way that the performance appraisals were carried out. With the exception of the flow charts, the manual provisions and the contractual clause were really aimed at methods by which performance was improved rather than proceeding down an intended path to dismissal. (para 38)

(2) In dealing with a manager of the defendant's seniority, some flexibility and latitude in the process might be permitted. However, if an employer adopts a less formal approach to appraisal and dismissal later comes to be considered, an employer would not be regarded as having acted justifiably unless the employer had first given the employee fair warning and an opportunity to improve and show whether he could do the job or not. (para 39)

(3) In a situation where purely performance issues were being appraised the plaintiff was not required to disclose the identity of the complainants. Disclosure might be required where misconduct issues leading to the possibility of summary dismissal were considered. In the present case the identity of the customers making complaints about the defendant were noted and discussed. However, in a situation where allegations were being made by fellow employees of his confrontational and aggressive approach it would be unreasonable to require the employer to disclose their identity if the defendant was to remain in a management role over them. (para 41)

(4) There were serious deficiencies concerning the defendant's performance of his duties as branch manager. Although it would have been preferable for them to be specified in writing

following each of the meetings rather than remaining merely in the form of minutes retained, these deficiencies were discussed with him and he was given opportunity to improve. Objective criticism was given and objective statements of standards set. (paras 43-45)

(5) By the penultimate meeting the plaintiff had really only completed a series of performance appraisals. The standards required before a dismissal could take place had not even begun to be met. The procedure, which should have been put in place at that point, was to clearly establish the standards in formal written warnings and go down the process, which was set out in the vertical flow chart contained in the policy and procedure manual. That such warnings were not then put in place and subsequent

meetings held to assess performance following the warnings, resulted in a substantial procedural deficiency. (para 45)

(6) Where meetings commence for performance appraisal but later in the process dismissal was in prospect the employee must be notified. It was possible that having had it brought home to him, by proper written warnings, that his employment was in jeopardy if he didn't improve, the defendant may have attended to the difficulties being put to him and improved. However, such a warning was not given. (paras 46, 49)

(7) The company did not conduct a final meeting at which the defendant was informed in advance that dismissal was a possible outcome, and at which he was given the opportunity of legal representation. The final meeting conducted was to confirm his dismissal, but that was an outcome, which the general manager had already predetermined prior to the meeting once he knew the defendant would not accept the other position offered. He did not undertake that meeting with an open mind. It was true that the defendant was given the opportunity of having his solicitor present at that meeting, but in view of the attitude the company had clearly adopted by that stage, it was difficult to see how such representation might have procured an alternative result. The general manager subsequently confirmed that that was so in the letter he wrote following that final meeting. (para 48)

(8) There was always the hope that matters would improve and that was enhanced if proper procedures were followed and the employee given proper time for reflection and the taking of advice. The plaintiff in the present case faced the added difficulty that in a situation where the employee was clearly being told the areas where he needed to improve, he simply was not listening. Faced with that difficulty matters were not reduced to writing as they should have been. (para 50)

(9) The early meetings were not objectionable. When it was clear, however, that the defendant was not going to improve in his performance and dismissal was an option then as a matter of fairness the plaintiff should have embarked on a more formal procedure of warning and assessment. Simply adopting the attitude that if the defendant was not to accept the demotion then the dismissal was the only alternative fell short of a fair and proper process. For those reasons the challenge was dismissed. (paras 51, 52)

(10) The appropriate method of dealing with reimbursement and mitigation was to consider the difference between the remuneration the defendant was receiving as branch manager and the remuneration he received in alternative employment. Had the procedural deficiencies not occurred and the defendant not improved his performance his continued employment would have been unlikely beyond a further period of 3 months. The gross lost remuneration was \$3,000 and that sum was awarded. (para 53)

(11) There was ample evidence of the defendant's distress and humiliation at his untimely termination of employment. However, he was somewhat the author of his own misfortune. (para

(12) Having regard to the nature of the employment and the overall circumstances surrounding the unjustifiability of the termination being purely procedural, the Court was not persuaded that there should be any substantial compensation for loss of the benefit of an expensive motor vehicle as was claimed. However, the loss of such benefit should not simply be subsumed in the compensation specifically awarded for the humiliation and distress. It was appropriate that a further identifiable sum be awarded, assessed at \$1,000. (para 55)

(13) Concerning contribution some of the defendant's actions were obstinate and obdurate. In other respects he refused, whether as a result of a quirk of his nature or deliberate stubbornness, to accept and improve the areas of criticism. That was similar to the colloquialism of bloody-mindedness referred to by Brandon LJ in *Nelson v British Broadcasting* (cited below). There were actions of the defendant which contributed towards the situation that gave rise to the personal grievance. However, the Authority's remedies award was tending towards the conservative. The Court would have been more inclined to have awarded compensation in the sum of \$7,500 with a one-third reduction arriving at the same figure as that awarded by the Authority. (paras 56-62)

Result: Challenge dismissed ; Cross-challenge granted in part ; Reimbursement of lost wages (\$3,000) ; Loss of benefit (\$1,000)(company vehicle) ; Compensation for humiliation etc (\$7,500 reduced to \$5,000 contributory conduct) ; Costs reserved

Statutes considered:

ERA s124

Words and phrases: Bloody-mindedness

Cases referred to in judgment:

Nelson v British Broadcasting Corporation (No 2) [1980] ICR 110

New Zealand (with exceptions) Food Processing etc IOUW v Unilever New Zealand

Ltd (1990) ERNZ Sel Cas 582

Paykel Ltd v Ahlfeld [1993] 1 ERNZ 334

Trotter v Telecom Corporation NZ Ltd [1993] 2 ERNZ 659

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Arrears - Employment Relations Act 2000

Thanakornmanaporn v Boonyaphat Company Ltd

8 Nov 2006, RA Monaghan, AA 340/06, (7 pages)

UNJUSTIFIED DISMISSAL - Whether dismissed or resigned - Respondent recruited applicant from Thailand on fixed term agreement and retained his passport, although would temporarily return it on request - Before fixed term expired applicant informed respondent offered another job - Also requested passport - Manager did not return it as thought wanted passport so could leave immediately - Applicant had not said intended leaving early - Insufficient grounds for manager's conclusion - Both parties came to link return of passport with termination of employment - Applicant felt no choice but to leave because wanted passport - Even if passport sought to pursue employment elsewhere, did not in itself mean would leave current employment early - Applicant did not resign or voluntarily leave employment - Although respondent not seeking to dismiss, actions amounted to initiative for termination of employment - Applicant dismissed - Since based on misunderstanding, dismissal unjustified - Remedies - Lost wages limited to period of fixed term - Authority unconvinced loss mitigated and lost wages adjusted to reflect that - Minimal compensation as already unhappy at work and intended to leave soon - PENALTY - Claim for breach of obligation to provide opportunity to obtain advice when entered employment relationship raised out of time - Breach of good faith not raised expressly before investigation meeting - Not appropriate to raise it in submissions and not treated as part of employment relationship problem - Applicant sought penalty for payment in Thai baht rather than New Zealand dollars - Parties had agreed part of applicant's salary would be remitted directly to his Thai account - No breach of employment agreement in respect of payment in baht and no penalty to be imposed - However, requirement for written consent to pay wages into bank account not met - Breach did not call for penalty, but respondent to amend its employment agreements - Employment agreement silent on deductions made for accommodation, food and utilities - Penalty warranted but mitigating factors as applicant orally agreed to deductions and respondent recognised mistakes and prepared to address them - ARREARS OF WAGES - Letter from respondent to Immigration Service before applicant employed stated hourly rate for position - However, letter merely account from employer to third party, not evidence of later agreement between parties - No grounds to order repayment of deductions as subject to oral agreement - Correct accounting of PAYE between respondent and IRD - If applicant wrongly taxed matter to address with IRD - Both parties' statements of evidence filed late - Start of investigation meeting delayed so applicant and advocate could read respondent's statement - Advocate advised Authority ready to proceed and not appropriate for him to allege in submissions not given enough time to prepare - Length of service one year ten months - Chef

