

Department of Labour
TE TARI MAHI



EMPLOYMENT CASES SUMMARY

December 2007

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

Employment Cases Summary

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

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

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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

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1 November 2007 - 30 November 2007

Wyatt v Simpson Grierson

AC 45/07

Heard: 27 Sep 2006, Auckland

Judgment Date: 20 Jul 2007

Court/Authority/Tribunal: Couch J

Appearances: G Wyatt (in person) ; P Swarbrick

NON DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – APPEAL AGAINST DECISION OF EMPLOYMENT TRIBUNAL - Practice and procedure – When cause of action accrued – Whether personal grievance raised within 90 day period – Plaintiff alleged salary review in 1999 unfair because paid less than comparable colleagues – Plaintiff submitted cause of action yet to come to his notice because colleagues actual salaries unknown – Defendant submitted cause of action arose when salary review completed and grievance not raised in 90 day period – s114 Employment Relations Act 2000 – HELD – If circumstances in which action taken an essential element of personal grievance, 90 day period begins when employee becomes aware of circumstances necessary to form reasonable belief action unjustifiable – Personal grievance action accrues at commencement of 90 day period – Grievance not raised in 90 day period – Defendant had not consented to late submission – Challenge dismissed – Solicitor

This was a non de novo challenge to a determination of the Employment Relations Authority, also sitting at the Employment Tribunal, which held that the plaintiff had failed to submit his personal grievance within the 90 day period.

The plaintiff was employed by the defendant as a staff solicitor from 1998 until 2002, when he was made redundant. The plaintiff believed that his salary reviews conducted by the defendant in 1999, 2000 and 2001 were carried out unfairly because he was paid less than comparable colleagues. The plaintiff did not have actual knowledge of his colleagues' salaries. However, he accessed billing information about his colleagues on the workplace computer system. It was also widely discussed that there was a ratio of 4.5 to 1 between the billing budget and solicitor's salaries. Using that information, the plaintiff calculated what he believed his colleagues' salaries to be. The plaintiff advanced his salary complaints in a memorandum to the defendant in 2002.

The Authority found that the 90 day period began when the plaintiff was notified of the result of his salary review and the plaintiff had failed to submit a personal grievance for any of the relevant years. However, in a second determination, the Authority found that the defendant had consented to the late submission of the personal grievances relating to 2000 and 2001. Therefore, the present case concerned only the personal grievance relating to the 1999 salary review.

The plaintiff submitted that the cause of action had not yet come to his notice because he did not have actual knowledge of his colleagues' salaries. Therefore, the 90 day period for submitting his personal grievance had not commenced.

The defendant contended that the cause of action arose when the salary review was completed. The plaintiff was not entitled to pursue his claim because he had not submitted his personal grievance within 90 days of that date.

The Court was required to resolve whether the plaintiff's claim should be determined under the Employment Contracts Act 1991 ("ECA") or the Employment Relations Act 2000 ("ERA").

Held

(1) The 90 day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable. (para 29)

(2) To the extent that the plaintiff's claim was founded in contract, the cause of action accrued on 1 February 1999 when the plaintiff was notified of the result of his salary review. Proceedings in respect of any such claim therefore had to be made under the ECA and within 6 years of that date. The plaintiff filed his original proceedings, which were principally claims for breach of contract, on 27 January 2005 being just 4 days short of the 6 year time limit. Those proceedings were commenced, however, in the Employment Tribunal which had no jurisdiction to entertain them. While the Employment Court did have jurisdiction to hear and determine claims for breach of contract under the ECA, the 6 year limitation period meant it was now too late for the plaintiff to commence proceedings founded on such claims in this jurisdiction. (para 37)

(3) To the extent that the plaintiff's contended personal grievance was based on issues other than breach of contract, the position was arguably different. The beginning of the 90 day period is the first time at which the employee can reasonably be expected to take steps to have his or her personal grievance considered. That should also be regarded as the time at which the cause of action embodied in the personal grievance accrues. (paras 38-40)

(4) The plaintiff could not raise the complaint that there was unjustifiable disparity between his salary and that of comparable colleagues without some knowledge or indication of what the salaries of his colleagues were. Thus, the present case was a case to which the alternative starting point for the 90 day period, that is when it "came to the notice of the employee", applied. (para 43)

(5) Knowledge of his colleagues' fee budgets and of the 4.5 to 1 ratio was all that was required for the plaintiff to properly raise a personal grievance about the level of his 1999 salary. On the plaintiff's own evidence, he had that knowledge by February 2001. The Court therefore fixed the date on which the 90 day period began as 1 February 2001. (para 53)

(6) The cause of action in respect of the plaintiff's concerns about the 1999 performance review also arose on 1 February 2001, and the matter fell to be determined in accordance with the provisions of the ERA rather than the ECA. (para 54)

(7) The plaintiff did not raise a personal grievance during the applicable 90 day period. The defendant did not consent to the late submission by the plaintiff of his personal grievance. (paras

61, 70)

Result: Challenge dismissed ; Costs in favour of defendant (quantum reserved)

Statutes considered:

ECA s33(2)
ECA s93(1)
ECA s95
ECA First Schedule, cl3
ERA s101(ab)
ERA s114
ERA s114(1)
ERA s179
ERA s245
ERA s248
Interpretation Act 1999 s5
Limitation Act 1950 s4
Limitation Act 1950 s4(7)
Privacy Act 1993

Words and phrases: Came to the notice of the employee

Cases referred to in judgment:

Creedy v Commissioner of Police [2006] 1 ERNZ 517
Drayton v Foodstuffs (South Island) Ltd [1995] 2 ERNZ 523
Murray v Morel & Co Ltd [2006] 2 NZLR 366 (CA)
Paul v Capital and Coast District Health Board [2005] ERNZ 197
Phillips v Net Tel Communications Ltd [2002] 2 ERNZ 340
Robertson v IHC New Zealand Inc [1999] 1 ERNZ 367
Ruebe-Donaldson v Sky Network Television Ltd (No1) [2004] 2 ERNZ 83
Tippins v Trust Bank New Zealand Ltd unreported, Judge Travis, 4 May 1994, AEC 19/94
Trustees Executors Ltd v Murray & Ors [2007] NZSC 27
Warburton v Mastertrade Ltd [1999] 1 ERNZ 636

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[973867]

Commissioner of Police v Creedy

CA 234/06

Heard: 13 Jun 2007, Wellington

Judgment Date: 24 Jul 2007

Court/Authority/Tribunal: William Young P, Hammond and O'Regan JJ

Appearances: CC Inglis, CM Curran-Tietjens ; JA Hope

COURT OF APPEAL – Appeal from Employment Court decision granting respondent leave to bring personal grievances out of time – Employment Court concluded respondent’s belief counsel had raised grievance and no further steps required was exceptional – Practice and procedure – Application for leave to appeal Employment Court’s exceptional circumstances conclusion – s114(4) Employment

Relations Act 2000 – Whether exceptional circumstances conclusion wrong in law – Whether Employment Court wrong to conclude s12 Police Act 1958 inquiry not immune from challenge – HELD – Exceptional circumstances test required more than just meritorious reason for not having raised grievance – Clients normally relied on legal advisors and although close personal relationship between client and counsel unusual that was not material – s12 inquiry not open to review in personal grievance proceedings – Application granted – Appeal allowed – Sworn police officer (Sergeant)

This was a successful appeal and application for leave to appeal an Employment Court decision (see: [2006] 1 ERNZ 517).

The respondent police sergeant was found guilty of a number of misconduct charges by an inquiry established by the appellant under s12 Police Act 1958 (“s12 inquiry”).

Before the appellant decided what sanction should be imposed the respondent was permitted to retire in December 2001. Before the substantive hearing of the misconduct charges the respondent’s barrister sent a letter to the District Commander, stating that “pending the final determination of the disciplinary proceedings, [the respondent] reserves his rights to pursue this personal grievance in due course”.

In January 2003 the respondent lodged a statement of problem, alleging unjustified disadvantage and constructive dismissal. The Employment Relations Authority determined both claims were not raised within the required 90 day period and there were no exceptional circumstances which warranted granting leave to bring the claims out of time.

The respondent successfully challenged that decision in the Employment Court which held that the respondent’s grievances were raised out of time but granted leave to bring the grievances. The unjustified disadvantage grievance was not raised within time by reason of the exceptional circumstances set out in s115(b) Employment Relations Act 2000 (“ERA”). The unjustified dismissal grievance could proceed because the plaintiff honestly believed, acting on what he understood his barrister told him, that it was unnecessary to raise any further grievance. In that regard the Court noted Parliament intended by enacting s115(b) ERA to negate certain findings in *Wilkins v Fortune* (cited below). The Court also noted the respondent’s unusual relationship and particular dependence on his barrister. For a period the barrister lived with the respondent who was the barrister’s only client. Finally, the Court held the s12 inquiry was an integral part of a dismissal process and therefore not immune from challenge in personal grievance proceedings.

The appellant sought leave to appeal the Employment Court’s conclusions in relation to the unjustified dismissal grievance and s12 inquiry. The Court of Appeal granted leave regarding the s12 inquiry but reserved the question of whether leave should be granted on the exceptional circumstances issue for final determination at the substantive hearing (see: [2006] 1 ERNZ 886).

