

Department of Labour
TE TARI MAHI



EMPLOYMENT CASES SUMMARY

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**INFORMATION AND PROMOTION GROUP –
INFORMATION 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 – Information Management Team database. Employment Court headnotes are provided by the Legal Research Counsel of the Ministry of Justice. Employment Authority headnotes are provided by the Legal Researchers of the Department of Labour.

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

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Significant Judgments/Decisions

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

Brief Summaries

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

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Significant Judgments/Decisions added to the Employment Law Database 1 October 2006 - 31 October 2006

Under the Employment Relations Act 2000

Axiom Rolle PRP Valuations Services Ltd v Kapadia and Anor

AC 43/06

Heard: 30 Jun 2005 - 25 Jul 2005 (3 days) Auckland

Judgment Date: 4 Aug 2006

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

Appearances: C Patterson ; no appearance, J Katz QC, J Burley

PRACTICE AND PROCEDURE – Application by non-party intervener for order setting aside or varying Anton Piller / search and seizure order – Full Court – Whether Employment Relations Authority and Employment Court empowered to make Anton Piller orders – HELD – Authority and Court not empowered to make Anton Piller orders – Parties seeking Anton Piller orders were to apply to High Court – Previous order of Court set aside – Real estate agent / branch manager

This was a successful application by a non party intervener to set aside an Anton Piller order made by the Employment Court reported at [2004] 2 ERNZ 307.

The defendant was employed by a company which held a real estate franchise in New Zealand. The plaintiff took steps to purchase the assets of the company but not the franchise. After the employment relationship between the plaintiff and defendant commenced the plaintiff found evidence to suggest that the defendant attempted to acquire the franchise, and intended that the company's real estate business be held by a third party (the non party intervener in the present proceedings). The plaintiff considered that by doing so the defendant was breaching his duties of confidence and fidelity. To preserve potentially incriminating evidence against the defendant the plaintiff applied ex parte to the Employment Relations Authority for an Anton Piller order.

The Authority refused the application on its merits.

The plaintiff challenged the Authority's determination. A single Employment Court judge granted the ex parte order which allowed entry to the offices of the third party to search, examine and remove specified items. The third party declined to admit the executioners of the order and applied to the Employment Court as intervener to vary or set aside the order. The defendant took no part in the present proceedings.

The non party intervener submitted that the Court had no power to grant an Anton Piller order. Alternatively, if the Court did have the power it did not extend to making orders against third parties.

Held:(1) In following the distinctions in the Employment Relations Act 2000 (“ERA”) between “jurisdiction” and “powers”, the Court concluded that, in the present context, “jurisdiction” was the entitlement in law of a body to hear and decide a cause or causes of action. A “power” was an entitlement in law to use a procedural tool to investigate and determine an employment relationship problem (in the Authority) or to hear and decide a cause of action (in the Court) within jurisdiction. (para 24)

(2) What was in issue in the present case was essentially not a “jurisdiction” as statutorily defined but the exercise of a power or process able to be employed by the parties or, in the case of the investigative Authority, the Authority itself. An Anton Piller order was the exercise of a power, a tool for the performance of the work by the Authority or the Court rather than the legal entitlement to take on the work. (para 25)

(3) It was common ground that the ERA did not provide expressly for either the Authority or the Court to make Anton Piller orders (or indeed Mareva orders). It was incontrovertible that Anton Piller orders were the exercise of an inherent power of High Court Judges. (para 28)

(4) The Authority was a “lay authority” in the sense that it was not presided over by judicial officers. It was important to the Court’s decision that the Authority was not a court. (para 44)

(5) The Court agreed with the High Court’s conclusion in *BDM Grange Ltd v Parker* (cited below) that the Authority was not empowered to make Anton Piller orders for the reasons set out in its judgment. Section 221 ERA relating to joinder, waiver, and extension of time, did not confer on the Authority powers to order search and seizure. Nor did s161(1)(r) ERA. That addressed the sorts of problems or matters the Authority was entitled to determine, not its powers exercisable within that jurisdiction or class of cases. (paras 52, 53)

(6) The power of the Authority in investigating any matter to “call for evidence and information from the parties or from any other person” (s160) did not extend to making Anton Piller orders. Nor did the catch-all power under s160(1)(f) to “follow whatever procedure the Authority considers appropriate”. (para 54)

(7) Section 162 ERA did not give the Authority the power to make Anton Piller orders. The High Court’s power to issue Anton Piller orders was not to make an order that it may make “under any enactment or rule of law relating to contracts”. Anton Piller orders were not an interlocutory tool derived from a rule of law relating to contracts. Although such orders could be made by the High Court in contract cases, they originated from and included other causes of action including, for example, copyright. The scheme of the ERA was not such as to give the Authority jurisdiction in causes of action other than (employment) contract and, in a limited sense in relation to the Court, in tort. (para 55)

(8) It was a powerful argument against the availability of the power to issue Anton Piller orders in the Authority that Parliament had enacted such strict privative provisions on review of the Authority’s processes that it was extremely difficult, if not impossible, to challenge even significant and draconian orders or directions that the Authority made in the course of its investigation of employment relationship problems. Provisions such as ss177(4), 178(6), 179(5) and 184(1A) ERA (especially) all purported to give the Authority forensic carte blanche to conduct and complete its statutory role of solving employment relationship problems even to the extent that orders made or directions given by it along the way that might be significant and

irreversible in their effect, were unchallengeable by appeal or review. Under such a statutorily exclusive regime it would be wrong to impute to the Authority what were draconian implied powers. (para 57)

(9) There being no express statutory power, the Authority was not able to make Anton Piller orders. (para 58)

(10) The Court had the same powers as the Authority when considering a challenge. It followed that the Court was not entitled in law to make an Anton Piller order on a challenge derivatively. (para 59)

(11) Regulation 6 of the Employment Court Regulations 2000 (“ECR”) permitted recourse in appropriate cases to r238 of the High Court Rules 1985, the High Court’s broad power to issue injunctions. The Authority had no power to prevent a breach of, or otherwise require compliance with, an employment agreement or employment law except by a statutory compliance order. The Authority was, however, required to investigate that employment relationship problem and determine a breach before it could issue a compliance order. Especially in circumstances of great urgency, that investigative process might not be swift enough to restrain what would otherwise be irreparable harm. It was a principle of long standing that there was no such remedy as an interim compliance order. Where urgent injunctive relief was appropriate in the employment field, it was the Court that was empowered, not the Authority. (para 70)

(12) The “implied powers” of a court of record did not, alone, extend to making Anton Piller orders in the course of proceedings with the Court’s jurisdiction. Although a court of record was not precluded from exercising implied powers there was to be something more to justify the existence of that power. (para 86)

(13) There was not an independent/original power of the Court to make search and seizure orders on an originating application. There was no express statutory power that would enable the Court to exercise the High Court’s inherent power to make Anton Piller orders. Although Mareva injunctions were so covered by reg 6(2)(a)(ii) ECR, Anton Piller orders were not because of their inherent nature. Nor could reg 6(2)(b) ECR be used in the absence of a statutory power underpinning Anton Piller orders. (paras 90, 91)

(14) Rule 9 of the High Court Rules did not provide a sufficient foundation for the existence of the power to make Anton Piller orders. All the commentaries agreed that that power came from the High Court’s inherent powers and not from r9 or similar rules in other jurisdictions. (para 93)

(15) Although no doubt inconvenient, an originating application made to the High Court in respect of a case that would otherwise be for the Authority or the Court at first instance, was neither unprecedented nor particularly problematic. The desire for procedural expediency could not trump the absence of a power in law on such a fundamental question affecting the rights and liberties of persons. Parties seeking Anton Piller orders in proceedings or intended proceedings that were within the exclusive jurisdiction of the Authority or the Court would have to apply to the High Court for such relief. (paras 97, 98)

(16) The Anton Piller order made in the Court was set aside as having been made in the absence of a power in law to do so. (para 101)

Comment: (1) The new s173(2C) ERA did not allow the Authority to make Anton Piller orders. (para 56)

(2) If the recommendations of the Rules Committee were adopted, Anton Piller orders may in future be governed by the High Court Rules, in which case reg 6 ECR would extend such powers to the Court in appropriate cases and as was now the case for Mareva injunctions. However, that would not confer the power on the Authority. (para 98)

(3) The High Court Rules 1985 contained other procedures that, although not identical to Anton Piller orders, might in appropriate cases be effective substitutes for them and available in the Court, although not in the Authority. These included the power to order the inspection, sampling and observation of any property under r322. The second power, whether or not used in combination with r322, was to make an order under r331 for the detention, custody or preservation of any property with similar powers to authorise entry onto land or doing other things for the purpose of giving effect to such an order. Applications for such orders could be heard ex parte in appropriate cases. (para 99)

(4) In view of the conclusion reached, it was unnecessary to address the many and comprehensive fall-back submissions made on behalf of non party intervener on the merits of the case and the legal argument about the power to grant relief against non-parties. (para 101)

(5) Clause 19 of Schedule 3 ERA provided that costs may be awarded to “any party”. The non party intervener was probably not a party to the proceeding, at least at present. Any questions of costs were henceforth to be dealt with by a single Judge. (para 102)

Result: Application granted ; Anton pillar order set aside ; Costs reserved

Statutes considered:

Contracts (Privity) Act 1982
Contractual Mistakes Act 1977
Contractual Remedies Act 1979
District Courts Act 1947 s42(3)
District Courts Act 1947 s56A
District Courts Act 1947 s56B
Employment Court Regulations 2000 r6
Employment Court Regulations 2000 r6(2)(a)(ii)
Employment Court Regulations 2000 r6(2)(b)
ECA s104
ECA s104(1)
ECA s104(1)(h)
ERA s3
ERA s 99
ERA s100
ERA s101
ERA s101(a)
ERA s127
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ERA s162
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ERA s173(2B) (b)
ERA s173(2C)
ERA s174
ERA s174(4)
ERA s177
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ERA s178(2)
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ERA s237(g)
ERA Pt9
ERA Pt10
ERA Second Schedule c117
ERA Third Schedule c113
ERA Third Schedule c119
Employment Relations Authority Regulations 2000
Fair Trading Act 1986
Frustrated Contracts Act 1944
High Court Rules 1985 R9
High Court Rules 1985 R238
High Court Rules 1985 R322
High Court Rules 1985 R331
Illegal Contracts Act 1970

Interpretation Act 1999 s5
Judicature Act 1908 s26J(4)
Judicature Act 1908 s100
LRA
Legislature Act 1908 s257
Minors' Contracts Act 1969
New Zealand Bill of Rights Act 1990 s3
New Zealand Bill of Rights Act 1990 s5
New Zealand Bill of Rights Act 1990 s6
New Zealand Bill of Rights Act 1990 s21
New Zealand Bill of Rights Act 1990 s29

Words and phrases: Court of record ; Power ; Jurisdiction

Cases referred to in judgment:

A Ltd v B [1998] 3 ERNZ 1191
Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55 ; [1976] 1 All ER 779 ;
[1976] FSR 129 ; [1976] 2 WLR 162 ; [1976] RPC 719
Auckland District Health Board v X (No 2) [2005] 1 ERNZ 551
Axiom Rolle PRP Valuations Services Ltd v Kapadia [2004] 2 ERNZ 307
Bamber v Air New Zealand unreported, Goddard CJ, 13 July 1995, AEC 32G/95
Bank Mellat v Nikpour [1985] FSR 87 (CA)
Board of Trustees of Timaru Girls' High School v Hobday (1993) 4 NZELC 98,211 ;
[1993] 2 ERNZ 146
Bowport Ltd v Turnbull [2004] 2 ERNZ 201
BDM Grange Ltd v Parker (2005) 7 NZELC 97,928 ; [2006] 1 NZLR 353 ; [2005] 1
ERNZ 343
Busby v Thorn EMI Video Programmes Ltd [1984] 1 NZLR 461 ; 2 IPR 304
Cardile v LED Builders Pty Ltd (1999) 198 CLR 380 ;162 ALR 294
Claydon v Attorney-General [2002] 1 NZLR 130 (HC)
Claydon v Attorney-General [2002] 1 ERNZ 281 ; [2004] NZAR 16 (CA)
Grenzservice Speditions GmbH v Jans (1995) 129 DLR (4th) 733
Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago [2004] 3
WLR 611 ; [2005] 1 All ER 499 ; [2004] EMLR 28 ; [2005] 1 AC 190
Koia v Attorney-General in respect of the Chief Executive of the Ministry Of Justice
[2004] 1 ERNZ 116
Lloyd v Museum of New Zealand Te Papa Tongarewa [2002] 1 ERNZ 744
NZ Railways Corporation v NZ Seamen's IUOW and Evans (No 2) [1989] 2 NZILR
613
Owen v McAlpine Industries Ltd [1999]1 ERNZ 870
R v Clement (1821) 4 B & Ald 218 ; 106 ER 918
Vaughan v Canterbury Spinners Ltd unreported, Goddard CJ, 18 March 2004, CC
5/04
White v Fellow Travel Inc [2004] 2 ERNZ 32
Woolf v Kelston Girls' High School Board of Trustees unreported, Colgan J, 19 April
2000, AC 28/00
X v Y Ltd v NZ Stock Exchange (1991) 4 NZELC 98,134 ; [1992] 1 ERNZ 863

Other workers/site names etc: Equity Realty (1995) Ltd

Pages: 7
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Cliff and Anor v Air New Zealand Ltd

AC 47/06

Heard: 27 Mar 2006 - 5 Apr 2006 (8 days) Auckland

Judgment Date: 23 Aug 2006

Court/Authority/Tribunal: Shaw J

Appearances: J Roberts, G Luen ; K Thompson

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS

AUTHORITY – Unjustified dismissal – Alleged excessive internet use – Alleged access of pornographic or offensive websites – Whether plaintiffs had knowledge of defendant’s internet policies – Whether investigation meetings were conducted fairly and in accordance with defendant’s policies – Reliability of data relied upon by defendant – HELD – Plaintiffs knew internet policy existed but not specifics – Defendant had not communicated its internet policy in accordance with its communications policy – Investigation breached defendant’s policy of providing all relevant information – Given seriousness of allegations, was not a sound and proper investigation – Serious questions about methodology of investigating computer data by defendant – Defendant’s conclusions about serious misconduct not justified – Challenge granted – Materials and logistics engineer; forward planner

This was a successful de novo challenge to a determination of the Employment Relations Authority which had held that the plaintiffs were justifiably dismissed.

In 2004, the defendant conducted an audit into internet usage by all of its employees in a particular division, which revealed a high usage of and/or significant access to pornographic or offensive sites by some users. The thirteen highest users were further investigated resulting in the dismissal of the plaintiffs for serious misconduct in relation to: (i) the time spent on the internet during work time for non-work related purposes, and (ii) the nature and contents of the sites visited. The Employment Relations Authority held that the plaintiffs’ dismissals were justified.

The audit data consisted of detailed Individual Activity Reports (“IARs”). The IARs were summarised in a more understandable format called Internet Usage Reports (“IURs”). The computer system was programmed to block access to certain web pages, and blocked activities were recorded in blocked user reports. During the defendant’s investigation the plaintiffs were shown their IURs but not their IARs or blocked activity reports.

During the investigation the plaintiffs raised doubt about the accuracy of the data relied on by the defendant. Upon re-examination, the internet access data for the number of hits on objectionable sites as well as the time spent on the internet were significantly reduced. However, the defendant took the view that the revised data made no difference to the outcome because there was to be zero tolerance in relation to internet abuse. As a result the plaintiffs did not learn about the revised data until the start of the final meeting at which they were dismissed.

The defendant had investigated some of the sites listed on the plaintiffs’ IURs by performing Google searches of the URLs and concluded that the sites had been

correctly categorised as pornographic or offensive, and had been systematically accessed. However, at the hearing the plaintiffs were able to show that access to inoffensive sites could be obtained by using similar search criteria but based on the URLs in the IARs.

The defendant's internet policy was contained in a number of policy documents. Some policies overlapped, and some were inconsistent. The first plaintiff was aware there was a policy on internet usage but he had not seen it. The second plaintiff had seen some of the policies but did not know of the specifics or where to find them.

The plaintiffs admitted personal use of the internet but alleged that that had not impacted on their work, and invited the defendant to check their computer logs and investigate their work habits with their co-workers. They explained the reasons for accessing some of the sites but denied accessing pornographic sites. The plaintiffs alleged that the defendant had breached its policies by failing to ensure that the internet policies were known to them. They further alleged that the defendant's investigation was not conducted fairly and in accordance with its own policies. The first plaintiff sought reinstatement but the second plaintiff did not.

