

Department of Labour
TE TARI MAHI



EMPLOYMENT CASES SUMMARY

August 2008

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

Employment Cases Summary

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

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

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Significant Judgments/Decisions

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

Brief Summaries

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

FULL-TEXT OF DETERMINATIONS

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

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Barry v Anoop Investments Ltd

AC 19/08

Heard: 21 May 2008, Auckland

Judgment Date: 3 Jun 2008

Court/Authority: Travis J

Appearances: M Young ; M Khan

PRACTICE AND PROCEDURE – Application for leave to file statement of defence out of time – Problems relating to service – Settlement negotiations were on-going but statement of defence never filed – Application for leave filed 63 days after service –

defendant submitted that justice best achieved in granting application due to attempts at settlement – Plaintiff submitted that increased costs and stress had caused significant prejudice – Plaintiff submitted there was no defence to claim – HELD – Likely explanation was that need to file statement of defence overlooked during settlement negotiations – Failure to file was inadvertent – Defendant had not failed to demonstrate any defence – Challenge would turn on credibility of witnesses therefore substantial merits and equities required defendant to be given opportunity to defend claim – Application granted

This was a successful application for leave to file a statement of defence out of time.

The Employment Relations Authority issued a determination on 18 January 2007 in which it found largely in the defendant's favour but did find that the plaintiff had made out a claim for wage arrears but did not quantify the amount. The plaintiff filed a de novo challenge to that determination on 15 February 2007.

There were problems relating to service. On 2 July 2007 the Authority issued a supplementary determination setting out the method for calculating the amount of wages arrears and awarding the plaintiff costs of \$2,000. The defendant paid \$12,000 to the plaintiff in respect of arrears and costs.

On 19 July 2007, the defendant's solicitors referred in correspondence to a possibility of a settlement. The matter was set-down but subsequently vacated on 6 September 2007 due to continued problems relating to service.

An amended statement of claim was eventually filed on 28 February 2008 and served on the defendant on 29 February 2008 according to an affidavit of service filed by the plaintiff. Further settlement negotiations ensued but no documents were filed on behalf of the defendant. As a result, the challenge was set down for an undefended hearing on 6 May 2008. On 2 May 2008, 63 days after service of the amended statement of claim, the defendant filed an application for leave to file the statement of defence out of time. The plaintiff opposed the granting of leave.

The Court may extend time to more effectually dispose of any matter before it according to the substantial merits and equities of the case, pursuant to section 221 of the Employment Relations Act 2000.

The defendant argued that the justice would best be achieved by granting the application because the defendant had been endeavouring to negotiate a final settlement with the plaintiff until shortly before the leave application was heard.

The plaintiff submitted that the application should be declined due to the increased cost, stress to the plaintiff and because there was no arguable defence to the claim.

Held

(1) The defendant's delays had been inordinate and were not adequately or expressly explained. However, the Court had drawn from the correspondence the inference that the defendant was taking steps to deal with the matter by way of settlement offers and had made a substantial payment in settlement of the supplementary determination of the Authority. The failure to file the statement of defence was inadvertent, or negligent rather than deliberate. (para 24)

(2) The Court rejected the plaintiff's contention that the defendant had failed to demonstrate any defence to his claims. (para 25)

(3) If the defendant was barred from defending the Authority's determination in its favour, there would be considerable difficulties in determining the present matter according to its substantial merits and equities, as provided by s221. The defendant was not taking any steps to contest the Authority's determination and the plaintiff would still have the burden of the challenge against those aspects in respect of which he had been successful. Because that challenge would turn largely on the credibility of witnesses for both sides, the Court did not consider it would be able to effectually dispose of the matter before it, according to the substantial merits and equities of the case, unless the defendant was given the opportunity it sought to defend the matter. (para 30)

Result: Application granted ; Orders accordingly ; Costs reserved

Statutes considered:

ERA s221
Employment Court Regulations 2000 r29

Cases referred to in judgment:

Bowles v Raukura Hauora o Tainui AC 67/06, 30 November 2006
Fisher v Fisher AC 2/07, 1 February 2007
Fordham v Xcentrix Communications Ltd (1996) 9 PRNZ 682
Hunt v Forklift Specialists Ltd WC 30/00, 18 May 2000
Otago Taxis Ltd v Strong CC 6/07, 2 March 2007

Pages: 2
[975030]

Arrears - Employment Relations Act 2000

Afuie v Fyran Marine Ltd

23 Jul 2007, Y S Oldfield, AA 300/07, (12 pages)

UNJUSTIFIED DISMISSAL – Serious misconduct – Co-worker (“K”) alleged applicant head-butted him – Applicant claimed accidentally struck heads – Respondent investigated, and interviewed applicant, witnesses, and K – Respondent concluded applicant head-butted K and had to dismiss applicant or be seen to condone workplace violence – Applicant claimed investigation unfair and respondent should have believed his account – Also claimed not formally told of details of complaint or injuries, and not advised to obtain independent advice or interpreter - Claimed dismissal decision premeditated – Authority found deliberate assault in workplace amounted to serious misconduct unless clear was in self defence - Although respondent could have been clearer about inquiry, subject narrow in scope so no risk of confusion – Informed of entitlement to support person – Applicant previously served as support person in disciplinary meeting so aware of purpose – Reasonable for respondent not to suggest interpreter as prior employment dealings in English – Risk that respondent did not begin investigation with open mind counterbalanced by involvement in inquiry of further respondent employee – Decision not premeditated and no serious flaws in inquiry or disciplinary process – Respondent formed genuine belief that serious misconduct occurred, and conclusion reasonable on facts – No ulterior motive to end employment, rather losing applicant great loss to respondent – Applicant claimed disparity of treatment compared to similar incidents with other employees – No detail of previous occasions provided so Authority accepted respondent’s evidence that no similar prior occasions – Fair and reasonable employer would have dismissed applicant in circumstances – Dismissal justified - If wrong, misconduct so serious would have found 100 percent contributory conduct – COUNTERCLAIM - Recovery of Monies – Applicant claimed final holiday pay incorrect – Respondent reviewed pay records and counterclaimed that overpaid applicant – Respondent took over outstanding holiday obligations when applicant’s employment transferred in purchase of business – Authority found pay correct – Applicant’s claim related to balance carried forward from previous owner, which respondent unable to assess – Applicant’s recovery of monies claim lay with former employer – Counterclaim dismissed - Boat builder

Result: Application dismissed (Unjustified dismissal) ; Application dismissed (Counterclaim) ; Costs reserved

Infinity Investment Group Ltd v Walker & Ors

19 July 2007, P Cheyne, CA 81/07, (10 pages)

BREACH OF CONTRACT – RECOVERY OF MONIES – First and second respondents trustees of first respondent’s family trust – Trustee property was land transferred by applicant – Applicant granted loan to trustees, secured by mortgage over land – Second respondent (“W”) covenantor under loan agreement – W argued transactions with family trust and also part of employment agreement (“EA”) with applicant – Provision in W’s EA to receive free house section subject to pro rata claw back provision – Different provision in loan agreement providing for repayment of principal sum on cessation of borrower’s or covenantor’s employment – Applicant sought to recover principal and interest under loan agreement when W made redundant – Respondents sought stay or order dismissing proceedings on basis matter an employment relationship problem within Authority’s exclusive jurisdiction – W argued no money owed by first and second respondents under EA – Also argued entitled to discharge of mortgage as no debt to secure – Authority assessed conflicting evidence about whether any agreed variation to terms of employment in EA – Free house section made part of employment arrangements with senior staff – Authority preferred respondent’s CEO (“R”) evidence that unaware of fringe benefit tax issues created by offer of free house section – When applicant’s CFO (“H”) asked to consider implementing free house section had to consider fringe

benefit tax liability that would arise on transfer of sections – Authority found that respondent delegated responsibility to resolve tax issue to W and H – Tax consequences inevitable if free house section provided as originally promised – H proposed applicant provide affected staff with interest free loan up to 10 years to cover section purchase price – New proposal meant applicant only liable for fringe benefit tax on interest free loan and employees provided with benefit of increased capital value in sections over 10 year period – H argued new proposal to replace rather than supplement existing contractual entitlements – Affected staff negotiated different arrangements – W and applicant agreed that transfer, loan and mortgage would be between applicant and trustees of W's family trust – No reference made to EA – H's evidence accepted that did not prepare variations to W's EA at time of land transactions because assumed conveyancing documents would have that effect – Applicant and W entered record of settlement in respect of employment relationship except for issue regarding purchase by loan to and mortgage from W and trustees – Not disputed applicant had not performed promise of free house section in EA – Applicant claimed loan agreement, transfer and mortgage reflected oral agreement to substitute those arrangements for original promise and therefore applicant able to enforce obligations under those arrangements since employment now ended – W argued loan agreement, transfer and mortgage stood alongside but subject to express terms in EA – W argued claw back provision in EA not operational because dismissed for redundancy – Also argued no agreement to vary EA because no meeting of minds on whether gift of free house section remained – Authority found applicant entitled to repayment of principal and interest in accordance with loan agreement since W's employment terminated – Issue for determination whether free house section in EA remained in force given loan, mortgage and land transaction – Authority found W and applicant agreed to substitute free house section in EA with transfer, loan and mortgage arrangements as documented – Fundamental inconsistency between arrangements meant both could not be operative – W did not reject proposed variation when open to do so – W knew was substituting one set of rights and obligations for another when agreed to variation and executed documents – Authority did not accept W's evidence that applicant would remit or amortise part of loan – Authority concluded W's employment with applicant gave access to investment opportunities that could have been more valuable than amount of loan – W prepared to forego part of right to free house section with view to maintaining relationship with applicant – Applicant's claim that variation lacked consideration rejected – Authority found consideration of lesser value than original promise but consideration provided nonetheless – Authority determined no terms of employment relationship between W and applicant that prevented applicant from enforcing rights under loan agreement – Orders accordingly – Costs reserved