Held

(1) The exceptional circumstances test requires more than just a meritorious reason for not having raised the grievance in a timely way. The exceptional quality of the relevant circumstances must be in respects which are relevant to the evaluative exercise in issue. Since clients normally rely on their legal advisers, the “exceptionality” of the legal and personal relationship between the respondent and his barrister was not material to the s 114(4) ERA exercise. (para 25)

(2) The *Wilkins v Fortune* (cited below) test had not been overtaken by a new legislative scheme under the ERA. Obviously if a case was within s115 ERA, the *Wilkins v Fortune* test did not

have to be independently satisfied. But outside the situations provided for by s114 ERA, there was no reason to suppose that the phrase “exceptional circumstances” had a meaning which differed from its meaning determined in *Wilkins v Fortune*. (para 26)

(3) The Court granted leave to appeal on the question of whether the Employment Court’s conclusion as to “exceptional circumstances” was wrong in law and the appeal on that question was allowed. The unjustified dismissal claim was out of time. (paras 27, 51, 52)

(4) The person conducting the s12 inquiry did not act on the direction of the appellant. The idea underpinning the s12 process was that the decision-maker must be someone other than the appellant. Since the powers which the inquirer exercised were not those of the appellant, it could not have been acting as his agent or delegate. (para 49)

(5) There was no explicit provision in either the Police Act 1958 or the ERA on which the inquirer’s actions might be attributed to the appellant. Such attribution was not implicit in the legislation. The Employment Court was wrong to conclude that the actions of the person conducting the s12 inquiry could be attributed to the appellant and thus wrong to conclude that they were open to review in personal grievance proceedings. (paras 49, 50)

Result: Application granted (leave to appeal) ; Appeal allowed ; Costs in favour of appellant (\$6,000 plus disbursements)

Statutes considered:

ECA s33(4)
ERA s96
ERA s103(1)(a)
ERA s103(1)(b)
ERA s114
ERA s114(4)
ERA s115
ERA s115(b)
ERA Part 9
Police Act 1958 s5
Police Act 1958 s5(5)
Police Act 1958 s5A(1)
Police Act 1958 s12
Police Act 1958 s87(1)
Police Regulations 1992
State Sector Act 1988 s56
State Sector Act 1988 s58

Cases referred to in judgment:

Creedy v Commissioner of Police [2006] 1 ERNZ 517 (EC)
Commissioner of Police v Creedy [2006] 1 ERNZ 886 (CA)
Wilkins & Field Ltd v Fortune [1998] 2 ERNZ 70; (1998) 5 NZELC 95,793 (CA)
Telecom New Zealand Ltd v Morgan [2004] 2 ERNZ 9
Commissioner of Police v Moore [2002] 2 NZLR 83; [2001] 1 ERNZ 638 (CA)
Petersen v Board of Trustees of Buller High School [2002] 1 ERNZ 139
AJ Burr Ltd v Blenheim Borough Council [1980] 2 NZLR 1
Smith v Attorney-General for & on behalf of Commissioner of Police [2005] 1 ERNZ 699

Pages: 3
[973910]

Terry Young Ltd v NZ Engineering, Printing & Manufacturing Union Incorporated

CC 15/07

Heard: 21 Jun 2007, Christchurch

Judgment Date: 25 Jul 2007

Court/Authority/Tribunal: Colgan,CJ

Appearances: JR Copeland ; JA Wilton

NON DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Statutory interpretation – s20 Employment Relations Act 2000 – Whether workplace discussions with union officials limited to discussions with employees individually – HELD – Discussions not confined to discussions with single individual employees – Collective discussions included – Challenge dismissed – COSTS – Test case – No order for costs

This was an unsuccessful non de novo challenge to a determination of the Employment Relations Authority which held discussions under s20 Employment Relations Act 2000 encompassed individual and collective discussions.

The parties were involved in a dispute about union access to the workplace. The plaintiff challenged a question of law decided by the Employment Relations Authority. The issue was whether, when a union exercises rights of access to a workplace under s20 of the Employment Relations Act 2000 (“ERA”), the law limits discussions by the union official to employees individually.

The plaintiff submitted that a proper interpretation of s20 ERA was that such discussions were restricted to discussions with single individual employees at any one time.

Held

(1) Union access to workplaces under s20 ERA is generally expressed to be for purposes that are collective rather than individual. It is correct that individualistic purposes are contemplated as well as collective ones. Those references do not dictate that the union representative may only speak to one union member or potential union member at a workplace. (paras 8, 10-11)

(2) Discussions with employees undertaken by union officials entering workplaces under s20 ERA are not confined to discussions with single employees individually but include discussions with employees collectively. (para 15)

Result: Challenge dismissed ; No order for costs

Statutes considered:

ECA

ERA s3

ERA s12

ERA s20

ERA s20(1)(a)

ERA s20(2)(a)

ERA s20(2)(b)
ERA s20(2)(d)
ERA s20(2)(e)
ERA s20(3)
ERA s20(3)(a)
ERA s20(3)(b)
ERA s20(3)(c)
ERA s20(4)
ERA s20(5)
ERA s21
ERA s21(1)(a)
ERA s26
ERA Part 4
Employment Relations Amendment Act (No 2) 2004 s9
Interpretation Act 1999 s4
Interpretation Act 1999 s4(1)(b)
Interpretation Act 1999 s33

Cases referred to in judgment:

Foodstuffs (Auckland) Ltd v National Distribution Union Inc [1995] 1 ERNZ 110
(CA)

Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corporation (NZ)
Ltd [1993] 2 ERNZ 513

Pages: 2
[973883]

Finau & Ors v Southward Engineering Company Ltd

WC 17/07

Heard: 16 Nov 2006, Wellington

Judgment Date: 25 Jul 2007

Court/Authority/Tribunal: Full Court

Appearances: JA Wilton ; TP Cleary, E Brown

REFERRAL OF QUESTION OF LAW – Interpretation of “work of a striking or locked out employee” – Whether employee who refuses to do work of striking employee becomes a party to the strike and liable to suspension – Whether individual union members become parties to the strike by reason of union membership – ss 81, 87, 97 Employment Relations Act 2000 – HELD – Employer can only direct nonstriking employees to do work they would regularly perform – Lawful refusal to do work does not make employee a party to the strike and liable to suspension – Mere union membership not sufficient to make union member a party to the strike – Action and intent necessary

This was a referral of a question of law from the Employment Relations Authority.

During strike action, the respondent instructed two applicant employees to operate a certain machine. They refused because they did not want to perform the work of striking operators. The defendant suspended the two applicants as parties to the strike. The two applicants were trained to operate the machine and did so from time to time when the usual operators were unavailable.

Their employment agreements permitted the respondent to require them to transfer to other jobs within the scope of its operations if they were competent to perform those jobs.

The applicants submitted that “work of a striking...employee” meant the particular work the striking employee would have been doing had he or she not been on strike. Further, that an employee had a right to refuse to do the work under s97 Employment Relations Act 2000 (“ERA”) and such refusal did not mean the employee was on strike and liable to suspension.

The respondent submitted that it had express or implied rights to redeploy its employees, and employees who refused redeployment had reduced the normal performance of their work and become parties to the strike. If the work to which the employees were redeployed could be described as their own work then s97 ERA did not apply. Finally, an employee could become a party to a strike and liable to suspension as a result of membership of a union, whose members were striking.

Held

(1) The proper interpretation of the s97(2) ERA expression “work of a striking ... employee” is the type of work usually done by a worker who is on strike. The “type of work” approach would enable employers to direct non-striking employees to do particular tasks within the range of work they normally perform but would require the agreement of those employees to do work they do not normally perform. Work which an employee normally performs comprises tasks which the employee regularly or routinely performs in the course of employment. The key is what the employee actually does as a matter of practice, rather than what may be contained in a job description or otherwise be provided in an employment agreement. (paras 24, 30-31)

(2) An employee exercising his or her right under s97(3) ERA to refuse to do the work of a striking employee would not fall within the definition of “strike” in s81(1) ERA. As a result, the employee would not be open to suspension under s87 ERA. (para 42)

(3) For any particular employee to become a party to a strike it has to be shown that he or she was not only a party to the original agreement to strike but has continued to support the strike as it occurs. Mere membership of a union whose members have voted to take strike action is not sufficient without more to establish that any particular employee is a party to the strike. The issue is then one of fact. If that employee goes on to behave in any of the ways described in s81(1)(a) ERA in accordance with the resolution to strike then he or she will be a party to the strike, provided that this conduct is accompanied by the mental element described in s81(1)(b) ERA. (paras 47, 49-50)

Comment

(1) For the purposes of the present case at least, there was no material distinction between a striking employee and a locked out employee. Although the Court referred to employees on strike, the same principles apply to locked out employees. (para 17)

Result: Question answered ; Costs to lie where they fall

Statutes considered:

ERA s3(a)(ii)

ERA s54(3)(b)

ERA s65(2)(b)

ERA s81

ERA s81(1)

ERA s81(1)(a)
ERA s81(1)(b)
ERA s87
ERA s97
ERA s97(2)
ERA s97(3)
ERA s97(3)(a)
ERA s97(3)(b)
ERA s97(3)(c)
ERA Part 8
Interpretation Act 1999 s5

Words and phrases: work of a striking or locked out employee

Cases referred to in judgment:

Carter Holt Harvey Ltd v National Distribution Union Inc [2002] 1 ERNZ 239
Heke v Attorney-General in respect of the Department of Corrections [1998] 1 ERNZ 583
National Distribution Union v General Distributors Ltd [2006] 1 ERNZ 790
National Distribution Union Inc v Carter Holt Harvey Ltd [2001] ERNZ 822
New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v Air Nelson Ltd CC 12/07, 17.06.07

Other workers/site names etc: Maiava, Reynard, Aloisio, Downs, Smith, Makara

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Service and Food Workers Union Nga Ringa Tota v Auckland District Health Board & Ors

WC 18/07

Heard: 15 Mar 2007, Wellington

Judgment Date: 1 Aug 2007

Court/Authority/Tribunal: Full Court

Appearances: P Cranney, A Hughes ; PC Chemis, HP Kynaston

PROCEEDINGS REMOVED FROM EMPLOYMENT RELATIONS AUTHORITY
– Collective bargaining – Plaintiff initiated bargaining with defendants for multiemployer collective agreement (“MECA”) – Whether defendants obliged to conclude MECA – Whether counter-initiation of bargaining permissible – Statutory interpretation – s33, Schedule 1B Employment Relations Act 2000 – HELD – Requirement to conclude a collective agreement – MECA not required – Counter initiation of bargaining not permitted – Questions answered

These were proceedings removed from the Employment Relations Authority.

The plaintiff union’s members included employees of the 16 defendant district health boards and four defendant companies that contracted services to the health boards. The plaintiff initiated bargaining with all the defendants seeking a multi-employer collective agreement (“meca”). All the defendants initially wanted single-employer collective agreements (“secas”). The health

boards later signalled willingness to be parties to a meca but opposed the inclusion of the defendant companies.

The plaintiff submitted that the Employment Relations Act 2000 (“ERA”) requires parties to collective bargaining, both generally and in the public health sector, to settle a meca if stipulated for by the union and therefore the defendants were acting contrary to law by refusing to agree to a meca. The plaintiff further submitted that the ERA does not contemplate or permit counter-initiation of bargaining by an employer against whom collective bargaining has been initiated by a union.