Held: (1) Where an employee did not comply with a code of conduct because of ignorance rather than by wilful defiance, there was no presumption that that could not constitute serious misconduct: Chief Executive of the Department of Inland Revenue v Buchanan and Anor (cited below). (para 135)

(2) There was no evidence that the defendant communicated its internet policies in the manner set out in its communication policy, other than the posting of it on the intranet and in a single newsletter. There was no evidence of reference to the internet principles in the employment agreements, nor of computer displays or e-mails on those topics. (para 126)

(3) As misuse of the internet could lead to dismissal, it was the defendant's responsibility to ensure by specified means that its policy was known to those who had access to the internet. It could reasonably have been expected that at the time any new user was given access to the internet they be provided with a specific reference to the policy either by a direction to the appropriate place on the intranet or in a written document. That was not done for either plaintiff. (para 136)

(4) It was unhelpful for the defendant's internet policies to be in several different locations and unwise for the policies not to be clearly described to any employee obtaining access to the internet for the first time. (para 137)

(5) Both plaintiffs knew in general that it was wrong to use the internet to access pornographic material. However neither of them understood that they could be liable for unsuccessful attempts to access a site, for example where a site was blocked. Similarly both plaintiffs were aware that while they could use the internet for personal use there was a limit based on reasonable use. That was a vague term for any employee to interpret in the absence of defined guidelines. The plaintiffs were entitled to clear and unambiguous statements of the internet policy particularly where a breach could, as in the present case, lead to the most serious consequences of dismissal. (paras 140-142)

(6) The results of the defendant's data investigations were seriously questionable. The IURs upon which the defendant relied to form its suspicions that the plaintiffs had deliberately and systematically accessed objectionable sites were demonstrably wrong. The

revised internet data showed a significantly reduced number of hits on objectionable sites as well as time spent on the internet and therefore the factual basis upon which the investigation was originally commenced had changed. The plaintiffs were entitled to have a reasonable opportunity to reassess the revised data. That was certainly not possible in the time they had prior to the dismissal meetings. The plaintiffs' investigations into the data after the dismissals raised serious questions about the methodology used by the defendant. (paras 149-150, 163-164)

(7) By entering only the domain names from the IURs, the defendant had a fairly good chance of looking at different pages than those accessed by the plaintiffs. As a result of the way the IUR data was presented, it was most likely that the internet investigations undertaken by the defendant did not accurately replicate the visits made by the plaintiffs. Also the content of web pages could have changed over time even though the URL did not, so that what was being viewed by the defendant months later could have been different from the original searches by the plaintiffs. The plaintiffs were not told about the defendant's searches or shown evidence of what had been found as a result of those searches and therefore had no opportunity to refute or challenge the validity of the searches undertaken. The investigations of what had been accessed should have been done by people with more expertise and understanding of the subtleties of internet data searches. The defendant's investigators did not have that expertise. (paras 156-157, 170-173)

(8) The full IARs should have been offered at the first opportunity to both plaintiffs. It was relevant and, as it turned out, critical to a proper evaluation of their internet use. It was only when they were able to compare the IURs with the IARs that they saw that what was being counted by the defendant was not just user activity but also pop-ups, counter-sites, flash sites, and streaming data none of which required a deliberate action by the user to have a hit recorded on their data. While at no time did the defendant deliberately withhold information from the plaintiffs, the onus was not on the plaintiffs to specify what information was needed to assist them. A proper inquiry should have included a reference to the IAR for each plaintiff. (paras 158-160, 168-169)

(9) The failure to show the plaintiffs the blocked user report was extremely serious. The reliability of the blocked user data was a source of dispute in the Court hearing and if it had been provided during the investigation that dispute could have been aired and taken into account. The blocked data material was relevant and should have been provided at an early opportunity. The onus was on the defendant to disclose. (paras 161, 165-167)

(10) The record of what was said at the meetings fell well below the appropriate standard required by the defendant's policies to take careful recordings of proceedings of disciplinary interviews. (para 174)

(11) It was beholden on the defendant to make the inquiries that both plaintiffs asked for about their work habits, their work computer logs, and whether their work was impacted by their internet use. The question of whether internet use impacted on performance was an important one. It was an essential part of the defendant's policy on personal internet usage. (para 176)

(12) The investigation breached the defendant's policy of providing all relevant information and, given the seriousness of the allegations, did not meet the high expectations of a sound and proper investigation. The investigation was not fair. (para 177)

(13) The test of justification applicable at the time of the dismissals was that in W & H

Newspapers v Oram (cited below): could the defendant be justified in believing that serious misconduct had occurred as a result of the investigation? At the most, both plaintiffs could properly be suspected of attempting to access objectionable sites. The defendant's policies were not at all clear or consistent on the point of whether attempting to access prohibited sites and being blocked was in the same category of seriousness as actually gaining access. In view of that, the defendant could not rely on a finding of attempting to access to establish serious misconduct. Therefore the defendant's conclusions about serious misconduct were not justified. (paras 178-186)

(14) The flawed nature of the investigations did not justify the defendant in concluding that the plaintiffs had actually visited objectionable sites on the internet. Even if they were justified in reaching that conclusion, there was very real doubt that those sites were deliberately visited for the purpose of viewing pornographic material. Given the unreliability of the data used to support its conclusions, the defendant was not justified in concluding that there had been systematic access. It was highly possible that much of the data deemed to be evidence of systematic access was in fact based on pop-ups and other non-manual hits. Given the seriousness of the allegations, the plaintiffs were entitled to a much more rigorous and expert examination of the merits of the allegations and of their explanations. (paras 187-189)

(15) The justification of excessive use relied on by the defendant to dismiss the plaintiffs faced some serious hurdles. The defendant's policies provided that personal use was acceptable provided it was not excessive and provided it did not impact on employee performance. In neither plaintiff's case was the question of performance ever raised. There was no evidence at all that their work performance was affected by their internet use. (paras 190-191)

(16) Another concern about the question of time was that the original decision to investigate the plaintiffs was on the basis that they were amongst the 13 highest users on the original numbers provided. There was no evidence at all whether they would still have been in the 13 top user group had the revised data been relied upon. (para 192)

(17) There was a concerning degree of arbitrariness in the way in which the defendant chose the employees to be further investigated. For those reasons the defendant was not justified in reaching the conclusion that the plaintiffs were guilty of serious misconduct. The defendant was entitled to investigate the internet usage of its employees but it was bound to do so against criteria that were clear and with a degree of expertise that ensured that the complex data was properly analysed. (paras 193- 194)

(18) The essential issue in the reinstatement which was sought by the first plaintiff was whether it would be practicable in all the circumstances. There was no evidence to suggest that it would not be practicable. Given the defendant's size and resources, that should not be an impracticable exercise. The first plaintiff was to be reinstated to either his former position or a comparable position for which he was suited. (paras 204-205)

(19) In relation to contributory behaviour, both plaintiffs' contribution was the over-use of the internet that led to them being investigated in detail and, to that extent they had contributed 25 percent towards their loss of earnings since their dismissals. However, their actions did not contribute in the same way towards the stress and humiliation which they suffered as a result of the investigation. Therefore, their actions did not contribute towards the remedies for stress and humiliation. (paras 208-210, 217-218, 220-222)

(20) Damages for stress and humiliation to the first plaintiff were assessed at \$15,000 but in recognition that he was to be reinstated that was reduced to \$10,000.

The second plaintiff was awarded \$12,000. (paras 211-212, 219)

Result: Challenge granted ; Reinstatement (Cliff) ; Loss of earnings (quantum to be calculated by parties less 25 percent for contribution)(Cliff)(Groom) ; Compensation for humiliation etc (\$15,000 reduced to \$10,000)(Cliff) (\$12,000)(Groom) ; Costs reserved

Statutes considered:

ERA s123(1)(c)(i)

ERA s124(a)

Cases referred to in judgment:

Chief Executive of the Department of Inland Revenue v Buchanan and Anor [2005] 1 ERNZ 767; (2006) 7 NZELC 98,153

Coutts Cars Ltd v Baguley [2001] 1 ERNZ 660 ; [2002] 2 NZLR 533

Lawless v Comvita New Zealand Ltd [2005] 1 ERNZ 861 ; (2005) 3 NZELR 86

Northern Distribution Union v BP Oil New Zealand Ltd [1992] 3 ERNZ 483 ; (1992) 1 NZELR 259

NZ (with exceptions) Food Processing etc IUOW v Unilever New Zealand Ltd [1990] 1 NZILR 35

W & H Newspapers v Oram [2000] 2 ERNZ 448 ; (2001) 1 NZELR 267 ; [2001] 3 NZLR 29

Other workers/site names etc: Groom

Pages: 44

[972945]

The New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Energex Ltd

AC 48/06

Heard: 1 May 2006, Auckland

Judgment Date: 28 Aug 2006

Court/Authority/Tribunal: Shaw J

Appearances: G Pollak ; P Tremewan

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS

AUTHORITY – Defendant required employees to sign bonding agreement prior to going on training course – Whether bonding agreements consistent with collective employment agreement (“cea”) – **HELD** – Imposition of bond as condition of employees’ training was inconsistent with cea – Matter should have been raised as variation to the cea including consultation, negotiation, and ratification – Bonding agreements obtained in breach of good faith obligations – Bonding requirement unenforceable – Challenge granted – Line mechanics

This was a successful de novo challenge to a determination of the Employment Relations Authority. The Authority held that agreements which bonded employees to the defendant in exchange for training were reasonable and did not breach the terms of the collective employment agreement.

The defendant employed members of the plaintiff union pursuant a collective employment agreement (“cea”). The cea contained a clause which committed the defendant to provide training, and the employees to undertake any training that was reasonably within their ability (“the training clause”). It also provided that the cea contained the entire agreement between the parties but that variations might be agreed to in writing. The cea also included a clause which dealt with outstanding matters and how new matters were to be dealt with (“the new matters clause”).

The defendant introduced a requirement that employees who took up a certain training programme would be individually bonded to the defendant for 2 years requiring them to repay the outstanding proportion of their training costs if they resigned during that time. The terms of the bonding agreement included that during the training period no annual leave was allowed to be taken, and no overtime or allowances would be paid. The bonds were presented to employees, often at short notice, as part of a letter which offered training.

The Employment Relations Authority held that it was entirely reasonable for the defendant to make some attempt to protect its investment in employee training; that employees who had entered bonding agreements had done so without undue influence; and that the bonding was not in breach of or inconsistent with the cea.

The plaintiff alleged that the requirement for employees to enter a bond was inconsistent with the cea because the defendant was contractually obligated to provide training to its employees. It was also inconsistent with the cea because the bonding agreement had not been bargained for collectively. It further alleged that the matter was a new matter which should be dealt with pursuant to the new matters clause in the cea. It was also concerned about the way the defendant approached individual members to sign without the agreement of the plaintiff union.

The defendant alleged that a bond was a reasonable requirement for an employer to protect its investment and was not repugnant as an employment practice. The bonding arrangements were entered into by willing employees, and were consistent with the cea obligations of both parties to offer and take the training opportunities. It further alleged that the new matters clause did not apply in the present case as it only covered pay and allowances of the concluded cea.

Held: (1) The reference to holidays in the bonding agreement was not inconsistent with the cea. It did not exclude the taking of annual holidays but merely provided a reasonable basis on which the employer could refuse consent to allow an employee to take leave during training. (para 34)

(2) The non-payment of overtime was not inconsistent with the cea. An employee on the training programme was not working overtime for the defendant to meet its service obligations and importantly the cea expressly absolved the defendant from paying overtime for employees attending courses. (para 35)

(3) Payment of staying away or meal allowances in the cea related to employees undertaking unplanned work without proper notice. Because employees were given meals and accommodation on the training programmes, there was no necessity for those payments to be made. There was no term in the bonding agreement which reduced employees’ entitlements which could not stand together with the cea. (paras 36-38)

(4) The training clause was a comprehensive clause that codified the provision of education and training by the defendant. Like all clauses of the cea, it was governed by the general clause that the agreement was the entire agreement between the parties. (para 42)

(5) The bonding arrangement was an additional condition to the terms on which training was undertaken. The requirement to be bonded was a unilateral attempt to add to the conditions which were agreed between the parties about the way the training was undertaken. That was not a slight variation, but introduced a new term which required the agreement of the parties to the cea. It was a significant change because it forced the employees to either refuse to do the training they had agreed to undergo under the term of the cea or to sign a bond without the requirement to do so having been ratified. It could not be said that the bond condition was a term more favourable to the employee than those in the cea and to that extent it was inconsistent with the cea. (paras 43-44)

(6) The new matters clause was not limited to alterations to set wage rates. It was not a term of art or statutorily defined. The word “new” in the context of the cea had the ordinary meaning of something that has not existed before. The cea expressly provided for new matters to be dealt with in accordance with the cea and the Employment Relations Act 2000 (“ERA”). The only mechanism available was by agreed variation undertaken as collective bargaining. (para 47)

(7) The bonding agreements were new matters as they were not part of the entire agreement between the union and the employer as contained in the cea. As such, the bonds could only be valid if they had been agreed between the parties in accordance with the cea and ss54(3)(iv) and 51 ERA. In addition, it was clear that none of the procedures in the variation clause of the cea were adopted by the defendant. The question of bonding the employees was not even raised with the plaintiff before the bonds were offered to the employees. (paras 48-50)

(8) While the employees were not coerced against their will to the extent that the agreements were induced by undue influence, they may have signed reluctantly. Their obligation under the cea was to agree to undertake training as directed by the defendant. Given that contractual obligation to agree to undertake training and the circumstances under which they were given the bonds to sign without proper opportunity for independent advice, they had little option but to agree to sign. All expressed misgivings about having to do so but they had no choice. In the circumstances, the manner in which the defendant raised the bonding issues and required the signatures was not in accordance with the defendant’s good faith obligations under the ERA. By approaching the unionised employees without reference to the plaintiff union, the defendant failed to communicate to the union its intention to approach individual employees to get their agreement and effectively “picked them off” as individuals. (para 53)

(9) Although some of the terms of the bonding agreement were not in themselves inconsistent with the cea, the imposition of a bond as a condition of an employee undertaking training was inconsistent with it. It was also a new matter between the parties to the cea and, as such, should have been raised by the defendant as a variation to the cea. That required that the defendant had to consult with the plaintiff over the proposed bond, negotiate with it, and that any proposal be ratified by the members of the plaintiff before the plaintiff could agree to the variation. Also, the agreement of the employees to their bonds was obtained in breach of the employer’s obligations to act in good faith. For those reasons the requirement for employees undertaking training to be bonded was not enforceable.

Result: Challenge granted ; Costs reserved

Statutes considered:
ERA Part 5

ERA Part 6
ERA s4(1A)(b)
ERA s51
ERA s54(3)(iv)
ERA s61
ERA s174
Holidays Act 2003 s18(1)
Labour Relations Act 1987 s174

Words and phrases: New

Cases referred to in judgment:

NZ Meat Processors etc IUOW v Alliance Freezing Company (Southland) Ltd [1990]
2 NZLR 1071 ; (1990) ERNZ Sel Cas 834

Pages: 13
[972951]

OCS Ltd v Service and Food Workers Union Nga Ringa Tota Incorporated

WC 15/06

Heard: 9 May 2006, Wellington

Judgment Date: 31 Aug 2006

Court/Authority/Tribunal: Shaw J

Appearances: PA McBride & GG Ballara ; P Cranney & A Hughes

DISPUTE – Defendants refused to comply with plaintiff’s instruction to use new finger scanning system for timekeeping purposes – Whether plaintiff’s direction was lawful and reasonable instruction – INJUNCTION – Whether employees’ refusal to comply with instruction unlawful strike action – HELD – Industrial democracy clause in collective agreement read together with statutory obligations to act in good faith created obligation on plaintiff to consult defendants prior to changes in workplace practices – Plaintiff’s communication did not meet standards of consultation – Plaintiff’s instructions to employees unlawful – Refusal by employees was justified and did not constitute unlawful strike action – Application for declarations and injunctions refused – Hospital cleaners

This was an unsuccessful application for declarations and injunctions in relation to the defendants’ refusal to comply with the plaintiff’s instruction to use a new finger scanning system for timekeeping purposes.

The plaintiff employed members of the first defendant union (“the employees”) under a collective employment agreement (“cea”). The cea contained a clause in which the parties recognised that change was necessary; that they had mutual interests; and that the employers agreed to provisions for consultation and recognition of union delegates (“the industrial democracy clause”).

The plaintiff decided to introduce a computer based integrated timekeeping system involving fingerprint scanning for its employees at Wellington Hospital. The system, known as Panztel, used biometric data terminals to scan employees’ fingers to allow the accurate

recording of hours worked by those employees. The Panztel did not store actual fingerprints and the data it did store could not be “reverse engineered” into actual fingerprints. Each employee had to “enrol” by registering two fingerprints and signing a consent form.