Result: Application granted (Unjustified dismissal) ; Reimbursement of lost wages (\$3,115.38) ; Compensation for humiliation etc (\$1,000) ; Application granted in part (Penalty) ; Penalty (\$1,000)(Payable to Crown) ; Application dismissed (Arrears of wages) ; Costs reserved

Watson v Fibre Logistics Ltd

20 Oct 2006, RA Monaghan, AA 323/06, (3 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Applicant sought wages and holiday pay due on termination - Dismissed after charged with offences involving misappropriation of funds from employee social club - Dismissal letter stated wage entitlements "frozen" pending outcome of misappropriation issue - Respondent claimed awaited outcome of trial in District Court - Respondent failed to meet timetable set by Authority for providing confirmation whether amounts in dispute, but subsequently advised amounts due - Authority set further timetable to allow respondent to address remaining claims - In light of delaying tactics to date, Authority warned would issue determination without hearing further from

respondent - Nothing further heard from respondent after contacted by Authority - Unacceptable - Proceedings determined without hearing further from respondent - No appearance for respondent - Wages and holiday pay due and owing - Interest 7.7 percent - PENALTY - Respondent failed to comply with Wages Protection Act 1983 by not paying wages - Failure also breached employment agreement - Liable to penalty under s134 Employment Relations Act 2000 ("ERA") - Deliberately withheld wages and flouted law - Given at least two of breaches based on same conduct not appropriate to order penalties in respect of each breach - Rather, conduct treated as single breach - Deliberate nature of breach, aggravated by subsequent delaying tactics, meant more than nominal penalty called for - Authority not addressed on issue whether respondent in breach of good faith obligations or whether penalty should be awarded under s4A ERA - Possibility of breach merely noted - If applicant guilty of charges would be called to account in appropriate place - COSTS - Length of investigation meeting not specified - Some, but not all, of applicant's modest legal fees bore directly on Authority proceedings - Entitled to contribution to costs of \$50 plus filing fee

Result: Arrears of wages (\$2,115.38) ; Arrears of holiday pay (\$3,077.89) ; Interest (7.7 %) ; Penalty (\$3,000)(Payable to Crown) ; Costs in favour of applicant (\$50) ; Disbursements (\$70)(Filing fee)

Arrears - Holiday Pay - Employment Relations Act 2000

Watson v Fibre Logistics Ltd

20 Oct 2006, RA Monaghan, AA 323/06, (3 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Applicant sought wages and holiday pay due on termination - Dismissed after charged with offences involving misappropriation of funds from employee social club - Dismissal letter stated wage entitlements "frozen" pending outcome of misappropriation issue - Respondent claimed awaited outcome of trial in District Court - Respondent failed to meet timetable set by Authority for providing confirmation whether amounts in dispute, but subsequently advised amounts due - Authority set further timetable to allow respondent to address remaining claims - In light of delaying tactics to date, Authority warned would issue determination without hearing further from respondent - Nothing further heard from respondent after contacted by Authority - Unacceptable - Proceedings determined without hearing further from respondent - No appearance for respondent - Wages and holiday pay due and owing - Interest 7.7 percent - PENALTY - Respondent failed to comply with Wages Protection Act 1983 by not paying wages - Failure also breached employment agreement - Liable to penalty under s134 Employment Relations Act 2000 ("ERA") - Deliberately withheld wages and flouted law - Given at least two of breaches based on same conduct not appropriate to order penalties in respect of each breach - Rather, conduct treated as single breach - Deliberate nature of breach, aggravated by subsequent delaying tactics, meant more than nominal penalty called for - Authority not addressed on issue whether respondent in breach of good faith obligations or whether penalty should be awarded under s4A ERA - Possibility of breach merely noted - If applicant guilty of charges would be called to account in appropriate place - COSTS - Length of investigation meeting not specified - Some, but not all, of applicant's modest legal fees bore directly on Authority proceedings - Entitled to contribution to costs of \$50 plus filing fee

Result: Arrears of wages (\$2,115.38) ; Arrears of holiday pay (\$3,077.89) ; Interest (7.7 %) ; Penalty (\$3,000)(Payable to Crown) ; Costs in favour of applicant (\$50) ; Disbursements (\$70)(Filing fee)

Breach of Contract - Employment Relations Act 2000

Grenside v Gaskin

30 Apr 2007, D Asher, WA 67/07, (7 pages)

BREACH OF CONTRACT - Matter dealt with on papers - No appearance for respondent - Other than statement in reply no submissions filed by respondent - Applicant alleged respondent breached confidentiality of mediated settlement and sought damages and penalty - After parties settlement reached at mediation, applicant applied for taxi licence - Respondent emailed LTNZ referencing his dismissal of applicant, how much it cost him in "unfair dismissal costs" and made other allegations - As result of email LTNZ halted application - LTNZ obliged to make inquiries on applicant's fitness to hold licence - Because other allegations contested and irrelevant to present application, non-publication of allegations ordered - Respondent breached obligation to keep fact of proceedings, settlement and its terms confidential - Breaches gratuitous, deliberate, and amounted to serious breach of applicant's employment agreement - "Unfair dismissal costs" not reference to legal costs and close to amount agreed in settlement - Respondent claimed properly exercised right to file objection under public notification - Claim rejected since allegations not relevant to purpose of objection and had nothing to do with applicant's character/fitness to hold licence - Other prohibited allegations may have proved relevant and could have been advanced without unnecessarily breaching confidentiality obligations - However, respondent clearly not prepared to appear in Authority - Damages - Applicant claimed breach affected ongoing employment in taxi industry - Claim unsupported by evidence - Reasonable to expect some evidence of impact email had on application for licence and re-employment experiences - Unconscionable for applicant to recover damages out of proportion to actual loss - Damages not established - PENALTY - Respondent largely failed to defend very serious claim - Respondent well-placed to communicate concerns without reporting dismissal and amount it cost him - Comments unrelated to application and clearly breached undertakings as to confidentiality - Due to distress caused applicant awarded half of penalty - COSTS - Length of investigation meeting not specified - Applicant awarded fair and reasonable costs of \$1,800

Result: Application granted (Breach of contract) ; Application dismissed (Breach of contract) ; Penalty (\$4,000)(\$2,000 payable to Crown)(\$2,000 payable to applicant) ; Costs in favour of applicant (\$1,800)

Compliance Order - Employment Relations Act 2000

Isherwood v Apex Car Rentals Ltd

12 Oct 2006, H Doyle, CA 148/06, (4 pages)

COMPLIANCE ORDER - Applicant sought compliance with Record of Settlement - Respondent claimed complied with settlement - Settlement clause provided once amounts, including salary paid, no further payments due - Applicant claimed "salary" definition wider than ordinary salary and included additional holiday and lieu entitlements - Amount owed unclear in settlement - Respondent sent copies of settlement to applicant to sign along with "without prejudice" letter - Letter stated would receive three days salary - Series of without prejudice communications regarding settling matter - Without prejudice protection continued to attach to such communications after settlement of an employment relationship problem - However, consideration of letter necessary to determine whether agreement reached - Authority risked being misled on amount to be paid under clause - Terms of settlement clearly accepted - Matter not one of interpretation - Letter clear about payment and sent before applicant signed settlement - Respondent entitled, in absence of rejection, counter offer, or other response, to rely on settlement on basis of payments in letter - Payment of additional entitlements not provided for in letter - Respondent paid three days salary - Terms of settlement complied with - Not entitled to compliance order - PENALTY - Counterclaim - Respondent alleged applicant in breach of good faith by claiming on settled matter and that claim misled Authority - Exemplary damages, penalties and full solicitor client costs initially sought - Damages no longer sought - Issue whether duty of good faith in s4(4) Employment Relations Act 2000 applied to matter - No submissions heard and no finding made on issue since applicant claimed did not know of letter - Unlikely would have found breach warranting penalty - All remaining terms of settlement prohibited from publication
Result: Application dismissed ; Orders accordingly ; Costs reserved