Held

(1) Parliament intended clause 6(1) of Schedule 1B to the ERA to mean that parties in the public health sector must support collective bargaining including bargaining for mecas. Parties in bargaining affected by Schedule 1B are obliged to take as their starting point and general approach to ongoing bargaining that both collective bargaining generally and bargaining for mecas in particular should be striven for and attained unless it is neither practical nor reasonable to do so. To “support” is to have a commitment to, but not an absolute or irrevocable commitment or a commitment at all costs. (paras 43, 54)

(2) As re-enacted by the Employment Relations Amendment Act (No 2) 2004, s33 ERA goes no further than to make it an incident of the duty of good faith in s4 ERA that a union and an employer bargaining for a collective agreement conclude such an agreement unless there is a genuine reason, based on reasonable grounds, not to. The requirement is to conclude a collective agreement that may include a meca but, equally, may include a seca or one of the other varieties of collective permutations that the ERA allows. Section 33 does not go so far as to mandate the conclusion of a meca even if this has been stipulated for by the union and even if the parties must, as in the present case, “support” bargaining for a meca. (para 66)

(3) Under the scheme of the ERA, bargaining for a collective agreement between the same parties covering the same employees can be initiated only once. The parties are then required to conclude a collective agreement unless there are genuine reasons based on reasonable grounds not to. Counter-initiation is not allowed. (paras 76, 84)

Result: Questions answered ; Costs reserved

Statutes considered:

ERA s3(a)(ii)
ERA s3(a)(iii)
ERA s3(a)(iv)
ERA s3(b)
ERA s4
ERA s31
ERA s31(aa)
ERA s31(b)
ERA s31(d)
ERA s31(e)
ERA s32(1)(a)
ERA s32(1)(b)
ERA s32(1)(c)
ERA s32(1)(ca)
ERA s32(1)(d)(i)
ERA s32(1)(d)(ii)

ERA s32(1)(d)(iii)
ERA s32(1)(e)
ERA s32(3)(a)
ERA s33
ERA s33(1)
ERA s34
ERA s35
ERA s40
ERA s40(1)
ERA s40(2)
ERA s41
ERA s42
ERA s42(1)
ERA s42(2)
ERA s43
ERA s44
ERA s44(1)(a)
ERA s45
ERA s45(2)
ERA s46
ERA s47
ERA s48
ERA s49
ERA s50
ERA s50A
ERA s50B
ERA s50C
ERA s50D
ERA s50E
ERA s50F
ERA s50G
ERA s50H
ERA s50I
ERA s50J
ERA s51(1)
ERA s51(2)
ERA s100A
ERA s100D
ERA s100E
ERA s100E(1)
ERA s100E(2)
ERA s100E(2)(a)
ERA s100E(2)(b)
ERA Part 5
ERA Schedule 1B cl1(1)
ERA Schedule 1B cl2
ERA Schedule 1B cl2(c)
ERA Schedule 1B cl4
ERA Schedule 1B cl5
ERA Schedule 1B cl6
ERA Schedule 1B cl6(1)
ERA Schedule 1B cl7
ERA Schedule 1B cl8

ERA Schedule 1B c19
ERA Schedule 1B c110
ERA Schedule 1B c113(1)
Employment Relations
Amendment Act (No2) 2004 s12
Employment Relations Amendment Act (No2) 2004 s36
Interpretation Act 1999 Part 2
Interpretation Act 1999 s5(1)
LRA s134
New Zealand Bill of Rights Act 1990 s4
New Zealand Bill of Rights Act 1990 s5
New Zealand Bill of Rights Act 1990 s6
New Zealand Bill of Rights Act 1990 s17
New Zealand Bill of Rights Act 1990 s29

Words and phrases: Counter-initiation ; Support

Cases referred to in judgment:

Association of University Staff Inc v Vice-Chancellor of the University of Auckland
[2005] ERNZ 224
Epic Packaging Ltd v NZ Amalgamated Engineering, Printing & Manufacturing
Union Inc [2006] 1 ERNZ 617
Gibbs v Crest Commercial Cleaning Ltd [2005] ERNZ 399
New Zealand Public Service Association Inc v Southland Regional Council [2005]
ERNZ 1008
NZ Air Line Pilots Assn IUOW v Gray and Ors [1989] 2 NZILR 454
R v Hansen [2007] NZSC 7; [2007] 3 NZLR 1
R v Oakes [1986] 1 SCR 103; (1986) 26 DLR (4th) 200 (SCC)
R v Rochon 2003 CanLII 9600; (2003) 173 CCC (3d) 321
Toll New Zealand Consolidated Ltd v Rail & Maritime Union Inc [2004] 1 ERNZ 392

Other workers/site names etc: OCS Ltd, Spotless Services (NZ) Ltd, ISS Facility Services Ltd,
Compass Group NZ Ltd

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[973920]

Electrotech Controls Ltd v Rarere

WC 21/07
Heard: 6 Jul 2007, Napier
Judgment Date: 5 Sep 2007
Court/Authority/Tribunal: Shaw, J
Appearances: MB Lawson, EC Fackney ; D Oliver

NON DE NOVO CHALLENGE AND CROSS-CHALLENGE TO
DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Defendant
continued to work after fixed term agreement ended – Whether same nature and
terms of employment – HELD – Plaintiff waived fixed term requirement – Parties
remained contractually bound to same terms and conditions – Apprentice electrician

This was a non-de novo challenge and cross-challenge to a determination of the Employment Relations Authority which held that the defendant was constructively dismissed.

The defendant was employed in 2001 as an apprentice electrician. She was placed on a series of fixed term agreements and a core agreement for the position. Each agreement fixed the term of employment by reference to the defendant achieving a qualification as an electrician. The core agreement provided that termination of the fixed term agreement would occur automatically on the expiry of 8,000 hours or proof of completion of her National Certificate, whichever was earlier.

The defendant completed 8,000 hours and all the units towards her National Certificate. While awaiting advice that she had completed all requirements satisfactorily, she continued carrying out the same duties she previously performed.

In May 2005 the parties were advised the defendant had satisfactorily completed the requirements for the National Certificate. However, she had not yet completed the required exam for becoming a registered electrician. In June 2005 the defendant was given notice of termination of her agreement and advised that she could apply for a trade assistant position. She was offered casual employment as a trade assistant until she completed her exams. The defendant believed her employment was permanent and that she should not have been given notice of termination then offered casual work. She withdrew her application for the trade assistant position.

The plaintiff brought a personal grievance. The Employment Relations Authority determined that the plaintiff was prepared to continue employing the defendant as a trade assistant. She was entitled to ongoing employment and her resignation constituted constructive dismissal.

The issue before the Court was the nature and terms of the defendant's employment after the end of the fixed term. The plaintiff submitted that, apart from the indeterminate duration, the terms of employment remained the same. The defendant submitted that when the fixed term ended she commenced work as a trade assistant.

Held

(1) When the defendant had completed her apprenticeship the plaintiff was entitled to terminate the contract immediately but it waived the fixed term requirement to enable her to continue her apprenticeship agreement until her qualification came through. The defendant acquiesced to that by continuing to work and receive payment. While her circumstances had changed because of her qualification, the agreement had not. The parties were still bound by the fixed term agreement and the core agreement which clearly treated her as an apprentice. (paras 30, 36)

(2) There was no arrangement that the defendant would stay on in a different role. It was up to the parties to negotiate a new agreement in the light of her changed status. Until that was done, she remained contractually bound as an apprentice subject to the same conditions of employment as an apprentice. (paras 31, 37)

Result: Challenge granted ; Costs reserved

Statutes considered:

ERA s66

Cases referred to in judgment:

Auto-Movements (NZ) Ltd v Eveleigh WC 15/07, 18 May 2007

New Zealand Railways Corporation v Fletcher Development and Construction Ltd

(1990) 1 NZ ConvC 190,464

Varney v Tasman Regional Sports Trust CC 15/04, 23 July 2004

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[974043]

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

AC 51/07

Heard: 5 Sep 2007, Auckland

Judgment Date: 7 Sep 2007

Court/Authority/Tribunal: Colgan, CJ

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

PRACTICE AND PROCEDURE – Admissibility of evidence – Expert evidence – Opinion evidence – Plaintiff alleged defendant’s witnesses proposed to give opinion evidence outside their expertise and about ultimate issues – Alleged witnesses lacked independence and evidence not detached and balanced – HELD – Admissibility of evidence governed by s189(2) Employment Relations Act 2000 – Evidence Act 2006 important source of reference – Court considered carefully and followed relevant Evidence Act provisions – Opinion evidence not inadmissible purely because about an ultimate issue – Focus on whether substantially helpful – Court best placed to determine ultimate issues – Conflict of interest did not automatically disqualify expert – Opinion evidence that was partial or amounted to advocacy inadmissible – Certain evidence ruled inadmissible – Stevedores and supporting employees

This was an interlocutory decision in which the Court ruled certain evidence inadmissible.

The defendants were stevedoring companies whose employees worked on wharves and cargo ships loading and discharging cargo and providing support services. The defendants wanted to introduce a drug and alcohol testing policy which was opposed by the plaintiff union, whose members were employed by the defendant. The plaintiff brought proceedings, removed from the Employment Relations Authority, alleging the intended policy would be a breach of the relevant collective employment agreements and a breach of the statutory obligation of good faith.

The defendants intended to call a number of expert witnesses. The first and third had been involved in the creation and/or preparation of the policy in dispute.

The plaintiffs alleged that the witnesses: (i) proposed to give opinion evidence about matters outside their expertise; (ii) proposed to give evidence about the ultimate issues for decision by the Court; and, (iii) advocated for a position and did not give evidence that was independent, detached and balanced. The plaintiff alleged the first and third witnesses lacked the necessary independence to be experts because each had a financial interest in the outcome of the proceeding.

Held

(1) The Employment Court was notable by its absence from the schedule of courts to which the Evidence Act 2006 applied expressly. The Evidence Act’s principles and contents were nevertheless an important source of reference whenever the admissibility of evidence was challenged or otherwise in question. They would affect and guide the exercise of the equity and

good conscience test under s189(2) of the Employment Relations Act 2000 (“ERA”). (paras 13, 14, 27)

(2) The Court proposed to primarily follow the relevant provisions in the Evidence Act 2006. Section 25(3) provided that if an opinion by an expert was based on a fact that was outside the general body of knowledge that made up the expertise of the expert, the opinion may be relied on by the fact-finder only if the fact was or will be proved or judicially noticed in the proceeding. Qualification under the Evidence Act as an expert witness did not allow the giving of opinion evidence beyond the parameters of that expertise. (paras 30, 31)

(3) Rather than focusing on whether the opinion evidence went to the ultimate issue, s25(1) Evidence Act focused on whether the fact-finder was likely to obtain substantial help from the opinion in understanding other evidence or in ascertaining any fact that was of consequence to the determination of the proceeding. Section 25(2) provided that an opinion by an expert was not inadmissible simply because it was about an ultimate issue to be determined in the proceeding. Ultimate issues were now no different to others when it came to opinion evidence on them. (paras 32, 33)

(4) Most if not all of the ultimate issues were questions of law and fact, either about the interpretation and application of collective employment agreements, or statutory provisions. Those were matters that the Court was both well versed in determining and best placed to decide. (para 33)