When the first scanning terminal was installed the union raised a number of “questions, concerns and issues” with the plaintiff and asserted that the plaintiff was required to seek the union’s agreement. The plaintiff responded to the union’s questions, and asserted that the implementation of the system was well within its management prerogative, that it had consulted with the employees and the union, and that it intended to proceed with the implementation without delay. It advised the employees of the commencement of the enrolment process but a notice, allegedly posted by the union representative, called all employees not to attend. The defendants raised an employment relationship problem and requested mediation. After the first mediation failed the union held a secret ballot in which the employees unanimously decided to oppose the implementation of the new finger scanning system. A second mediation failed also.

The plaintiff alleged that its request was lawful and that the employees’ actions amounted to unlawful strike action. It relied on the requirement under ss130 to 132 Employment Relations Act 2000 (“ERA”) to keep proper wage and time records. It alleged that implied terms of the cea included that the employees were required to act in good faith, and to comply with its lawful and reasonable instructions. The plaintiff denied that it was obliged to consult over the Panztel issue but alleged that in any event it had consulted adequately.

The defendants alleged that the plaintiff’s instructions were not lawful and that the plaintiff should have sought resolution of the dispute before issuing the instructions. During the hearing the defendants, for the first time, traversed the cultural impact of the predominantly Samoan employees to the Panztel technology. The defendants alleged that it was against the employees’ customs to sign in with their thumb and that it was only when people did something wrong that they should have to provide a fingerprint. They alleged that among the requisites for the plaintiff to be a good employer was recognition of the cultural differences of ethnic or minority groups.

Held:(1) It was clear that there was a genuine dispute between the parties. The plaintiff did not properly follow the statutory procedure for resolving a dispute as per ss5 and129(1) ERA, and to that extent it was not acting in accordance with the law. By doing so it ran the risk that it could be requiring its employees to perform an act that was unlawful in the sense that it was in breach of the cea. There was no certainty of avoiding that risk without having the dispute determined. The dispute over the plaintiff’s requirement should have been resolved before the implementation request was made. (paras 40-43)

(2) The fact that the plaintiff was bound to keep proper records was incontrovertible. However, the cea was silent as to the means by which information for that record was to be gathered apart from the employer’s requirement to provide timesheets or other means for the purpose of the employees recording their overtime. The binding legal obligation in ss130 to 132 ERA was on the employer alone. There was a complete absence of direct reference in the cea to methods of regular timekeeping and nothing at all that contemplated electronic methods. (paras 50, 53)

(3) By relying on an implied term that employees would comply with all reasonable lawful instructions the plaintiff had fallen into a circular argument which did not advance its case. The rest of the terms pleaded were all reasonable expectations of an employer being corollaries of the good faith term but none of the

terms were sufficiently specific to answer the question whether the request for the employee to undergo finger scanning was lawful and reasonable. (paras 58-59)

(4) In the absence of neither an express contractual provision in the cea nor agreement between the parties to require employees to undergo finger scanning, it was not sufficient to invoke inchoate implied terms to make an instruction lawful. The implied terms relied on by the plaintiff were, like the s4 ERA obligations of good faith, about how the parties would conduct themselves. That left the lawfulness of such a request to be decided in terms of the parties' obligations under the ERA and the cea. (para 60)

(5) Apart from the industrial democracy clause which recognised the desirability of consultation there was no specific reference to consultation in the cea. That provision, together with the statutory obligations to act in good faith, including the necessity for both sides to be responsive and communicative, created an obligation on the plaintiff to precede any changes of workplace practices with consultation. (para64)

(6) What was required to meet the obligation of consultation depended on the context in which consultation was required. In the present case the evidence did not meet the standards of consultation. The plaintiff's advice that it was looking to implement the Panztel system, and informal discussions with individual staff including the second defendant, were not consultation. It was not preceded by information about the technology and that evidence was not sent to the union until after the machine had been installed. When the plaintiff indicated by email that the system would be introduced in the following few weeks there had been no consultation at all. (paras 65-70)

(7) It was plain that the plaintiff had made up its mind to install the system and its attempts to communicate with the union were for the purpose of persuading the union and its members to accept a decision which had already been made. The plaintiff adopted the view that unless they heard anything adverse then they would proceed. That was an unwise position to take. It certainly was not the action of an employer making an effort to accommodate the views of its employees. Because the plaintiff's instructions to its employees were made before it had met its cea and statutory obligations to consult with them and their union, the instruction was unlawful. (paras 70-72)

(8) The reason why proper, full, and timely consultation in the present case was essential was revealed by the defendants' evidence of the cultural impact of the Panztel technology on the predominantly Samoan employees. It was correct that during the period when the union and the employees were voicing their objections to the Panztel, the question of cultural values was not explicitly raised by the employees or the union. The appropriate time for them to have raised those issues would have been during the initial consultations. However because the consultation did not happen the employees had no opportunity to explain that to the plaintiff. (paras 73-74)

(9) It was not so much the use of the machine that was objected to but the perceived intent and motives of the plaintiff in introducing it along with suspicions and fears based on incomplete understanding of the technology. There was no evidence that the plaintiff took any steps to ascertain if there were any cultural difficulties before the machine was installed. Given the composition of the employees it was not an unreasonable requirement for an employer such as the plaintiff to be open to such matters. (paras 87, 90)

(10) Applying the principles from judgments from the Australia, the UK, and

Canada to the present case, the Court concluded that: (i) the cea was silent on the method of timekeeping and therefore the introduction of new technology for that purpose should have been by agreement with the union as a party to the agreement; (ii) the Panztel technology was at the lower end of intrusiveness when compared with eye or face scanning; (iii) although the plaintiff had the right to introduce the new method of timekeeping, it failed to give any reasonable opportunities, before making the decision, to hear the valid concerns of its employees. The onus was on the plaintiff as a good employer to introduce the technology in a planned, consultative, and educative manner; (iv) the plaintiff did not take appropriate steps to inform its employees of the new measures or to obtain their consent before introducing it. The obligation was on the plaintiff to obtain that consent. In addition, given the nature of its workplace, the plaintiff as a good employer should have been alert to the cultural sensitivities that the new technology would give rise to. (para 95)

(11) The plaintiff's decision to implement the Panztel would of itself have been an adequate basis for a lawful and reasonable instruction to its employees but only if it had complied with its obligations to consult in a timely and appropriate way with its staff. Its failure to do so meant that its instruction was unlawful because it was in breach of both its contractual and statutory obligations. Further, because the union had initiated an employment relationship problem, it was not appropriate for the plaintiff to persevere with the implementation of the Panztel until the dispute had been resolved. As a consequence, the refusal by the employees was justified and did not constitute unlawful strike action. (para 97)

Comment: (1) The plaintiff's decision to bring the matter before the Court by way of an application for discretionary relief of injunction was not a constructive way to resolve a genuine dispute. In those circumstances, discretionary relief would have been refused in any event. (para 97)

Result: Application refused ; Costs reserved

Statutes considered:

Crown Entities Act 2004 s118

ERA s4

ERA s4(1)

ERA s4(1)(a)

ERA s4(1A)

ERA s5

ERA s18

ERA s32

ERA s129(1)

ERA s130

ERA s131

ERA s132

ERA Schedule 1B cl5

New Zealand Health and Disability Act 2000 s6(1)

Privacy Act 1993 s6

Cases referred to in judgment:

Auckland City Council v NZ Public Service Association Inc [2003] 2 ERNZ 386;
[2004] 2 NZLR 10

Australian Liquor, Hospitality and Miscellaneous Workers Union, New South Wales
Branch v North Sydney Leagues Club [2002] NSWIRComm 299

Cascadia Terminal v Grain Workers' Union, Local 333 [2004] C.L.A.D. No. 43

Cooper v Dunedin City Council unreported, H Doyle, 9 July 2003, CA 77/03
L v M Limited [1994] 1 ERNZ 123
McCrory re Application for Judicial Review [2001] NIQB 19
New Zealand Police Association Inc v Commissioner of Police [1995] 1 ERNZ 658
PIPED Act Case Summary #185 Privacy Commission of Canada
PMP Print Limited v Barnes unreported, D King, 28 September 2004 AA 317/04
Sky Network Television Ltd v Duncan [1998] 3 ERNZ 917; (1999) 5 NZELC 95,869
Talbot v Air New Zealand Limited [1994] 2 ERNZ 216
Toll NZ Consolidated Ltd v Rail and Maritime Union Inc [2004] 1 ERNZ 392
Wellington City Council v Body Corporate 51702 [2002] 3 NZLR 486
Wellington etc Clerical etc Workers IUOW v College Group Ltd [1984] ACJ 315
Pages: 19
[972958]

Arrears - Employment Relations Act 2000

Bonnafoux v Zico Ltd

25 May 2006, H Doyle, CA 76/06, (7 pages)

ARREARS OF WAGES – Claim for payment of performance bonus – Employment agreement provided for payment of bonus after each completed period of six months employment if performance satisfactory – Applicant resigned – Sought payment of bonus for final six months of employment – Informed bonus not payable as performance unsatisfactory – Payment of bonus not truly discretionary but required objective performance assessment in terms of duties and responsibilities – Performance measures never specified – No formal performance review before resignation – Some issues discussed but no clear evidence applicant told during employment that performance unsatisfactory – Performance bonus due and owing – Restaurant manager

Result: Application granted ; Arrears of wages (\$2,100)(Performance bonus) ; No order for costs ; Disbursements in favour of applicant (\$70)(Filing fee)

Busby v Talent Base Ltd

2 Jun 2006, R Monaghan, AA 194/06, (2 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Applicant alleged monies owing for unpaid holiday pay, wages, and commissions - Application for penalty withdrawn at investigation meeting - No appearance for respondent - Authority proceeded in respondent's absence under cl12, second schedule of the Employment Relations Act 2000 - Applicant resigned giving four weeks notice - Placed on garden leave until end of employment - Fortnightly salary payment due but not paid - Nor did she receive any further payments - Also, applicant's regular salary payments were over or underpaid on occasion - Accepted wages, holiday pay, and commission due and owing - COSTS - Respondent to pay applicant \$70 for reimbursement of filing fee - Talent manager

Result: Application granted ; Arrears of wages and holiday pay (\$2,132.17) ; Unpaid commissions (\$10,485.54) ; Disbursements in favour of applicant (\$70)(Filing fee)

Darling v Platinum Properties Ltd

29 May 2006, P Cheyne, CA 78/06, (7 pages)

ARREARS OF WAGES - UNJUSTIFIED DISADVANTAGE - Applicant employed to establish business – No written employment agreement - Number of performance issues raised few months into employment – Manager appointed – Applicant resigned on three months notice – Attempts to negotiate lesser period unsuccessful - Cellphone, office keys and petrol card removed from applicant – Time off work due to stress-related illness – Raised grievance during absence – Brief return to work - Respondent's reply to grievance required applicant to bring forward resignation to take effect immediately or be summarily dismissed – Directed not to attend work – On respondent's evidence no dismissal and resignation not brought forward – Applicant willing to attend work but instructed not to – Therefore employment remained on foot until ended by reason of resignation – Arrears of wages due and owing until end of original notice period – Removal of phone, keys and card based on suspicions about applicant having secured employment with competitor - Applicant given no chance to comment on suspicions – Actions not remedied even after applicant informed them of actual future plans - Removal of items unjustified disadvantage – Respondent entitled to appoint manager - Disappointment over appointment and implications for applicant's future with respondent not unjustified disadvantage – Remedies – Difficult to distinguish effects caused by non-actionable disappointment and effects caused by established grievance – Disappointment was more significant cause of applicant's stress and compensation assessed accordingly – Not appropriate to award payment for time off due to stress as not satisfied applicant would have needed leave if proven grievance only

factor – Performance issues too remote from grievance to amount to contributory conduct – PENALTY – Claim for penalty for failure to provide employment agreement - If employment agreement defining notice period provided, problem unlikely to have arisen – Penalty appropriate – Other claims made late in investigation meeting dismissed – Length of service until disadvantage three months - Property manager

Harvey v Smith and Anor t/a D M Transport

9 Oct 2006, GJ Wood, WA 132/06, (6 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Constructive dismissal – No appearance by respondent - Service on any particular member of partnership sufficient to constitute service on all partners - At beginning of employment some difficulties in arranging method of pay and later over taxation – Applicant concerned paying far more tax than usual and took it up with respondent – Dispute went on for several weeks without resolution – Respondent accused applicant of breaching employment agreement’s confidentiality provisions by raising concerns directly with IRD – Applicant told he would be given alternative driving run and would no longer be given weekend work – Authority accepted changes made to punish applicant – Applicant concerned about changes as knew nothing about new run and would lose money without weekend work – Applicant believed unfairly punished and resigned – Agreed to work out one month notice period – Respondent made deduction from final pay for time applicant away giving evidence in High Court on another matter – Authority accepted respondent previously agreed to pay applicant for this time – Applicant greatly distressed by dismissal – Matters made worse by insulting text messages sent by respondent – Constructive dismissal – Workers entitled to take up issues concerning them, particularly over appropriate level of take home pay – Instead of assisting process, respondent punished applicant – Clear breach of duty of sufficient seriousness to make it reasonably foreseeable that applicant would resign – Remedies - Disadvantage inextricably linked with unjustified dismissal and global award appropriate – Compensation would have been extended beyond three months had employment been for much longer duration than three months and had he not been working significantly reduced hours at new employment – Applicant did not receive weekend work for last three weeks of employment – Entitled to claim that loss – ARREARS OF WAGES AND HOLIDAY PAY - No holiday pay paid – Applicant entitled to week’s pay deducted because of High Court attendance and holiday pay - COSTS - Two hour investigation meeting - Applicant sought costs of \$4,000 plus expenses - Appropriate to award \$1,500 plus disbursements as claimed - Also entitled to interest on all amounts owing of 6 percent - Length of service three months - Driver
Result: Application granted ; Reimbursement of lost wages (\$6,342.05)(Three months plus lost weekends) ; Compensation for humiliation etc (\$8,000) ; Arrears of wages (\$560) ; Arrears of holiday pay (\$336.80) ; Costs in favour of applicant (\$1,500) ; Disbursements (\$223) ; Interest (6%)

Keightly (Labour Inspector) & Anor v Pakiwi Traders Ltd t/a Tandoor Pakistani Cuisine

11 Oct 2006, V Campbell, AA 318/06, (12 pages)

ARREARS OF WAGES AND HOLIDAY PAY – Application by Labour Inspector on behalf of second applicant for outstanding holiday pay – Application by second applicant (“applicant”) for unpaid wages and sick pay – Respondent did not deny claims but counterclaimed for damages and submitted that due to other factors should not have to pay debt - No dispute that amount calculated by applicants correct and that liability existed - BREACH OF CONTRACT - Counterclaim - Respondent claimed applicant left with insufficient notice - Sought \$43,087 for loss suffered as result of breach of employment agreement – No evidence parties agreed on length of notice required - Applicant claimed unable to give any notice as working conditions so poor and felt treated as a slave – Applicant entitled to leave without notice - Actions directly attributable to respondent and

its managing director included breaches of Employment Relations Act 2000 ("ERA") and Holidays Act 2003, possession of applicant's passport, searches of applicant's personal belongings and correspondence, and notification to Immigration of intent not to continue applicant's employment together with notification of serious allegations against applicant after he sought assistance from DoL to enforce his minimum employment rights – Applicant aware director contacted Immigration and that he played a role in deportation of applicant's cousin – Director had alleged applicant and his cousin had links to terrorist organisation - Applicant fearful of what director would do to him once he contacted authorities – Respondent's actions entitled applicant to treat contract as being at an end and to leave employment as he did - Breach of contract claim dismissed – Estoppel - Respondent argued applicant estopped from succeeding in his claims – Submitted estoppel arose from applicant's failure to advise respondent he was leaving employment, which denied respondent opportunity to arrange payment – ERA provides for actions relating to employment problems that are not personal grievances to be taken for period of up to six years following event - Applicant put arrears claim in hands of Labour Inspector – Respondent fully informed and participated in investigation – Authority did not accept applicant failed to request payment – Respondent submitted applicant's actions put company into position where it could not pay entitlements as he had denied respondent opportunity to replace him and therefore business could not make an income – Applicant entitled to leave employment - Submission not accepted by Authority – Labour Inspector and applicant entitled to pursue claims - ARREARS OF WAGES AND HOLIDAY PAY HOLDING – Monies due and owing - Also entitled to interest on amount owing of 8.66 percent – PENALTY – Respondent failed to comply with requirements of Holidays Act 2003 – Appropriate to impose penalty - Authority assisted by Department of Labour interpreter
Result: Application granted ; Arrears of holiday pay (\$5,872.60) ; Interest on holiday pay (8.66 percent) ; Arrears of wages (\$1,026.20) ; Penalty (\$1,000)(Payable to Crown) ; Filing fee in favour of first applicant (\$70) ; Filing fee in favour of second applicant (\$70)