Rural Women New Zealand Incorporated v Jehma

2 Nov 2006, D Asher, WA 151/06, (4 pages)

COMPLIANCE ORDER - Compliance with record of settlement sought - Respondent confirmed had not adhered to terms of settlement - Attributed failure to period of unemployment and other financial commitments - Respondent submitted now able to pay sum in instalments as originally agreed - Applicant also sought interest and costs - Respondent had not disputed any aspect of applicant's claim - However, Authority did not accept interest claim because of amount sought and applicant had claimed it under District Courts Act 1947 - Current 90-day bill rate fair and reasonable rate - Compliance ordered - COSTS - Length of investigation meting not specified - Applicant awarded costs of \$2,000
Result: Application granted ; Compliance ordered ; Interest (\$186)(7.58%) ; Costs in favour of applicant (\$2,000) ; Disbursements (\$70)(Filing fee)

Ueese & Ueese v Conference of Samoan Adventist Church

28 Aug 2006, L Robinson, AA 275/06, (3 pages)

COMPLIANCE ORDER - Applicants sought compliance with record of settlement - Authority's file documented considerable difficulty in obtaining respondent's co-operation - Authority minute directed investigation meeting to proceed as consequence of respondent's failure to take any steps - No appearance by respondent - Authority satisfied respondent had not complied with record of settlement - No evidence of excuse or justification for failure - Compliance ordered - Interest 9 percent - Leave reserved for applicants to bring further application to Authority in event of continuing non-compliance - PENALTY - On balance of probabilities, case deserved penalty - Penalty necessary to encourage observance of objects of Employment Relations Act 2000 - COSTS - Length of investigation meeting not specified - Applicants sought full costs of \$1,681 - Costs reasonable - Entirely appropriate applicants

be reimbursed full costs

Result: Compliance ordered ; Interest (9%) ; Penalty (\$2,000)(\$1,000 payable to Crown, \$1,000 payable to applicants) ; Costs in favour of applicants (\$1,681.25)

Costs - Employment Relations Act 2000

646 Victoria (Hamilton) Ltd v Phillips

23 May 2007, Perkins, J, AC 29/07, (1 pages)

PRACTICE AND PROCEDURE – Application to strike out proceedings by defendant – Delay – No appearance by plaintiff – Plaintiff filed de novo challenge and application for stay of Authority proceedings in August 2006 – Court granted stay and directed remedies awarded by Authority be paid into Court – Plaintiff failed to comply – Plaintiff failed to co-operate with progression of proceedings – HELD – Clear that plaintiff had no intention of proceeding with challenge – Delay caused substantial prejudice to defendant particularly in enforcing Authority determination – Application granted – Defendant’s cross-challenge withdrawn – COSTS – Defendant awarded \$3,000 costs for Court proceedings

Result: Application dismissed ; Orders accordingly ; Costs in favour of defendant (\$3,000)

Eastern Bay Independent Industrial Workers Union Incorp v Cater Holt Harvey Ltd

30 Nov 2006, V Campbell, AA 322A/06, (3 pages)

COSTS - Unsuccessful application to reopen investigation meeting - Length of investigation meeting less than one day - Respondent sought full costs of \$37,951 - High costs due to respondent's need to respond to three statements of problem with range of claims - Not appropriate case for indemnity costs - Two Calderbank offers made and applicant on notice respondent intended to seek full costs - Both offers reasonable and, along with respondent's warnings, significant factors to be considered - Obligation on applicant to contribute significantly to post-offer costs

Result: Costs in favour of respondent (\$10,000)

Grenside v Gaskin

30 Apr 2007, D Asher, WA 67/07, (7 pages)

BREACH OF CONTRACT - Matter dealt with on papers - No appearance for respondent - Other than statement in reply no submissions filed by respondent - Applicant alleged respondent breached confidentiality of mediated settlement and sought damages and penalty – After parties settlement reached at mediation, applicant applied for taxi licence - Respondent emailed LTNZ referencing his dismissal of applicant, how much it cost him in “unfair dismissal costs” and made other allegations - As result of email LTNZ halted application - LTNZ obliged to make inquiries on applicant’s fitness to hold licence - Because other allegations contested and irrelevant to present application, non-publication of allegations ordered - Respondent breached obligation to keep fact of proceedings, settlement and its terms confidential - Breaches gratuitous, deliberate, and amounted to serious breach of applicant’s employment agreement - "Unfair dismissal costs" not reference to legal costs and close to amount agreed in settlement - Respondent claimed properly exercised right to file objection under public notification - Claim rejected since allegations not relevant to purpose of objection and had nothing to do with applicant's character/fitness to hold licence - Other prohibited allegations may have proved relevant and could have been advanced without unnecessarily breaching confidentiality obligations - However, respondent clearly not prepared to appear in Authority - Damages - Applicant claimed breach affected ongoing employment in taxi industry - Claim unsupported by evidence - Reasonable to expect some evidence of impact email had on application for licence and re-employment experiences - Unconscionable for applicant to recover damages out of proportion to actual loss - Damages not established - PENALTY - Respondent largely failed to defend very serious claim - Respondent well-placed to communicate concerns without reporting dismissal and amount it cost him - Comments unrelated to application and clearly breached undertakings as to confidentiality - Due to distress caused applicant awarded half of penalty - COSTS - Length of investigation meeting not specified - Applicant awarded fair and reasonable costs of

\$1,800

Result: Application granted (Breach of contract) ; Application dismissed (Breach of contract) ; Penalty (\$4,000)(\$2,000 payable to Crown)(\$2,000 payable to applicant) ; Costs in favour of applicant (\$1,800)

Rural Women New Zealand Incorporated v Jehma

2 Nov 2006, D Asher, WA 151/06, (4 pages)

COMPLIANCE ORDER - Compliance with record of settlement sought - Respondent confirmed had not adhered to terms of settlement - Attributed failure to period of unemployment and other financial commitments - Respondent submitted now able to pay sum in instalments as originally agreed - Applicant also sought interest and costs - Respondent had not disputed any aspect of applicant's claim - However, Authority did not accept interest claim because of amount sought and applicant had claimed it under District Courts Act 1947 - Current 90-day bill rate fair and reasonable rate - Compliance ordered - COSTS - Length of investigation meting not specified - Applicant awarded costs of \$2,000

Result: Application granted ; Compliance ordered ; Interest (\$186)(7.58%) ; Costs in favour of applicant (\$2,000) ; Disbursements (\$70)(Filing fee)

Service & Food Workers Union Nga Ringa Tota v OCS Ltd

21 Mar 2007, Shaw, J, WC 8A/07, (1 pages)

COSTS – Successful de novo challenge to Employment Relations Authority determination – Plaintiff sought unspecified costs - Challenge related to dispute about interpretation and operation of collective agreement – HELD – Both parties ultimately benefited from having definitive ruling – Costs to lie where they fell

Result: Cost to lie where they fall

Snorkel Elevating Work Platforms Ltd v Thompson

3 Nov 2006, PR Stapp, WA 73A/06, (4 pages)

PRACTICE AND PROCEDURE - Issue raised regarding interest payable by respondent - Claim for interest disposed of at time of substantive determination - Matter closed - COSTS - Both parties claimed costs for respective applications that had been consolidated and heard together - Length of investigation meeting not specified - Each successful with own claim - Applicant sought contribution of \$15,000 towards total costs of \$35,000 for its recovery application - Submitted costs should lie where they fall for respondent's personal grievance - Also sought disbursements of \$22,469, including expenses relating to video conference, witnesses, and counsel's travel - Respondent's costs were \$25,148 for recovery action, and \$18,078 for his personal grievance - Costs ordered on both applications as Authority satisfied both genuine and not just matter of leverage against each other - Expense of video conferencing to be shared as benefited both parties - No other disbursements ordered because both parties required to prepare for investigation, inevitably involving photocopying etc - Both parties chose their counsel and travel expenses inevitable part of proceedings given applicant's obligations involved attendance in New Zealand - Respondent should not have to pay for applicant's choice - Attendance of witnesses a standard requirement - Given employer was applicant it should meet own witness costs - Respondent to pay costs of \$6,000, being 40 percent of reasonable costs of \$15,000 - Assessment based on preparation, representation and time involved in Authority investigation, and because of proportionality of applicant's claim - Applicant to pay \$3,000 towards respondent's costs for straight forward personal grievance