(5) The presence of a conflict of interest did not disqualify automatically an expert. Rather, the question was whether the expert’s opinion was independent both of the parties and of the pressures of the litigation. There was a dividing line drawn between persuasive/party-supportive opinion evidence (admissible) and opinion evidence that was partial and/or amounted to advocacy for the party calling it (inadmissible). Issues as to whether the outcome of the case would or would not enable the expert witness to reinforce or pursue a commercial opportunity were components of the partiality/advocacy tests. (paras 35, 39, 43)

(6) The first witness intended to give opinion evidence about the quality of a policy in the development of which she had been significantly instrumental. The Court concluded that her evidence as currently drafted would not meet the conduct test under s26(1) Evidence Act and Schedule 4 to the High Court Rules. The Court was not satisfied that the first witness was not an advocate for the defendants or that her intended opinion evidence was impartial. She did not qualify as an expert witness for the purposes of giving such opinion evidence. (para 66)

(7) The second witness was not able to give certain opinion evidence including as to the invasive or personal privacy elements of urine testing. The third witness and some of his evidence were at risk of failing to meet the statutorily required impartiality of an expert witness or, put another way and to adopt another test, of being seen as advocacy for the defendants who have engaged him. There was, however, insufficient material before the Court to reach that conclusion. Thus the evidence was provisionally admissible under s14 of the Evidence Act and the Court reserved the question of the admissibility of the challenged parts of it until he had been cross-examined. (paras 75, 85)

Comment

(1) Regulation 6 of the Employment Court Regulations 2000 meant the relevant provisions of the High Court Rules 1985 were engaged. Rules 330A, 330B, 330C and 330D, dealing with expert witnesses, were applicable, as was Schedule 4 to the High Court Rules. (para 15)

Result: Orders accordingly ; No order for costs

Statutes considered:

Employment Court Regulations 2000 r6
ERA s189(2)
Evidence Act 2006 s4
Evidence Act 2006 s6
Evidence Act 2006 s7
Evidence Act 2006 s8
Evidence Act 2006 s14
Evidence Act 2006 s23
Evidence Act 2006 s24
Evidence Act 2006 s25
Evidence Act 2006 s25(1)
Evidence Act 2006 s25(2)
Evidence Act 2006 s25(3)
Evidence Act 2006 s26
Evidence Act 2006 s26(1)
High Court Rules R330A
High Court Rules R330A(2)
High Court Rules R330B
High Court Rules R330C
High Court Rules R330D
High Court Rules Schedule 4

Cases referred to in judgment:

Diagnostic Medlab Ltd v Auckland District Health Board unreported, Asher J, 5 December 2006, HC Auckland, CIV-2006-404-4724
National Justice Compania Naviera SA v Prudential Assurance Co Ltd [1993] 2 Lloyd's Rep 68 (QBD)
NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd [2004] 1 ERNZ 614
Toth v Jarman [2006] 4 All ER 1276 (CA)

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

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[974066]

The Chief Executive of The Department of Corrections v Tawhiwhirangi

WC 14A/07
Heard: 16 Jul 2007, Wellington
Judgment Date: 13 Sep 2007
Court/Authority/Tribunal: Shaw, J
Appearances: PJ Radich, K Spackman ; BA Buckettt

DE NOVO CHALLENGE AND CROSS-CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Unjustified dismissal – Serious misconduct – Plaintiff alleged defendant assaulted prisoner – Defendant alleged plaintiff breached common law and statutory obligations – HELD – Standard of fair

and reasonable employer analogous to standard of care applied in negligence that considers reasonable skill and knowledge of defendant – Relevant factors include size of workplace, number of employees, available resources and employer’s statutory and public interest obligations – Investigation not procedurally fair – If alleged assault occurred would have been justified in circumstances – Dismissal unjustified – Remedies deferred until further hearing – Challenge and cross-challenge dismissed – Principal Corrections Officer

This was an unsuccessful challenge by the plaintiff to a determination of the Employment Relations Authority which held that the defendant’s dismissal was unjustified and an unsuccessful cross-challenge by the defendant involving allegations that the plaintiff had breached its common law and statutory obligations.

The defendant was employed by the plaintiff as a Principal Corrections Officer. A prisoner asked the defendant to bring contraband into the prison. The defendant refused and ordered the prisoner to leave his office. The defendant followed the prisoner out of the office. As the defendant and prisoner exited the office, another officer believed the prisoner was going to attack the defendant and initiated control and restraint on the prisoner.

A Unit Manager conducted an initial inquiry and concluded it was probable the defendant had assaulted the prisoner prior to the control and restraint. The defendant was suspended. The defendant said that he had placed his hand on the prisoner’s shoulder to guide him but denied striking the prisoner. The prisoner did not originally complain of an assault prior to the control and restraint.

An investigation was commenced and a number of interviews were held. The investigator found on a preliminary basis that the defendant was guilty of serious misconduct and should be dismissed (“the investigation report”). After receiving the investigation report, viewing the video footage and following a series of meetings in which the defendant’s representatives made submissions, the regional manager dismissed the defendant.

The defendant submitted that there were a number of procedural flaws in the investigation, including that the defendant was not given proper notice of the specific allegations against him and that the regional manager had formed an unwavering view based on the investigation report and had refused to consider alternative interpretations.

Held

(1) The employer’s actions are measured against the standard of what a fair and reasonable employer would have done in all the circumstances. This refers to a fair and reasonable employer in the position of the plaintiff. This approach is similar to the way the standard of care is assessed in the common law of negligence which acknowledges the reasonable skill and knowledge of a person in the position of the defendant. (para 9)

(2) In assessing generally whether the actions of an employer were fair and reasonable, relevant factors are the size of the workplace and the number of employees employed, the nature and quality of the resources available to the employer including access to specialist human resources advice, and any other statutory or public interest obligations on the employer. Because of its particular characteristics and legislative and policy obligations, the plaintiff was obliged to act with a high standard of fairness and reasonableness. (paras 11, 144)

(3) The mere application of force by a prison officer on a prisoner does not establish serious misconduct. In order to assess whether it is justified the decision maker must properly inquire

into the state of mind of the officer at the time the physical force was used. There was no consideration in the employment investigation or the preliminary findings of the defendant's reasons for acting as they found he had. (paras 146, 150)

(4) The employment investigation was not conducted fairly. It was in breach of the plaintiff's policy requiring investigations to be procedurally fair by informing the employee of the details of the allegations and evidence against him. It did not afford him a real opportunity to explain and the regional manager closed his mind to any alternative explanation. (paras 132, 155)

(5) The decision to dismiss would not have been a reasonable response even if the defendant had used the physical force as alleged. That was because of the defendant's description of the attitude of the prisoner. There was a strong possibility that the prisoner was passively resisting the defendant's instruction. It was, therefore, reasonably open to a fair-minded employer to conclude that even if the alleged application of force by the defendant occurred it was in circumstances which did not justify dismissal. The regional manager may have reasonably concluded there had been breaches of the code of conduct but not serious misconduct. (paras 157-160)

(6) In the light of the outcome of the challenge it was not necessary to discuss the cross-challenge in any detail except to note that on the evidence none of the cross challenges would have been made out. In addition, although the Court found that the plaintiff unjustifiably dismissed the defendant, there was no evidence that in doing so it was in breach of any statutory or contractual obligation to the extent that warranted any penalty. (para 5)

Result: Challenge dismissed ; Cross-challenge dismissed ; Remedies deferred until further hearing ; Costs reserved

Statutes considered:

Corrections Act 2004 s83
ERA s4(1A)
ERA s103A

Cases referred to in judgment:

Air New Zealand Ltd v Hudson [2006] 1 ERNZ 415
Bolam v Friern Hospital Management Committee [1957] 1 WLR 582
Hamilton v Papakura District Council [2000] 1 NZLR 265
Lawless v Comvita New Zealand Ltd [2005] ERNZ 861
NZ (with exceptions) Food Processing IUOW v Unilever New Zealand Ltd [1990] 1 NZILR 35
NZ (with exceptions) Shipwrights Union v Honda NZ Ltd [1989] 3 NZILR 82
Timu v Waitemata District Health Board AC 34/07, 7 June 2007
Whitehouse v Jordan [1981] 1 WLR 246
X v Auckland District Health Board [2007] ERNZ 66

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[974055]

Tawhiwhirangi v The Chief Executive of the Department of Corrections

WC 22/07

Heard: 3, 4 Sep 2007, Wellington

Judgment Date: 14 Sep 2007

Court/Authority/Tribunal: Colgan, CJ

Appearances: B Buckett ; P Radich, E Warden

PROCEEDINGS REMOVED FROM EMPLOYMENT RELATIONS AUTHORITY
– Practice and procedure – Application by plaintiff for compliance order preventing defendant from further investigating allegations of misconduct – Defendant submitted Court lacked jurisdiction to make order against Crown – Alternatively that plaintiff not entitled to relief – HELD – Jurisdictional argument rejected – Compliance order may be made against Crown employers – Some procedural flaws but just to allow investigation to continue – Application declined – Principal Corrections Officer

This was an unsuccessful application by the plaintiff for a compliance order. The plaintiff was dismissed by the defendant for alleged assault. He brought a personal grievance and the Employment Court found the dismissal unjustified (see: WC 14A/07) (“the substantive decision”). The issue of reinstatement had been deferred.

After the Court hearing but before the substantive decision the defendant alleged that the plaintiff was involved in the theft of a deep fryer and commenced investigation. The plaintiff sought a compliance order to prevent the defendant from undertaking any further investigative or disciplinary procedures in respect of any matter until further order of the Court. The plaintiff also sought findings regarding the defendant’s investigative and disciplinary procedure into the alleged theft.

By consent, the Court made an interim order that the defendant was to take no further steps until the present application could be heard by a different Judge.

The plaintiff submitted that the defendant had breached its obligation of good faith, its own policies and had made a number of procedural errors. The plaintiff also contended he was being subjected to a witch-hunt and the investigation had been undertaken to resist any orders of reinstatement the Court might make.

The defendant submitted that the Court lacked jurisdiction to award the relief sought because it amounted to a quia timet injunction that could not be made against the Crown. Alternatively, it contended the plaintiff was not entitled to the relief sought.