Kennedy v Stockman and Anor

16 May 2006, M Urlich, AA 173/06, (4 pages)

UNJUSTIFIED DISMISSAL - Contracting relationship between applicant and second respondent – Agreed applicant to become employee from certain date – One week after employment commenced applicant informed by email that employment to end for financial reasons – First respondent subsequently wrote to applicant asserting he had resigned - Finish date arranged for approximately three weeks later - First respondent acting as agent of second respondent when offered employment to applicant – Correct employer second respondent - Email amounted to dismissal – No indication prior to dismissal that second respondent could not afford to pay applicant – No discussion with applicant or opportunity to comment – Dismissal unjustified – Remedies - Circumstances aggravated by first respondent's attempt to rename dismissal as resignation - ARREARS OF WAGES – Applicant never received salary - Applicant entitled to outstanding salary - Reasonable notice in circumstances would be one month – However no basis for ordering recovery of wages in lieu of notice for period greater than three weeks already negotiated by parties – Length of service four weeks – Development manager

Result: Applications granted ; Arrears of wages (\$6,666.66 gross) ; Compensation for humiliation etc (\$1,500) ; Costs reserved

Muncey v Redican Allwood Ltd

30 Oct 2006, PR Stapp, WA 148/06, (4 pages)

JURISDICTION - Applicant had previously brought employment relationship problem against "Garry Lloyd" – During mediation, respondent substituted for Garry Lloyd for purposes of decision under s140 Employment Relations Act 2000 (compliance) - Implied respondent was applicant's employer – Mediator decided he lacked jurisdiction to deal with

arrears claim as no information that applicant's injury work related – Applicant proceeded to Authority with arrears claim against Garry Lloyd but Authority determined it lacked jurisdiction as parties had agreed to mediator's "final and binding" decision – Since that determination, applicant's injury accepted as work related accident - Current arrears claim cited respondent – Respondent was applicant's employer – Parties did not disagree with Authority making determination on matter – Authority had jurisdiction as these were new proceedings citing respondent, not Garry Lloyd – Mediator's decision did not include terms of reference that precluded outstanding matters in applicant's employment being dealt with – Final and binding on issues that mediator did deal with – No terms of settlement or agreement with mediator to effect that decision was in full and final settlement of any or all outstanding matters in applicant's employment – Matter remained open to be determined by Authority – ARREARS OF WAGES – Parties not able to contract out of Injury Prevention, Rehabilitation, and Compensation Act 2001 ("IPRC Act") requirement to pay first week's compensation – Respondent's claim applicant breached his obligation to it was entirely separate matter and respondent unable to withhold first week compensation to offset this – Recovery action under s131 ERA permissible under s99 IPRC Act – ACC's assessment that injury work related included duty on respondent to pay first week's compensation – Applicant entitled to 80% of earnings lost for first week

Result: Application granted ; Arrears of wages (\$563.20) ; Disbursements in favour of applicant (\$70)(Filing fee)

Oborn v Plumbco Ltd

26 May 2006, RA Monaghan, AA 184/06, (5 pages)

UNJUSTIFIED DISADVANTAGE – UNJUSTIFIED DISMISSAL – Constructive dismissal – Alleged unjustified demotion - Applicant promoted to position of foreman on particular job – Subsequently worked on different site as tradesman with no reduction in pay or requirement to return vehicle and cell phone – General manager attempted to arrange meeting to talk about applicant's future – Alleged told in phone conversation to return vehicle and cellphone and that was to work as tradesman with pay reduction from then on – Applicant believed demoted and resigned without attending meeting – Applicant's beliefs based on assumption not fact - Applicant not told was being demoted or that pay reduced – Should have waited for meeting to confirm assumptions before resigning – No demotion – No unjustified disadvantage – No constructive dismissal – ARREARS OF WAGES – Claim for bonus payment – Alleged offered bonus payment as part of foreman's duties – On evidence no bonus offered – Length of service nine months - Foreman/tradesman plumber

Result: Applications dismissed ; Costs reserved

Arrears - Holiday Pay - Employment Relations Act 2000

Busby v Talent Base Ltd

2 Jun 2006, R Monaghan, AA 194/06, (2 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Applicant alleged monies owing for unpaid holiday pay, wages, and commissions - Application for penalty withdrawn at investigation meeting - No appearance for respondent - Authority proceeded in respondent's absence under cl12, second schedule of the Employment Relations Act 2000 - Applicant resigned giving four weeks notice - Placed on garden leave until end of employment - Fortnightly salary payment due but not paid - Nor did she receive any further payments - Also, applicant's regular salary payments were over or underpaid on occasion - Accepted wages, holiday pay, and commission due and owing - COSTS - Respondent to pay applicant \$70 for reimbursement of filing fee - Talent manager

Result: Application granted ; Arrears of wages and holiday pay (\$2,132.17) ; Unpaid commissions (\$10,485.54) ; Disbursements in favour of applicant (\$70)(Filing fee)

Harvey v Smith and Anor t/a D M Transport

9 Oct 2006, GJ Wood, WA 132/06, (6 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Constructive dismissal - No appearance by respondent - Service on any particular member of partnership sufficient to constitute service on all partners - At beginning of employment some difficulties in arranging method of pay and later over taxation - Applicant concerned paying far more tax than usual and took it up with respondent - Dispute went on for several weeks without resolution - Respondent accused applicant of breaching employment agreement's confidentiality provisions by raising concerns directly with IRD - Applicant told he would be given alternative driving run and would no longer be given weekend work - Authority accepted changes made to punish applicant - Applicant concerned about changes as knew nothing about new run and would lose money without weekend work - Applicant believed unfairly punished and resigned - Agreed to work out one month notice period - Respondent made deduction from final pay for time applicant away giving evidence in High Court on another matter - Authority accepted respondent previously agreed to pay applicant for this time - Applicant greatly distressed by dismissal - Matters made worse by insulting text messages sent by respondent - Constructive dismissal - Workers entitled to take up issues concerning them, particularly over appropriate level of take home pay - Instead of assisting process, respondent punished applicant - Clear breach of duty of sufficient seriousness to make it reasonably foreseeable that applicant would resign - Remedies - Disadvantage inextricably linked with unjustified dismissal and global award appropriate - Compensation would have been extended beyond three months had employment been for much longer duration than three months and had he not been working significantly reduced hours at new employment - Applicant did not receive weekend work for last three weeks of employment - Entitled to claim that loss - ARREARS OF WAGES AND HOLIDAY PAY - No holiday pay paid - Applicant entitled to week's pay deducted because of High Court attendance and holiday pay - COSTS - Two hour investigation meeting - Applicant sought costs of \$4,000 plus expenses - Appropriate to award \$1,500 plus disbursements as claimed - Also entitled to interest on all amounts owing of 6 percent - Length of service three months - Driver

Result: Application granted ; Reimbursement of lost wages (\$6,342.05)(Three months plus lost weekends) ; Compensation for humiliation etc (\$8,000) ; Arrears of wages (\$560) ; Arrears of holiday pay (\$336.80) ; Costs in favour of applicant (\$1,500) ; Disbursements (\$223) ; Interest (6%)

Keightly (Labour Inspector) & Anor v Pakiwi Traders Ltd t/a Tandoor Pakistani Cuisine 11 Oct 2006, V Campbell, AA 318/06, (12 pages)

ARREARS OF WAGES AND HOLIDAY PAY – Application by Labour Inspector on behalf of second applicant for outstanding holiday pay – Application by second applicant (“applicant”) for unpaid wages and sick pay – Respondent did not deny claims but counterclaimed for damages and submitted that due to other factors should not have to pay debt - No dispute that amount calculated by applicants correct and that liability existed - BREACH OF CONTRACT - Counterclaim - Respondent claimed applicant left with insufficient notice - Sought \$43,087 for loss suffered as result of breach of employment agreement – No evidence parties agreed on length of notice required - Applicant claimed unable to give any notice as working conditions so poor and felt treated as a slave – Applicant entitled to leave without notice - Actions directly attributable to respondent and its managing director included breaches of Employment Relations Act 2000 ("ERA") and Holidays Act 2003, possession of applicant’s passport, searches of applicant’s personal belongings and correspondence, and notification to Immigration of intent not to continue applicant’s employment together with notification of serious allegations against applicant after he sought assistance from DoL to enforce his minimum employment rights – Applicant aware director contacted Immigration and that he played a role in deportation of applicant’s cousin – Director had alleged applicant and his cousin had links to terrorist organisation - Applicant fearful of what director would do to him once he contacted authorities – Respondent’s actions entitled applicant to treat contract as being at an end and to leave employment as he did - Breach of contract claim dismissed – Estoppel - Respondent argued applicant estopped from succeeding in his claims – Submitted estoppel arose from applicant’s failure to advise respondent he was leaving employment, which denied respondent opportunity to arrange payment – ERA provides for actions relating to employment problems that are not personal grievances to be taken for period of up to six years following event - Applicant put arrears claim in hands of Labour Inspector – Respondent fully informed and participated in investigation – Authority did not accept applicant failed to request payment – Respondent submitted applicant's actions put company into position where it could not pay entitlements as he had denied respondent opportunity to replace him and therefore business could not make an income – Applicant entitled to leave employment - Submission not accepted by Authority – Labour Inspector and applicant entitled to pursue claims - ARREARS OF WAGES AND HOLIDAY PAY HOLDING – Monies due and owing - Also entitled to interest on amount owing of 8.66 percent – PENALTY – Respondent failed to comply with requirements of Holidays Act 2003 – Appropriate to impose penalty - Authority assisted by Department of Labour interpreter

Result: Application granted ; Arrears of holiday pay (\$5,872.60) ; Interest on holiday pay (8.66 percent) ; Arrears of wages (\$1,026.20) ; Penalty (\$1,000)(Payable to Crown) ; Filing fee in favour of first applicant (\$70) ; Filing fee in favour of second applicant (\$70)

Bargaining - Employment Relations Act 2000

National Distribution Union v Spotless Services Ltd

5 Oct 2006, K Raureti, AA 313/06, (9 pages)

BARGAINING - Applicant initiated bargaining for Multi Employer Collective Agreement ("MECA") - Intended coverage included two cleaners employed by respondent – Respondent party to NZ Cleaning Contractors MECA with a different union (Service & Food Workers Union) – Coverage of that MECA included work done by cleaners but they were members of applicant, not SFWU – Respondent regarded NZ Cleaning Contractors agreement as “applicable collective agreement” for its cleaners and argued applicant could not initiate bargaining earlier than 60 days before expiry of that agreement – Whether NZ Cleaning Contractors agreement was “applicable collective agreement” for purposes of s41 Employment Relations Act 2000 ("ERA") – Applicant argued “applicable collective agreement” related to agreement between intended parties to bargaining and collective agreement could only bind union which was party to it – Applicant claimed not uncommon for employers to be party to separate agreements with two or more unions with potentially overlapping coverage – Applicant submitted s5 ERA definition of “applicable collective agreement” clear, it was collective agreement between relevant union and employer and nothing in context of initiation of bargaining required departure from that meaning – Respondent claimed there was already an “applicable collective agreement” between 'a union' (SFWU) and 'an employer' (respondent) - When new cleaners employed respondent had to advise them of collective agreement and ability to join SFWU (s62 ERA) – Claimed authorising another union to commence bargaining would potentially expose respondent to numerous collective agreement negotiations with various unions – Respondent argued this ran counter to objective of building productive employment relationships, undermined NZ Cleaning Contractors agreement and affected relationship between parties – Respondent submitted s41(1) ERA envisaged a “greenfield situation” where an employer is not party to a collective agreement which would cover one or more employees if they joined the appropriate union – While employer obligations arose out of s62 ERA, those obligations did not arise out of there being an “applicable collective agreement” – Applying interpretation pursuant to s5 ERA Authority concluded there was no “applicable collective agreement” between applicant and respondent – Question answered in favour of applicant - COSTS - Matter determined on the papers - Parties agreed costs to lie where they fall

Result: Question answered in favour of applicant ; Costs to lie where they fall

Breach of Contract - Employment Relations Act 2000

Keightly (Labour Inspector) & Anor v Pakiwi Traders Ltd t/a Tandoor Pakistani Cuisine 11 Oct 2006, V Campbell, AA 318/06, (12 pages)

ARREARS OF WAGES AND HOLIDAY PAY – Application by Labour Inspector on behalf of second applicant for outstanding holiday pay – Application by second applicant (“applicant”) for unpaid wages and sick pay – Respondent did not deny claims but counterclaimed for damages and submitted that due to other factors should not have to pay debt - No dispute that amount calculated by applicants correct and that liability existed - BREACH OF CONTRACT - Counterclaim - Respondent claimed applicant left with insufficient notice - Sought \$43,087 for loss suffered as result of breach of employment agreement – No evidence parties agreed on length of notice required - Applicant claimed unable to give any notice as working conditions so poor and felt treated as a slave – Applicant entitled to leave without notice - Actions directly attributable to respondent and its managing director included breaches of Employment Relations Act 2000 ("ERA") and Holidays Act 2003, possession of applicant’s passport, searches of applicant’s personal belongings and correspondence, and notification to Immigration of intent not to continue applicant’s employment together with notification of serious allegations against applicant after he sought assistance from DoL to enforce his minimum employment rights – Applicant aware director contacted Immigration and that he played a role in deportation of applicant’s cousin – Director had alleged applicant and his cousin had links to terrorist organisation - Applicant fearful of what director would do to him once he contacted authorities – Respondent’s actions entitled applicant to treat contract as being at an end and to leave employment as he did - Breach of contract claim dismissed – Estoppel - Respondent argued applicant estopped from succeeding in his claims – Submitted estoppel arose from applicant’s failure to advise respondent he was leaving employment, which denied respondent opportunity to arrange payment – ERA provides for actions relating to employment problems that are not personal grievances to be taken for period of up to six years following event - Applicant put arrears claim in hands of Labour Inspector – Respondent fully informed and participated in investigation – Authority did not accept applicant failed to request payment – Respondent submitted applicant's actions put company into position where it could not pay entitlements as he had denied respondent opportunity to replace him and therefore business could not make an income – Applicant entitled to leave employment - Submission not accepted by Authority – Labour Inspector and applicant entitled to pursue claims - ARREARS OF WAGES AND HOLIDAY PAY HOLDING – Monies due and owing - Also entitled to interest on amount owing of 8.66 percent – PENALTY – Respondent failed to comply with requirements of Holidays Act 2003 – Appropriate to impose penalty - Authority assisted by Department of Labour interpreter
Result: Application granted ; Arrears of holiday pay (\$5,872.60) ; Interest on holiday pay (8.66 percent) ; Arrears of wages (\$1,026.20) ; Penalty (\$1,000)(Payable to Crown) ; Filing fee in favour of first applicant (\$70) ; Filing fee in favour of second applicant (\$70)

Perkins v Harbour City Signs Ltd

6 Oct 2006, D King, AA 315/06, (3 pages)

UNJUSTIFIED DISMISSAL – Poor performance – Respondent claimed applicant received three warnings – First two “warnings” were not warnings as applicant not told employment in jeopardy or that she was being given warnings – “Warnings” were simply Operations Manager telling applicant about errors in accordance with obligation to provide training – Giving of third warning disputed by applicant – Warning procedurally unfair – Third warning given just before respondent closed for Christmas – On first day back after break applicant verbally informed of dismissal and given notice – Two days later written dismissal letter left on her desk – Applicant claimed shocked to receive letter and wrote resignation letter effective that day – Dismissal unjustified – Even if applicant had been told before

holiday close down that employment in jeopardy she had no opportunity to improve performance as dismissed on first day back – Basic elements of procedural fairness not met – Probationary clause provided for termination at end of three month period – Applicant dismissed after less than seven weeks employment – Respondent had obligation to provide training over a reasonable period of time - Parties had agreed that time period was to be three months - Applicant unjustifiably dismissed and entitled to treat actions of respondent as breach of contract and contract as being at an end – Length of service less than seven weeks - BREACH OF CONTRACT - Counterclaim - No contractual provision requiring repayment of notice - Respondent unable to identify any loss suffered as consequence of early departure - Dismissal letter made it clear applicant would have been released within notice period if she found other employment - Claim dismissed - Office administrator
Result: Application granted(Unjustified dismissal) ; Reimbursement of lost wages (\$3,273)(3 months less earnings) ; Compensation for humiliation etc (\$2,000) ; Application dismissed(Breach of contract) ; Costs reserved

Regent Night'n Day v Helm

8 Jun 2006, P Montgomery, CA 85/06, (2 pages)

BREACH OF CONTRACT - Applicant alleged respondent left employment without giving required notice - Alleged respondent owed \$1,611 for costs of unreturned uniform items, shop account, and costs associated with training and certification under licensing law requirements - Attempts to serve papers on respondent proved difficult - Respondent acknowledged debt and agreed to make payment - Terms of such arrangement yet to be established - Authority ordered respondent to pay monies owing - Parties directed to mediation to formally establish and record those terms