Result: Orders accordingly ; Costs in favour of applicant (\$6,000) ; Disbursements in favour of applicant (\$657.13)(Video conferencing) ; Costs in favour of respondent (\$3,000)

South Taranaki Free Kindergarten Association v McLennan

6 Mar 2007, Shaw J, WC 9/07, (1 pages)

COSTS – Successful non de novo challenge and unsuccessful cross-challenge – Plaintiff successfully challenged reinstatement order – Plaintiff made Calderbank offer prior to Court hearing – Plaintiff sought \$8,000 contribution to actual Court costs of \$11,221 plus disbursements of \$935 – Plaintiff submitted defendant should have costs in Authority of \$2,000 for successful unjustified dismissal claim – Defendant submitted costs should lie where they fell – Defendant submitted unjustified dismissal catastrophic for her because of limitations in obtaining satisfactory alternative employment – HELD – Was appropriate that defendant pay proportion of plaintiff's costs because of Calderbank offer which was generous and realistic – Court took into account plaintiff's difficulties regarding future employment and that she had to call on retirement savings to fund litigation – Those factors persuaded Court not to order full indemnity/solicitor client costs – Costs in favour of plaintiff \$8,000 plus \$925 disbursements in Court – Costs in favour of defendant of \$2,000 in Authority – Total due to plaintiff \$6,925 – Calculation of outstanding wages reserved
Result: Costs in favour of plaintiff (\$8,000) Disbursements (\$925)(Court) ; Costs in favour of defendant (\$2,000)(Authority) ; Calculation of outstanding wages reserved

Uelese & Uelese v Conference of Samoan Adventist Church

28 Aug 2006, L Robinson, AA 275/06, (3 pages)

COMPLIANCE ORDER - Applicants sought compliance with record of settlement - Authority's file documented considerable difficulty in obtaining respondent's co-operation - Authority minute directed investigation meeting to proceed as consequence of respondent's failure to take any steps - No appearance by respondent - Authority satisfied respondent had not complied with record of settlement - No evidence of excuse or justification for failure - Compliance ordered - Interest 9 percent - Leave reserved for applicants to bring further application to Authority in event of continuing non-compliance - PENALTY - On balance of probabilities, case deserved penalty - Penalty necessary to encourage observance of objects of Employment Relations Act 2000 - COSTS - Length of investigation meeting not specified - Applicants sought full costs of \$1,681 - Costs reasonable - Entirely appropriate applicants be reimbursed full costs

Result: Compliance ordered ; Interest (9%) ; Penalty (\$2,000)(\$1,000 payable to Crown, \$1,000 payable to applicants) ; Costs in favour of applicants (\$1,681.25)

Watson v Fibre Logistics Ltd

20 Oct 2006, RA Monaghan, AA 323/06, (3 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Applicant sought wages and holiday pay due on termination - Dismissed after charged with offences involving misappropriation of funds from employee social club - Dismissal letter stated wage entitlements "frozen" pending outcome of misappropriation issue - Respondent claimed awaited outcome of trial in District Court - Respondent failed to meet timetable set by Authority for providing confirmation whether amounts in dispute, but subsequently advised amounts due - Authority set further timetable to allow respondent to address remaining claims - In light of delaying tactics to date, Authority warned would issue determination without hearing further from respondent - Nothing further heard from respondent after contacted by Authority - Unacceptable - Proceedings determined without hearing further from respondent - No appearance for respondent - Wages and holiday pay due and owing - Interest 7.7 percent - PENALTY - Respondent failed to comply with Wages Protection Act 1983 by not paying wages - Failure also breached employment agreement - Liable to penalty under s134 Employment Relations Act 2000 ("ERA") - Deliberately withheld wages and flouted law - Given at least two of breaches based on same conduct not appropriate to order penalties in

respect of each breach - Rather, conduct treated as single breach - Deliberate nature of breach, aggravated by subsequent delaying tactics, meant more than nominal penalty called for - Authority not addressed on issue whether respondent in breach of good faith obligations or whether penalty should be awarded under s4A ERA - Possibility of breach merely noted - If applicant guilty of charges would be called to account in appropriate place - COSTS - Length of investigation meeting not specified - Some, but not all, of applicant's modest legal fees bore directly on Authority proceedings - Entitled to contribution to costs of \$50 plus filing fee

Result: Arrears of wages (\$2,115.38) ; Arrears of holiday pay (\$3,077.89) ; Interest (7.7 %) ; Penalty (\$3,000)(Payable to Crown) ; Costs in favour of applicant (\$50) ; Disbursements (\$70)(Filing fee)

Wyatt v Whangarei Boys' High School

30 May 2007, K Raureti, AA 85A/07, (2 pages)

COSTS - Successful personal grievance - Length of investigation meeting not specified - Applicant sought total costs of \$3,146 which included two days preparation time and filing fee - Respondent challenged substantive determination and indicated would not agree to make contribution to costs - Election to challenge did not operate as stay of proceedings on substantive determination - Respondent made no submissions on costs - Applicant succeeded in claim - Entitled to contribution to costs

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

Dispute - Employment Relations Act 2000

Barclay & New Zealand Amalgamated Engineering Printing & Manufacturing Union (Inc) (EMPU) v Air New Zealand Ltd

23 Nov 2006, PR Stapp, WA 168/06, (7 pages)

DISPUTE - Interpretation of collective employment agreement ("CEA") - Domestic leave provisions in CEA amended to comply with changes to Holidays Act 2003 - Parties disagreed about whether amendments represented substantive change by way of negotiation - Applicant Union submitted members could use up to five days unused sick leave in any year for "domestic leave" purposes - Respondent argued sick leave allocated in two ways, sick leave under Holidays Act, paid at relevant daily pay, and additional sick leave allocated under contract provisions paid at ordinary pay - Contended domestic leave available from Holidays Act entitlement only - Plain meaning of words could settle matter - Employee with unused sick leave could use entitlement in event of sickness of spouse, or person who depended on them for care, up to level of minimum sick leave entitlement under Holidays Act - Respondent provided sick leave in terms of relevant daily pay and ordinary pay, and where both available entitlement could be used from combined pool available to employee for "domestic leave" purposes - Applicant employee had previously used two days of statutory sick leave - Issue whether could take another three days leave, which would take her to permissible five days - Otherwise would have to take leave without pay, even though had contractual sick leave available - Employee could draw up to five days leave if had it, including from pool paid at ordinary pay, if entitlement under Holidays Act and paid at relevant daily pay used

Result: Question answered in favour of applicants ; Costs reserved

Injunction - Employment Relations Act 2000

NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Air Nelson Ltd
5 Jun 2007, H Doyle, CA 59/07, (10 pages)

INTERIM INJUNCTION – Applicant claimed respondent breached s97 Employment Relations Act by employing or engaging another person to perform work of striking employee – Sought interim injunction restraining breach – Respondent and Air New Zealand National Cargo (“ANZNC”) parties to sale and handling agency contract – Respondent advised ANZNC strike would affect ability to handle freight and would be unable to fulfil obligations under agency contract – ANZNC took on responsibility for handling goods and its employees did tasks that would have been performed by striking union members – Applicant had to establish arguable case respondent employed or engaged others to do work of striking employees – Individuals doing work of striking employees were Air New Zealand Limited employees – Agency contract between respondent and ANZNC provided remedial options for ANZNC in event respondent unable to meet obligations, including providing service itself – Care to be taken with finding arguable case respondent permitted work to be performed by Air New Zealand Ltd, and that by extension, it employed or engaged other persons – Could equally be argued ANZNC exercised rights under contract to provide service itself – Communication from respondent insufficient to establish arguable case it engaged or employed Air New Zealand Ltd and/or its employees to do work of striking employees – To extent could argue respondent did not stop arrangements, agency contract established ANZNC entitled to perform service if respondent unable to – No evidence respondent provided financial reward or other consideration to individuals doing work or any evidence of contractual relationship with them – Arguable case not established – Interim injunction declined