Result: Orders accordingly ; Costs reserved

Laphorn v Hayes t/a Wisteria Cottage Day Spa

25 Jul 2007, J Crichton, CA 82/07, (12 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant claimed respondent unjustifiably reneged promise of day leave – Respondent claimed never unconditionally promised day leave – Applicant attended disciplinary meeting with father as support person – Written warning issued – Applicant did not return to work – Applicant's father telephoned respondent – Applicant's father claimed told by respondent that applicant must work all weekends except statutory holidays for 8 months, and preferable if applicant resigned because casual worker able to work more hours than permanent part-time worker – Authority preferred applicant's father's evidence of conversation – Applicant's father formed view that respondent would make applicant's life "a misery" if returned to workplace – Evidence from co-workers that respondent hard on applicant and did not want her back in workplace – Witnesses gave evidence that respondent actively sought to discourage applicant from returning to work – Inconsistencies between respondent's written and oral evidence, and oral

evidence unsure or evasive – Authority found that after day leave respondent's behaviour represented course of conduct with deliberate dominant purpose of extracting applicant's resignation – Dismissal unjustified - UNJUSTIFIED DISADVANTAGE – Some events outside 90 day period – No application to pursue grievance out of time – Found applicant could not rely on matters prior to 90 day period in relation to claim for unjustified disadvantage – Authority considered allegations regarding applicant's day leave and that hours of work changed unilaterally – Evidentiary difference between parties' accounts – Authority preferred respondent's evidence – Found applicant not guaranteed 35 hours per week – No unjustified disadvantage – Counterclaim for recovery of financial losses that applicant's work would have generated on day absent without agreement dismissed – PENALTY – Respondent claimed applicant breached employment agreement for day leave – Found respondent already responded by issuing disciplinary warning – Inappropriate to add further penalty – However, contributory conduct relevant to award for dismissal - Remedies – Found applicant's failure to attend work "disgraceful" – 75 percent contributory conduct – Beauty therapist

Result: Application dismissed (disadvantage) ; Application granted (constructive dismissal) ; Compensation for humiliation etc \$1,000 ; Lost wages \$1,366.50 ; Counterclaim dismissed ; Penalty dismissed ; Costs reserved

Saunders v Makaiwai Farm Partnership

24 Jul 2007, H Doyle, CA 83/07, (9 pages)

DISPUTE - Whether respondent agreed to provide applicant with 20 artificially bred weaned heifer calves or 20 four day old calves - No dispute applicant owed something, issue being what was offered and agreed to, and so therefore outstanding - Agreement not in writing - Respondent purchased property applicant worked on and offered applicant position - Parties met to discuss employment agreement - Respondent declined applicant's proposed salary increase - Parties discussed bonus structure respondent had in place for other employees - Respondent said agreed extra money applicant sought could be available by way of at-risk bonus - Respondent claimed only after bonus discussed that issue of applicant rearing calves raised - Parties agreed applicant offered 20 calves but respondent claimed offer was part of performance bonus scheme and never agreed applicant would receive weaned heifer calves - Considerable difference in value between four day old calves and weaned heifer calves - Applicant claimed when raised issue of calves some months later respondent said would sort out it out - Respondent said applicant indicated would not be raising calves and so confirmed with him that therefore bonus would be solely monetary - Respondent made settlement offer prior to applicant resigning - Authority considered more likely than not agreement was for 20 four day old calves and value of calves would then be deducted from performance bonus payable - Unlikely respondent would have offered applicant remuneration package valued at more than pay increase applicant had sought that respondent had just rejected - More likely than not that when salary increase declined parties discussed performance bonus system as system already in place for other employees - Found respondent had not considered providing applicant with calves prior to meeting - More likely only reason calves offered because applicant discussed possibility of rearing them offsite - More likely was agreement to connect value of calves with performance bonus and deduct value from bonus - Authority found respondent agreed to provide applicant with 20 four day old calves and deduct value from performance bonus - Remedies - No calves set aside for applicant and applicant now employed elsewhere - Applicant awarded value of 20 four day old calves, being \$3,000, plus interest from date would have received calves until respondent made settlement offer - Authority approached performance bonus on basis applicant would have received maximum payment then deducted value of calves - Applicant entitled to performance bonus in sum of \$2,000 - Costs reserved but Authority noted may be case where appropriate for costs to lie where they fall - Herd Manager

Result: Questions answered ; Orders Made ; \$3,249.28 (payment of calves) ; \$2,000 (performance bonus) ; Costs reserved

Breach of Contract - Employment Relations Act 2000

Infinity Investment Group Ltd v Walker & Ors

19 July 2007, P Cheyne, CA 81/07, (10 pages)

BREACH OF CONTRACT – RECOVERY OF MONIES – First and second respondents trustees of first respondent's family trust – Trustee property was land transferred by applicant – Applicant granted loan to trustees, secured by mortgage over land – Second respondent ("W") covenantor under loan agreement – W argued transactions with family trust and also part of employment agreement ("EA") with applicant – Provision in W's EA to receive free house section subject to pro rata claw back provision – Different provision in loan agreement providing for repayment of principal sum on cessation of borrower's or covenantor's employment – Applicant sought to recover principal and interest under loan agreement when W made redundant – Respondents sought stay or order dismissing proceedings on basis matter an employment relationship problem within Authority's exclusive jurisdiction – W argued no money owed by first and second respondents under EA – Also argued entitled to discharge of mortgage as no debt to secure – Authority assessed conflicting evidence about whether any agreed variation to terms of employment in EA – Free house section made part of employment arrangements with senior staff – Authority preferred respondent's CEO ("R") evidence that unaware of fringe benefit tax issues created by offer of free house section – When applicant's CFO ("H") asked to consider implementing free house section had to consider fringe benefit tax liability that would arise on transfer of sections – Authority found that respondent delegated responsibility to resolve tax issue to W and H – Tax consequences inevitable if free house section provided as originally promised – H proposed applicant provide affected staff with interest free loan up to 10 years to cover section purchase price – New proposal meant applicant only liable for fringe benefit tax on interest free loan and employees provided with benefit of increased capital value in sections over 10 year period – H argued new proposal to replace rather than supplement existing contractual entitlements – Affected staff negotiated different arrangements – W and applicant agreed that transfer, loan and mortgage would be between applicant and trustees of W's family trust – No reference made to EA – H's evidence accepted that did not prepare variations to W's EA at time of land transactions because assumed conveyancing documents would have that effect – Applicant and W entered record of settlement in respect of employment relationship except for issue regarding purchase by loan to and mortgage from W and trustees – Not disputed applicant had not performed promise of free house section in EA – Applicant claimed loan agreement, transfer and mortgage reflected oral agreement to substitute those arrangements for original promise and therefore applicant able to enforce obligations under those arrangements since employment now ended – W argued loan agreement, transfer and mortgage stood alongside but subject to express terms in EA – W argued claw back provision in EA not operational because dismissed for redundancy – Also argued no agreement to vary EA because no meeting of minds on whether gift of free house section remained – Authority found applicant entitled to repayment of principal and interest in accordance with loan agreement since W's employment terminated – Issue for determination whether free house section in EA remained in force given loan, mortgage and land transaction – Authority found W and applicant agreed to substitute free house section in EA with transfer, loan and mortgage arrangements as documented – Fundamental inconsistency between arrangements meant both could not be operative – W did not reject proposed variation when open to do so – W knew was substituting one set of rights and obligations for another when agreed to variation and executed documents – Authority did not accept W's evidence that applicant would remit or amortise part of loan – Authority concluded W's employment with applicant gave access to investment opportunities that could have been more valuable than amount of loan – W prepared to forego part of right to free house section with view to maintaining relationship with applicant – Applicant's claim that variation lacked

consideration rejected – Authority found consideration of lesser value than original promise but consideration provided nonetheless – Authority determined no terms of employment relationship between W and applicant that prevented applicant from enforcing rights under loan agreement – Orders accordingly – Costs reserved

Result: Orders accordingly ; Costs reserved

Costs - Employment Relations Act 2000

Batistich v Northland District Health Board

25 Jun 2008, J Wilson, AA 152A/08, (5 pages)

COSTS - Successful personal grievance - Length of investigation meeting not specified - Respondent sought contribution of \$3,500 to costs based on Calderbank offer made to applicant prior to investigation meeting which was rejected - Applicant argued motivating factor was matter of principle - Authority found in light of Calderbank offer case was one where appropriate to vary usual principle that costs follow event and not award cost to winner (applicant) - Costs therefore in favour of respondent - Amount to be offset against award of compensation

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

Bettany v Masonry Design Solutions Ltd

13 Jun 2008, Y S Oldfield, AA 154A/08, (2 pages)

COSTS - Successful personal grievance - 1 ½ day investigation meeting - Applicant sought \$5,570 as contribution to costs of \$8,356 - Argued respondent's counterclaim extended meeting time unnecessarily - Respondent submitted applicant's costs included costs associated with mediation - Argued applicant caused investigation meeting to be extended and noted applicant's high level of contributory conduct - Submitted costs should lie where they fall - Applicant entitled to moderate award of costs

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

Chambers v Michael Bourgeois Joinery Ltd

20 Jun 2008, J Crichton, CA 83/08, (2 pages)

COSTS - No investigation meeting - Parties resolved issues by agreement - Applicant sought costs relating to reaching settlement - Applicant sought contribution to costs of \$423 being two thirds of costs sustained as consequence of respondent's continuing default - Respondent agreed to pay half of applicant's costs - Authority found applicant entitled to full costs as not fair for applicant to bear any costs for trying to get respondent to perform obligations he had already promised to do - Applicant entitled to full costs

Result: Costs in favour of applicant (\$704.50)

Curtain Makers New Zealand v Crocombe & Ors

16 Jun 2008, M Ulrich, AA 208/08, (5 pages)

COSTS - Urgent interim injunction application withdrawn two days before investigation meeting - Respondents sought costs - Submitted high contribution to costs totaling \$11,947 warranted as applicant abandoned application after respondents filed all evidence, and applicant's claims were speculative and unsupported - Also argued factual disputes common in injunctive settings - Applicant failed to respond to respondents offer to inspect computers - Respondent's costs unnecessarily added to - Fifth respondent sought indemnity costs of \$3,500 claiming the large number of respondents increased preparatory work and abandonment of application incurring extensive costs - Applicant submitted costs should be reserved until substantive matter settled - Respondents entitled to high award of costs - Indemnity costs not warranted - First, second, third, fourth and sixth respondents entitled to \$8,000 contribution to costs - Fifth respondent entitled to \$2,000 contribution to costs

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

IC Frith (NZ) Ltd v Young

13 Jul 2007, Y S Oldfield, AA 211/07, (5 pages)

COSTS – Unsuccessful investigation and determination of restraint of trade claim by applicant (“first claim”) – After investigation, applicant’s breach of confidentiality claim (“second claim”) dealt with by telephone conferences and meeting with Authority - Second claim withdrawn – Respondent sought full indemnity of costs \$17,945 and disbursements \$688.54 – Respondent argued warranted in instructing counsel as faced claim in excess of \$200,000 – Argued incurred reasonable costs because first claim involved complex legal issues and second claim involved documentary disclosure and inspection – Alleged claims lacked merit – Alleged respondent deliberately damaged applicant’s reputation– Applicant accepted modest contribution to costs appropriate – Applicant claimed costs awards not to punish or reward – Claimed costs should lie where they fall for second claim as was after investigation meeting – Authority found applicant’s submission regarding damage to reputation not relevant to costs – In first claim, no unusual features to warrant departure from usual costs approach – Full indemnity costs not appropriate – Authority’s “standard” approach to costs not inflexible – Facts merited higher than usual award for half day matter – Considering high costs incurred, respondent awarded \$3,000 for applicant’s first claim – Found second claim able to attract costs award because formed early part of its investigation – Partial investigation capable of attracting costs award – Second claim involved 4 telephone conferences, written submission and short attendance at meeting - \$1,000 awarded to applicant for costs for respondent’s second claim