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

Regent Night'n Day v Lee

8 Jun 2006, P Montgomery, CA 84/06, (2 pages)

BREACH OF CONTRACT - Applicant alleged respondent left employment without giving required notice - Alleged respondent owed \$2,133 for costs of unreturned uniform items, shop account, and costs associated with training and certification under licensing law requirements - Attempts to serve papers on respondent proved difficult - Respondent acknowledged debt and agreed to make payment on instalment basis - Authority ordered respondent to pay monies owing - Parties directed to mediation to formally establish and record those terms

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

Compliance Order - Employment Relations Act 2000

Labour Inspector (Henning) v Danseys Pass Coach Inn Ltd

6 Jun 2006, J Crichton, CA 82/06, (2 pages)

COMPLIANCE ORDER - Compliance with demand notice sought - No appearance for respondent despite fact director of respondent had spoken to Senior Support Officer of Authority and confirmed money was owing and proposed payment by instalments - Satisfied demand notice properly served on respondent - Respondent did not lodge objection to demand notice - As respondent had not exercised its right to object, nor had it met obligations by paying sums referred to in demand notice, directed that respondent comply with demand notice within 14 days - \$1,461 owing - Amount owing to be split evenly and to be directly made available to two specified employees - COSTS - Costs to lie where they fall

Result: Compliance ordered ; Costs to lie where they fall

Medway (Labour Inspector) v Wright and Anor t/a The Wright Builders of 65 Cottle Park Drive, Normandale, Lower Hutt

16 Jun 2006, PR Stapp, WA 92/06, (2 pages)

COMPLIANCE ORDER - Compliance with demand notice sought - Respondent disputed outstanding holiday pay - However, no objection lodged in time - Respondent had not sought leave for extension of time - Authority unable to deal with objection to sum demanded - Respondent's other issues relating to applicant's employment had to be considered as separate application and any civil matters pursued in Disputes Tribunal - Satisfied Inspector followed requirements of Employment Relations Act 2000 and demand notice in order - Respondent directed to comply with demand notice

Result: Compliance ordered ; Costs reserved (Filing fee)

Costs - Employment Relations Act 2000

Angel and Anor v Fonterra Co-operative Group

9 Jun 2006, P Montgomery, CA 51A/06, (2 pages)

COSTS - Justified dismissal - Two day investigation meeting - Applicants filed challenge to determination - Respondent sought \$6,000 as reasonable contribution to costs plus disbursements of \$250 and payment for executive time of \$500 - Applicant alleged reasonable contribution to respondent's costs would be \$3,000 - Applicant alleged disbursements sought were excessive and opposed claim for executive time - Applicant submitted costs should not become payable until challenge determined - Both parties conducted their cases in straightforward manner - Just to award \$2,750 as contribution to reasonably incurred costs - Also awarded disbursements of \$100 - Applicants ordered to pay sums but order stayed pending Court's decision

Result: Costs in favour of respondent (\$2,750) ; Disbursements (\$100) ; Order stayed pending Court decision

Harvey v Smith and Anor t/a D M Transport

9 Oct 2006, GJ Wood, WA 132/06, (6 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Constructive dismissal - No appearance by respondent - Service on any particular member of partnership sufficient to constitute service on all partners - At beginning of employment some difficulties in arranging method of pay and later over taxation - Applicant concerned paying far more tax than usual and took it up with respondent - Dispute went on for several weeks without resolution - Respondent accused applicant of breaching employment agreement's confidentiality provisions by raising concerns directly with IRD - Applicant told he would be given alternative driving run and would no longer be given weekend work - Authority accepted changes made to punish applicant - Applicant concerned about changes as knew nothing about new run and would lose money without weekend work - Applicant believed unfairly punished and resigned - Agreed to work out one month notice period - Respondent made deduction from final pay for time applicant away giving evidence in High Court on another matter - Authority accepted respondent previously agreed to pay applicant for this time - Applicant greatly distressed by dismissal - Matters made worse by insulting text messages sent by respondent - Constructive dismissal - Workers entitled to take up issues concerning them, particularly over appropriate level of take home pay - Instead of assisting process, respondent punished applicant - Clear breach of duty of sufficient seriousness to make it reasonably foreseeable that applicant would resign - Remedies - Disadvantage inextricably linked with unjustified dismissal and global award appropriate - Compensation would have been extended beyond three months had employment been for much longer duration than three months and had he not been working significantly reduced hours at new employment - Applicant did not receive weekend work for last three weeks of employment - Entitled to claim that loss - ARREARS OF WAGES AND HOLIDAY PAY - No holiday pay paid - Applicant entitled to week's pay deducted because of High Court attendance and holiday pay - COSTS - Two hour investigation meeting - Applicant sought costs of \$4,000 plus expenses - Appropriate to award \$1,500 plus disbursements as claimed - Also entitled to interest on all amounts owing of 6 percent - Length of service three months - Driver

Result: Application granted ; Reimbursement of lost wages (\$6,342.05)(Three months plus lost weekends) ; Compensation for humiliation etc (\$8,000) ; Arrears of wages (\$560) ; Arrears of holiday pay (\$336.80) ; Costs in favour of applicant (\$1,500) ; Disbursements (\$223) ; Interest (6%)

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Result: Compliance ordered ; Costs to lie where they fall

Mitchell v Blue Star Print Group (NZ) Ltd t/a Printlink

2 Jun 2006, D Asher, WA 53A/06, (5 pages)

COSTS – Unsuccessful personal grievance and claim for exemplary damages – Length of investigation meeting not specified – Respondent sought contribution to total costs of \$37,262 – Calderbank offer put to applicant – Applicant elected not to act on advice to obtain experienced representation – Respondent’s costs increased by far-reaching nature of applicant’s claim – Foreseeable that constructive dismissal claim would be unsuccessful as applicant unfit to work and receiving ACC payments – Applicant’s challenge to substantive determination not reason for Authority to put off decision on costs – Contribution to respondent’s costs ordered – Suggested parties attempt agreement on costs payment regime consistent with applicant’s ACC status

Result: Costs in favour of respondent (\$6,000)

National Distribution Union v Spotless Services Ltd

5 Oct 2006, K Raureti, AA 313/06, (9 pages)

BARGAINING - Applicant initiated bargaining for Multi Employer Collective Agreement ("MECA") - Intended coverage included two cleaners employed by respondent – Respondent party to NZ Cleaning Contractors MECA with a different union (Service & Food Workers Union) – Coverage of that MECA included work done by cleaners but they were members of applicant, not SFWU – Respondent regarded NZ Cleaning Contractors agreement as “applicable collective agreement” for its cleaners and argued applicant could not initiate bargaining earlier than 60 days before expiry of that agreement – Whether NZ Cleaning Contractors agreement was “applicable collective agreement” for purposes of s41 Employment Relations Act 2000 ("ERA") – Applicant argued “applicable collective agreement” related to agreement between intended parties to bargaining and collective agreement could only bind union which was party to it – Applicant claimed not uncommon for employers to be party to separate agreements with two or more unions with potentially overlapping coverage – Applicant submitted s5 ERA definition of “applicable collective agreement” clear, it was collective agreement between relevant union and employer and nothing in context of initiation of bargaining required departure from that meaning – Respondent claimed there was already an “applicable collective agreement” between 'a union' (SFWU) and 'an employer' (respondent) - When new cleaners employed respondent had to advise them of collective agreement and ability to join SFWU (s62 ERA) – Claimed authorising another union to commence bargaining would potentially expose respondent to numerous collective agreement negotiations with various unions – Respondent argued this ran counter to objective of building productive employment relationships, undermined NZ Cleaning Contractors agreement and affected relationship between parties – Respondent submitted s41(1) ERA envisaged a “greenfield situation” where an employer is not party to a collective agreement which would cover one or more employees if they joined the appropriate union – While employer obligations arose out of s62 ERA, those obligations did not arise out of there being an “applicable collective agreement” – Applying interpretation pursuant to s5 ERA Authority concluded there was no “applicable collective agreement” between applicant and respondent – Question answered in favour of applicant - COSTS -

Matter determined on the papers - Parties agreed costs to lie where they fall

Result: Question answered in favour of applicant ; Costs to lie where they fall

Osborne v Crop and Food Research Institute

24 May 2006, P Montgomery, CA 75/06, (4 pages)

PRACTICE AND PROCEDURE – Application for joinder – Respondent sought to join applicant’s former counsel to costs application on basis of criticism in substantive determination of quality of advice given to applicant – Applicant’s counsel misjudged situation - However joinder to costs application not appropriate – COSTS – Unsuccessful personal grievance – One day investigation meeting – Respondent sought contribution of \$18,634.50 to total costs and disbursements of \$31,204.46 – Argued costs increased by interlocutory matters unnecessarily advanced by applicant and continued assertion that dismissal substantively unjustified despite admission by applicant during investigation meeting that respondent entitled to disestablish role – Appropriate starting point \$2,500 per day – Award of \$5,000 appropriate taking into account significant unnecessary costs caused by way applicant’s case pleaded

Result: Application dismissed (Joinder) ; Costs in favour of respondent (\$5,000)

Dispute - Employment Relations Act 2000

NZ Amalgamated Engineering Printing & Manufacturing Union v Bridgestone New Zealand Ltd

10 May 2006, J Crichton, CA 66/06, (6 pages)

DISPUTE - Whether respondent able to transfer members of applicant from day shift to rotating shift without their consent - Respondent had been unable to fill vacancies on rotating shift so elected to reassign some workers from day shift - Letters signed by two applicants acknowledging hours of work may be subject to change were overridden by Collective Employment Agreement ("CEA") - CEA contained clause setting out "principles and commitments" - Respondent argued not just aid to interpretation but imposed substantive obligation on parties - Words in clause general in nature - Meaning respondent sought to adduce from words specific in its effects - If parties had intended consequence respondent sought they would have made specific provision in agreement - Respondent argued agreement allowed more drastic changes to be visited on workers pursuant to another clause in CEA and that it would be an "absurd result" if less drastic changes were not permitted - Authority not persuaded by this argument as clause they sought to draw comfort from plainly did not apply to circumstances of case - CEA allowed variation subject to Union ratification - Union's ratification process did not apply to altering shift pattern of particular workers - Authority accepted applicant's submission that if parties intended that respondent could effectively transfer between shifts with impunity it would have been specifically provided for and that respondent's interpretation made rest of clause superfluous - Respondent referred to principles that employee cannot expect duties to remain unchanged during whole employment relationship and employers right to manage business - Legal precept could not be relied upon to add to provisions of CEA where agreement was silent on particular point - Authority not persuaded agreement allowed respondent to transfer workers from one shift to another without their consent - Clause in dispute intended to allow transfers from one shift to other in circumstances where existing worker absent for whatever reason rather than replacement of worker who had left employment - No clear provision in agreement which contemplated transfer on open ended or permanent basis where workers required to replace other workers who had left job - Question answered in favour of applicant

Result: Question answered in favour of applicant ; Costs reserved

Good Faith - Employment Relations Act 2000

Corbett v Bendon Ltd

30 May 2006, A Dumbleton, AA 188/06, (6 pages)

UNJUSTIFIED DISMISSAL – Misconduct - Summary dismissal – Applicant dismissed after respondent discovered applicant had created company to develop own lingerie line – Company website solicited advances from prospective manufacturers - Conflict of interest clause in employment agreement prohibited applicant from “engaging in business activity” that “may affect ability to discharge duties and responsibilities to respondent” – Both elements required for conflict to exist - Applicant’s company intended to become business in normal sense of word not just hobby or fun – Searching for manufacturers to produce orders was activity in relation to present or future business – “Engaging in business activity” wider than “being in business” – Reasonable for respondent to conclude applicant engaged in business activity – If potential manufacturers had contacted applicant her ability to discharge employment duties and responsibilities may have been affected – Many opportunities for applicant to promote own product to respondent’s customers – Reasonable to conclude conflict of interest existed – Breach sufficiently serious to justify summary dismissal – Walker v Aitken (cited below) distinguished – Location of disciplinary meeting in public food hall unsatisfactory but did not materially detract from fairness of enquiry – Respondent acted with unnecessary haste when dismissed applicant on phone immediately after disciplinary meeting – Lapse not enough by itself to render dismissal unjustified – Dismissal substantively and procedurally justified - UNJUSTIFIED DISADVANTAGE – Alleged unjustified suspension - One day suspension on pay during disciplinary process – Suspension conformed with express term of employment agreement – No material disadvantage suffered – GOOD FAITH – No breach of good faith by respondent – Length of service six weeks – Lingerie sales consultant

Result: Applications dismissed ; Costs reserved

Jurisdiction - Employment Relations Act 2000

Muncey v Redican Allwood Ltd

30 Oct 2006, PR Stapp, WA 148/06, (4 pages)

JURISDICTION - Applicant had previously brought employment relationship problem against "Garry Lloyd" – During mediation, respondent substituted for Garry Lloyd for purposes of decision under s140 Employment Relations Act 2000 (compliance) - Implied respondent was applicant's employer – Mediator decided he lacked jurisdiction to deal with arrears claim as no information that applicant's injury work related – Applicant proceeded to Authority with arrears claim against Garry Lloyd but Authority determined it lacked jurisdiction as parties had agreed to mediator's "final and binding" decision – Since that determination, applicant's injury accepted as work related accident - Current arrears claim cited respondent – Respondent was applicant's employer – Parties did not disagree with Authority making determination on matter – Authority had jurisdiction as these were new proceedings citing respondent, not Garry Lloyd – Mediator's decision did not include terms of reference that precluded outstanding matters in applicant's employment being dealt with – Final and binding on issues that mediator did deal with – No terms of settlement or agreement with mediator to effect that decision was in full and final settlement of any or all outstanding matters in applicant's employment – Matter remained open to be determined by Authority – ARREARS OF WAGES – Parties not able to contract out of Injury Prevention, Rehabilitation, and Compensation Act 2001 ("IPRC Act") requirement to pay first week's compensation – Respondent's claim applicant breached his obligation to it was entirely separate matter and respondent unable to withhold first week compensation to offset this – Recovery action under s131 ERA permissible under s99 IPRC Act – ACC's assessment that injury work related included duty on respondent to pay first week's compensation – Applicant entitled to 80% of earnings lost for first week

Result: Application granted ; Arrears of wages (\$563.20) ; Disbursements in favour of applicant (\$70)(Filing fee)

Penalty - Employment Relations Act 2000

Darling v Platinum Properties Ltd

29 May 2006, P Cheyne, CA 78/06, (7 pages)

ARREARS OF WAGES - UNJUSTIFIED DISADVANTAGE - Applicant employed to establish business – No written employment agreement - Number of performance issues raised few months into employment – Manager appointed – Applicant resigned on three months notice – Attempts to negotiate lesser period unsuccessful - Cellphone, office keys and petrol card removed from applicant – Time off work due to stress-related illness – Raised grievance during absence – Brief return to work - Respondent's reply to grievance required applicant to bring forward resignation to take effect immediately or be summarily dismissed – Directed not to attend work – On respondent's evidence no dismissal and resignation not brought forward – Applicant willing to attend work but instructed not to – Therefore employment remained on foot until ended by reason of resignation – Arrears of wages due and owing until end of original notice period – Removal of phone, keys and card based on suspicions about applicant having secured employment with competitor - Applicant given no chance to comment on suspicions – Actions not remedied even after applicant informed them of actual future plans - Removal of items unjustified disadvantage – Respondent entitled to appoint manager - Disappointment over appointment and implications for applicant's future with respondent not unjustified disadvantage – Remedies – Difficult to distinguish effects caused by non-actionable disappointment and effects caused by established grievance – Disappointment was more significant cause of applicant's stress and compensation assessed accordingly – Not appropriate to award payment for time off due to stress as not satisfied applicant would have needed leave if proven grievance only factor – Performance issues too remote from grievance to amount to contributory conduct – PENALTY – Claim for penalty for failure to provide employment agreement - If employment agreement defining notice period provided, problem unlikely to have arisen – Penalty appropriate – Other claims made late in investigation meeting dismissed – Length of service until disadvantage three months - Property manager

Keightly (Labour Inspector) & Anor v Pakiwi Traders Ltd t/a Tandoor Pakistani Cuisine