Result: Application dismissed ; Costs reserved

Jurisdiction - Employment Relations Act 2000

Cockburn v Aylesford Automotive (2001) Ltd

23 Nov 2006, H Doyle, CA 162/06, (6 pages)

JURISDICTION - Whether employee or independent contractor - Applicant worked for respondent's previous owner, but not as employee - In September 2001 business sold - Applicant agreed to work full time for new owner and considered himself employee - Respondent claimed applicant told situation would remain same as under previous owner and it intended to engage applicant as contractor - No written agreement - IRD audited respondent's wage and tax records - IRD decided applicant an employee and sent letter to respondent stating PAYE to be deducted - Although respondent denied receiving letter began to deduct PAYE from October 2002 - Control factors weighed in favour of employment relationship - Applicant's role integral part of respondent's business and not accessory to it - Fundamental test more consistent with employment relationship than person in business on own account - No significant industry evidence - Factors indicative of employment relationship clearly outweighed factors indicative of independent contractor from October 2002 - Prior to that date applicant accounted personally for payment of taxes and had not considered true nature of relationship - Employee from October 2002 onwards - Warrant of fitness inspector

Result: Question answered in favour of applicant ; Costs reserved

Wu v Hamilton Holdings (2002) Ltd

30 Nov 2006, RA Monaghan, AA 364/06, (5 pages)

JURISDICTION - Whether employee or independent contractor - Applicant real estate salesperson - At interview applicant told position "commission only" - "Commission only" not synonymous with "contractor" - Discussion did not amount to express agreement to principal/contractor relationship - Authority accepted applicant received written agreement - Nothing to suggest applicant's attention drawn to clause stating engaged as contractor - No evidence of express agreement - Section 51A Real Estate Agents Act 1976 did not apply - Applicant's failure to respond to anything in employment agreement meant Authority prepared to imply or infer at least acquiescence to independent contractor clause - However, not determinative - Discussion about registration for GST, applicant's use of own vehicle, and agreement to pay salesperson's registration fee weighed in favour of contractor relationship, although fact applicant did not register for GST acknowledged - Applicant's general lack of kind of activity expected of salesperson so extreme most unlikely employer would have accepted it without comment - Applicant mentioned several times interest in real estate based on desire to understand own real estate transaction, to help friend with a transaction, and an interest in improving English skills - Consistent with short term personal interests, not wider loyalty and commitment of employment relationship - Independent contractor - No jurisdiction - Real estate salesperson

Result: Application dismissed ; Costs reserved

Penalty - Employment Relations Act 2000

Grenside v Gaskin

30 Apr 2007, D Asher, WA 67/07, (7 pages)

BREACH OF CONTRACT - Matter dealt with on papers - No appearance for respondent - Other than statement in reply no submissions filed by respondent - Applicant alleged respondent breached confidentiality of mediated settlement and sought damages and penalty - After parties settlement reached at mediation, applicant applied for taxi licence - Respondent emailed LTNZ referencing his dismissal of applicant, how much it cost him in "unfair dismissal costs" and made other allegations - As result of email LTNZ halted application - LTNZ obliged to make inquiries on applicant's fitness to hold licence - Because other allegations contested and irrelevant to present application, non-publication of allegations ordered - Respondent breached obligation to keep fact of proceedings, settlement and its terms confidential - Breaches gratuitous, deliberate, and amounted to serious breach of applicant's employment agreement - "Unfair dismissal costs" not reference to legal costs and close to amount agreed in settlement - Respondent claimed properly exercised right to file objection under public notification - Claim rejected since allegations not relevant to purpose of objection and had nothing to do with applicant's character/fitness to hold licence - Other prohibited allegations may have proved relevant and could have been advanced without unnecessarily breaching confidentiality obligations - However, respondent clearly not prepared to appear in Authority - Damages - Applicant claimed breach affected ongoing employment in taxi industry - Claim unsupported by evidence - Reasonable to expect some evidence of impact email had on application for licence and re-employment experiences - Unconscionable for applicant to recover damages out of proportion to actual loss - Damages not established - PENALTY - Respondent largely failed to defend very serious claim - Respondent well-placed to communicate concerns without reporting dismissal and amount it cost him - Comments unrelated to application and clearly breached undertakings as to confidentiality - Due to distress caused applicant awarded half of penalty - COSTS - Length of investigation meeting not specified - Applicant awarded fair and reasonable costs of \$1,800

Result: Application granted (Breach of contract) ; Application dismissed (Breach of contract) ; Penalty (\$4,000)(\$2,000 payable to Crown)(\$2,000 payable to applicant) ; Costs in favour of applicant (\$1,800)

Isherwood v Apex Car Rentals Ltd

12 Oct 2006, H Doyle, CA 148/06, (4 pages)

COMPLIANCE ORDER - Applicant sought compliance with Record of Settlement - Respondent claimed complied with settlement - Settlement clause provided once amounts, including salary paid, no further payments due - Applicant claimed "salary" definition wider than ordinary salary and included additional holiday and lieu entitlements - Amount owed unclear in settlement - Respondent sent copies of settlement to applicant to sign along with "without prejudice" letter - Letter stated would receive three days salary -Series of without prejudice communications regarding settling matter - Without prejudice protection continued to attach to such communications after settlement of an employment relationship problem - However, consideration of letter necessary to determine whether agreement reached - Authority risked being misled on amount to be paid under clause - Terms of settlement clearly accepted - Matter not one of interpretation - Letter clear about payment and sent before applicant signed settlement - Respondent entitled, in absence of rejection, counter offer, or other response, to rely on settlement on basis of payments in letter - Payment of additional entitlements not provided for in letter - Respondent paid three days salary - Terms of settlement complied with - Not entitled to compliance order - PENALTY - Counterclaim - Respondent alleged applicant in breach of good faith by claiming on settled matter and that claim misled Authority - Exemplary damages, penalties and full solicitor client costs initially

sought - Damages no longer sought - Issue whether duty of good faith in s4(4) Employment Relations Act 2000 applied to matter - No submissions heard and no finding made on issue since applicant claimed did not know of letter - Unlikely would have found breach warranting penalty - All remaining terms of settlement prohibited from publication
Result: Application dismissed ; Orders accordingly ; Costs reserved