Held

(1) The Court is empowered to enforce the good faith obligations by compliance order if it is satisfied that a defendant has not acted in good faith. A compliance order may, in an appropriate case, include an order that a party desist from conduct that is in breach of the statutory requirements. That may include, theoretically at least and in an appropriate case, a direction to cease an activity that is in breach of the statute. The same extends to contractual breaches. Therefore, if the employer has not followed his own process, that can be the subject of a compliance order. (para 2)

(2) A statutory compliance order can be made against a range of persons including Crown employers. The Court did not accept the defendant's jurisdictional submission. (paras 3-4)

(3) The defendant could not reasonably ignore the allegation. The most just course of action was to permit the defendant's investigative process to continue and not to order its permanent stay. Despite errors having been identified by the plaintiff, a compliance order was not warranted to prevent further non-compliance. The consent interim order was set aside. (paras 45 and 61)

(4) The matters presently being investigated and that had been before the Court in the present application could not be grounds to resist the plaintiff's reinstatement on its merits in the earlier proceedings. (para 72)

Result: Application dismissed ; Orders accordingly ; Costs reserved

Statutes considered:

ERA s4
ERA s4(1)(b)
ERA s4(1A)(b)
ERA s4(1A)(c)
ERA s137
ERA s137(1)(a)(i)
ERA s137(1)(a)(ii)
ERA s161(1)(n)
ERA Part 1
ERA s178
New Zealand Bill of Rights Act 1990
State Sector Act 1988 s56

Cases referred to in judgment:

Chief Executive of the Department of Corrections v Tawhiwhirangi WC 14A/07, 13 September 2007
Ioane v Waitakere City Council [2003] 1 ERNZ 104
Irvines Freightlines Ltd v Cross [1993] 1 ERNZ 424
Tawhiwhirangi v Attorney-General in respect of Chief Executive, Department of Justice [1993] 2 ERNZ 546

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[974065]

NZ Tramways & Public Passenger Transport Authorities Employees IUOW v Cityline (NZ) Ltd t/a Cityline Hutt Valley & Anor

WC 23/07

Heard: 30 Jul 2007, Wellington

Judgment Date: 19 Sep 2007

Court/Authority/Tribunal: Shaw J

Appearances: P McBride ; PA Caisley

DRAFT HEADNOTE ONLY - CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Plaintiff challenged validity of purported multi employer multi union collective agreement ("MEMUCA") between

defendants and two other unions – Applied to Authority for declaration MEMUCA not valid and void ab initio – Authority declined declaration as would have had effect of cancelling MEMUCA, and validity of purported agreement properly tested by application for review – Whether Authority had jurisdiction to declare a document is or is not a collective employment agreement ("CEA") – Case turned on effect of s163 Employment Relations Act 2000 ("ERA") which provided Authority may not make order cancelling or varying CEA or any term of a CEA – Scheme of Part 5 ERA that CEAs must comply with statutory requirements in order to come into force – Section 25 ECA stated if contract contravened Employment Contracts Act 1991("ECA") provisions, contract not unenforceable or of no effect unless expressly provided for in ECA – No equivalent in ERA - Purpose of s163 and s192(1) ERA to prevent Authority or Court from interfering with CEAs in force – Accorded with purposes of ERA that promote orderly collective bargaining - If CEA in force, could not be cancelled or varied and could only be varied by collective bargaining process – If a document not correctly formed under statutory process it did not meet statutory content requirements - Open to question whether such document in fact a CEA in terms of ERA – Possible that a CEA could be held by Court or Authority to be void and unenforceable if grounds properly made out – If CEA found to be valid could not be cancelled or varied - Requests for declaration whether a document a CEA under ERA was not a request to cancel a CEA - Authority could continue with application for declaration – Application for review under s194 ERA only available once right of challenge exhausted

This was a successful challenge to a determination of the Employment Relations Authority which held that it could not make a declaration whether a collective agreement was valid or not because s163 of the Employment Relations Act 2000 prevented the Authority from making an order cancelling or varying all or part of a collective agreement.

The plaintiff was a party to a single employer collective agreement with each defendant. The defendants then entered into a collective agreement with two other unions (“the WUBCA”).

The plaintiff applied to the Employment Relations Authority for a declaration that the WUBCA was not valid and was void ab initio. The Authority held that to make the requested declaration would be to cancel the WUBCA which was prohibited by s163 of the Employment Relations Act 2000 (“ERA”).

The plaintiff challenged that determination. It submitted that if an agreement is declared void then it never had legal effect. The declaration sought was different from asking the Authority to vary or cancel a collective agreement. The defendants submitted (i) a declaration that the WUBCA had never had legal effect would effectively cancel the collective agreement and that was prohibited by s163 ERA; and, (ii) the Authority was prevented by s161(2) ERA from making any determination relating to bargaining and a declaration of invalidity would effectively interfere with bargaining.

Held

(1) A collective agreement must comply with certain statutory requirements in order to come into force and is only then binding and enforceable. The purpose of s163 and s192(1) ERA is to prevent the Authority or the Court from interfering with a collective agreement that is in force. If a collective agreement is in force it cannot be cancelled or varied under the law relating to contracts and can only be varied by the process of collective bargaining. If a document is not correctly formed under the statutory process and does not meet the statutory content requirements it is open to question whether it is in fact a collective agreement in terms of the ERA. It is

therefore possible that a collective agreement could be held by the Court or the Authority to be void, without legal effect, and unenforceable if the grounds are properly made out. If this were the case, then the question of cancellation or variation would not arise. (paras 20, 26-27)

(2) A request for a declaration as to whether a document is or is not a collective agreement in terms of the ERA, is not a request to cancel the agreement. There can only be one of two outcomes. Either it is a collective agreement in terms of the ERA or it is not. If it is not then it is void and of no effect. If it is found to be a valid collective agreement it cannot be cancelled or varied. (para 30)

Result: Challenge granted

Statutes considered:

ECA s25
ERA s5
ERA s51
ERA s52
ERA s54
ERA s54(1)
ERA s56
ERA s56(1)
ERA s61(2)(b)
ERA s161(2)
ERA s163
ERA s184(1A)
ERA s192(1)
ERA s194
ERA Part 5

Words and phrases: bound ; binding

Cases referred to in judgment:

Fletcher Construction New Zealand Ltd, Dillingham Construction Inc and Ilbau Gesellschaft (t/a Fletcher Dillingham Ilbau Joint Venture) v New Zealand Engineering Printing & Manufacturing Union Inc [1999] 2 ERNZ 183
O'Malley v Vision Aluminium Ltd (No 2) [1992] 2 ERNZ 660

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[974220]

Waitemata District Health Board v Timu

CA 322/07

Heard: 17 Sep 2007, Wellington

Judgment Date: 20 Sep 2007

Court/Authority/Tribunal: Hammond, Robertson, Arnold JJ

Appearances: A Russell ; G Pollak

COURT OF APPEAL – Practice and procedure – Application for leave to appeal
Employment Court decision – Whether applicant breached rules of natural justice –
Whether Employment Court substituted its own judgment – Whether obscene or

abusive language could be serious misconduct when not so described in applicant's policy – Whether evidence of earlier incident relevant to remedies – HELD – No deviation from established natural justice principle – Employment Court did not substitute own view – Question concerning obscene or abusive language did not justify intervention – No error in assessing remedies – Application dismissed – Psychiatric nurse

This was an unsuccessful application for leave to appeal to the Court of Appeal.

The respondent was dismissed from his employment with the applicant in July 2004 for allegedly physically assaulting a patient and using abusive language.

The Employment Court held that the investigation of the alleged assault was procedurally unfair as the applicant failed to follow certain natural justice requirements. The Employment Court noted that abusive language could amount to serious misconduct but that it was described in the applicant's policy as misconduct generally rather than serious misconduct. The Employment Court concluded the respondent's conduct could not be characterised as serious misconduct.

The proposed questions of law for which leave was sought were: (a) whether the applicant could not rely upon obscene or abusive language which could cause offence as serious misconduct because it was not so described in the relevant policy; (b) whether the applicant's decision-maker was in breach of the rules of natural justice and thereby failed to conduct a fair or reasonable enquiry when deciding on disputed questions of fact; (c) if, and to what extent, the Employment Court usurped the functions of the applicant and its decision-maker upon an investigation that satisfied natural justice and the requirements of the case by substituting its judgment for that of the applicant; and, (d) whether evidence of an earlier incident was relevant to the remedies claimed by the respondent.

Held

(1) There was no deviation from established principle in the Employment Court's approach to natural justice. The Employment Court did not substitute its view as to what should occur for an assessment of the procedure adopted. (paras 10, 13)

(2) If the Employment Court was suggesting that obscene or abusive language was never capable of being regarded as serious misconduct justifying dismissal in an absolute and unequivocal sense it would be in error. The Court suspected the Employment Court was speaking in the context of the facts of the case, but even if it were not, the point was not one which would meet the statutory test to justify the intervention of the Court. (para 17)

(3) There was no error of principle in assessing remedies. The matter was an example of the application of non-contentious principle to the facts of the case. The applicant's view that principles were incorrectly applied to the facts of the case did not create a question of law. (paras 18-20)

Result: Application dismissed ; Costs in favour of respondent (\$1,500 plus disbursements)

Statutes considered:

ERA s214(3)

Cases referred to in judgment:

Airline Stewards and Hostesses of New Zealand IUW v Air New Zealand Ltd (1990)
ERNZ Sel Cas 985; [1990] 3 NZLR 549; (1990) 4 NZELC 95,259 (CA)

Timu v Waitemata District Health Board (2007) 4 NZELR 471
W & H Newspapers Ltd v Oram [2000] 2 ERNZ 448; [2001] 3 NZLR 29; (2001) 6
NZELC 96,197 (CA)

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Arrears - Employment Relations Act 2000

Epplett v Emerson t/a Emerson Distribution

23 Jul 2007, PR Stapp, WA 101/07, (3 pages)

ARREARS OF WAGES AND HOLIDAY PAY - No appearance for respondent - Respondent failed to respond to Authority's communications and request for wage, time and holiday records - Authority satisfied applicant employed by respondent personally - Applicant resigned giving two weeks notice - Subsequently told job restructured and not required to work - Employment ended without applicant being paid - Claim established - Applicant used own vehicle in duties - Applicant to be reimbursed for use of fuel - Claim for reimbursement during notice rejected given notice not worked - Wages and holiday pay due and owing

Result: Arrears of wages and holiday pay (\$823.85) ; Reimbursements (\$251.60)(Fuel expenses) ; Disbursements (\$70)(Filing fee)

Preston & Ors v Scenicland Services (Nelson) Ltd

21 May 2007, P Montgomery, CA 56/07, (2 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Applicants sought arrears owed when respondent ceased trading - Arrears calculated by Labour Inspector - Respondent advised had no funds and sent copy of Notice of Proceedings for Putting Company into Liquidation - Orders made in event liquidator had funds to disburse

Result: Application granted ; Arrears of wages (\$971.60)(PP) ; (\$321)(PC) ; (\$631.25)(CD) ; (\$426)(MT) ; (\$24)(JD) ; Arrears of holiday pay (\$5,613.69)(PP) ; (\$32.76)(PC) ; (\$3,279.81)(CD) ; (\$251.73)(MT) ; (\$554.22)(JD) ; Other monies (\$12,026)(PP)(bonus) ; Disbursements (\$70)(Filing fee)