11 Oct 2006, V Campbell, AA 318/06, (12 pages)

ARREARS OF WAGES AND HOLIDAY PAY – Application by Labour Inspector on behalf of second applicant for outstanding holiday pay – Application by second applicant (“applicant”) for unpaid wages and sick pay – Respondent did not deny claims but counterclaimed for damages and submitted that due to other factors should not have to pay debt - No dispute that amount calculated by applicants correct and that liability existed - BREACH OF CONTRACT - Counterclaim - Respondent claimed applicant left with insufficient notice - Sought \$43,087 for loss suffered as result of breach of employment agreement – No evidence parties agreed on length of notice required - Applicant claimed unable to give any notice as working conditions so poor and felt treated as a slave – Applicant entitled to leave without notice - Actions directly attributable to respondent and its managing director included breaches of Employment Relations Act 2000 ("ERA") and Holidays Act 2003, possession of applicant's passport, searches of applicant's personal belongings and correspondence, and notification to Immigration of intent not to continue applicant's employment together with notification of serious allegations against applicant after he sought assistance from DoL to enforce his minimum employment rights – Applicant aware director contacted Immigration and that he played a role in deportation of applicant's cousin – Director had alleged applicant and his cousin had links to terrorist organisation - Applicant fearful of what director would do to him once he contacted authorities – Respondent's actions entitled applicant to treat contract as being at an end and to leave employment as he did - Breach of contract claim dismissed – Estoppel - Respondent argued applicant estopped from succeeding in his claims – Submitted estoppel arose from applicant's failure to advise respondent he was leaving employment, which denied

respondent opportunity to arrange payment – ERA provides for actions relating to employment problems that are not personal grievances to be taken for period of up to six years following event - Applicant put arrears claim in hands of Labour Inspector – Respondent fully informed and participated in investigation – Authority did not accept applicant failed to request payment – Respondent submitted applicant's actions put company into position where it could not pay entitlements as he had denied respondent opportunity to replace him and therefore business could not make an income – Applicant entitled to leave employment - Submission not accepted by Authority – Labour Inspector and applicant entitled to pursue claims - ARREARS OF WAGES AND HOLIDAY PAY HOLDING – Monies due and owing - Also entitled to interest on amount owing of 8.66 percent – PENALTY – Respondent failed to comply with requirements of Holidays Act 2003 – Appropriate to impose penalty - Authority assisted by Department of Labour interpreter

Result: Application granted ; Arrears of holiday pay (\$5,872.60) ; Interest on holiday pay (8.66 percent) ; Arrears of wages (\$1,026.20) ; Penalty (\$1,000)(Payable to Crown) ; Filing fee in favour of first applicant (\$70) ; Filing fee in favour of second applicant (\$70)

Personal Grievance - Dismissal - Employment Relations Act 2000

Aerengamate v Optimum Performance (Lifestyle) Ltd and Anor

9 Jun 2006, D King, AA 200/06, (2 pages)

PRACTICE AND PROCEDURE - Identity of employer - No appearance by either respondent - After hearing Authority took evidence from Chief Operating Officer of second respondent - Claimed applicant employed by second respondent - Supplied unsigned employment agreement and time and wage records - Employer was second respondent - UNJUSTIFIED DISMISSAL - Applicant alleged unjustifiably dismissed - Evidence unchallenged - Unjustified dismissal - Remedies - Applicant sought reimbursement for time taken to gain full time employment - Applicant had employment difficulties shortly after commencing employment - Difficult to ascertain how long employment would have lasted - Declined to award reimbursement for more than three months - Authority unable to calculate lost wages as did not have information regarding applicant's part time earnings - Length of service four weeks - Caregiver

Result: Application granted ; Reimbursement of lost wages (Quantum to be determined by parties) ; Compensation for humiliation etc (\$2,500) ; Costs reserved

Ayers v Advertising Works Ogilvy Ltd

20 Oct 2006, L Robinson, AA 324/06, (11 pages)

UNJUSTIFIED DISMISSAL – Respondent purchased another advertising agency and managing director (“MD”) told applicant he “would be a casualty” – MD said applicant not losing his job but presented him with three options; leave, renegotiate employment package without current title, or become Creative Director of Direct Marketing, although staying on same salary package could make him “vulnerable” – Applicant felt only option was to leave - Applicant’s legal advisers raised personal grievance and set out exit package - MD unhappy with communication and publicly berated applicant about it – Applicant took leave and subsequently cleared desk and did not return to work – Immediately prior to mediation, respondent responded to letter raising personal grievance and stated applicant’s job not at risk – Immediately after unsuccessful mediation MD emailed respondent’s staff stating applicant had resigned – Applicant maintained he had not resigned and that email constituted a dismissal – Claimed respondent’s rejection of proposed settlement left employment relationship problem unresolved but continued employment unaffected - Letter raising personal grievance problematic on first reading – Reasonable for respondent to interpret it as resignation – However, Authority concluded statement must be construed in context of what was ultimately communicated – In Authority’s view, it would have been clear applicant essentially communicating a proposal – Resignation conditional upon respondent’s acceptance of proposed settlement – Difficulty arose because correspondence was essentially “without prejudice” advice, but was not noted as such – Applicant had not conducted himself as though he had resigned – Authority did not consider respondent honestly considered applicant had resigned, MD had taken steps to assure applicant no basis for resignation – No resignation – After mediation it was for applicant to decide whether to continue employment – However, MD made decision for him by affirming resignation the basis for which he had earlier taken steps to assure applicant was misconceived – MD’s email after mediation premature and precipitous – Authority seriously doubted whether it was option for applicant to retrieve situation by denying or withdrawing incorrect resignation – Applicant right to consider he had been discarded – Declaration applicant would not be returning was improper - Together with preceding bad faith conduct, this plainly evidenced intention by respondent not to continue employment relationship – Reasonable for applicant to regard respondent’s actions as repudiatory conduct and entitled to elect to affirm it – Unjustified dismissal – Remedies – Inevitable applicant would not have remained at respondent – Applicant’s resolution to depart and potential redundancy

were contingencies Authority had regard to when assessing true loss – Employment agreement specified consultative process in relation to potential redundancy – Two months regarded as reasonable consultation period and would have had two months notice – Applicant also entitled to four weeks redundancy compensation – Aggravated damages not available - PENALTY - Authority not persuaded circumstances required punitive response - Penalty declined - Length of service six years, one year in current role - Creative Director of Brand and Direct Marketing

Result: Application granted (Unjustified dismissal) ; Reimbursement of lost wages (\$93,333.33)(4 months) ; Compensation for humiliation etc (\$15,000) ; Compensation for lost benefit (Redundancy compensation)(\$21,538.46) ; Application dismissed (Penalty) ; Costs reserved

Cochrane v Nicky's Superfresh and Discount Cigarette Ltd

25 May 2006, P Cheyne, CA 77/06, (4 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Principal of respondent unhappy when applicant and another employee declined to work additional hours to facilitate principal's holiday – Alleged verbally abused applicant next day when other employee failed to turn up for work - Advised applicant of intention to pay wages two days later than usual – Respondent's tone and manner uncivil and ill mannered rather than abusive - Inconsiderate but not breach of duty – Payment details not specifically covered in employment agreement – However unilateral change to long standing arrangement to pay applicant on certain day of week was breach of duty – Not reasonably foreseeable that breach would cause resignation – No constructive dismissal - OTHER MONIES – Counterclaim by respondent for payment in lieu of notice – Employment agreement required two weeks notice of termination of employment – Applicant breached requirement – No evidence of loss arising from breach – Counterclaim dismissed – Length of service one year – Shop worker

Result: Application dismissed ; Counterclaim dismissed ; Costs reserved

Cotes v PR Driving Services Ltd and Anor

15 May 2006, J Wilson, AA 172/06, (4 pages)

UNJUSTIFIED DISMISSAL – Applicant signed contract with first respondent to provide relief driving services for clients on as required basis – Worked number of shifts for second respondent – Drivers licence suspended as result of accumulated demerit points – Second respondent's transport manager provided affidavit in support of application for limited licence – Affidavit stated second respondent could provide applicant almost full-time work for next three months – Later advised work not available – Alleged affidavit created employment relationship between applicant and second respondent – Applicant knew exact nature of employment when signed original employment agreement with first respondent – No new employment agreement created by affidavit – Even if affidavit was offer from second respondent, terms would have been employment on as required basis – Evidence that work not available accepted – No dismissal by either respondent – Length of service less than one month – Relief truck driver

Result: Application dismissed ; Costs reserved

Harvey v Smith and Anor t/a D M Transport

9 Oct 2006, GJ Wood, WA 132/06, (6 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Constructive dismissal – No appearance by respondent - Service on any particular member of partnership sufficient to constitute service on all partners - At beginning of employment some difficulties in arranging method of pay and later over taxation – Applicant concerned paying far more tax

than usual and took it up with respondent – Dispute went on for several weeks without resolution – Respondent accused applicant of breaching employment agreement’s confidentiality provisions by raising concerns directly with IRD – Applicant told he would be given alternative driving run and would no longer be given weekend work – Authority accepted changes made to punish applicant – Applicant concerned about changes as knew nothing about new run and would lose money without weekend work – Applicant believed unfairly punished and resigned – Agreed to work out one month notice period – Respondent made deduction from final pay for time applicant away giving evidence in High Court on another matter – Authority accepted respondent previously agreed to pay applicant for this time – Applicant greatly distressed by dismissal – Matters made worse by insulting text messages sent by respondent – Constructive dismissal – Workers entitled to take up issues concerning them, particularly over appropriate level of take home pay – Instead of assisting process, respondent punished applicant – Clear breach of duty of sufficient seriousness to make it reasonably foreseeable that applicant would resign – Remedies - Disadvantage inextricably linked with unjustified dismissal and global award appropriate – Compensation would have been extended beyond three months had employment been for much longer duration than three months and had he not been working significantly reduced hours at new employment – Applicant did not receive weekend work for last three weeks of employment – Entitled to claim that loss – ARREARS OF WAGES AND HOLIDAY PAY - No holiday pay paid – Applicant entitled to week’s pay deducted because of High Court attendance and holiday pay - COSTS - Two hour investigation meeting - Applicant sought costs of \$4,000 plus expenses - Appropriate to award \$1,500 plus disbursements as claimed - Also entitled to interest on all amounts owing of 6 percent - Length of service three months - Driver

Result: Application granted ; Reimbursement of lost wages (\$6,342.05)(Three months plus lost weekends) ; Compensation for humiliation etc (\$8,000) ; Arrears of wages (\$560) ; Arrears of holiday pay (\$336.80) ; Costs in favour of applicant (\$1,500) ; Disbursements (\$223) ; Interest (6%)

Hyde v Hospitality Services Ltd

31 May 2006, GJ Wood, WA 83/06, (11 pages)

UNJUSTIFIED DISMISSAL – RAISING PERSONAL GRIEVANCE - Constructive dismissal – Applicant in national training and development role – Respondent proposed hiring additional employee to link professional development training with formal unit standards qualifications – Applicant not consulted – Informed of proposal in brief meeting - Applicant raised concerns in email – New employee appointed – Applicant continued working without complaint until resigned to take up new employment – Respondent breached number of significant duties to applicant when developing unit standards proposal – Removal of all management responsibilities regarding design, development and implementation of training programmes constituted significant change to terms of employment – Change amounted to demotion – Breach sufficiently serious to make resignation reasonably foreseeable – However applicant’s email did not constitute raising of personal grievance – Concerns not raised again until after resignation – Delay in raising matters so long that applicant acquiesced in changes imposed on her – Change to position not sufficiently proximate to resignation to found claim for constructive dismissal – UNJUSTIFIED DISADVANTAGE – Consideration of power to find alternative grievance under Employment Relations Act 2000 s122 - Although demotion amounted to unjustified disadvantage, disadvantage grievance not raised within 90 days so no award possible – Length of service three years three months – National training and development manager

Result: Application dismissed ; Costs reserved

Jeong v Hanyang Corporation Ltd

2 Oct 2006, J Scott, AA 307/06, (10 pages)

UNJUSTIFIED DISMISSAL – UNJUSTIFIED DISADVANTAGE – Constructive

dismissal – Alleged respondent failed to have systems in place to protect employees from violence – Group from respondent’s business went out to dinner and Karaoke – Director of respondent threw half-full bottle of whisky and it hit applicant on head – Director alleged was trying to get his wife’s attention – Applicant alleged he lost consciousness and was taken to emergency unit – Applicant alleged director assaulted him in retaliation for his brother’s new business – Applicant initially said he had fallen down stairs to prevent wife finding out truth, but later admitted truth and went to police – Director and wife apologised next day – Director convicted of acting with reckless disregard for safety of others – Credibility finding in favour of respondent – All witnesses denied applicant actually lost consciousness – Parties had enjoyed excellent relationship – Director of respondent took reasonable steps to protect own business interests but did not threaten to take every measure to destroy applicant’s brother’s business – Was most improbable that director tossed bottle with intention of hitting anyone – However, was a reckless act – Unjustified disadvantage – Entitled to compensation of \$5,000 – Could not find that director’s action amounted to breach of duty so serious that it justified applicant treating relationship at end without at least talking to director – In context of good relationship between parties and the fact much alcohol had been consumed, should have been matter for discussion between parties particularly since director spoke to applicant as soon as he could afterwards and apologised – No constructive dismissal – Evidence disclosed that more probable reason for applicant leaving employment was that respondent’s action pointed the way to the recovery of significant monetary damages – Employee entitled to treat significant breach of duty as unilateral termination and sue – But resignation must be for the breach not the potential compensation – No unjustified dismissal – Entitled to lost remuneration for period off work due to injuries – Other claims made by applicant either misconstrued or applicant was complicit in breach (failure to provide IEA) and must be declined – Length of service until disadvantage 7 ½ months - Date of resignation not specified - Sales Manager

Result: Application granted (unjustified disadvantage) ; Reimbursement of lost wages (2 weeks) ; Compensation for humiliation etc (\$5,000) ; Application dismissed (unjustified dismissal and other claims) ; Costs reserved

Kennedy v Stockman and Anor

16 May 2006, M Urlich, AA 173/06, (4 pages)

UNJUSTIFIED DISMISSAL - Contracting relationship between applicant and second respondent – Agreed applicant to become employee from certain date – One week after employment commenced applicant informed by email that employment to end for financial reasons – First respondent subsequently wrote to applicant asserting he had resigned - Finish date arranged for approximately three weeks later - First respondent acting as agent of second respondent when offered employment to applicant – Correct employer second respondent - Email amounted to dismissal – No indication prior to dismissal that second respondent could not afford to pay applicant – No discussion with applicant or opportunity to comment – Dismissal unjustified – Remedies - Circumstances aggravated by first respondent’s attempt to rename dismissal as resignation - ARREARS OF WAGES – Applicant never received salary - Applicant entitled to outstanding salary - Reasonable notice in circumstances would be one month – However no basis for ordering recovery of wages in lieu of notice for period greater than three weeks already negotiated by parties – Length of service four weeks – Development manager

Result: Applications granted ; Arrears of wages (\$6,666.66 gross) ; Compensation for humiliation etc (\$1,500) ; Costs reserved

Oborn v Plumbco Ltd

26 May 2006, RA Monaghan, AA 184/06, (5 pages)

UNJUSTIFIED DISADVANTAGE – UNJUSTIFIED DISMISSAL – Constructive dismissal – Alleged unjustified demotion - Applicant promoted to position of foreman on particular job – Subsequently worked on different site as tradesman with no reduction in pay or requirement to return vehicle and cell phone – General manager attempted to arrange meeting to talk about applicant’s future – Alleged told in phone conversation to return vehicle and cellphone and that was to work as tradesman with pay reduction from then on – Applicant believed demoted and resigned without attending meeting – Applicant’s beliefs based on assumption not fact - Applicant not told was being demoted or that pay reduced – Should have waited for meeting to confirm assumptions before resigning – No demotion – No unjustified disadvantage – No constructive dismissal – ARREARS OF WAGES – Claim for bonus payment – Alleged offered bonus payment as part of foreman’s duties – On evidence no bonus offered – Length of service nine months - Foreman/tradesman plumber
Result: Applications dismissed ; Costs reserved

Palmer v Bluescope New Zealand Steel Ltd

26 Sep 2006, D King, AA 305/06, (6 pages)

UNJUSTIFIED DISMISSAL - Applicant revealed his alcohol problem to manager – Required to enter Rehabilitation Agreement ("RA") and submit to random breath testing - Dismissed when failed test – Applicant denied consuming alcohol but was unable to obtain blood test – Employer unable to dismiss every person with alcohol or drug problem - Has to manage situation so rights of disabled employee and other employees are weighed fairly and reasonably – If applicant had not volunteered information company would have been unknowingly employing person with alcohol problem, a potentially more dangerous situation – Need for safeguards for employees in drug and alcohol testing environment and need to ensure testing scientifically valid – Also issue regarding privacy and access to test results – Not a question of Authority setting RA aside, rather question of taking its reasonableness and fairness into account as relevant factor – Even if reading correct, issue was whether in all circumstances dismissal justified – Inadequate consideration given to exploring other possible reasons for reading – No evidence alternative disciplinary actions considered – Strict liability approach made RA unreasonable and placed applicant in less advantageous position than employee who did not disclose alcoholism – More than likely that alcohol impaired employee who had not entered agreement like this would have received warning for first offence – Decision to dismiss based on health and safety but disciplinary meetings focused on whether reading accurate – Insufficient account taken of applicant’s ready agreement to take test – Fact applicant had not displayed any performance or impairment problems not taken into account – Unjustified dismissal – Remedies – Parties to meet and try to resolve issue of remedies themselves or with assistance from mediator - Length of service not specified - Crane operator
Result: Application granted ; Question of remedies reserved ; Costs reserved