Thanakornmanaporn v Boonyaphat Company Ltd

8 Nov 2006, RA Monaghan, AA 340/06, (7 pages)

UNJUSTIFIED DISMISSAL - Whether dismissed or resigned - Respondent recruited applicant from Thailand on fixed term agreement and retained his passport, although would temporarily return it on request - Before fixed term expired applicant informed respondent offered another job - Also requested passport - Manager did not return it as thought wanted passport so could leave immediately - Applicant had not said intended leaving early - Insufficient grounds for manager's conclusion - Both parties came to link return of passport with termination of employment - Applicant felt no choice but to leave because wanted passport - Even if passport sought to pursue employment elsewhere, did not in itself mean would leave current employment early - Applicant did not resign or voluntarily leave employment - Although respondent not seeking to dismiss, actions amounted to initiative for termination of employment - Applicant dismissed - Since based on misunderstanding, dismissal unjustified - Remedies - Lost wages limited to period of fixed term - Authority unconvinced loss mitigated and lost wages adjusted to reflect that - Minimal compensation as already unhappy at work and intended to leave soon - PENALTY - Claim for breach of obligation to provide opportunity to obtain advice when entered employment relationship raised out of time - Breach of good faith not raised expressly before investigation meeting - Not appropriate to raise it in submissions and not treated as part of employment relationship problem - Applicant sought penalty for payment in Thai baht rather than New Zealand dollars - Parties had agreed part of applicant's salary would be remitted directly to his Thai account - No breach of employment agreement in respect of payment in baht and no penalty to be imposed - However, requirement for written consent to pay wages into bank account not met - Breach did not call for penalty, but respondent to amend its employment agreements - Employment agreement silent on deductions made for accommodation, food and utilities - Penalty warranted but mitigating factors as applicant orally agreed to deductions and respondent recognised mistakes and prepared to address them - ARREARS OF WAGES - Letter from respondent to Immigration Service before applicant employed stated hourly rate for position - However, letter merely account from employer to third party, not evidence of later agreement between parties - No grounds to order repayment of deductions as subject to oral agreement - Correct accounting of PAYE between respondent and IRD - If applicant wrongly taxed matter to address with IRD - Both parties' statements of evidence filed late - Start of investigation meeting delayed so applicant and advocate could read respondent's statement - Advocate advised Authority ready to proceed and not appropriate for him to allege in submissions not given enough time to prepare - Length of service one year ten months - Chef

Result: Application granted (Unjustified dismissal) ; Reimbursement of lost wages (\$3,115.38) ; Compensation for humiliation etc (\$1,000) ; Application granted in part (Penalty) ; Penalty (\$1,000)(Payable to Crown) ; Application dismissed (Arrears of wages) ; Costs reserved

Ueese & Ueese v Conference of Samoan Adventist Church

28 Aug 2006, L Robinson, AA 275/06, (3 pages)

COMPLIANCE ORDER - Applicants sought compliance with record of settlement - Authority's file documented considerable difficulty in obtaining respondent's co-operation - Authority minute directed investigation meeting to proceed as consequence of respondent's failure to take any steps - No appearance by respondent - Authority satisfied respondent had

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ARREARS OF WAGES AND HOLIDAY PAY - Applicant sought wages and holiday pay due on termination - Dismissed after charged with offences involving misappropriation of funds from employee social club - Dismissal letter stated wage entitlements "frozen" pending outcome of misappropriation issue - Respondent claimed awaited outcome of trial in District Court - Respondent failed to meet timetable set by Authority for providing confirmation whether amounts in dispute, but subsequently advised amounts due - Authority set further timetable to allow respondent to address remaining claims - In light of delaying tactics to date, Authority warned would issue determination without hearing further from respondent - Nothing further heard from respondent after contacted by Authority - Unacceptable - Proceedings determined without hearing further from respondent - No appearance for respondent - Wages and holiday pay due and owing - Interest 7.7 percent - PENALTY - Respondent failed to comply with Wages Protection Act 1983 by not paying wages - Failure also breached employment agreement - Liable to penalty under s134 Employment Relations Act 2000 ("ERA") - Deliberately withheld wages and flouted law - Given at least two of breaches based on same conduct not appropriate to order penalties in respect of each breach - Rather, conduct treated as single breach - Deliberate nature of breach, aggravated by subsequent delaying tactics, meant more than nominal penalty called for - Authority not addressed on issue whether respondent in breach of good faith obligations or whether penalty should be awarded under s4A ERA - Possibility of breach merely noted - If applicant guilty of charges would be called to account in appropriate place - COSTS - Length of investigation meeting not specified - Some, but not all, of applicant's modest legal fees bore directly on Authority proceedings - Entitled to contribution to costs of \$50 plus filing fee

Result: Arrears of wages (\$2,115.38) ; Arrears of holiday pay (\$3,077.89) ; Interest (7.7 %) ; Penalty (\$3,000)(Payable to Crown) ; Costs in favour of applicant (\$50) ; Disbursements (\$70)(Filing fee)

Personal Grievance Dismissal - Employment Relations Act 2000

MacGougan v The West Coast District Health Board (WCDHB)

30 Aug 2006, P Cheyne, CA 133/06, (4 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Applicant alleged breach of confidence by respondent's representatives when it attempted to have him admitted to psychiatric clinic - Applicant had problems with anxiety, panic attacks and alcohol - Medical certificates stated unfit for work for six months - Respondent's employees could be funded for referral to clinic - Manager arranged for applicant to see psychiatrist employed by respondent for referral - Arrangements made with applicant's consent, at least through partner - After consultation, psychiatrist wrote to another doctor asking applicant be considered for referral, and to respondent's manager - Applicant claimed told assessment would be kept confidential but respondent's typists processed assessment, and referral doctor was respondent's employee - Authority found applicant knew of referral doctor's involvement and only told local typists would not be used - Applicant later resigned and alleged actions of psychiatrist breached assurances of confidentiality or privacy and were breaches of duty by respondent - Actions complained of not those of employer - Although employed by respondent, psychiatrist not acting as employer in dealings with applicant - Resignation not caused by breach of duty by employer - Applicant also alleged respondent breached obligation's by making report to Nursing Council under Health Practitioners' Competence Assurance Act 2003 ("HPCA") - Report not made in bad faith - No civil proceedings could be brought against respondent for making report because of operation of s45(6) HPCA - No other grievance could be taken in relation to events as not raised within time limit - Length of service one year seven months - Psychiatric nurse

Result: Application dismissed ; Costs reserved

Stephens v Rosebuds Solutions Ltd

26 Oct 2006, R Monaghan, AA 328/06, (4 pages)

UNJUSTIFIED DISMISSAL - Whether dismissed or resigned - Applicant returned company van to office for use of employee on evening shift - Subsequently received message from employee indicating would not work shift, and director ("C") informed of situation - Applicant retrieved van and took it home without advising C - C left text message employment would be terminated if van not returned next day - Applicant claimed told his employment terminated when rang to explain could not return van next day - Dispute over conversations - Respondent denied said employment "terminated" - Unlikely applicant told to drop off company property later in week - Matter turned on credibility of witnesses - C angry enough to threaten dismissal if van not returned - Applicant principally relied on assertion C told him employment terminated - Authority not persuaded C used those words - Rather, common ground C instructed applicant to return van next morning or would be dismissed, and applicant indicated not in position to do so - Likely applicant took exchange as amounting to dismissal, or concluded employment at an end next day when failed to return van - Should have taken note of later indication still employed and been open to attending meeting with C - Exchange of messages not consistent with allegation expressly dismissed - Rather, consistent with applicant's uncertainty over whether failure to return van meant employment terminated - Applicant concluded prematurely had been dismissed - Gave no indication thought C dismissed him - Applicant's attitude to C gave him reason to believe decision to leave applicant's - No dismissal - Length of service not specified - Contract cleaner

Result: Application dismissed ; Costs reserved

Thanakornmanaporn v Boonyaphat Company Ltd

8 Nov 2006, RA Monaghan, AA 340/06, (7 pages)

UNJUSTIFIED DISMISSAL - Whether dismissed or resigned - Respondent recruited applicant from Thailand on fixed term agreement and retained his passport, although would temporarily return it on request - Before fixed term expired applicant informed respondent offered another job - Also requested passport - Manager did not return it as thought wanted passport so could leave immediately - Applicant had not said intended leaving early - Insufficient grounds for manager's conclusion - Both parties came to link return of passport with termination of employment - Applicant felt no choice but to leave because wanted passport - Even if passport sought to pursue employment elsewhere, did not in itself mean would leave current employment early - Applicant did not resign or voluntarily leave employment - Although respondent not seeking to dismiss, actions amounted to initiative for termination of employment - Applicant dismissed - Since based on misunderstanding, dismissal unjustified - Remedies - Lost wages limited to period of fixed term - Authority unconvinced loss mitigated and lost wages adjusted to reflect that - Minimal compensation as already unhappy at work and intended to leave soon - PENALTY - Claim for breach of obligation to provide opportunity to obtain advice when entered employment relationship raised out of time - Breach of good faith not raised expressly before investigation meeting - Not appropriate to raise it in submissions and not treated as part of employment relationship problem - Applicant sought penalty for payment in Thai baht rather than New Zealand dollars - Parties had agreed part of applicant's salary would be remitted directly to his Thai account - No breach of employment agreement in respect of payment in baht and no penalty to be imposed - However, requirement for written consent to pay wages into bank account not met - Breach did not call for penalty, but respondent to amend its employment agreements - Employment agreement silent on deductions made for accommodation, food and utilities - Penalty warranted but mitigating factors as applicant orally agreed to deductions and respondent recognised mistakes and prepared to address them - ARREARS OF WAGES - Letter from respondent to Immigration Service before applicant employed stated hourly rate for position - However, letter merely account from employer to third party, not evidence of later agreement between parties - No grounds to order repayment of deductions as subject to oral agreement - Correct accounting of PAYE between respondent and IRD - If applicant wrongly taxed matter to address with IRD - Both parties' statements of evidence filed late - Start of investigation meeting delayed so applicant and advocate could read respondent's statement - Advocate advised Authority ready to proceed and not appropriate for him to allege in submissions not given enough time to prepare - Length of service one year ten months - Chef