Arrears - Holiday Pay - Employment Relations Act 2000

Epplett v Emerson t/a Emerson Distribution

23 Jul 2007, PR Stapp, WA 101/07, (3 pages)

ARREARS OF WAGES AND HOLIDAY PAY - No appearance for respondent - Respondent failed to respond to Authority's communications and request for wage, time and holiday records - Authority satisfied applicant employed by respondent personally - Applicant resigned giving two weeks notice - Subsequently told job restructured and not required to work - Employment ended without applicant being paid - Claim established - Applicant used own vehicle in duties - Applicant to be reimbursed for use of fuel - Claim for reimbursement during notice rejected given notice not worked - Wages and holiday pay due and owing

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Stewart v Century 21 Huntly, Morrinsville & Papakura Ltd

30 Apr 2007, V Campbell, AA 129/07, (10 pages)

UNJUSTIFIED DISMISSAL - Summary dismissal - Whether dismissed or resigned - Manager queried applicant's management of client's property and level of communication with client - Applicant sent email to client outlining impending tenancy of client's property and left office - Manager claimed spoke to client and decided applicant lied - When applicant returned to office heated argument ensued - Authority found in no uncertain terms applicant told to leave workplace - Manager claimed applicant told him to "stick his job" - Applicant said "I'll resign" - Statement intended to convey her intention if shouting and bad language continued - Applicant left office and did not return - Provided medical certificate not fit to work when handed in keys - Handing back keys consistent with understanding had been dismissed - Manager's conduct in swearing and telling applicant to go dismissive and repudiatory - Even if wrong on point, manager's conduct plainly invited resignation which would have amounted to constructive dismissal - Dismissal - Manager's conduct outrageous - Failed to undertake investigation disclosing conduct a fair and reasonable employer would regard serious misconduct - Conduct in contravention of procedural fairness and fell short of obligation to be constructive in maintaining productive employment relationship - Failed to comply with terms of employment and follow own procedures - Dismissal unjustified - ARREARS OF HOLIDAY PAY - Without agreement respondent paid applicant as if on annual leave following dismissal - Manner of payment during notice period had effect of reducing applicant's statutory entitlements - Holiday pay due and owing - Conduct warranted interest award - Interest 8.5 percent - Property manager

Result: Application granted ; Reimbursement of lost wages (\$4,742)(13 weeks less 5 weeks pay following dismissal) ; Compensation for humiliation etc (\$5,000) ; Arrears of

holiday pay (\$873.60) ; Interest 8.5% ; Costs reserved

Bargaining - Employment Relations Act 2000

NZ Meatworkers & Related Trades Union of Workers v Crusader Meats Ltd

16 Nov 2007, Y Oldfield, AA 359/07, (4 pages)

BARGAINING – Application for reference to facilitation – Authority earlier declined reference – Authority found negotiations not unduly protracted and had not been extensive efforts to resolve issues – Applicant claimed despite further attempts to progress matter, unable to resolve impasse and situation markedly worse since first application – Respondent supported current application - Since earlier determination parties had revised offers, convened further bargaining meetings, and engaged in mediation and industrial action – Applicant given notice of further lockouts – What constituted “unduly protracted” bargaining and a reasonable timeframe for completion of process could depend on circumstances of bargaining – Factors impacting on task included nature of industry involved, complexity of document under negotiation, extent of its coverage and past history, and level of union membership – Approximately 10 percent of respondent’s employees members of applicant – Nearly two years passed since bargaining initiated for relatively small group of workers – In circumstances Authority satisfied bargaining now unduly protracted – Parties’ considered had reached deadlock - Parties expended additional time and effort to resolve matter - Situation materially different from that whe earlier determination issued - Threshold in s50C(1)(b) Employment Relations Act 2000 satisfied – Parties referred to facilitation

Result: Application granted ; No order for costs

Compliance Order - Employment Relations Act 2000

Belich v Rusty Pelican Ltd

19 Jul 2007, R Arthur, AA 212/07, (5 pages)

COMPLIANCE ORDER - Applicant awarded lost wages and compensation in earlier determination - Respondent placed in receivership two weeks after investigation meeting and before determination issued - Receiver of respondent advised only some of lost wages award preferential, with rest of claim unsecured - Matter dealt with urgently on papers Applicant challenged Receiver's analysis - Declaration and compliance order sought regarding decision - Applicant claimed Companies Act 1993 ("CA") provisions should not override Authority's order for lost wages - Given application arose out of employment relationship problem, Authority clearly had jurisdiction to determine claim - Essential issue whether approach taken by Receiver correct - Whether order for lost wages subject to preferential claims regime of CA - Schedule 7 cl2(bb) of CA expressly limited extent Authority and Courts could give claims for wages greater or lesser preference than other creditors - Approach correct as Schedule limited wage or salary preference claims to amounts earned in four months before receivership began - No compliance order needed - Respondent's director appeared to have misled Authority about prospect and imminence of receivership - However, actions did not affect outcome of application

Result: Application declined ; No order for costs

Cook Executive Recruitment (2005) Ltd v Lewis

2 Aug 2007, RA Monaghan, AA 205A/07, (2 pages)

COMPLIANCE ORDER - Applicant sought order respondent comply with obligation to repay money as set out in earlier consent order - Parties had agreed respondent would make part payment and provide details of financial situation - Agreed order for immediate payment would be made if respondent defaulted - No payments made - Respondent ordered to pay amount owed forthwith - Orders made by consent remained in force

Result: Compliance ordered ; No order for costs

Ferguson v Pump and Water Solutions Ltd

11 Jul 2007, V Campbell, AA 207/07, (3 pages)

COMPLIANCE ORDER - Applicant sought compliance with mediated record of settlement - Respondent claimed not in financial position to pay full amount due - Important Authority send clear signal mediated terms of settlement must be honoured - Compliance order appropriate - Authority satisfied financial position of respondent required order for payment by instalments - COSTS - Applicant's costs not necessary if respondent had honoured settlement agreement - Awarded \$250 contribution to costs

Result: Compliance ordered ; Orders accordingly ; Costs in favour of applicant (\$250) ; Disbursements (\$70)(Filing fee)

Panel Holdings Ltd v Paki

24 Oct 2007, D King, AA 335/07, (3 pages)

COMPLIANCE ORDER - Applicant sought compliance with two previous Authority determinations - No appearance by respondent - Compliance ordered - COSTS - Applicant sought costs associated with compliance application of \$1,582 - Put to unnecessary cost and trouble to file compliance application - Applicant entitled to reasonable contribution to costs

Result: Compliance ordered ; Costs in favour of applicant (\$1000); Disbursements

(\$70)(Filing Fee)

Williams v Waikato Flying School Ltd

26 Oct 2007, D King, AA 336/07, (2 pages)

COMPLIANCE ORDER - Applicant sought compliance with settlement agreement - No appearance by respondent - Applicant had not received total sum owed under agreement - Compliance ordered - COSTS - Applicant awarded contribution to costs

Result: Compliance Ordered ; Costs in favour of applicant (\$500) ; Disbursements (\$70)(Filing fee)

Costs - Employment Relations Act 2000

Barnett v Brooklyn Holdings Ltd & Ors

22 Nov 2007, PR Stapp, WA 138A/07, (3 pages)

COSTS - Unsuccessful personal grievance - Two day investigation meeting - Respondents sought contribution to total costs of \$13,186 - Argued Calderbank offer made and rejected - Applicant argued only modest award should be granted as had a strong case - Respondents put to expense of investigation - Applicant to contribute 66% of respondent's total costs - Respondent awarded \$3,029 as contribution to costs

Result: Cost in favour of applicant (\$3,029.40)

Cadman v Napier Girls High School Board of Trustees

30 Oct 2007, PR Stapp, WA 119A/07, (3 pages)

COSTS - Applicant not an employee - 1 ½ day investigation meeting - Respondent sought contribution of \$8,100 to total costs of \$36,949 - Meeting took longer than necessary because of failure to provide replies in writing, prior to investigation meeting and because of new allegations made by applicant - Applicant had important issue of principle to be tested - However had to accept desire came with cost - Contribution to costs based on 60% of reasonable costs - Decision on disbursements reserved for detail to be provided

Result: Costs in favour of respondent (\$4,860)

Dahl v Knight train Haulage Ltd

26 Oct 2007, R Arthur, AA 278A/07, (3 pages)

COSTS - Successful personal grievance - One day investigation meeting - Applicant sought contribution of \$3,270 to total costs of \$4,770 - Respondent submitted Calderbank offer made prior to investigation rejected and suggested costs should lie where they fall - Offer less than result ultimately achieved by applicant - Unhelpful conduct of respondent regarding mediation taken into account - Under tariff approach case would normally warrant award of \$1,500 - Increased to \$2,000 to recognise respondent's conduct

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

Dams v Powerbeat International Ltd

9 Nov 2007, A Dumbleton, AA 256A/07, (4 pages)

COSTS - Successful personal grievance - Two day investigation meeting - Applicant sought contribution to total costs of \$5,568 - Applicant's costs very modest in circumstances - Notional rate to calculate costs would not do justice to work - Authority had regard to applicant's total success and lack of contribution - Total cost of investigation meeting did not take into account considerable activity that occurred outside investigation meeting - Application of notional rate to hearing time would not do justice to work involved in case for applicant's counsel - Applicant entitled to reasonable contribution to costs and disbursements

Result: Costs in favour of applicant (\$4,350)(including disbursements)

Drayton Transport Ltd v Stocker

18 Oct 2007, J Crichton, CA 103A/07, (2 pages)

COSTS - Successful recovery of monies - Length of investigation meeting not specified - Applicant sought full costs of \$956.25 and submitted costs should follow event because case was relatively unusual as respondent chose to defend entirely unmeritorious claim - Respondent to pay significant contribution to costs

Result: Costs in favour of applicant (\$836.72)

Ferguson v Pump and Water Solutions Ltd

11 Jul 2007, V Campbell, AA 207/07, (3 pages)

COMPLIANCE ORDER - Applicant sought compliance with mediated record of settlement - Respondent claimed not in financial position to pay full amount due - Important Authority send clear signal mediated terms of settlement must be honoured - Compliance order appropriate - Authority satisfied financial position of respondent required order for payment by instalments - COSTS - Applicant's costs not necessary if respondent had honoured settlement agreement - Awarded \$250 contribution to costs

Result: Compliance ordered ; Orders accordingly ; Costs in favour of applicant (\$250) ; Disbursements (\$70)(Filing fee)