Phillips v iTAG Ltd

24 Oct 2006, P Montgomery, CA 150/06, (7 pages)

UNJUSTIFIED DISADVANTAGE – UNJUSTIFIED DISMISSAL – Applicant’s employment agreement set out hours of work and stated additional hours required “from time to time” – One month into employment applicant required to work number of additional hours - Applicant told Managing Director (MD) unable to work extended hours because of late notice – Alleged response was that refusal would put applicant “on thin ice” - Applicant later informed MD he was raising personal grievance – Alleged MD had not dealt with him in good faith in terms of expected hours of work and by setting unattainable bonus target – Applicant proposed “gentleman’s agreement” whereby he would not pursue grievances but would not work extended hours and that he would begin looking for new job – Applicant claimed MD said he felt parties could still work together – Later MD asked

applicant to attend meeting to discuss concerns and gave him letter containing allegations of inappropriate behaviour – Before meeting, applicant advised he was proceeding with grievances, did not want to work for company and would seek new employment as soon as possible – MD said he did not consider this to be resignation and thought parties could still work together – Following day, applicant told MD he was going to Police over email MD had previously shown applicant – Applicant claimed email pornographic but MD thought it “pretty harmless” – At meeting to discuss applicant's behaviour he replied “no comment” to each point raised – When asked, applicant restated intention to leave and proposal parties work together on matter – After brief adjournment, alleged MD said that as applicant had made it clear that he intended to leave, his statement was being taken as resignation – MD had not regarded applicant's earlier statement of intent to leave as resignation – At that point parties had interim arrangement pending applicant putting “managed exit” proposal in writing for MD's consideration – Status quo would remain until such time as MD considered proposal – It was only in light of events on day of meeting that MD construed statement as resignation – No evidence applicant remonstrated with MD or sought to change perception of statement - Applicant's statement that he wanted to leave as soon as possible was not, in circumstances, capable of amounting to resignation – While behaviour of applicant decidedly unusual given “managed exit” proposal that did not warrant unilateral abandoning of proposal by respondent – Repetition of intention to leave did not entitle MD to regard it as actual resignation – Unjustified dismissal – Employment agreement required applicant to work overtime and issue discussed at pre-employment stage – Parties did not appear to have discussed notice to be given if overtime required – Remedies – Contributory conduct – Authority considered applicant's reaction to receiving letter detailing respondent's concerns, his raising of the email incident and his threat to publicise it within tourist industry - Also considered applicant's refusal to engage with MD during disciplinary meeting - Awards reduced by one third – Length of service 11 weeks - Area Manager
Result: Application granted (Unjustified dismissal) ; Reimbursement of lost wages (\$10,456.28 reduced to \$6,974.34)(14 weeks less earnings) ; Compensation for humiliation etc (\$6,000 reduced to \$4,000) ; Compensation for lost benefit (Company vehicle)(\$3,230.78 reduced to \$2,154.93) ; Costs reserved

Procter v Northland Disabilities Resource Centre Trust Matapuna Hauora

15 May 2006, YS Oldfield, AA 170/06, (7 pages)

UNJUSTIFIED DISADVANTAGE – UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant entitled to ten weeks' paid leave per year – Indicated willingness to renegotiate entitlement due to respondent's financial concerns – Believed renegotiation not to occur until later in year – Issue raised during performance meeting – Subsequent discussions about need for change – Applicant submitted leave form for upcoming school holidays – Received letter stating that failure to reach agreement over leave entitlements could result in review of applicant's position – Later informed by email that leave application could not be processed until entitlement issue resolved – Meeting to discuss matters cancelled for general manager to attend Tangi – Miscommunication meant applicant not aware of cancellation - Miscommunication discussed with general manager and alternative meeting date set – Applicant requested information on procedure to be followed during negotiations – General manager referred applicant to Employment Relations Act 2000 (“ERA”) - Applicant resigned – Raising issue during performance meeting not major error – Discussions about need for change reasonable – Reasonable for applicant to fear for job upon receiving letter – Respondent not justified in linking possibility of review with issue of leave entitlements – Reasonable for respondent to want meeting before processing leave application but needed to occur promptly - Two week delay before responding to leave application not reasonable – Caused applicant unnecessary anxiety – Letter and email unjustified disadvantage – Respondent's subsequent conduct met all obligations – General manager's comments about ERA not out of line – Too soon for applicant to presume respondent intended to change conditions of employment unilaterally – Resignation prior to scheduled meeting premature – Orderly completion of notice period and send-off given to applicant indicated no irretrievable break down of relationship – No constructive dismissal

– Length of service six years one month – Service co-ordinator/needs assessor

Result: Application dismissed (Unjustified dismissal) ; Application granted (Unjustified disadvantage) ; Compensation for humiliation etc (\$1,500) ; Costs reserved

Personal Grievance - Dismissal - Misconduct - Employment Relations Act 2000

Cameron v Stan Semenoff Transport Ltd

1 Jun 2006, L Robinson, AA 193/06, (4 pages)

UNJUSTIFIED DISMISSAL – Serious misconduct – Summary dismissal – Applicant dismissed on spot after respondent received complaint from another transport company of dangerous driving by applicant – Warning previously issued concerning same conduct observed by off-duty police officer – No prior notice of details or seriousness of allegations or advice of entitlement to representation – Brief response to allegations volunteered by applicant rather than actively sought by respondent – Pre-prepared dismissal letter evidence of respondent’s closed mind – Dismissal unjustified – Remedies – Driving incidents rightly categorized as blameworthy conduct by applicant – Dismissal would have been justified if not for procedural irregularities – Contributory conduct 50 percent – Length of service one year six months – Truck driver

Result: Application granted ; Reimbursement of lost wages (\$6,000 reduced to \$3,000)(12 weeks reduced to 6 weeks) ; Compensation for humiliation etc (\$5,000 reduced to \$2,500) ; Costs reserved

Corbett v Bendon Ltd

30 May 2006, A Dumbleton, AA 188/06, (6 pages)

UNJUSTIFIED DISMISSAL – Misconduct - Summary dismissal – Applicant dismissed after respondent discovered applicant had created company to develop own lingerie line – Company website solicited advances from prospective manufacturers - Conflict of interest clause in employment agreement prohibited applicant from “engaging in business activity” that “may affect ability to discharge duties and responsibilities to respondent” – Both elements required for conflict to exist - Applicant’s company intended to become business in normal sense of word not just hobby or fun – Searching for manufacturers to produce orders was activity in relation to present or future business – “Engaging in business activity” wider than “being in business” – Reasonable for respondent to conclude applicant engaged in business activity – If potential manufacturers had contacted applicant her ability to discharge employment duties and responsibilities may have been affected – Many opportunities for applicant to promote own product to respondent’s customers – Reasonable to conclude conflict of interest existed – Breach sufficiently serious to justify summary dismissal – Walker v Aitken (cited below) distinguished – Location of disciplinary meeting in public food hall unsatisfactory but did not materially detract from fairness of enquiry – Respondent acted with unnecessary haste when dismissed applicant on phone immediately after disciplinary meeting – Lapse not enough by itself to render dismissal unjustified – Dismissal substantively and procedurally justified - UNJUSTIFIED DISADVANTAGE – Alleged unjustified suspension - One day suspension on pay during disciplinary process – Suspension conformed with express term of employment agreement – No material disadvantage suffered – GOOD FAITH – No breach of good faith by respondent – Length of service six weeks – Lingerie sales consultant

Result: Applications dismissed ; Costs reserved

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

Perkins v Harbour City Signs Ltd

6 Oct 2006, D King, AA 315/06, (3 pages)

UNJUSTIFIED DISMISSAL – Poor performance – Respondent claimed applicant received three warnings – First two “warnings” were not warnings as applicant not told employment in jeopardy or that she was being given warnings – “Warnings” were simply Operations Manager telling applicant about errors in accordance with obligation to provide training – Giving of third warning disputed by applicant – Warning procedurally unfair – Third warning given just before respondent closed for Christmas – On first day back after break applicant verbally informed of dismissal and given notice – Two days later written dismissal letter left on her desk – Applicant claimed shocked to receive letter and wrote resignation letter effective that day – Dismissal unjustified – Even if applicant had been told before holiday close down that employment in jeopardy she had no opportunity to improve performance as dismissed on first day back – Basic elements of procedural fairness not met – Probationary clause provided for termination at end of three month period – Applicant dismissed after less than seven weeks employment – Respondent had obligation to provide training over a reasonable period of time - Parties had agreed that time period was to be three months - Applicant unjustifiably dismissed and entitled to treat actions of respondent as breach of contract and contract as being at an end – Length of service less than seven weeks - BREACH OF CONTRACT - Counterclaim - No contractual provision requiring repayment of notice - Respondent unable to identify any loss suffered as consequence of early departure - Dismissal letter made it clear applicant would have been released within notice period if she found other employment - Claim dismissed - Office administrator

Result: Application granted(Unjustified dismissal) ; Reimbursement of lost wages (\$3,273)(3 months less earnings) ; Compensation for humiliation etc (\$2,000) ; Application dismissed(Breach of contract) ; Costs reserved

Personal Grievance - Dismissal - Redundancy - Employment Relations Act 2000

Gutsell v Koru Blue Ltd t/a Airport Lodge Motel

2 Oct 2006, P Montgomery, CA 146/06, (4 pages)

UNJUSTIFIED DISMISSAL – Redundancy – Applicant employed as motel cleaner - Motel subsequently purchased by respondent – Sale and purchase agreement acknowledged that under Employment Relations Act 2000 employees entitled to transfer to respondent on same terms and conditions – In month prior to sale applicant worked three days per week instead of her usual five as recovering from surgery – New owners decided to realign cleaning schedule - Believed applicant customarily worked three days – Director told applicant she was let go as she was unable to work five day week required by business – Respondent mistakenly assumed applicant’s days of work at time were those she had always worked – Respondent obliged to consult with applicant before declaring her surplus to requirements – Failure to do so resulted in unjustified dismissal – Length of service three weeks with respondent, 15 months with business – Cleaner

Result: Application granted ; Reimbursement of lost wages (\$500)(3 weeks) ;
Compensation for humiliation etc (\$2,500) ; Arrears of holiday pay (6 percent of lost wages) ; Costs reserved

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

Corbett v The Chief Executive, Department of Corrections

1 Jun 2006, J Scott, AA 192/06, (10 pages)

RAISING OF PERSONAL GRIEVANCE – Whether applicant raised grievance within 90 day time limit – Unjustified dismissal claim dismissed by Authority – Challenge filed - New application for unjustified disadvantage in relation to written warning filed on same day - Applicant notified grievance relating to disciplinary investigations one day before written warning issued – Whether notification covered actual warning or just disciplinary process – At time grievance raised warning inevitable as date for applicant to provide submissions on proposed penalty already passed – Employment Relations Act 2000 s114 contemplated event “that has occurred or is occurring” - Warning was “occurring” at time grievance raised and was event that had come to notice of employee even though not yet confirmed – Respondent’s reply to applicant’s raising of grievance impliedly accepted grievance included outcome of second investigation – Justification for warning and issues arising from investigation leading to warning inextricably linked - Commonsense for Authority to permit investigation into matter in entirety – Corrections officer

Result: Question determined in favour of applicant ; Costs reserved

Hyde v Hospitality Services Ltd

31 May 2006, GJ Wood, WA 83/06, (11 pages)

UNJUSTIFIED DISMISSAL – RAISING PERSONAL GRIEVANCE - Constructive dismissal – Applicant in national training and development role – Respondent proposed hiring additional employee to link professional development training with formal unit standards qualifications – Applicant not consulted – Informed of proposal in brief meeting - Applicant raised concerns in email – New employee appointed – Applicant continued working without complaint until resigned to take up new employment – Respondent breached number of significant duties to applicant when developing unit standards proposal – Removal of all management responsibilities regarding design, development and implementation of training programmes constituted significant change to terms of employment – Change amounted to demotion – Breach sufficiently serious to make resignation reasonably foreseeable – However applicant’s email did not constitute raising of personal grievance – Concerns not raised again until after resignation – Delay in raising matters so long that applicant acquiesced in changes imposed on her – Change to position not sufficiently proximate to resignation to found claim for constructive dismissal – UNJUSTIFIED DISADVANTAGE – Consideration of power to find alternative grievance under Employment Relations Act 2000 s122 - Although demotion amounted to unjustified disadvantage, disadvantage grievance not raised within 90 days so no award possible – Length of service three years three months – National training and development manager

Result: Application dismissed ; Costs reserved

Personal Grievance - Unjustified Disadvantage - Employment Relations Act 2000

Corbett v Bendon Ltd

30 May 2006, A Dumbleton, AA 188/06, (6 pages)

UNJUSTIFIED DISMISSAL – Misconduct - Summary dismissal – Applicant dismissed after respondent discovered applicant had created company to develop own lingerie line – Company website solicited advances from prospective manufacturers - Conflict of interest clause in employment agreement prohibited applicant from “engaging in business activity” that “may affect ability to discharge duties and responsibilities to respondent” – Both elements required for conflict to exist - Applicant’s company intended to become business in normal sense of word not just hobby or fun – Searching for manufacturers to produce orders was activity in relation to present or future business – “Engaging in business activity” wider than “being in business” – Reasonable for respondent to conclude applicant engaged in business activity – If potential manufacturers had contacted applicant her ability to discharge employment duties and responsibilities may have been affected – Many opportunities for applicant to promote own product to respondent’s customers – Reasonable to conclude conflict of interest existed – Breach sufficiently serious to justify summary dismissal – Walker v Aitken (cited below) distinguished – Location of disciplinary meeting in public food hall unsatisfactory but did not materially detract from fairness of enquiry – Respondent acted with unnecessary haste when dismissed applicant on phone immediately after disciplinary meeting – Lapse not enough by itself to render dismissal unjustified – Dismissal substantively and procedurally justified - UNJUSTIFIED DISADVANTAGE – Alleged unjustified suspension - One day suspension on pay during disciplinary process – Suspension conformed with express term of employment agreement – No material disadvantage suffered – GOOD FAITH – No breach of good faith by respondent – Length of service six weeks – Lingerie sales consultant

Result: Applications dismissed ; Costs reserved

Darling v Platinum Properties Ltd

29 May 2006, P Cheyne, CA 78/06, (7 pages)

ARREARS OF WAGES - UNJUSTIFIED DISADVANTAGE - Applicant employed to establish business – No written employment agreement - Number of performance issues raised few months into employment – Manager appointed – Applicant resigned on three months notice – Attempts to negotiate lesser period unsuccessful - Cellphone, office keys and petrol card removed from applicant – Time off work due to stress-related illness – Raised grievance during absence – Brief return to work - Respondent’s reply to grievance required applicant to bring forward resignation to take effect immediately or be summarily dismissed – Directed not to attend work – On respondent’s evidence no dismissal and resignation not brought forward – Applicant willing to attend work but instructed not to – Therefore employment remained on foot until ended by reason of resignation – Arrears of wages due and owing until end of original notice period – Removal of phone, keys and card based on suspicions about applicant having secured employment with competitor - Applicant given no chance to comment on suspicions – Actions not remedied even after applicant informed them of actual future plans - Removal of items unjustified disadvantage – Respondent entitled to appoint manager - Disappointment over appointment and implications for applicant’s future with respondent not unjustified disadvantage – Remedies – Difficult to distinguish effects caused by non-actionable disappointment and effects caused by established grievance – Disappointment was more significant cause of applicant’s stress and compensation assessed accordingly – Not appropriate to award payment for time off due to stress as not satisfied applicant would have needed leave if proven grievance only factor – Performance issues too remote from grievance to amount to contributory conduct – PENALTY – Claim for penalty for failure to provide employment agreement - If

employment agreement defining notice period provided, problem unlikely to have arisen – Penalty appropriate – Other claims made late in investigation meeting dismissed – Length of service until disadvantage three months - Property manager