Result: Application granted (Unjustified dismissal) ; Reimbursement of lost wages (\$3,115.38) ; Compensation for humiliation etc (\$1,000) ; Application granted in part (Penalty) ; Penalty (\$1,000)(Payable to Crown) ; Application dismissed (Arrears of wages) ; Costs reserved

Personal Grievance - Dismissal - Misconduct - Employment Relations Act 2000

Field v AB Equipment Ltd

6 Nov 2006, P Stapp, WA 154/06, (11 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Applicant visited client site to complete job on way home from work - Filled out time sheet at later date - Later involved in verbal altercation with manager - Applicant asked to attend disciplinary meeting to discuss alleged falsification of timesheets, and aggressive and discourteous behaviour - Not given details of allegations until meeting - Meeting primarily about timesheet and parties discussed gate diary obtained from client - Adjourned so respondent could make further enquiries - Respondent verbally confirmed accuracy of gate diary, but conceded this did not prove veracity - Applicant dismissed without being given opportunity to comment on outcome of further enquiries - Applicant told decision reached but not told what it was - Asked if had anything else to say, then dismissed - Since dismissal time required at client site decreased - Company suspected applicant claimed more time than worked, but allegation not raised at time of dismissal - Fair and reasonable employer would not have come to honestly held belief applicant falsified timesheet when it relied upon word of mouth that gate diary accurate and conceded advice received did not prove veracity of accuracy of gate diary - Respondent's conclusion exposed as inadequate by evidence of gatekeepers who remembered applicant's visit - Credibility issue over what said to respondent at time - Respondent unreasonably concluded applicant lied - Investigation appeared flawed and wholly inadequate - Unsubstantiated allegations about applicant putting in more time at site than necessary did not assist defence - Respondent's conclusion further affected by not giving applicant detail of allegation in advance when probable he could have been confused because frequently attended site - Also manner in which information obtained left it exposed to latter conflict over what said - On their own, allegations regarding behaviour did not amount to serious misconduct - Seriousness of allegations required respondent to prove them with sufficiently high degree of proof that serious misconduct occurred - Unjustified dismissal - Remedies - Claim for superannuation reserved as requested - Length of service not specified - Forklift technician

Result: Application granted ; Reimbursement of lost wages (\$18,929.86) ; Compensation for humiliation etc (\$12,000) ; Orders accordingly ; Costs reserved

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

Stott v Redvale Canine Centre Ltd

21 Jun 2007, L Robinson, AA 187/07, (7 pages)

RAISING PERSONAL GRIEVANCE – Whether grievance raised within 90 days – Applicant wrote two letters to respondent requesting written statement of dismissal and raising personal grievance – Letters incorrectly addressed and not received – Third letter received outside 90 day period – Section 114(2) Employment Relations Act 2000 proceeded on basis employer made “aware” of alleged grievance – Authority termed awareness “notice” of specific grievance – “Notice” preferred rather than “knowledge” – Notice could be actual or constructive – Presumption necessary and desirable where alleged grievant had done what could reasonably be expected of them to convey notice to employer – As matter of policy, constructive notice permitted, for to deny it would be to licence wilful blindness by unprincipled employer – 90 day period directed at facilitating resolution as near as possible to problem – However, preservation of substantive legal rights and entitlement to pursue them expressly contemplated by s114 – Which deemed “reasonable steps” as a “raised” personal grievance – Alleged grievant should be permitted to run grievance as of right if could show reasonable steps taken in 90 days to fix employer with notice – Accepted taking reasonable steps in particular circumstances may be equivalent to actually raising grievance, irrespective of receipt – In equity and good conscience, preservation of entitlement to pursue grievance prevailed over any consideration directed at ensuring problems resolved expeditiously – Whether actions taken within 90 day period relevant, not whether employer received notice – Section 114 framed only in terms of employee’s actions – Authority satisfied applicant took genuine and reasonable steps to make respondent aware of alleged grievance – No compelling reason to deny entitlement to pursue legal rights – Grievance raised within 90 days - Kennel manager

Result: Application granted; No order for costs

Practice & Procedure - Employment Relations Act 2000

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

3 Oct 2006, D King, AA 308/06, (5 pages)

PRACTICE AND PROCEDURE - Application for removal to Employment Court - Applicant alleged respondent repeated conduct previously held to be illegal by Court - Also alleged breach of good faith and breach of agreement between parties - Submitted all three causes of action relied in part on earlier Court decision - Proceedings related to communications to non-union members and good faith obligations - Respondent claimed issues already determined and sought to strike out first cause of action and certain allegations on basis of res judicata and estoppel arguments - Authority did not think novel or new questions of law - Issues related to particular circumstances of case and Authority ideal forum for determination - Important question of law not likely to arise other than incidentally - Section s178(2)(b) Employment Relations Act 2000 required case be "of such nature and urgency" it should be removed in public interest - No claim by applicant case urgent - No current proceedings before Court to justify removal - Type and number of respondent's claims did not in itself constitute circumstances in which removal should be ordered - Authority often dealt with interlocutory proceedings - Authority about to issue determination when Employment Court released Axiom Rolle PRP Valuations Services Ltd v Kapadia (cited below) - Parties given opportunity to make further submissions - Authority accepted retained jurisdiction to make some permanent injunctions - Grounds for removal not satisfied

Result: Application dismissed ; Costs reserved

C v The Commissioner of Police

23 May 2007, GJ Wood, WA 81/07, (3 pages)

PRACTICE AND PROCEDURE - Application for removal to Employment Court - Applicant claimed problem of such nature and urgency that in public interest it be removed, and in all circumstances Court should determine matter - Applicant alleged harassment (principally, but not solely, sexual harassment) and constructive dismissal - Applicant made linkages with Bazley inquiry into police conduct and high profile trials of police officers - Also relied on need for urgent closure to matter - Respondent denied relevant to Bazley inquiry and believed matter could be dealt with by Authority - Saw no particular need for urgency as events occurred over 10 months ago - Nature of case not one of itself that would create situation where in public interest to remove matter immediately to Court - Authority did not accept public interest in case created simply because Government report into police culture found parts of it wanting - Problem did not involve same serious criminal allegations as made against other Police officers referred to - Public interest in officers and police conduct did not in itself mean any case involving police should be removed to Court in public interest - No reason Authority could not deal with matter as promptly as Court - Authority's investigative processes quite likely to be less stressful for applicant than adversarial approach of Court and vast majority of Authority determinations not challenged - Interests of justice would not be better served by removing employment relationship problem to Court - Application declined - Interim order prohibited publication of applicant's name and identifying information