Result: Costs in favour of respondent (\$4,000)

Mills v Catalyst Commercial Ltd

13 Jun 2008, Y S Oldfield, AA 56A/08, (1 pages)

COSTS - Successful personal grievance - Length of investigation meeting not specified - Respondent submitted costs should lie where they fall - Applicant made no submission and Authority unable to make contact with applicant or her representatives - No order for costs made

Result: No order for costs

Mullay v Southern Institute of Technology

31 Jan 2006, H Doyle, CA 15/06, (4 pages)

COSTS – Unsuccessful personal grievance – One day investigation meeting – Respondent sought \$6,311, being 60% contribution to actual solicitor/client costs – Applicant legally aided – Section 40(2) Legal Services Act (“LSA”) required exceptional circumstances before costs in excess of amount required by s15(1) LSA awarded against applicant – Section 15(1) LSA required \$50 contribution – Authority found adjournment and amendments to nature of applicant’s problem not of themselves exceptional – Unusual that evidence from applicant’s witnesses did not support claim, which suggested case not carefully analysed – Case and its progression perilously close to exceptional circumstances – Authority concerned if applicant had chosen to ignore sensible warnings or settlement offers because knew had no vulnerability to costs – Balancing concerns against investigative role of Authority, circumstances fell short of high threshold required – No exceptional circumstances – Authority considered appropriate to make order under s40(4) LSA specifying what costs order would have been made if applicant not legally aided - Found respondent’s actual costs and disbursements reasonable – Respondent entirely successful – Respondent warned applicant that claim without merit – Respondent required to do additional preparation due to problem reframing – Sensible settlement offer – Balanced against applicant’s financial position, found if applicant had not been legally aided, fair and reasonable award would have been 40% actual costs in sum of \$4,112 plus \$238 disbursements – Applicant ordered to pay respondent \$50 costs, being amount of legal aid contribution

Result: Costs in favour of respondent (\$50)

The New Zealand Tramways and Public Passenger Transport Authorities Employees' IOUW (Wellington Branch) v Mana Coach Services Ltd

19 Jun 2008, P Cheyne, WA 85/08, (4 pages)

COSTS - Bargaining issues - Two day investigation meeting - Respondent argued costs should not be ordered as it was challenging the determination in Employment Court or costs should lie where they fall as both parties had elements of success - Applicant incurred costs of \$38,000 - Sought indemnity award or substantial contribution of two-thirds - Case was legally and factually complicated - Authority noted issues were very significant for parties so urgency, complexity and importance meant both parties were represented by two counsel meaning standard daily tariff would not be just result - Costs in favour of applicant

Result: Costs in favour of applicant (\$12,000)

Potter v Australian Consolidated Press New Zealand Ltd

8 Jul 2008, V Campbell, AA 82A/08, (3 pages)

COSTS - Unsuccessful personal grievance - One day investigation meeting - Applicant made no submissions - Respondent sought costs of \$7,500 - No information provided to confirm actual costs - Matter required large amount of work from both parties with numerous documents provided to Authority - Respondent made Calderbank offer of \$7,500 prior to commencing preparation for investigation meeting - Authority found given nature and complexities of cases as well as Calderbank offer, applicant required to pay respondent contribution to costs

Result: Costs in favour of respondent (\$4,000)

Pulu v Ministry of Justice

25 Jun 2008, M Ulrich, AA 219/08, (3 pages)

COSTS - Respondent sought contribution of \$2,500 to costs associated with withdrawal of application - Respondent had made Calderbank offer prior to cancellation of application, which was rejected - Respondent advised applicant "too poor" to make contribution to respondent's costs - Applicant submitted no costs award should be made due to various circumstances - Applicant's 26 years of service with respondent, serious illness applicant was suffering, belief she was unjustifiably dismissed and inability to work due to poor health and age made it impossible to pay any costs award - Respondent argued not at fault terminating respondent's employment by medical retirement, poor health unrelated to employment and no medical evidence provided to support applicant's claim she withdrew proceedings due to ill health - Authority found applicant had ample opportunity to withdraw application prior to costs being incurred - Appropriate for applicant to make some contribution to respondent costs incurred

Result: Costs in favour of respondent (\$1,550)

Dispute - Employment Relations Act 2000

NZ Steel Ltd v New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc

24 Jul 2007, V Campbell, AA 216/07, (14 pages)

DISPUTE – Applicant sought declaration that lawfully entitled to implement drug and alcohol policy (“policy”) – Respondents argued applicant failed to comply with contractual obligations by unilaterally imposing policy without respondents’ agreement and failed to consult about purpose and content of policy – Authority directed mediation regarding lawfulness of specific aspects of policy content, limiting scope of determination - Expert in drug and alcohol policies (“N”) met with applicant’s management – Authority satisfied purpose of meeting exploratory – N later presented to management on options for testing and policy implementation – Expert on rehabilitation (“B”) also provided expert advice – Applicant’s management made minor amendments to template policy drafted by N and B – Authority accepted draft only intended for discussion – Draft policy tabled at Strategic Co-ordinating Team (“SCT”) meeting, consisting of senior representatives from unions and management – Respondents argued applicant in breach of CEA because aspects of policy contained in guide supplementary to CEA, so changes made by applicant required agreement before implementation – Undisputed that agreement not reached – Applicant claimed agreement not necessary before policy implemented – Authority found no dispute about interpretation, operation or application of CEA or its supplementary documents – Found applicant implemented new policy - No attempt to change or interpret CEA in way which would change CEA or supplementary documents - Agreement with unions not required before policy implemented – No breach of CEA - Union delegates asked to form joint consultative committee (“committee”) to formulate policy proposal – Applicant advised all staff of available consultation process and of plan to implement policy – First respondent would not support provision in policy for random testing – Management representatives on committee made changes to draft policy – Authority dismissed respondent’s argument that had no opportunity to have input to changes made at that time – Found was available to union representatives to assist committee – Found changes to draft reflected changes discussed and agreed at committee meetings – Conflicting evidence on possibilities for active participation in committee meetings – Authority found committee meetings provided open opportunity for those present to air views – Respondent claimed timeframe for consultation insufficient given large number of issues raised and holiday period – Authority found timeframe for consultation insufficient to allow proper consultation for unions outside committee, especially given time of year – However, Authority balanced this against further discussion between parties and changes to policy post policy implementation – Respondents also claimed no consultation with health and safety representatives – Authority found ERA and Health and Safety in Employment Act reinforce employers’ positive obligations to ensure participation of employees in health and safety consultation – Delay in putting policy to health and safety forum acceptable because likely given at earliest opportunity – Conflicting evidence whether applicant responded to health and safety forum’s feedback – Authority found full initial and ongoing opportunities to discuss and raise issues relating to draft – Respondents claimed consultation sham because applicant had fixed mind in relation to policy contents and because proposal documented before consultation commenced – Found applicant’s changes to final content of policy showed did not have fixed mind – Found applicant entitled to have working plan in mind before consultation commenced, and important for parties to know proposal so can provide views - Consultation obligations met – Applicant entitled to implement policy and amended policy

Result: Application granted ; Costs reserved

Saunders v Makaiwai Farm Partnership

24 Jul 2007, H Doyle, CA 83/07, (9 pages)

DISPUTE - Whether respondent agreed to provide applicant with 20 artificially bred weaned heifer calves or 20 four day old calves - No dispute applicant owed something, issue being what was offered and agreed to, and so therefore outstanding - Agreement not in writing - Respondent purchased property applicant worked on and offered applicant position - Parties met to discuss employment agreement - Respondent declined applicant's proposed salary increase - Parties discussed bonus structure respondent had in place for other employees - Respondent said agreed extra money applicant sought could be available by way of at-risk bonus - Respondent claimed only after bonus discussed that issue of applicant rearing calves raised - Parties agreed applicant offered 20 calves but respondent claimed offer was part of performance bonus scheme and never agreed applicant would receive weaned heifer calves - Considerable difference in value between four day old calves and weaned heifer calves - Applicant claimed when raised issue of calves some months later respondent said would sort out it out - Respondent said applicant indicated would not be raising calves and so confirmed with him that therefore bonus would be solely monetary - Respondent made settlement offer prior to applicant resigning - Authority considered more likely than not agreement was for 20 four day old calves and value of calves would then be deducted from performance bonus payable - Unlikely respondent would have offered applicant remuneration package valued at more than pay increase applicant had sought that respondent had just rejected - More likely than not that when salary increase declined parties discussed performance bonus system as system already in place for other employees - Found respondent had not considered providing applicant with calves prior to meeting - More likely only reason calves offered because applicant discussed possibility of rearing them offsite - More likely was agreement to connect value of calves with performance bonus and deduct value from bonus - Authority found respondent agreed to provide applicant with 20 four day old calves and deduct value from performance bonus - Remedies - No calves set aside for applicant and applicant now employed elsewhere - Applicant awarded value of 20 four day old calves, being \$3,000, plus interest from date would have received calves until respondent made settlement offer - Authority approached performance bonus on basis applicant would have received maximum payment then deducted value of calves - Applicant entitled to performance bonus in sum of \$2,000 - Costs reserved but Authority noted may be case where appropriate for costs to lie where they fall - Herd Manager

Result: Questions answered ; Orders Made ; \$3,249.28 (payment of calves) ; \$2,000 (performance bonus) ; Costs reserved