Harvey v Smith and Anor t/a D M Transport

9 Oct 2006, GJ Wood, WA 132/06, (6 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Constructive dismissal – No appearance by respondent - Service on any particular member of partnership sufficient to constitute service on all partners - At beginning of employment some difficulties in arranging method of pay and later over taxation – Applicant concerned paying far more tax than usual and took it up with respondent – Dispute went on for several weeks without resolution – Respondent accused applicant of breaching employment agreement's confidentiality provisions by raising concerns directly with IRD – Applicant told he would be given alternative driving run and would no longer be given weekend work – Authority accepted changes made to punish applicant – Applicant concerned about changes as knew nothing about new run and would lose money without weekend work – Applicant believed unfairly punished and resigned – Agreed to work out one month notice period – Respondent made deduction from final pay for time applicant away giving evidence in High Court on another matter – Authority accepted respondent previously agreed to pay applicant for this time – Applicant greatly distressed by dismissal – Matters made worse by insulting text messages sent by respondent – Constructive dismissal – Workers entitled to take up issues concerning them, particularly over appropriate level of take home pay – Instead of assisting process, respondent punished applicant – Clear breach of duty of sufficient seriousness to make it reasonably foreseeable that applicant would resign – Remedies - Disadvantage inextricably linked with unjustified dismissal and global award appropriate – Compensation would have been extended beyond three months had employment been for much longer duration than three months and had he not been working significantly reduced hours at new employment – Applicant did not receive weekend work for last three weeks of employment – Entitled to claim that loss – ARREARS OF WAGES AND HOLIDAY PAY - No holiday pay paid – Applicant entitled to week's pay deducted because of High Court attendance and holiday pay - COSTS - Two hour investigation meeting - Applicant sought costs of \$4,000 plus expenses - Appropriate to award \$1,500 plus disbursements as claimed - Also entitled to interest on all amounts owing of 6 percent - Length of service three months - Driver

Result: Application granted ; Reimbursement of lost wages (\$6,342.05)(Three months plus lost weekends) ; Compensation for humiliation etc (\$8,000) ; Arrears of wages (\$560) ; Arrears of holiday pay (\$336.80) ; Costs in favour of applicant (\$1,500) ; Disbursements (\$223) ; Interest (6%)

Hyde v Hospitality Services Ltd

31 May 2006, GJ Wood, WA 83/06, (11 pages)

UNJUSTIFIED DISMISSAL – RAISING PERSONAL GRIEVANCE - Constructive dismissal – Applicant in national training and development role – Respondent proposed hiring additional employee to link professional development training with formal unit standards qualifications – Applicant not consulted – Informed of proposal in brief meeting - Applicant raised concerns in email – New employee appointed – Applicant continued working without complaint until resigned to take up new employment – Respondent breached number of significant duties to applicant when developing unit standards proposal – Removal of all management responsibilities regarding design, development and implementation of training programmes constituted significant change to terms of employment – Change amounted to demotion – Breach sufficiently serious to make resignation reasonably foreseeable – However applicant's email did not constitute raising of personal grievance – Concerns not raised again until after resignation – Delay in raising matters so long that applicant acquiesced in changes imposed on her – Change to position not sufficiently proximate to resignation to found claim for constructive dismissal –

UNJUSTIFIED DISADVANTAGE – Consideration of power to find alternative grievance under Employment Relations Act 2000 s122 - Although demotion amounted to unjustified disadvantage, disadvantage grievance not raised within 90 days so no award possible – Length of service three years three months – National training and development manager

Result: Application dismissed ; Costs reserved

Jeong v Hanyang Corporation Ltd

2 Oct 2006, J Scott, AA 307/06, (10 pages)

UNJUSTIFIED DISMISSAL – UNJUSTIFIED DISADVANTAGE – Constructive dismissal – Alleged respondent failed to have systems in place to protect employees from violence – Group from respondent’s business went out to dinner and Karaoke – Director of respondent threw half-full bottle of whisky and it hit applicant on head – Director alleged was trying to get his wife’s attention – Applicant alleged he lost consciousness and was taken to emergency unit – Applicant alleged director assaulted him in retaliation for his brother’s new business – Applicant initially said he had fallen down stairs to prevent wife finding out truth, but later admitted truth and went to police – Director and wife apologised next day – Director convicted of acting with reckless disregard for safety of others – Credibility finding in favour of respondent – All witnesses denied applicant actually lost consciousness – Parties had enjoyed excellent relationship – Director of respondent took reasonable steps to protect own business interests but did not threaten to take every measure to destroy applicant’s brother’s business – Was most improbable that director tossed bottle with intention of hitting anyone – However, was a reckless act – Unjustified disadvantage – Entitled to compensation of \$5,000 – Could not find that director’s action amounted to breach of duty so serious that it justified applicant treating relationship at end without at least talking to director – In context of good relationship between parties and the fact much alcohol had been consumed, should have been matter for discussion between parties particularly since director spoke to applicant as soon as he could afterwards and apologised – No constructive dismissal – Evidence disclosed that more probable reason for applicant leaving employment was that respondent’s action pointed the way to the recovery of significant monetary damages – Employee entitled to treat significant breach of duty as unilateral termination and sue – But resignation must be for the breach not the potential compensation – No unjustified dismissal – Entitled to lost remuneration for period off work due to injuries – Other claims made by applicant either misconstrued or applicant was complicit in breach (failure to provide IEA) and must be declined – Length of service until disadvantage 7 ½ months - Date of resignation not specified - Sales Manager

Result: Application granted (unjustified disadvantage) ; Reimbursement of lost wages (2 weeks) ; Compensation for humiliation etc (\$5,000) ; Application dismissed (unjustified dismissal and other claims) ; Costs reserved

Oborn v Plumbco Ltd

26 May 2006, RA Monaghan, AA 184/06, (5 pages)

UNJUSTIFIED DISADVANTAGE – UNJUSTIFIED DISMISSAL – Constructive dismissal – Alleged unjustified demotion - Applicant promoted to position of foreman on particular job – Subsequently worked on different site as tradesman with no reduction in pay or requirement to return vehicle and cell phone – General manager attempted to arrange meeting to talk about applicant’s future – Alleged told in phone conversation to return vehicle and cellphone and that was to work as tradesman with pay reduction from then on – Applicant believed demoted and resigned without attending meeting – Applicant’s beliefs based on assumption not fact - Applicant not told was being demoted or that pay reduced – Should have waited for meeting to confirm assumptions before resigning – No demotion – No unjustified disadvantage – No constructive dismissal – ARREARS OF WAGES – Claim for bonus payment – Alleged offered bonus payment as part of foreman’s duties – On evidence no bonus offered – Length of service nine months - Foreman/tradesman plumber

Result: Applications dismissed ; Costs reserved

Phillips v iTAG Ltd

24 Oct 2006, P Montgomery, CA 150/06, (7 pages)

UNJUSTIFIED DISADVANTAGE – UNJUSTIFIED DISMISSAL – Applicant’s employment agreement set out hours of work and stated additional hours required “from time to time” – One month into employment applicant required to work number of additional hours - Applicant told Managing Director (MD) unable to work extended hours because of late notice – Alleged response was that refusal would put applicant “on thin ice” - Applicant later informed MD he was raising personal grievance – Alleged MD had not dealt with him in good faith in terms of expected hours of work and by setting unattainable bonus target – Applicant proposed “gentleman’s agreement” whereby he would not pursue grievances but would not work extended hours and that he would begin looking for new job – Applicant claimed MD said he felt parties could still work together – Later MD asked applicant to attend meeting to discuss concerns and gave him letter containing allegations of inappropriate behaviour – Before meeting, applicant advised he was proceeding with grievances, did not want to work for company and would seek new employment as soon as possible – MD said he did not consider this to be resignation and thought parties could still work together – Following day, applicant told MD he was going to Police over email MD had previously shown applicant – Applicant claimed email pornographic but MD thought it “pretty harmless” – At meeting to discuss applicant’s behaviour he replied “no comment” to each point raised – When asked, applicant restated intention to leave and proposal parties work together on matter – After brief adjournment, alleged MD said that as applicant had made it clear that he intended to leave, his statement was being taken as resignation – MD had not regarded applicant’s earlier statement of intent to leave as resignation – At that point parties had interim arrangement pending applicant putting “managed exit” proposal in writing for MD’s consideration – Status quo would remain until such time as MD considered proposal – It was only in light of events on day of meeting that MD construed statement as resignation – No evidence applicant remonstrated with MD or sought to change perception of statement - Applicant’s statement that he wanted to leave as soon as possible was not, in circumstances, capable of amounting to resignation – While behaviour of applicant decidedly unusual given “managed exit” proposal that did not warrant unilateral abandoning of proposal by respondent – Repetition of intention to leave did not entitle MD to regard it as actual resignation – Unjustified dismissal – Employment agreement required applicant to work overtime and issue discussed at pre-employment stage – Parties did not appear to have discussed notice to be given if overtime required – Remedies – Contributory conduct – Authority considered applicant’s reaction to receiving letter detailing respondent’s concerns, his raising of the email incident and his threat to publicise it within tourist industry - Also considered applicant’s refusal to engage with MD during disciplinary meeting - Awards reduced by one third – Length of service 11 weeks - Area Manager

Result: Application granted (Unjustified dismissal) ; Reimbursement of lost wages (\$10,456.28 reduced to \$6,974.34)(14 weeks less earnings) ; Compensation for humiliation etc (\$6,000 reduced to \$4,000) ; Compensation for lost benefit (Company vehicle)(\$3,230.78 reduced to \$2,154.93) ; Costs reserved

Procter v Northland Disabilities Resource Centre Trust Matapuna Hauora

15 May 2006, YS Oldfield, AA 170/06, (7 pages)

UNJUSTIFIED DISADVANTAGE – UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant entitled to ten weeks’ paid leave per year – Indicated willingness to renegotiate entitlement due to respondent’s financial concerns – Believed renegotiation not to occur until later in year – Issue raised during performance meeting – Subsequent discussions about need for change – Applicant submitted leave form for upcoming school holidays – Received letter stating that failure to reach agreement over leave entitlements could result in review of applicant’s position – Later informed by email that leave

application could not be processed until entitlement issue resolved – Meeting to discuss matters cancelled for general manager to attend Tangi – Miscommunication meant applicant not aware of cancellation - Miscommunication discussed with general manager and alternative meeting date set – Applicant requested information on procedure to be followed during negotiations – General manager referred applicant to Employment Relations Act 2000 (“ERA”) - Applicant resigned – Raising issue during performance meeting not major error – Discussions about need for change reasonable – Reasonable for applicant to fear for job upon receiving letter – Respondent not justified in linking possibility of review with issue of leave entitlements – Reasonable for respondent to want meeting before processing leave application but needed to occur promptly - Two week delay before responding to leave application not reasonable – Caused applicant unnecessary anxiety – Letter and email unjustified disadvantage – Respondent’s subsequent conduct met all obligations – General manager’s comments about ERA not out of line – Too soon for applicant to presume respondent intended to change conditions of employment unilaterally – Resignation prior to scheduled meeting premature – Orderly completion of notice period and send-off given to applicant indicated no irretrievable break down of relationship – No constructive dismissal – Length of service six years one month – Service co-ordinator/needs assessor

Result: Application dismissed (Unjustified dismissal) ; Application granted (Unjustified disadvantage) ; Compensation for humiliation etc (\$1,500) ; Costs reserved

Practice & Procedure - Employment Relations Act 2000

Aerengamate v Optimum Performance (Lifestyle) Ltd and Anor

9 Jun 2006, D King, AA 200/06, (2 pages)

PRACTICE AND PROCEDURE - Identity of employer - No appearance by either respondent - After hearing Authority took evidence from Chief Operating Officer of second respondent - Claimed applicant employed by second respondent - Supplied unsigned employment agreement and time and wage records - Employer was second respondent - UNJUSTIFIED DISMISSAL - Applicant alleged unjustifiably dismissed - Evidence unchallenged - Unjustified dismissal - Remedies - Applicant sought reimbursement for time taken to gain full time employment - Applicant had employment difficulties shortly after commencing employment - Difficult to ascertain how long employment would have lasted - Declined to award reimbursement for more than three months - Authority unable to calculate lost wages as did not have information regarding applicant's part time earnings - Length of service four weeks - Caregiver

Result: Application granted ; Reimbursement of lost wages (Quantum to be determined by parties) ; Compensation for humiliation etc (\$2,500) ; Costs reserved

Clements v Camand Holdings Ltd

2 Jun 2006, P Cheyne, CA 79/06, (2 pages)

PRACTICE AND PROCEDURE - Authority ordered respondent to pay arrears of wages in previous determination - Reserved leave for parties to revert to Authority for quantum if necessary - Applicant asked Authority to determine quantum - Respondent to pay \$5,500 for 5 ½ months applicant worked as chef in accordance with previous findings - Also entitled to arrears for last week of work of \$1,038 - Also entitled to holiday pay on those arrears of \$392 - Holiday pay of \$1,155 also owing - Interest on amounts 9 percent

Result: Quantum specified ; Arrears of wages (\$46,538) ; Arrears of holiday pay (\$1,547.28) ; Interest (9 percent)

Osborne v Crop and Food Research Institute

24 May 2006, P Montgomery, CA 75/06, (4 pages)

PRACTICE AND PROCEDURE – Application for joinder – Respondent sought to join applicant's former counsel to costs application on basis of criticism in substantive determination of quality of advice given to applicant – Applicant's counsel misjudged situation - However joinder to costs application not appropriate – COSTS – Unsuccessful personal grievance – One day investigation meeting – Respondent sought contribution of \$18,634.50 to total costs and disbursements of \$31,204.46 – Argued costs increased by interlocutory matters unnecessarily advanced by applicant and continued assertion that dismissal substantively unjustified despite admission by applicant during investigation meeting that respondent entitled to disestablish role – Appropriate starting point \$2,500 per day – Award of \$5,000 appropriate taking into account significant unnecessary costs caused by way applicant's case pleaded

Result: Application dismissed (Joinder) ; Costs in favour of respondent (\$5,000)

Service Food Workers Union Nga Ringa Tota & Ors v Spotless Services (NZ) Ltd & Ors

24 Oct 2006, D Asher, WA 144/06, (5 pages)

PRACTICE AND PROCEDURE – Application for removal to Employment Court – Applicants raised issue regarding compliance with Code of Good Faith for Public Health Sector, Schedule 1B Employment Relations Act ("ERA") – Whether employees who exercised Code rights to participate in meetings, discussions and activities for collective

bargaining purposes were entitled to do so without deduction of wages - Applicant union initiated bargaining with respondents and other employers for Multi Employer Collective Agreement – Union arranged 15-30 minute meetings with members to discuss bargaining issues – Respondents, but not all employers, deducted wages from those who attended – Union claimed deductions unlawful and breached Code and Wages Protection Act 1983 – Sought arrears of wages, compliance order and declarations that deductions breached Code – Authority satisfied matter met requirements for removal in s178(2) ERA – Issue novel, involved bargaining problem in an essential service and related to public hospitals – Application not opposed by respondents - Matter removed to Court
Result: Application granted ; Matter removed to Court ; Costs reserved

Practice & Procedure - Consent Orders - Employment Relations Act 2000

Donselaar v Attorney General in Respect of the Department of Corrections

8 Jun 2006, GJ Wood, WA 52A/06, (1 pages)

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

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

Hoare v TNL Group Ltd

9 Jun 2006, P Cheyne, CA 83/06, (1 pages)

CONSENT ORDER - Applicant was dismissed - Brought personal grievance about dismissal - At investigation meeting parties reached agreement on terms of settlement - Full and final settlement of issues between parties - Terms of settlement became order of Authority - Respondent accepted applicant's conduct causing accident did not constitute serious misconduct justifying instant dismissal - Applicant accepted that accident was avoidable - Applicant accepted that prior to accident, respondent raised concerns with him about failure to secure a pallet, failure to remove dangerous goods certificate and failure to secure curtain buckles and a roof pole - Driver

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

Jensen v The Gate Shop Ltd

15 Jun 2006, GJ Wood, WA 90/06, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement at investigation meeting - Respondent to pay applicant \$1,350 in full and final settlement of all matters between parties - Terms of settlement to be orders of Authority

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

Maxwell v Simons Engineering Ltd

6 Jun 2006, GJ Wood, WA 84/06, (1 pages)

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

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

McFarlane v Flesh Ltd t/a Flesh Club and Lounge

22 Jun 2006, A Dumbleton, AA 212/06, (1 pages)

CONSENT ORDER - Oral finding at investigation meeting that unjustified dismissal grievance not raised within 90-day time limit - Authority noted that an unjustified disadvantage claim had been raised within time limit - Invoking s122 Employment Relations Act 2000 Authority indicated it would continue investigating problem as unjustified disadvantage - 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

Mildon v Dunbier Marine NZ Pty Ltd

20 Jun 2006, R Arthur, AA 206/06, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement during investigation meeting - Terms of settlement to be orders of Authority - Terms of settlement full, final and binding in respect of all employment related matters between parties

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

Patel v Cigna Life Insurance New Zealand Ltd

21 Jun 2006, GJ Wood, WA 94/06, (1 pages)

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

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

Phillips v British, Middleeastern, Sporting & Cultural Club Ltd

7 Jun 2006, GJ Wood, WA 86/06, (1 pages)

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

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

Department of Labour
TE TARI MAHI