Result: Application dismissed ; Costs reserved

Maritime Union of New Zealand Inc & Ors v TLNZ Ltd

19 Jun 2007, RA Monaghan, AA 181/07, (4 pages)

PRACTICE AND PROCEDURE - Application for removal to Employment Court - Both parties consented to removal - Applicant claimed respondent's new policy to test for presence of drugs and alcohol in employees and potential employees unlawful - Policy

provided for pre-employment, post accident, post incident and reasonable cause testing – Applicant claimed respondent sought to impose oppressive policy on stevedores not working in “safety sensitive” areas – Also claimed urine testing unnecessarily intrusive and less intrusive avenues open – Respondent contended all work sites “safety sensitive” – Authority accepted Court would need to determine whether NZ Amalgamated Engineering etc Union Inc v Air New Zealand (cited below) applicable where safety issues rather than public safety issues arose – Key issue whether in light of recent technological developments, urine testing no longer appropriate and could now be considered unreasonably intrusive – Needed to address relationship between drug and alcohol testing and workplace safety in waterfront industry specifically, but also in terms that extended to wider public interest – Matters of such significance that should be removed to Employment Court, particularly given effluxion of time and nature of technological developments since Air New Zealand – Removal ordered

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

McGillivray v Godfreys Bakery

14 May 2007, J Crichton, CA 52/07, (3 pages)

PRACTICE AND PROCEDURE - Interim determination – Respondent alleged paragraphs in statement of problem breached s148(1) Employment Relations Act 2000 by referring to matters generated for purposes of mediation - Employment relationship deteriorated after business sold to respondent - Applicant raised unjustified disadvantage grievance and at his request parties attended mediation - During mediation respondent prepared “list of expectations” required of applicant - Applicant believed in worse position after mediation and resigned - Applicant regarded list as evidence respondent wanted him to leave - Applicant unreasonably expected mediation would only deal with his issues, not respondent's - Fact one party initiated mediation did not provide right to "drive" mediation process - Authority satisfied respondent participated in mediation for purposes of making genuine contribution to continuing employment relationship - List came about in that context - By referring to list paragraphs traversed matters confidential by reason of s148 - Not entitled to plead paragraphs - Parties to proceed exclusively on unjustified disadvantage claim unless constructive dismissal claim could be reformatted without recourse to paragraphs - If claim reformatted, applicant's counsel to contact Authority

Result: Question answered in favour of respondent ; No order for costs

Mullay v Southern Institute of Technology

31 Jan 2006, H Doyle, CA 15/06, (1 pages)

COURT OF APPEAL – Application for leave to appeal Employment Court decision – Meat processor decided to dispense with separate facilities for meat inspectors at certain plant – Whether respondent required to ensure meat inspectors had access to separate facilities – Employment Court held no such entitlement (see: [2005] 1 ERNZ 789) – Appellants challenged significance Employment Court had attributed to fact that separate facilities had been historically provided – Submitted Employment Court did not separately address health and safety obligations under collective agreement – Final ground of appeal addressed factual findings of Employment Court – HELD – Argument for existence of implied term of entitlement to separate facilities was hopeless and related arguments had no prospects of success – Employment Court focused primarily on provisions in Health and Safety in Employment Act 1992 (“HSEA”) – Collective agreement was expressed in different language – However, factual findings regarding HSEA equally applicable to collective agreement – Suggestion that “no evidence” to support Employment Court’s conclusions was untenable – None of proposed grounds disclosed genuinely arguable question of law – Leave to appeal declined

Result: Application dismissed (leave to appeal) – Cost in favour of respondent (\$1,500 plus

disbursements)

NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Air Nelson Ltd
21 Jun 2007, H Doyle, CA 59A/07, (2 pages)

PRACTICE AND PROCEDURE - Application for removal to Employment Court – Interpretation and application of s97 Employment Relations Authority - Important question of law likely to arise and no good reason not to remove matter – Applicant attached minute from Chief Judge indicating that if substantive claim came before Employment Court he would consider establishing Full Court to hear case - Matter removed to Court
Result: Application granted ; Costs reserved

Snorkel Elevating Work Platforms Ltd v Thompson
3 Nov 2006, PR Stapp, WA 73A/06, (4 pages)

PRACTICE AND PROCEDURE - Issue raised regarding interest payable by respondent - Claim for interest disposed of at time of substantive determination - Matter closed - COSTS - Both parties claimed costs for respective applications that had been consolidated and heard together - Length of investigation meeting not specified - Each successful with own claim - Applicant sought contribution of \$15,000 towards total costs of \$35,000 for its recovery application - Submitted costs should lie where they fall for respondent's personal grievance - Also sought disbursements of \$22,469, including expenses relating to video conference, witnesses, and counsel's travel - Respondent's costs were \$25,148 for recovery action, and \$18,078 for his personal grievance - Costs ordered on both applications as Authority satisfied both genuine and not just matter of leverage against each other - Expense of video conferencing to be shared as benefited both parties - No other disbursements ordered because both parties required to prepare for investigation, inevitably involving photocopying etc - Both parties chose their counsel and travel expenses inevitable part of proceedings given applicant's obligations involved attendance in New Zealand - Respondent should not have to pay for applicant's choice - Attendance of witnesses a standard requirement - Given employer was applicant it should meet own witness costs - Respondent to pay costs of \$6,000, being 40 percent of reasonable costs of \$15,000 - Assessment based on preparation, representation and time involved in Authority investigation, and because of proportionality of applicant's claim - Applicant to pay \$3,000 towards respondent's costs for straight forward personal grievance

Result: Orders accordingly ; Costs in favour of applicant (\$6,000) ; Disbursements in favour of applicant (\$657.13)(Video conferencing) ; Costs in favour of respondent (\$3,000)

Practice & Procedure - Consent Orders - Employment Relations Act 2000

A v B

28 Mar 2007, J Crichton, CA 30/07, (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, evidence in Authority, names of parties and witnesses, details of which may identify parties and location of employment and relationship problem

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

Administrators of the Estate of the Late Wayne Torrie v Fonterra Co-Operative Group Ltd

15 May 2007, D Asher, WA 75/07, (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

Barrow v Wellington Towbar & Bullbars Services Ltd

16 May 2007, GJ Wood, WA 76/07, (1 pages)

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

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

Bradford v Waikato District Health Board

11 Jun 2007, J Scott, AA 172/07, (1 pages)

CONSENT ORDER - Parties reached interim agreement - Terms of settlement to be orders of Authority - Parties agreed applicant would take special leave on full pay without prejudice to standard leave entitlements and respondent would suspend review of applicant's practice until outcome of applicant's claim in Authority

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

Economou v Pivotal Services Ltd

6 Jun 2007, D Asher, WA 89/07, (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 and medical evidence heard by Authority

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

Hodgson v Parentline Charitable Trust

20 Apr 2007, J Scott, AA 114/07, (1 pages)

INTERIM CONSENT ORDER - Publication of any report on the proceedings of evidence given on afternoon of 20 April 2007 under the heading "The Outcomes Project" prohibited on interim basis - Order to be reviewed after consultation with counsel or a consent memorandum received from them in following week

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

Metcalf (Labour Inspector) v Carl Marsters t/a C & M Marsters

13 Jun 2007, K Raureti, AA 174/07, (1 pages)

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

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

Mike Henry Insurance Brokers Ltd v Wiles & Anor

15 Jun 2007, L Robinson, AA 178/07, (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

Neilson v The Commissioner of Police

22 May 2007, D Asher, WA 80/07, (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

Somers v Whangarei Bait and Tackle Ltd

5 Apr 2007, Y Oldfield, AA 105/07, (1 pages)

CONSENT ORDER - When application lodged company ("P") cited as respondent - Respondent substituted for P as respondent party 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

Thomas v The Accident Compensation Corporation

7 Jun 2007, D Asher, WA 91/07, (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

Watson v Workbridge Inc

29 Mar 2007, D Asher, WA 47/07, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement at investigation meeting - Terms of settlement full and final - 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

Wyatt v Bay West Plumbing Ltd

18 May 2007, K Raureti, AA 151/07, (1 pages)

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

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

Department of Labour
TE TARI MAHI