Secretary of Justice v Gibbons & Ors

21 Jul 2008, G J Wood, WA 96/08, (8 pages)

DISPUTE - Ministry of Justice ("MoJ") instituted review of Māori Land Court's operations - Respondents involved in review until MoJ considered potential for conflict of interest - MoJ's new structure following review involved additional staff and changes to positions - Made decision not to pursue options preferred by respondents - Determined respondents would not be re-confirmed into positions in new structure as considered new positions dissimilar to existing positions - Declined to offer any positions to respondents until advertisement process complete - Dispute whether consistent with respondents' employment agreements to advertise for what applicant considered new positions or whether respondents should be appointed to their preference of position - Restructuring put on hold until dispute resolved - Respondents purported to file personal grievances by way of counter-claim - Authority did not address claims due to urgency of situation, and matter initially raised as dispute - Employment agreements of first three respondents provided would be notified of intention to disestablish position if position surplus to requirements - Then provided aim was to appoint them to another position not dissimilar to current position and which was suitable to skills and abilities - Fourth respondent's employment agreement

contained a different provision that where position made redundant could be offered new position - Respondents had all applied for new positions - Authority looked at whether respondents should be reconfirmed into positions in new structure by considering whether positions would cease to exist or would continue in substance - Found none of respondents' positions continued in substance - First respondent's position effectively split in two - Changes to second, third, and fourth respondents' positions resulted in reduced responsibilities and loss of management and strategic functions - Respondents' positions surplus to requirements - Authority found new positions dissimilar to respondents' current positions for essentially same reasons as found positions did not continue in substance - First three respondents claimed clause in employment agreement required applicant to offer them positions - Authority found language permissive and did not require applicant to offer positions, only once position offered that agreement mandated outcome - However, obligations under employment agreement, and good faith obligations remained - Parties must continue to use process in employment agreement to discuss appropriate solution as process not concluded - Fourth respondent claimed treated inconsistently, and in disparate manner to other affected staff - Issues best dealt with as part of personal grievance claim - Authority declared applicant entitled to continue advertising and recruitment process in respect of new positions - Respondents' personal grievances remained extant and respondent's free to progress claims

Result: Questions answered ; Costs reserved

Injunction - Employment Relations Act 2000

PGG Wrightson Ltd v Jary

3 Jul 2008, P Cheyne, CA 93/08, (9 pages)

INJUNCTION – Applicant sought to enforce against respondent restraint of trade provisions in employment agreement (“EA”) between respondent and W – W owned wool business that employed respondent – W sold wool business to applicant who offered to employ respondent – Respondent declined offer and joined competitor after being made redundant – Applicant sought injunction and damages against applicant and further interim injunction pending resolution of substantive problem – Respondent’s EA with W included non-solicitation and restraint of trade clauses – Applicant claimed was assigned provisions under sale and purchase agreement – Assuming restraint of trade in respondent’s EA capable of assignment then strongly arguable case assignment affected by sale agreement – Authority cited *Gibbs v Crest Commercial Cleaning Ltd* [2005] ERNZ 399 where Court found “long standing principle of employment law that no person (whether employee or employer) may be compelled to engage in an employment relationship with another” – Applicant, referring to *Williams v Masters* (1912) 31 NZLR 1148, argued restraint and non-solicitation clauses to protect goodwill of business and were assignable independently of employment relationship – Authority found *Williams*, did not support proposition that restraint in EA may be assigned as part of employers goodwill – Court in *Williams* referred to plaintiff’s submission as being supported only in “certain circumstances” – However in *Gardner & Ors v Cooper HC Auckland CP 1360/90* the Court approved passage in *Castle Parcels Ltd v Dale and Ors* (1989) 2 NZELC 78-265 in making interim injunction against former employees of a company that had sold its business and at least implicitly assigned its employment agreements to the purchaser – Authority found on strength of *Gardner* arguable that restraint affecting employee may be part of goodwill of business and assignable independently of employment relationship – Authority noted significant arguments to the contrary – Authority found given principle in *Nokes v Doncaster Amalgamated Collieries Limited* [1940] AC 1014 (later followed in *Gibbs*) no circumstances short of explicit statutory language by which employment itself can be assigned – Authority stated if *Gardner* right then from employee’s perspective at common law burden of contract that survives termination can be validly assigned but not benefits – Authority found as case on significant point affecting many employees and employers consideration given to removing substantive to Employment Court – Issue for Authority whether restraints arguably reasonable so as to be enforceable – Restraint of trade clause (Clause 43) too uncertain to be enforceable – Clause 43 really had no meaning due to poor drafting – Authority found Clause 43 not reasonable or capable of modification even to arguable standard – No valid restraint – Authority found non-solicitation clause (Clause 42) too wide to be enforceable in current state as on face prevented ex-employee from soliciting anyone who might sell wool – Applicant submitted Authority permitted to modify unreasonable restraint under s8 Illegal Contracts Act 1970 – Authority found preconditions to exercise power to modify under s164 ERA not satisfied, however, correct that Clause 42 capable of modification in order to be made reasonable and therefore enforceable – Authority found applicant made case to arguable standard that Clause 42 could be enforceable – Evidence suggested breach of Clause 42 at least regarding W’s clients – Authority finding that breach of Clause 42 but no breach of Clause 43 made difference to assessment of balance of convenience – Authority determined respondent not prevented from working in field of expertise by order preventing solicitation of W’s clients – Applicant’s submission accepted that potential difficulties assessing damages if breach eventually established – Potential for significant financial harm – Interim injunction ordered prohibiting respondent from soliciting new business from any of W’s existing clients

Result: Application granted ; Orders accordingly ; Costs reserved

Penalty - Employment Relations Act 2000

Lapthorn v Hayes t/a Wisteria Cottage Day Spa

25 Jul 2007, J Crichton, CA 82/07, (12 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant claimed respondent unjustifiably reneged promise of day leave – Respondent claimed never unconditionally promised day leave – Applicant attended disciplinary meeting with father as support person – Written warning issued – Applicant did not return to work – Applicant’s father telephoned respondent – Applicant’s father claimed told by respondent that applicant must work all weekends except statutory holidays for 8 months, and preferable if applicant resigned because casual worker able to work more hours than permanent part-time worker – Authority preferred applicant’s father’s evidence of conversation – Applicant’s father formed view that respondent would make applicant’s life “a misery” if returned to workplace – Evidence from co-workers that respondent hard on applicant and did not want her back in workplace – Witnesses gave evidence that respondent actively sought to discourage applicant from returning to work – Inconsistencies between respondent’s written and oral evidence, and oral evidence unsure or evasive – Authority found that after day leave respondent’s behaviour represented course of conduct with deliberate dominant purpose of extracting applicant’s resignation – Dismissal unjustified - UNJUSTIFIED DISADVANTAGE – Some events outside 90 day period – No application to pursue grievance out of time – Found applicant could not rely on matters prior to 90 day period in relation to claim for unjustified disadvantage – Authority considered allegations regarding applicant’s day leave and that hours of work changed unilaterally – Evidentiary difference between parties’ accounts – Authority preferred respondent’s evidence – Found applicant not guaranteed 35 hours per week – No unjustified disadvantage – Counterclaim for recovery of financial losses that applicant’s work would have generated on day absent without agreement dismissed – PENALTY – Respondent claimed applicant breached employment agreement for day leave – Found respondent already responded by issuing disciplinary warning – Inappropriate to add further penalty – However, contributory conduct relevant to award for dismissal - Remedies – Found applicant’s failure to attend work “disgraceful” – 75 percent contributory conduct – Beauty therapist

Result: Application dismissed (disadvantage) ; Application granted (constructive dismissal) ; Compensation for humiliation etc \$1,000 ; Lost wages \$1,366.50 ; Counterclaim dismissed ; Penalty dismissed ; Costs reserved

Personal Grievance - Dismissal - Employment Relations Act 2000

Butler v Air New Zealand Ltd

1 Aug 2007, M Ulrich, AA 225/07, (16 pages)

UNJUSTIFIED DISMISSAL – Serious misconduct – Applicant claimed respondent wrongly applied staff travel policy and failed to conduct fair investigation into disciplinary allegations – Claimed decision to dismiss harsh given applicant's personal circumstances at time – While on sick leave, applicant used staff travel privileges to attend overseas memorial service for recently deceased grandfather – Respondent accepted applicant unwell and needed to be on sick leave – However argued improper to leave country on staff travel privilege to resolve personal issues while on sick leave – Argued reasonable for respondent to expect applicant would remain in country to recuperate – Respondent argued applicant saw pamphlet prohibiting staff travel while on sick leave – Applicant claimed never saw pamphlet – Applicant signed declaration on travel application stating understood policy prohibited staff travel while on sick leave – Respondent scheduled disciplinary meeting – Applicant claimed not aware of policy on staff travel – Applicant claimed staff travel division knew policy and should have directed applicant to manager to obtain approval – Also claimed manager knew applicant on sick leave and intended to access staff travel – Manager denied knowing applicant wanted to travel while on sick leave – Respondent alleged every crew member received file drop copy of staff travel policy and policy also available to employees on intranet – Applicant claimed no intention to break any rule and not clear whether rule applied to staff travelling as nominees – Applicant's doctor submitted applicant not well to work but of sane mind to travel – Respondent concluded applicant's actions amounted to serious misconduct and employment terminated – Respondent argued staff travel division administration employees to process tickets not authorise travel requests – Authority found if employees not eligible to access privileges then had to apply for exemption – Staff travel policy well documented, distributed and available – Authority found applicant knew or ought to have reasonably known of policy – Authority rejected argument that applicant's state of mind meant unable to understand potential employment difficulties with accessing staff travel while on sick leave – Authority found evidence showed applicant mindful of employment rights and obligations – Authority found respondent had reasonable basis for forming view that actions of applicant breached staff travel policy – Authority found claimed delays in disciplinary investigation did not amount to serious flaws in process – Found reasonable that employer would expect employee on paid sick leave to remain in country to recuperate – Applying principles in *Air New Zealand v Hudson* [2006] ERNZ 415 Authority concluded applicant given fair opportunity to comment on allegations – Evidence did not support finding applicant treated differently from other staff – No unjustified dismissal – Flight attendant

Result: Application dismissed ; Costs reserved

Hansen v RDF and F Catering Ltd t/a Rainbow Dairy and Cafe

31 Jul 2007, P Montgomery, CA 88/07, (9 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant claimed unjustifiably dismissed following incidents at workplace - Respondent claimed applicant resigned - Applicant claimed lost wages, compensation, and solicitor/client costs – Applicant previously spoken to about use of incorrect cleaning cloths and wearing jeans while trousers being repaired – On day of alleged dismissal claimed reprimanded over delay in trouser repair – Claimed respondent's co-owner abruptly and aggressively asked her to remove polar fleece jacket – Applicant claimed felt intimidated and upset – Respondent denied standing over and intimidating applicant – Co-workers evidence that applicant angry and respondent direct but not unreasonable – Applicant handed respondent's other co-owner her apron, saying "I don't want to work here

anymore" and left during shift – Several days later co-worker instigated meeting between applicant and respondent – Respondent of view applicant asking if could withdraw resignation – Applicant of view not resigned but left café because upset over alleged behaviour of respondent – Respondent considered matter then telephoned applicant to say decided to "leave things as they are" – Applicant claimed took this to mean had been dismissed - Authority found applicant took exception to respondent asking her to remove jacket and became unreasonably angry – Little doubt of applicant's intention to resign in words spoken and gesture of removing and handing over apron – Evidence too light to bear weight of constructive dismissal – Respondent entitled to take actions as resignation – Purpose of meeting that respondent consider permitting applicant to withdraw resignation – Not disciplinary meeting as applicant already resigned – Open to respondent to decline attempt to rescind resignation – Dismissal justified – Employed for under one month - Counter staff member
Result: Application dismissed ; Costs reserved