Ford v General Storage Ltd

25 Oct 2007, R Arthur, AA 277A/07, (2 pages)

COSTS - Successful personal grievance - One day investigation meeting - Applicant sought contribution to costs of \$2,500, claimed amount sought significantly less than actual costs - Respondent made no submissions regarding costs - Matter dealt with efficiently in single day - Necessarily incurred costs closer to lower end of tariff scale - Reasonable contribution awarded to applicant

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

Forsyth v Telstraclear Ltd

1 Nov 2007, L Robinson, AA 320A/07, (3 pages)

COSTS - Unsuccessful dispute - One day investigation meeting - Respondent sought contribution of \$7,725 to total costs of \$13,440 - Applicant submitted award should be modest as facts came within narrow compass - Notional reasonable costs calculated as \$5,000 - Applicant to pay contribution to costs

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

Hardgrave v Customkit Buildings Ltd

23 Jul 2007, R A Monaghan, AA 135A/07, (3 pages)

COSTS - Successful personal grievance - Three day investigation meeting - Applicant sought contribution of \$10,500 to costs - Calderbank offer was rejected as offer included costs reducing benefit compared to remedies awarded by Authority - Respondent argued applicant's contribution, Calderbank offer and withdrawal of counter-claim should be taken into account - Since applicant not entirely successful in claim, reduction applied to costs awarded - Applicant also sought reimbursement of medical expenses which was dismissed - Entitled to contribution to costs of \$9,000

Result: Costs in favour of applicant (\$9,000); Filing Fee(\$70)

Heremia v Wilding International Ltd

18 Oct 2007, V Campbell, AA 237A/07, (2 pages)

COSTS - Successful personal grievance - One day investigation meeting - Applicant was legally aided - Sought between \$4,000 and \$5,000 as contribution to costs - No evidence produced to show what legal aid grant or actual costs were - Not overly complex case, however large amount of documentation provided by respondent - Applicant awarded reasonable contribution to costs

Result: Costs in favour of applicant (\$3,000)(including disbursements)

Hollands v Jam Marketing Pty Ltd

31 Jul 2007, D King, AA 179A/07, (3 pages)

UNJUSTIFIED DISMISSAL - Poor performance - No appearance for respondent - No written employment agreement - Earlier determination found applicant an employee - Matter determined on applicant's uncontested evidence - Applicant employed to sell timeshare properties on salary plus commission basis - Within two months told was being let go because was "a round peg in a square hole" - Not given any indication employment at risk or opportunity to comment - Manner dismissal affected "brutal" - Decision predetermined - Dismissal unjustified - PENALTY - Respondent intended to provide employment agreement but failed to do so - Penalty appropriate - COSTS - Applicant entitled to costs - Applicant to forward details of expenditure incurred to Authority

Result: Application granted ; Reimbursement of lost wages (\$5,000)(10 weeks) ; Compensation for humiliation etc (\$8,000) ; Penalty (\$3,000)(Payable to Crown)

Jeffries v Adis International Ltd

15 May 2007, Traivs, J, AC 24/07, (1 pages)

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Plaintiff challenged Authority's costs award of \$3,000 against plaintiff – COSTS – Unsuccessful de novo challenge (see: AC 69/06) – Defendant sought reasonable contribution of \$30,000 to actual costs of \$76,246 – HELD – Plaintiff made case unnecessarily complex – Authority's award well within scope of its discretion – Challenged dismissed – Award of \$30,000 would be modest contribution – However, solely because of plaintiff's financial circumstances, Court ordered her to pay \$20,000 towards defendant's costs – Authority award confirmed – Costs in favour of defendant (\$20,000)

Result: Challenge dismissed ; Costs in favour of defendant (\$20,000)

Keehan v Cedric and Emma Monk t/a CJ & E Monk and R.E.M. Farms Ltd

19 Oct 2007, H Doyle, CA 122/07, (4 pages)

COSTS - Applicant discontinued personal grievance proceedings - Submitted costs to lie where they fall as not in financial position to continue claim - Respondent submitted award of costs should be \$1,000 - Respondent put to considerable expense by having to lodge affidavits for interim application for reinstatement as well as corresponding with Authority even though case withdrawn - Respondent entitled to reasonable contribution to costs

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

Kurene and Anor v United Group Rail (NZ) Ltd

2 Nov 2007, D Asher, WA 21B/07, (6 pages)

COSTS - Successful personal grievance - Two investigations spread over three days - Applicant sought full costs of \$49,667 plus disbursements - Respondent agreed to interim reinstatement and that applicant had personal grievance - Concessions came after applicant had occurred almost all of her costs and could not justify any reward - Realistic settlement proposals advanced by applicants - Costs incurred reflected applicants' "belts and braces" approach to investigations - Full costs not warranted but applicants to recover all fair and reasonable costs - Reasonable costs calculated with reference to legal aid rate - Margin added to recognise greater costs resulting from urgent interim application and complexities of substantive investigation - Applicants to determine how costs awarded to be allocated between them

Result: Costs in favour of applicants (\$12,000) ; Disbursements (\$1,084.74)

MacKenzie v Ogilvy New Zealand Ltd t/a Advertising Works Ogilvy Ltd

1 Nov 2007, M Urlich, AA 346/07, (3 pages)

COSTS - Successful personal grievance - Less than one day investigation meeting - Applicant sought contribution of \$2026 to total costs of \$3,070 - Submitted matter could have been settled earlier had respondent made offer - Respondent argued applicant's claim had limited success and \$500 would be appropriate award for costs due to applicant's contribution - Authority noted contribution reflected in level of remedies awarded - Little factual disagreement between parties - Applicant entitled to contribution to costs

Result: Costs in favour of applicant (\$2,000) ; Filing fee (\$70)

Nelson v Hickory Bay Ltd

24 May 2007, J Crichton, CA 38A/07, (3 pages)

COSTS - Partially successful arrears claim - Length of investigation meeting not specified - Applicant appeared for himself but engaged counsel to prepare closing submissions - Sought contribution to actual costs of \$1,165 - Respondent sought \$900 disbursements for travel costs required for director to appear at investigation meeting - Both parties could reasonably be considered successful - Authority disposed to think greater onus on employer party rather than employee to follow up matters and successfully resolve disputes - Applicant's argument entitled to additional salary payments had no merit - Both parties to share blame for inability to resolve matters - On daily tariff approach costs award would probably be less than \$1,000 - Costs to lie where they fall

Result: Costs to lie where they fall

Ng v Whitireia Community Polytechnic

29 Oct 2007, R Arthur, AA 242A/07, (4 pages)

COSTS - Unsuccessful personal grievance - Less than one day investigation meeting - Respondent sought contribution of \$2,500 to total costs of \$10,000 - Applicant submitted any costs awarded against her should be no more than \$250 - Provided information of income and claimed had only uncertain casual work - Also suggested respondent's conduct not blameless - Award within usual daily range appropriate - Payments to be made by instalments

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

Panel Holdings Ltd v Paki

24 Oct 2007, D King, AA 335/07, (3 pages)

COMPLIANCE ORDER - Applicant sought compliance with two previous Authority determinations - No appearance by respondent - Compliance ordered - COSTS - Applicant sought costs associated with compliance application of \$1,582 - Put to unnecessary cost and trouble to file compliance application - Applicant entitled to reasonable contribution to costs
Result: Compliance ordered ; Costs in favour of applicant (\$1000); Disbursements (\$70)(Filing Fee)

Rillstone v Product Sourcing International 2000 Ltd

25 Oct 2007, R Arthur, AA 167A/07, (6 pages)

COSTS - Successful personal grievance - One day investigation meeting - Applicant sought contribution of \$24,585 to full costs of \$37,251 - Calderbank offer of \$32,000 declined by respondent - Respondent argued Calderbank should not be considered as more than award to applicant as after tax - Disputed matter complex, submitted applicant's costs excessive - Authority took into account Calderbank offer, unnecessary costs incurred by applicant and issues resulting from witness statements - Reasonable costs calculated as \$4,000 and \$500 allowed for procedural issue
Result: Costs in favour of applicant (\$4,500) ; Disbursements (\$370)

Shone v Gisborne Intermediate School Board of Trustees

20 Nov 2007, R Arthur, AA 294A/07, (3 pages)

COSTS - Unsuccessful injunction application - Half day investigation meeting - Applicant sought costs of \$2,000 plus expenses of \$521 - Respondent argued costs should lie where they fall - Submitted applicant did not succeed in obtaining injunction, matter was test case and respondent acted in good faith - Applicant entitled to costs award of \$1,200 given nature of case and preparation involved - Costs for out of town counsel allowed due to special venue arrangements
Result: Costs in favour of applicant (\$1,756)(including disbursements)

Taylor & Ors v Office Max New Zealand Ltd

18 Oct 2007, J Crichton, CA 97A/07, (4 pages)

COSTS - Successful personal grievances - Two day investigation meeting - Total of 11 applicants sought award of \$2,500 to \$3,000 per day per applicant - Respondent proposed contribution of \$6,000 total to costs incurred by applicants - Both parties questioned need for investigation meeting and considered factual matrix confined - Matter less complex as applicants' evidence very similar - Costs award of magnitude sought by applicants considered quite extraordinary as no evidence matters in contention so complex or out of the ordinary uniquely high award required - Authority made decision to hear evidence in investigation meeting rather than decide case on papers in order to ascertain whether applicants' had colluded in their evidence - Not a case that justified extraordinary costs award - No documentation or evidence provided by applicants identifying costs - Respondent's starting point reasonable but adjusted to take into account additional complexity of group action - Applicants awarded global contribution to costs
Result: Costs in favour of applicants (\$8,000)

Williams v Waikato Flying School Ltd

26 Oct 2007, D King, AA 336/07, (2 pages)

COMPLIANCE ORDER - Applicant sought compliance with settlement agreement - No appearance by respondent - Applicant had not received total sum owed under agreement - Compliance ordered - COSTS - Applicant awarded contribution to costs

Result: Compliance Ordered ; Costs in favour of applicant (\$500) ; Disbursements (\$70)(Filing fee)

Parental Leave - Employment Relations Act 2000

Ross v Department of Labour

16 May 2007, GJ Wood, WA 77/07, (1 pages)

PARENTAL LEAVE - Irregularity occurred in applicant's application for parental leave - Reasonable for Authority to remedy irregularity - Applicant entitled to paid parental leave