Lapthorn v Hayes t/a Wisteria Cottage Day Spa

25 Jul 2007, J Crichton, CA 82/07, (12 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant claimed respondent unjustifiably reneged promise of day leave – Respondent claimed never unconditionally promised day leave – Applicant attended disciplinary meeting with father as support person – Written warning issued – Applicant did not return to work – Applicant's father telephoned respondent – Applicant's father claimed told by respondent that applicant must work all weekends except statutory holidays for 8 months, and preferable if applicant resigned because casual worker able to work more hours than permanent part-time worker – Authority preferred applicant's father's evidence of conversation – Applicant's father formed view that respondent would make applicant's life "a misery" if returned to workplace – Evidence from co-workers that respondent hard on applicant and did not want her back in workplace – Witnesses gave evidence that respondent actively sought to discourage applicant from returning to work – Inconsistencies between respondent's written and oral evidence, and oral evidence unsure or evasive – Authority found that after day leave respondent's behaviour represented course of conduct with deliberate dominant purpose of extracting applicant's resignation – Dismissal unjustified - UNJUSTIFIED DISADVANTAGE – Some events outside 90 day period – No application to pursue grievance out of time – Found applicant could not rely on matters prior to 90 day period in relation to claim for unjustified disadvantage – Authority considered allegations regarding applicant's day leave and that hours of work changed unilaterally – Evidentiary difference between parties' accounts – Authority preferred respondent's evidence – Found applicant not guaranteed 35 hours per week – No unjustified disadvantage – Counterclaim for recovery of financial losses that applicant's work would have generated on day absent without agreement dismissed – PENALTY – Respondent claimed applicant breached employment agreement for day leave – Found respondent already responded by issuing disciplinary warning – Inappropriate to add further penalty – However, contributory conduct relevant to award for dismissal - Remedies – Found applicant's failure to attend work "disgraceful" – 75 percent contributory conduct – Beauty therapist

Result: Application dismissed (disadvantage) ; Application granted (constructive dismissal) ; Compensation for humiliation etc \$1,000 ; Lost wages \$1,366.50 ; Counterclaim dismissed ; Penalty dismissed ; Costs reserved

Sefo v Sealord Shellfish Ltd

24 Jul 2007, P Montgomery, CA 84/07, (15 pages)

UNJUSTIFIED DISADVANTAGE – Applicant worked on mussel opening line – Automated system counted mussels, attributed mussels to individual line workers and checked quality of mussels – If more than 3 percent of mussels rejected by quality checker then percentage subtracted from individual worker's final pay – Malfunction meant system unable to attribute mussels to particular workers – Respondent claimed applicant incited co-workers to "cheat" following malfunction – Applicant suspended from work prior to formal investigation – Union representative challenged decision to suspend – Authority accepted respondent's argument that suspension reasonable as investigation required public consultation with other workers – Suspension justified – UNJUSTIFIED DISMISSAL – Manager claimed applicant left position on opening line, approached co-worker ("A"), and said "go for it the belt is stuffed" – Applicant denied saying "go for it" – A claimed fifty to sixty percent certain applicant said "go for it" – Formal complaint lodged against applicant by second co-worker ("B") – B claimed saw applicant approach other line workers and had also spoken with A following incident – Respondent investigated co-workers who worked same shift as applicant – Third co-worker ("C") claimed approached by applicant – However, no co-workers investigated heard words "go for it" or thought applicant encouraging co-workers to cheat – At investigation meeting respondent alleged applicant told at least three workers to "go for it" – Authority found allegation extraordinary given findings of co-worker interviews – Interviews effectively ruled out all employees apart from A as an employee applicant spoke to following belt malfunction – Discrepancy in evidence where respondent's witnesses told Authority that regardless of actual words used A sure encouraged to cheat by applicant – A told Authority that was not sure what applicant had said – Authority found unsafe for respondent to conclude A correct in perception when was unsure of exactly what was heard – A asked by respondent to put percentage figure on certainty to avoid uncertain phrases – Manager gave evidence that satisfied summary dismissal appropriate when A made estimate over fifty percent – Authority found key witness questioned only after decision made and in effect was not absolutely certain applicant said "go for it" – Dismissal unjustified – Remedies – Authority found applicant contributed to situation giving rise to dismissal when left position in line when belt malfunctioned – Contributory conduct 20 percent – Applicant's actions not those expected of senior experienced worker – Respondent's derisory comments and imprudent actions inappropriate for employee in leadership position – Reinstatement declined – Clear evidence that applicant suffered considerable humiliation and injury to feelings – Evidence unchallenged – Compensation of \$12,000 appropriate – Costs reserved – Mussel opener

Result: Application granted ; Reimbursement of lost wages (Reduced to 4 months less earnings) ; Compensation for humiliation etc (\$15,000 reduced to \$12,000) ; Costs reserved

Strichen v The Ministry of Social Development

27 Jul 2007, D Asher, WA 105/07, (15 pages)

UNJUSTIFIED DISADVANTAGE – Applicant claimed unjustifiably disadvantaged on five occasions then constructively dismissed – Respondent denied allegations and replied some issues not raised within 90 days – Authority sought clarity of initial claim because volume of documentation reflected absence of focused preparation by applicant – Applicant's first grievance was that not treated fairly nor properly supported in role – Claims not supported by any evidence and lacked sufficient specificity for respondent to have been on notice – Authority found although applicant disappointed by respondent's decisions, actions legitimate expression of employer's right to manage – Second grievance related to comments in performance assessment – Authority found genuine attempt by respondent to assess performance – Authority rejected applicant's claims that negative comments by co-workers affected performance assessment – Respondent able to justify comments of internal difficulties – Evident applicant

refused to accept responsibility for issues – Third grievance rejected as no evidence of conspiracy to deny applicant timely entitlement to information – Fourth grievance that performance assessment given to applicant without prior consultation – Authority rejected grievance as standard procedure for respondent to provide draft assessment to employees to invite comment – Applicant's fifth grievance that respondent's disciplinary action in response to email sent by applicant breached code of conduct and not consistent or fair – Authority found warning issued fair and reasonable response in circumstances – UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant claimed over ten year period "scapegoated", "bullied" and "abused" – Authority found applicant's self reported records cannot be described as evidence that respondent acted unjustifiably and therefore caused the deterioration in applicant's health – Authority found extensive communication from applicant did not make clear that would resign should respondent not provide remedies sought in relation to grievances – Clear from applicant's evidence that intention to resign because of lack of qualifications, financial and family commitments, not failure of respondent to satisfy grievance concerns – Authority found respondent willing to consider applicant's concerns evidenced by number of meetings, mediations and proposals advanced to find resolution – Respondent's ultimate refusal to accommodate applicant's concerns was genuine view following proper and extensive process that claims had no merit – No constructive dismissal – Given Authority's finding on grievances unnecessary to address 90 day issue – Social worker

Result: Application dismissed ; Costs reserved

Taylor v Raukura Hauora O Tainui

27 Jul 2007, L Robinson, AA 221/07, (35 pages)

UNJUSTIFIED DISMISSAL – Applicant established foundation to purchase respondent health clinic – Respondent believed applicant's intentions surrounding purchase and subsequent intention to set up new clinic contrary to duty of fidelity and consequently dismissed applicant – Applicant discussed proposal to purchase with respondent's Chief Executive Officer ("M") – Respondent alleged applicant made threat to pressure sale by telling M that resignations of colleagues forthcoming – Authority found applicant failed to disclose own personal connection with trust – Not disputed that applicant told M if proposal not accepted resignations would be forthcoming – Authority also found M told applicant would look forward to receiving applicant's resignation – Proposal to purchase respondent rejected – Applicant denied raising staff resignations as a "threat" or ultimatum and confirmed professional responsibilities to respondent – Authority found possibility of resignations raised merely to highlight reality of situation – Applicant claimed authorised to disclose intentions of some doctors working for respondent – Applicant claimed M fully engaged in process and never referred to any potential conflict of interest or brought up any issues during correspondence – Authority found statements in correspondence inconsistent with allegation of threat by applicant – Authority found in context of open discussion of commercial nature, applicant's statement made as idle observation and statement of fact – M's statements and advice not consistent with perception of threat – M gave evidence to Authority that no threat perceived – Respondent claimed applicant breached general duty of fidelity owed to respondent – Authority concluded respondent acquiesced and through M conducted commercial negotiations with applicant in open manner without objection – Correspondence between applicant and M related to commercial purchase – Correspondence not an incident of employment relationship – In negotiating sale and purchase, respondent not acting as employer and applicant not carrying out employment duties – No objection made to applicant pursuing own interests known to M and respondent – Statement of forthcoming resignations made by prospective purchaser to prospective vendor – Respondent alleged after proposal to purchase declined, applicant actively took steps to establish competing clinic and solicited employees – Applicant approached director of District Health Board ("DHB") to ascertain requirements

to set up new clinic – Applicant also sought approval to join Primary Health Organisation (“PHO”) – Applicant claimed intended to ensure respondent’s best interests – Authority found applicant never disclosed precisely who involved in foundation – Applicant claimed intended foundation to work collaboratively with respondent, however, not disclosed to respondent – Authority found M always knew of applicant’s intentions and personal involvement with foundation – M not concerned about applicant’s intentions and encouraged discussion about purchasing respondent and setting up alternative practice – Authority concluded if respondent did not want applicant to set up clinic then should have communicated immediately when fixed with knowledge – Whether applicant’s and other staff’s activities contrary to duties to respondent did not matter as undertaken with respondent’s full knowledge and implied consent or acquiescence – When declined purchase proposal respondent should have reinforced expectations of fidelity and good faith – Respondent could have investigated applicants allegations when thought not truthful – Respondent’s failure to conduct proper enquiries meant no evidence to prove allegations – Allegation that applicant solicited other employees contrary to duty of fidelity never put to applicant – Dismissal unjustified – UNJUSTIFIED DISADVANTAGE – Respondent failed to wait for response from applicant before suspension – Staff meeting where announcement made that applicant suspended unfair in circumstances – Suspension unjustified – REMEDIES – Respondent alleged applicant transferred patient database to personal email – Applicant claimed M knew was looking at database and did not object – Authority found overtone of secrecy apparent in emails sent by applicant – Also unknown to respondent, but with notice of existence, letter by applicant that competing practice would not be complimentary to respondent – Authority found if respondent had gathered information by way of full and fair investigation then may have been in position to justify termination – Applicant did not act in good faith towards respondent because did not disclose colleagues involved when asked – Whether or not expressly asked, had duty to be forthcoming to employer and to volunteer information in active and communicative way – Contributory conduct 33 percent – Applicant entitled to reimbursement of lost wages – Applicant claimed was devastated by respondent’s decision and treatment throughout process – Also claimed reputation damaged – Compensation \$10,000 – Costs reserved – Registered medical practitioner

Result: Application granted ; Reimbursement of lost wages (Quantum to be determined by parties)(Contributory conduct 33.3%) ; Compensation for humiliation etc (\$15,000 reduced to \$10,000)

Personal Grievance - Dismissal - Misconduct - Employment Relations Act 2000

Afuie v Fyran Marine Ltd

23 Jul 2007, Y S Oldfield, AA 300/07, (12 pages)

UNJUSTIFIED DISMISSAL – Serious misconduct – Co-worker (“K”) alleged applicant head-butted him – Applicant claimed accidentally struck heads – Respondent investigated, and interviewed applicant, witnesses, and K – Respondent concluded applicant head-butted K and had to dismiss applicant or be seen to condone workplace violence – Applicant claimed investigation unfair and respondent should have believed his account – Also claimed not formally told of details of complaint or injuries, and not advised to obtain independent advice or interpreter - Claimed dismissal decision premeditated – Authority found deliberate assault in workplace amounted to serious misconduct unless clear was in self defence - Although respondent could have been clearer about inquiry, subject narrow in scope so no risk of confusion – Informed of entitlement to support person – Applicant previously served as support person in disciplinary meeting so aware of purpose – Reasonable for respondent not to suggest interpreter as prior employment dealings in English – Risk that respondent did not begin investigation with open mind counterbalanced by involvement in inquiry of further respondent employee – Decision not premeditated and no serious flaws in inquiry or disciplinary process – Respondent formed genuine belief that serious misconduct occurred, and conclusion reasonable on facts – No ulterior motive to end employment, rather losing applicant great loss to respondent – Applicant claimed disparity of treatment compared to similar incidents with other employees – No detail of previous occasions provided so Authority accepted respondent’s evidence that no similar prior occasions – Fair and reasonable employer would have dismissed applicant in circumstances – Dismissal justified - If wrong, misconduct so serious would have found 100 percent contributory conduct – COUNTERCLAIM - Recovery of Monies – Applicant claimed final holiday pay incorrect – Respondent reviewed pay records and counterclaimed that overpaid applicant – Respondent took over outstanding holiday obligations when applicant’s employment transferred in purchase of business – Authority found pay correct – Applicant’s claim related to balance carried forward from previous owner, which respondent unable to assess – Applicant’s recovery of monies claim lay with former employer – Counterclaim dismissed - Boat builder

Result: Application dismissed (Unjustified dismissal) ; Application dismissed (Counterclaim) ; Costs reserved

Pou v Alliance Group Ltd

11 Jul 2008, J Crichton, CA 96/08, (15 pages)

UNJUSTIFIED DISMISSAL – Serious misconduct – Applicant charged with theft and receiving stolen property - Offences dated prior to employment - In recruitment process, applicant not required to disclose criminal convictions or pending criminal Court appearances – During employment applicant advised respondent of upcoming Court appearance – Applicant claimed encouraged by immediate manager and works manager not to resign – Applicant pleaded guilty – Appealed sentence of imprisonment and remanded on bail – Conviction, prior convictions and sentence reported in newspaper – Non-custodial sentence since imposed - Compliance Manager (“E”) advised applicant that instituting disciplinary investigation – Applicant suspended for serious breach of code of conduct – Disciplinary meeting held – Dismissal letter stated lost trust and confidence in applicant due to dishonesty convictions, emphasising importance of honesty in quality assurance officer role, as opposed to ordinary meat worker – Applicant appointed without inquiry into extensive criminal history due to failures in respondent’s recruitment system – Authority found likely respondent would not have appointed applicant had it been aware of criminal history – Applicant not up front, relying on respondent’s failure to inquire about

convictions – No general duty on negotiating parties to reveal material facts voluntarily – Not yet in employment relationship so duty of good faith not applicable – Not illegal, but failure to disclose may be ethically unworthy – Applicant claimed unreasonable delay in disciplinary investigation - Authority found number of points after applicant put respondent on notice when could have commenced disciplinary investigation – Respondent took no steps until sentencing appearance – E claimed deferred disciplinary investigation until “full picture” known – Authority found delay did not prejudice applicant – Delay not unreasonable – Applicant claimed decision-maker in disciplinary investigation, E, biased – E disputed applicant’s witnesses evidence of bias – Bias allegations focused on events prior to termination of employment – However, if E demonstrably “had it in for” applicant prior to dismissal, possibility of bias must be considered – Also found pre-determination suggested by E’s reaction to discovering convictions at start of investigation process – Coupled with earlier issues of bias, suggested unfairness which good and fair employer would have dealt with – Possibility of predetermination of final result – Applicant claimed respondent reassured job safe – Authority found no assurances given on which applicant could reasonably rely – Encouragement to withdraw resignation proper reflection of realities of modern workplace - Applicant claimed suspension unfair – Suspension proposed and confirmed in same telephone conversation – Applicant’s evidence of phone conversation preferred – No genuine opportunity for applicant to coherently comment on prospective suspension – At least required advancing prospect of suspension, seeking comment then reflecting before final decision – Reason for dismissal was loss of trust and confidence in applicant as result of criminal offending predating commencement of employment relationship – Applying principles in *Murray v Attorney-General* [2002] 1 ERNZ 184, respondent could not dismiss in reliance on pre employment serious misconduct – Here, equity and good conscience jurisdiction does not allow Authority to conclude that despite that, decision to dismiss justified – *Murray* distinguished because higher standard applicable to Departments of State compared to meat works and dishonesty offences did not impact on applicant’s ability to carry out role – Unjustifiably dismissed – UNJUSTIFIED DISADVANTAGE – Authority concluded appearance of bias and unlawful suspension amounted to unjustified disadvantage – Remedies - Several occasions where applicant evasive and unethical in failing to provide straightforward answers when matters put to her – Not unlawful, but appropriate to require employees to truthfully answer employer’s questions – 50 percent contributory conduct – Applicant should not be seen to benefit from own wrong – Applicant provided little evidence of suffering - Award of \$2,000 compensation appropriate – 3 weeks lost wages remaining from date of dismissal under employment agreement (\$1,350) - Quality assurance officer

Result: Application granted (Dismissal) ; Application granted (Disadvantage) ; Lost wages (3 weeks)(\$1,350) ; Compensation for humiliation etc (\$2,000) ; Costs reserved

Personal Grievance - Dismissal - Redundancy - Employment Relations Act 2000

Heremaia v Sheddan Investments Ltd t/a Tokaanu Hotel

2 Aug 2007, V Campbell, AA 229/07, (7 pages)

UNJUSTIFIED DISMISSAL – Redundancy – Respondent unrepresented at investigation meeting and filed no statement of reply – Authority arranged conference call – Only in extraordinary circumstances would Authority not grant leave to arrange conference call in circumstances – Applicant worked breakfast and dinner shifts – Applicant claimed advised by respondent that no longer offering breakfasts so position redundant – Claimed no warning, consultation, or notice period – Respondent argued applicant initiated conversation by asking what was happening with business – Authority preferred applicant's evidence that made redundant – Authority found consultation statutory requirement of duty of good faith under s4 Employment Relations Act 2000 – Found no consultation with applicant prior to decision to terminate employment – Found decision of redundancy profoundly unfair – No notice that redundancy a possibility – Usual actions of fair and reasonable employer not present – Given inherent unfairness in determination and implementation of redundancy, Authority found redundancy not genuine – Dismissal unjustified – Remedies - Authority found 2 weeks reasonable notice period in circumstances – Authority ordered 2 weeks pay in lieu of notice – Applicant found alternative employment on lower wage 2 weeks after dismissal – Applicant arranged meeting with respondent to discuss redundancy – Respondent confirmed offer of reinstatement 5 months after dismissal – Open for applicant to refuse offer un circumstances – Respondent offered no apology or assurance of future fair treatment – Authority ordered respondent also pay applicant 3 months difference in lower wage – Authority accepted applicant upset and embarrassed by dismissal – Exacerbated by small community and advertisement published in newspaper day after dismissal with photo – No contributory conduct – Awarded \$5,000 compensation - Second chef

Result: Application granted ; Reimbursement of lost wages (\$840)(2 weeks notice) ; (\$2,495.59)(3 months wage difference) ; Compensation for humiliation etc (\$5,000) ; Costs reserved

Personal Grievance - Sexual Harassment - Employment Relations Act 2000

A v B & C

14 Jul 2008, M Ulrich, AA 248/08, (19 pages)

SEXUAL HARRASMENT – CONSTRUCTIVE DISMISSAL – Applicant claimed unjustifiably constructively dismissed following respondent’s failure to fully and fairly investigate complaint of sexual harassment by co-worker (“D”) – Respondent a partnership between (“B”) and (“C”) – Respondent argued fully and fairly investigated applicant’s complaint – Respondents alleged applicant acted in sexually provocative manner in workplace and dealings with applicant fair and reasonable – Authority commented that striking similarity of respondent’s witnesses filed evidence undermined credibility of evidence and did not assist investigation – No provision for sexual harassment complaint procedure in employment agreement (“EA”) – No sexual harassment prevention policy in place – Work rules provided guidelines for appropriate conduct but did not deal with sexual harassment – Applicant raised complaint with B about D’s conduct during work Christmas party – Details of complaint not provided – B then generally admonished staff for inappropriate conduct during Christmas party and suggested staff responsible apologise to those offended – D approached B and C and made apology that “might have said something which might have upset somebody” – B recorded that understood apology to relate to applicant or her guest – Respondent sought information from remaining co-workers (“E”) and (“F”) who alleged applicant had complained to them about D’s conduct but had not witnessed any inappropriate conduct – F continued to speak to applicant about complaint and relayed information to respondents without applicant’s knowledge – When applicant and support person (“G”) first met with respondents, not told investigation had commenced or that tentative conclusion formed complaint not genuine – Applicant provided written complaint that D made sexually explicit proposal and grabbed her breast during work hours – F said had not seen incident when asked by applicant in front of D – Applicant then claimed during Christmas function D approached her and made sexually explicit request – Applicant told D that would tell C about incident and D replied C would not believe her – D denied alleged conduct occurred and told respondents that applicant acted in sexually provocative manner in workplace – Following meeting C alleged observed conduct she interpreted as sexually provocative – Staff meeting immediately called where staff advised sexual harassment unacceptable and provocative sexual conduct and false complaints also unacceptable and would have serious consequences – Applicant refused to attend mediation proposed to resolve issue – C raised concerns with applicant regarding conduct she saw as sexually provocative – Following heated discussion applicant left workplace – Medical certificate provided next day stating applicant not fit to work for at least one month – Final warning issued for “unauthorised leave, stress, false accusations etc” – Applicant also informed that C had obtained opinion from doctor that applicant suffering from “Borderline Personality Disorder” –application by applicant – Authority declined B, C and D application for urgent direction to mediation in response to personal grievance application – Application filed by B, C, D, E and F where problem outlined as sexual harassment, false allegation etc by applicant – Parties directed to mediation and subsequently all claims filed against applicant withdrawn – Authority found test for sexual harassment subjective in sense that perception of complainant and observable effects on him or her is what an employer is required to seriously consider in investigating complaint – Not for employer to substitute own judgment of what constitutes sexual harassment in workplace – Authority satisfied applicant subjected to some behaviour of sexual nature from D during Christmas function and behaviour unwelcome and offensive – Authority unable to conclude on other alleged sexual harassment as not sufficiently specified – Certain facts not disputed – D said something to applicant which could not be overheard, applicant told E and F about comment during evening and that it was offensive, complaint raised with B next working day – Actions

consistent with nature of allegations made and intention to complain – D’s recollection of events to Authority very poor and therefore doubts on ability to recall – D accepted intoxicated during Christmas function – Authority found D’s apology to C most likely proffered for offending applicant – Authority found although respondents did not have sexual harassment policy in place had taken reasonable steps to make clear to applicant what should be done if concerned about co-workers – Commencing investigation before complaint was formally made and with applicant’s knowledge or consent tainted investigation with hearsay and unnecessarily complicated issues under investigation – Respondents had no reasonable basis to be concerned after forming conclusion complaint “kept changing” – Respondents concerns never put to applicant for comment – Fact story appeared to change inevitable consequence of commencing investigation before details received – Applicant never told D had made apology – If C concerned about applicant’s alleged sexually provocative conduct meeting should have been properly constituted – Applicant should have received notice of meeting and had opportunity to bring support person – Not appropriate to disclose findings of investigation by way of response to applicant’s opposition to attending mediation – Found no duty to believe complaint, however, duty to inquire fairly and reasonably into facts of complaint – Issuance of final written warning fell short of duty to conduct disciplinary action fairly and reasonably – Statement that C’s doctor had formed opinion that applicant had Borderline Personality Disorder misleading – Medical opinion required familiarity with symptoms and formal diagnosis – Authority accepted doctors evidence of informal discussion and suggestion there may be an underlying disorder – No opinion or diagnosis given – Reasonably foreseeable employment would end – Authority satisfied breaches of duty ended employment relationship – Unjustified constructive dismissal – REMEDIES – No credit to respondent claim applicant’s behaviour amounted to sexual harassment when nothing raised prior to complaint being issued – No contribution – Applicant claimed suffered stress, lacked of motivation, and became insecure and self-conscious since allegations of sexually provocative conduct made – Also claimed could not continue apprenticeship because of personal allegations and felt too ashamed to try re-enter trade in small community – G gave evidence that applicant’s self confidence had plummeted, physically distressed and demeanour had changed to an extent not seen before – Costs reserved

Result: Application granted ; Reimbursement of lost wages (\$5040) ; Compensation for humiliation etc (\$15,000) ; Costs reserved

Personal Grievance – Unjustified Disadvantage - Employment Relations Act 2000

Laphorn v Hayes t/a Wisteria Cottage Day Spa

25 Jul 2007, J Crichton, CA 82/07, (12 pages)

UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant claimed respondent unjustifiably reneged promise of day leave – Respondent claimed never unconditionally promised day leave – Applicant attended disciplinary meeting with father as support person – Written warning issued – Applicant did not return to work – Applicant’s father telephoned respondent – Applicant’s father claimed told by respondent that applicant must work all weekends except statutory holidays for 8 months, and preferable if applicant resigned because casual worker able to work more hours than permanent part-time worker – Authority preferred applicant’s father’s evidence of conversation – Applicant’s father formed view that respondent would make applicant’s life “a misery” if returned to workplace – Evidence from co-workers that respondent hard on applicant and did not want her back in workplace – Witnesses gave evidence that respondent actively sought to discourage applicant from returning to work – Inconsistencies between respondent’s written and oral evidence, and oral evidence unsure or evasive – Authority found that after day leave respondent’s behaviour represented course of conduct with deliberate dominant purpose of extracting applicant’s resignation – Dismissal unjustified - UNJUSTIFIED DISADVANTAGE – Some events outside 90 day period – No application to pursue grievance out of time – Found applicant could not rely on matters prior to 90 day period in relation to claim for unjustified disadvantage – Authority considered allegations regarding applicant’s day leave and that hours of work changed unilaterally – Evidentiary difference between parties’ accounts – Authority preferred respondent’s evidence – Found applicant not guaranteed 35 hours per week – No unjustified disadvantage – Counterclaim for recovery of financial losses that applicant’s work would have generated on day absent without agreement dismissed – PENALTY – Respondent claimed applicant breached employment agreement for day leave – Found respondent already responded by issuing disciplinary warning – Inappropriate to add further penalty – However, contributory conduct relevant to award for dismissal - Remedies – Found applicant’s failure to attend work “disgraceful” – 75 percent contributory conduct – Beauty therapist

Result: Application dismissed (disadvantage) ; Application granted (constructive dismissal) ; Compensation for humiliation etc \$1,000 ; Lost wages \$1,366.50 ; Counterclaim dismissed ; Penalty dismissed ; Costs reserved

Le Gros v PPCS Ltd

1 Aug 2007, H Doyle, CA 89/07, (9 pages)

UNJUSTIFIED DISADVANTAGE – Applicant employed as spare man, covering absent co-workers in variety of positions – Respondent offered transfer to permanent packer role – Required applicant undergo drug test as condition of appointment – Applicant claimed requiring test was unjustified action affecting his terms and conditions of employment – Respondent argued company policy required applicants to undergo drug test as high risk safety-sensitive position – Respondent also argued offer of employment conditional on drug test and applicant refused to comply – No challenge to legality of policy – Special provision in policy regarding testing for internal transfers – Authority rejected respondent’s argument that policy criteria need not be met for testing to be justifiable – Authority found testing justifiable when three criteria in policy met – First criterion met because applicant was offered new position – Second criterion not met because role of packer not “entirely new role” for applicant – “Entirely” meant wholly or completely – Applicant already familiar with position due to prior role temporarily covering position – Found not necessary to determine third criterion of whether high risk role because already found second criterion not met – Best for employer, Union and/or employees to together assess whether

high risk role – Policy criteria not met when applicant was required to undergo testing – Fair and reasonable employer would follow policy without unexpected or arbitrary testing – Request unjustified under policy – Refusal to undergo test resulted in disadvantage because not appointed to new position and request gave applicant belief that work put down and respondent lost trust in him – Remedies – Found applicant \$15,000 better off in existing role due to subsequent market forces – No lost wages – Applicant humiliated and suffered upset and stress, which impacted on private relationships – Award of \$6,000 appropriate considering that applicant better off in existing employment – No contributory conduct – Spare man

Result: Application granted ; Compensation for humiliation etc (\$6,000) ; Costs reserved

Neill v Air Nelson Ltd

25 Jul 2007, P Montgomery, CA 86/07, (6 pages)

UNJUSTIFIED DISADVANTAGE – Applicant claimed Flight Operations Manager (“G”) passed erroneous information to Civil Aviation Authority (CAA) which led to suspension and disqualification of applicant’s flight certificate – G discovered applicant stressed and receiving counselling – Informal meeting between applicant and G – Applicant agreed to G’s recommendation to take few weeks off and check blood pressure – G discussed matter with Air New Zealand Medical Officer who recommended one month stand down – Applicant’s own doctor found blood pressure normal – Applicant advised by email of 4 week minimum stand down period and must obtain new certificate before return – G informed CAA of applicant’s stand down due to depression and said applicant receiving “psychiatric counselling” – CAA suspended then withdrew applicant’s certificate – Applicant claimed seriously disadvantaged as would need to disclose withdrawal of certificate to future prospective employers – Authority found G acted in good faith in responsibilities under CAA Rules and his view of best interests of applicant and airline – However, G erroneously linked applicant’s counselling to health and employment – Information supplied to CAA erroneous – Unfair treatment by employer, who conveyed inaccurate information arising in informal meeting with serious and ongoing consequences – G failed to establish facts accurately by acting without further consultation with applicant – Applicant’s flying career tagged as direct result of respondent’s actions in respect of applicant’s Class 1 certificate - Remedies – Claim of \$5,000 moderate given applicant engaged for 13 years – Parties directed to quantify and resolve expenses incurred by applicant - First Officer

Result: Application granted ; Compensation for humiliation etc (\$5,000) ;
Quantum of expenses to be determined by parties (payable to applicant)
; Costs reserved

Sefo v Sealord Shellfish Ltd

24 Jul 2007, P Montgomery, CA 84/07, (15 pages)

UNJUSTIFIED DISADVANTAGE – Applicant worked on mussel opening line – Automated system counted mussels, attributed mussels to individual line workers and checked quality of mussels – If more than 3 percent of mussels rejected by quality checker then percentage subtracted from individual worker’s final pay – Malfunction meant system unable to attribute mussels to particular workers – Respondent claimed applicant incited co-workers to “cheat” following malfunction – Applicant suspended from work prior to formal investigation – Union representative challenged decision to suspend – Authority accepted respondent’s argument that suspension reasonable as investigation required public consultation with other workers – Suspension justified – UNJUSTIFIED DISMISSAL – Manager claimed applicant left position on opening line, approached co-worker (“A”), and said “go for it the belt is stuffed” – Applicant denied saying “go for it” – A claimed fifty to sixty percent certain applicant said “go for it” – Formal complaint lodged against applicant by second co-worker (“B”) – B claimed saw applicant approach other line workers and had also spoken with A following incident – Respondent investigated co-workers who

worked same shift as applicant – Third co-worker (“C”) claimed approached by applicant – However, no co-workers investigated heard words “go for it” or thought applicant encouraging co-workers to cheat – At investigation meeting respondent alleged applicant told at least three workers to “go for it” – Authority found allegation extraordinary given findings of co-worker interviews – Interviews effectively ruled out all employees apart from A as an employee applicant spoke to following belt malfunction – Discrepancy in evidence where respondent’s witnesses told Authority that regardless of actual words used A sure encouraged to cheat by applicant – A told Authority that was not sure what applicant had said – Authority found unsafe for respondent to conclude A correct in perception when was unsure of exactly what was heard – A asked by respondent to put percentage figure on certainty to avoid uncertain phrases – Manager gave evidence that satisfied summary dismissal appropriate when A made estimate over fifty percent – Authority found key witness questioned only after decision made and in effect was not absolutely certain applicant said “go for it” – Dismissal unjustified – Remedies – Authority found applicant contributed to situation giving rise to dismissal when left position in line when belt malfunctioned – Contributory conduct 20 percent – Applicant’s actions not those expected of senior experienced worker – Respondent’s derisory comments and imprudent actions inappropriate for employee in leadership position – Reinstatement declined – Clear evidence that applicant suffered considerable humiliation and injury to feelings – Evidence unchallenged – Compensation of \$12,000 appropriate – Costs reserved – Mussel opener

Result: Application granted ; Reimbursement of lost wages (Reduced to 4 months less earnings) ; Compensation for humiliation etc (\$15,000 reduced to \$12,000) ; Costs reserved

Strichen v The Ministry of Social Development

27 Jul 2007, D Asher, WA 105/07, (15 pages)

UNJUSTIFIED DISADVANTAGE – Applicant claimed unjustifiably disadvantaged on five occasions then constructively dismissed – Respondent denied allegations and replied some issues not raised within 90 days – Authority sought clarity of initial claim because volume of documentation reflected absence of focused preparation by applicant – Applicant’s first grievance was that not treated fairly nor properly supported in role – Claims not supported by any evidence and lacked sufficient specificity for respondent to have been on notice – Authority found although applicant disappointed by respondent’s decisions, actions legitimate expression of employer’s right to manage – Second grievance related to comments in performance assessment – Authority found genuine attempt by respondent to assess performance – Authority rejected applicant’s claims that negative comments by co-workers affected performance assessment – Respondent able to justify comments of internal difficulties – Evident applicant refused to accept responsibility for issues – Third grievance rejected as no evidence of conspiracy to deny applicant timely entitlement to information – Fourth grievance that performance assessment given to applicant without prior consultation – Authority rejected grievance as standard procedure for respondent to provide draft assessment to employees to invite comment – Applicant’s fifth grievance that respondent’s disciplinary action in response to email sent by applicant breached code of conduct and not consistent or fair – Authority found warning issued fair and reasonable response in circumstances – UNJUSTIFIED DISMISSAL – Constructive dismissal – Applicant claimed over ten year period “scapegoated”, “bullied” and “abused” – Authority found applicant’s self reported records cannot be described as evidence that respondent acted unjustifiably and therefore caused the deterioration in applicant’s health – Authority found extensive communication from applicant did not make clear that would resign should respondent not provide remedies sought in relation to grievances – Clear from applicant’s evidence that intention to resign because of lack of qualifications, financial and family commitments, not failure of respondent to satisfy grievance concerns – Authority found respondent willing to consider applicant’s concerns evidenced by number of meetings, mediations and

proposals advanced to find resolution – Respondent’s ultimate refusal to accommodate applicant’s concerns was genuine view following proper and extensive process that claims had no merit – No constructive dismissal – Given Authority’s finding on grievances unnecessary to address 90 day issue – Social worker

Result: Application dismissed ; Costs reserved

Taylor v Raukura Hauora O Tainui

27 Jul 2007, L Robinson, AA 221/07, (35 pages)

UNJUSTIFIED DISMISSAL – Applicant established foundation to purchase respondent health clinic – Respondent believed applicant’s intentions surrounding purchase and subsequent intention to set up new clinic contrary to duty of fidelity and consequently dismissed applicant – Applicant discussed proposal to purchase with respondent’s Chief Executive Officer (“M”) – Respondent alleged applicant made threat to pressure sale by telling M that resignations of colleagues forthcoming – Authority found applicant failed to disclose own personal connection with trust – Not disputed that applicant told M if proposal not accepted resignations would be forthcoming – Authority also found M told applicant would look forward to receiving applicant’s resignation – Proposal to purchase respondent rejected – Applicant denied raising staff resignations as a “threat” or ultimatum and confirmed professional responsibilities to respondent – Authority found possibility of resignations raised merely to highlight reality of situation – Applicant claimed authorised to disclose intentions of some doctors working for respondent – Applicant claimed M fully engaged in process and never referred to any potential conflict of interest or brought up any issues during correspondence – Authority found statements in correspondence inconsistent with allegation of threat by applicant – Authority found in context of open discussion of commercial nature, applicant’s statement made as idle observation and statement of fact – M’s statements and advice not consistent with perception of threat – M gave evidence to Authority that no threat perceived – Respondent claimed applicant breached general duty of fidelity owed to respondent – Authority concluded respondent acquiesced and through M conducted commercial negotiations with applicant in open manner without objection – Correspondence between applicant and M related to commercial purchase – Correspondence not an incident of employment relationship – In negotiating sale and purchase, respondent not acting as employer and applicant not carrying out employment duties – No objection made to applicant pursuing own interests known to M and respondent – Statement of forthcoming resignations made by prospective purchaser to prospective vendor – Respondent alleged after proposal to purchase declined, applicant actively took steps to establish competing clinic and solicited employees – Applicant approached director of District Health Board (“DHB”) to ascertain requirements to set up new clinic – Applicant also sought approval to join Primary Health Organisation (“PHO”) – Applicant claimed intended to ensure respondent’s best interests – Authority found applicant never disclosed precisely who involved in foundation – Applicant claimed intended foundation to work collaboratively with respondent, however, not disclosed to respondent – Authority found M always knew of applicant’s intentions and personal involvement with foundation – M not concerned about applicant’s intentions and encouraged discussion about purchasing respondent and setting up alternative practice – Authority concluded if respondent did not want applicant to set up clinic then should have communicated immediately when fixed with knowledge – Whether applicant’s and other staff’s activities contrary to duties to respondent did not matter as undertaken with respondent’s full knowledge and implied consent or acquiescence – When declined purchase proposal respondent should have reinforced expectations of fidelity and good faith – Respondent could have investigated applicants allegations when thought not truthful – Respondent’s failure to conduct proper enquiries meant no evidence to prove allegations – Allegation that applicant solicited other employees contrary to duty of fidelity never put to applicant – Dismissal unjustified – UNJUSTIFIED DISADVANTAGE –

Respondent failed to wait for response from applicant before suspension – Staff meeting where announcement made that applicant suspended unfair in circumstances – Suspension unjustified – REMEDIES – Respondent alleged applicant transferred patient database to personal email – Applicant claimed M knew was looking at database and did not object – Authority found overtone of secrecy apparent in emails sent by applicant – Also unknown to respondent, but with notice of existence, letter by applicant that competing practice would not be complimentary to respondent – Authority found if respondent had gathered information by way of full and fair investigation then may have been in position to justify termination – Applicant did not act in good faith towards respondent because did not disclose colleagues involved when asked – Whether or not expressly asked, had duty to be forthcoming to employer and to volunteer information in active and communicative way – Contributory conduct 33 percent – Applicant entitled to reimbursement of lost wages – Applicant claimed was devastated by respondent's decision and treatment throughout process – Also claimed reputation damaged – Compensation \$10,000 – Costs reserved – Registered medical practitioner

Result: Application granted ; Reimbursement of lost wages (Quantum to be determined by parties)(Contributory conduct 33.3%) ; Compensation for humiliation etc (\$15,000 reduced to \$10,000)

Personal Grievance - Practice & Procedure - Employment Relations Act 2000

Musa v Whanganui District Health Board and Anor

11 Jul 2008, G J Wood, WA 94/08, (2 pages)

PRACTICE AND PROCEDURE - Application for removal to Employment Court - Applicant claimed first respondent breached settlement agreement through actions of second respondent - Second respondent member of first respondent - All parties agreed important question of law and neither respondent opposed removal to Employment Court - Question of law was whether first respondent vicariously liable to applicant for actions of second respondent where second respondent not authorised to act on behalf of first respondent and did not purport to do so - Question not directly considered by either Authority or Court before - Important question as could apply to all bodies governed by a Board - Issues of mediation, cross-claim by second respondent and non-publication orders could be dealt with by Court - No other factors mitigated in favour of Authority dealing with issue at first instance - Matter removed to Employment Court

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

Roberts v Commissioner of New Zealand Police

2 Aug 2007, R A Monaghan, AA 230/07, (4 pages)

PRACTICE AND PROCEDURE – Respondent sought to strike out proceedings – Applicant claimed unjustifiably dismissed and disadvantaged in substantive proceedings – Authority heard matter separately from substantive at request of parties – Authority had previously determined applicant could not proceed with grievance as brought outside 3 year time limit in s114(6) ERA – Previous determination challenged in Employment Court – Court concluded proceedings brought within time limit and matter to now be decided on merits in Employment Tribunal (“Tribunal”) – By direction of Court under s252 ERA Chief of Authority appointed member to exercise jurisdiction of Tribunal – Respondent argued allegation that suspension unlawful raised out of time, without consent of employer and without leave of Tribunal – Tribunal found grievance based on suspension raised outside 90 day period and no application to submit grievance out of time – Pleadings struck out to extent related to justification for suspension – Applicant’s claim that unjustifiably dismissed based substantially on fairness of procedure of Police Disciplinary Tribunal (“PDT”) – Respondent sought orders striking out certain paragraphs in amended statement of claim – Respondent argued investigation into allegations contained in paragraphs 17(ii) and 17(iii) of statement of claim would undermine findings and decision of Tribunal to extent related to Tribunal hearing – Argued further investigation of allegations in 17(v) to 17(viii) would require Tribunal to review processes of PDT which was outside jurisdiction of Tribunal – Tribunal applied reasoning in Commissioner of Police v Creedy [2007] NZCA 311 that actions of PDT not attributable to respondent and not open to review in personal grievance proceedings – Tribunal found nothing to suggest had any more power than Authority to review decisions of PDT or that present circumstances distinguishable from Creedy – Tribunal found reference to “entrapment” in clause 17(ii) suggested defence to allegation of misconduct – Therefore matter heard and determined by PDT – Seeking reconsideration from Tribunal amounted to appeal against original finding – Tribunal found no such right of appeal – Tribunal concluded by applying reasoning in Creedy that Tribunal’s treatment of allegations to effect that applicant entrapped could not be attributed to Commissioner – Paragraph 17(ii) struck out by Tribunal – Also struck out paragraph 17(iii) to extent it concerned justification for suspension – Tribunal relying on reasons and conclusions in Creedy, struck out paragraphs 17(v) to 17(viii) on grounds claim an attempt to review proceedings of PDT

Result: Orders accordingly ; Costs reserved

Department of Labour
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