Result: Orders accordingly ; No order for costs

Penalty - Employment Relations Act 2000

Charles v Waitakere City Council and Anor

19 Nov 2007, R Arthur, AA 362/07, (21 pages)

UNJUSTIFIED DISADVANTAGE – First respondent (“WC”) contracted to provide dog control services to second respondent (“NSC”) – Applicant employed on fixed term to provide services to NSC – NSC expressed concern about applicant’s performance to WC several times - Allegations not put to applicant and she was unaware NSC considering invoking clause in contract to remove her from duties – Clause subsequently invoked and WC attempted to transfer applicant to duties at WC for remainder of fixed term – Applicant raised grievance and did not return to work – Applicant entitled to know, and have opportunity to comment on, allegations and possibility removal clause would be invoked – Also entitled to opportunity to improve work practices – WC breached trust and confidence, and statutory duty of good faith to be active and communicative – Also breached duty not to act in way likely to mislead or deceive when advised applicant of NSC’s demand and transfer – No contractual basis for transfer - Unjustified disadvantage – Remedies – Applicant remained employed on unpaid sick leave – Entitled to wages lost immediately following removal from NSC position – Could have expected to be stood down on full pay while consulted about alternative arrangements – Reasonable period four weeks as did not mitigate loss – Contributory conduct 25 percent - PENALTY – Applicant alleged NSC aided and abetted WC’s breach of employment agreement – Not open to Authority to consider NSC’s commercial decision to invoke removal clause – Whether contract between respondents structured and applied to avoid employee’s rights important question of policy within Authority’s role and powers in equity and conscience – Removal clauses inconsistent with employment statutory regime – No evidence removal clause operated by NSC in calculated way to help WC avoid obligations – No penalty – Dog control officer

Result: Application granted (Disadvantage) ; Reimbursement of lost wages (4 weeks reduced to 3) ; Compensation for humiliation etc (\$10,000 reduced to \$7,500) ; Application dismissed (Penalty) ; Costs reserved

Hollands v Jam Marketing Pty Ltd

31 Jul 2007, D King, AA 179A/07, (3 pages)

UNJUSTIFIED DISMISSAL - Poor performance - No appearance for respondent - No written employment agreement - Earlier determination found applicant an employee - Matter determined on applicant's uncontested evidence - Applicant employed to sell timeshare properties on salary plus commission basis - Within two months told was being let go because was “a round peg in a square hole” - Not given any indication employment at risk or opportunity to comment - Manner dismissal affected "brutal" - Decision predetermined - Dismissal unjustified - PENALTY - Respondent intended to provide employment agreement but failed to do so - Penalty appropriate - COSTS - Applicant entitled to costs - Applicant to forward details of expenditure incurred to Authority

Result: Application granted ; Reimbursement of lost wages (\$5,000)(10 weeks) ; Compensation for humiliation etc (\$8,000) ; Penalty (\$3,000)(Payable to Crown)

Kessell v Harris Transport (1974) Ltd

6 Jun 2007, GJ Wood, WA 90/07, (7 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Poor performance - Summary dismissal - Applicant responsible for scheduling transport jobs and organising staff - Received three written warnings for forgetfulness and mismanagement of jobs - Delay in issuing of third warning - Manager unaware applicant had diabetes - Often neglected to take medication, resulting in forgetfulness - Manager angry with applicant after day's work

lost - Applicant called in sick by email next day - Manager sent email terminating employment due to "performance issues" - Respondent claimed in statement in reply dismissed applicant for serious misconduct - Evidence showed applicant clearly dismissed for poor performance - Basic tenets in *Trotter v Telecom Corporation of New Zealand Ltd* (cited below) not followed - Test of serious or repeated failure deliberateness - Manager acknowledged problem not any deliberate failure to follow instructions - Reasons for warnings raised cursorily if at all - No fair opportunity to answer respondent's concerns - Disciplinary meeting should have been held - Applicant may have disclosed condition and altered manager's perspective - Whole disciplinary and dismissal process fundamentally flawed given applicant had minimal involvement in it - Not given clear information what improvements required, how improvement would be measured or time frames to make them - Dismissal unjustified - Remedies - Applicant responsible for proper management of diabetic condition - Respondent not required to pay for results of applicant's illness on its business - Could have alleviated matters if had been informed of condition - Applicant responsible for many of manager's concerns - However, not responsible for gross breaches of fair and reasonable treatment - Contributory conduct 33.33 percent - PENALTY - Applicant claimed penalties for breach of contract and good faith - Penalties not to be added to remedies for unjustified dismissal in normal course of events - Justice of case met by lost wages and compensation awards - Operations Manager

Result: Application granted ; Reimbursement of lost wages (\$9,750 reduced to \$6,500) ; Compensation for humiliation etc (\$12,000 reduced to \$8,000) ; Costs reserved

Taurima v White Gloves Television Productions Ltd

27 Apr 2007, M Urlich, AA 126/07, (14 pages)

UNJUSTIFIED DISMISSAL - Applicant claimed on same day promised ongoing work, was dismissed when requested outstanding wages - Respondent claimed applicant employed on successive fixed term agreements based on funding it received to develop or produce television programmes - Claimed employment ended by expiry of fixed term or alternatively applicant resigned - Whether dismissed or resigned - Whether fixed term employment - Pay sheets showed applicant's work covered 12 distinct terms separated by periods where no work provided and she received no pay - Employed on series of fixed term agreements prior to amendment to s66 Employment Relations Act 2000 ("ERA") - Respondent claimed amendments not relevant because terms of fixed term agreed to prior to - "Key personnel form" was evidence a fixed term agreement entered into prior to date amendments came into effect - Section 66 obligations met - Amendments did not superimpose obligations on existing fixed term agreements - ARREARS OF WAGES - Applicant claimed respondent unlawfully deducted monies from amount should have received as production manager - Not unlawful deductions, rather applicant's employment agreement, as to timing of payments, varied without her consent - PENALTY - Applicant sought penalty for failure to provide written employment agreement -

Personal Grievance - Dismissal - Employment Relations Act 2000

Cooke v Panda Catering Ltd

25 Jul 2007, RA Monaghan, AA 218/07, (2 pages)

UNJUSTIFIED DISMISSAL - Triangular employment relationship - Respondent provided catering services at Eden Park - Applicant employed by respondent - Applicant involved in incident in main kitchen - Claimed expected further shifts but none given - Applicant filed employment relationship problem nearly three years after problem arose - Respondent had claimed employment casual - No appearance for respondent - Respondent lost catering contract - Unrelated company obtained contract and purchased respondent - Respondent no longer existed - Authority could not investigate further

Result: Application dismissed ; No order for costs

Mitchinson v The Chief Executive of the Department of Corrections

9 Nov 2007, H Doyle, CA 132/07, (30 pages)

UNJUSTIFIED DISMISSAL – Serious misconduct – Respondent claimed applicant falsely declared injury during Control and Restraint (C&R) training – Applicant’s doctor (“J”) diagnosed sprain and ACC form completed – Operations manager (“L”) failure to obtain evidence from J significant omission in investigation – Evidence would have led to different conclusions – Investigation focused on what was seen during C&R and applicant’s subsequent actions – Timeline provided to “L” as part of investigation – L questioned other employees about applicant’s intention to participate in C&R – Other employees said no indication applicant not going to participate in C&R – Questions asked of other participants in C&R inconsistent – Unclear why certain statements rejected – Consistent physical evidence of recent injury – Applicant able to provide detail of exercises done during C&R – Interviews undertaken some weeks after C&R – Fair and reasonable employer would have been cautious about reliability of individual recollections of C&R – Analysis of statements undertaken on basis that information of some participants to be believed and other information not to be believed – Only trainer adamant applicant did not participate – Fair and reasonable employer would have considered possibility applicant undertook exercises without trainer seeing – Ambiguity in statements not taken into account, instead interpretation least favourable to applicant accepted – No reason to conclude some witnesses lying – Analysis of participants’ interviews flawed – Evidence favourable to applicant rejected without good reason – Sector manager (“B”) concluded applicant did not make anyone aware of injury and failed to complete work accident report – Fair and reasonable employer faced with conflicting accounts would have realised need for medical information – Applicant claimed advised “V” of injury and intended to obtain accident report – V’s statement, consistent with applicant’s version of events, dismissed – Clear example of closed mind approach to investigation – Significant flaws in investigation – Considered objectively L and B’s minds turned against applicant so favourable matters not considered or investigated and simply dismissed or ignored – Fair and reasonable employer not justified in concluding serious misconduct or that applicant falsely declared work injury – Not completing accident report would not be considered serious misconduct by fair and reasonable employer – Dismissal unjustified – Remedies -Applicant failed to make fact sustained injury clear – Contributory conduct percent - Reinstatement ordered – Prison instructor

Result: Application granted ; Reinstatement ordered ; Reimbursement of lost wages (\$53,551.13 reduced to \$48,196.02)(48 weeks) ; Compensation for humiliation etc (\$20,000 reduced to \$18,000) ; Costs reserved

Stewart v Century 21 Huntly, Morrinsville & Papakura Ltd

30 Apr 2007, V Campbell, AA 129/07, (10 pages)

UNJUSTIFIED DISMISSAL - Summary dismissal - Whether dismissed or resigned - Manager queried applicant's management of client's property and level of communication with client - Applicant sent email to client outlining impending tenancy of client's property and left office - Manager claimed spoke to client and decided applicant lied - When applicant returned to office heated argument ensued - Authority found in no uncertain terms applicant told to leave workplace - Manager claimed applicant told him to "stick his job" - Applicant said "I'll resign" - Statement intended to convey her intention if shouting and bad language continued - Applicant left office and did not return - Provided medical certificate not fit to work when handed in keys - Handing back keys consistent with understanding had been dismissed - Manager's conduct in swearing and telling applicant to go dismissive and repudiatory - Even if wrong on point, manager's conduct plainly invited resignation which would have amounted to constructive dismissal - Dismissal - Manager's conduct outrageous - Failed to undertake investigation disclosing conduct a fair and reasonable employer would regard serious misconduct - Conduct in contravention of procedural fairness and fell short of obligation to be constructive in maintaining productive employment relationship - Failed to comply with terms of employment and follow own procedures - Dismissal unjustified - ARREARS OF HOLIDAY PAY - Without agreement respondent paid applicant as if on annual leave following dismissal - Manner of payment during notice period had effect of reducing applicant's statutory entitlements - Holiday pay due and owing - Conduct warranted interest award - Interest 8.5 percent - Property manager

Result: Application granted ; Reimbursement of lost wages (\$4,742)(13 weeks less 5 weeks pay following dismissal) ; Compensation for humiliation etc (\$5,000) ; Arrears of holiday pay (\$873.60) ; Interest 8.5% ; Costs reserved

Taurima v White Gloves Television Productions Ltd

27 Apr 2007, M Urlich, AA 126/07, (14 pages)

UNJUSTIFIED DISMISSAL - Applicant claimed on same day promised ongoing work, was dismissed when requested outstanding wages - Respondent claimed applicant employed on successive fixed term agreements based on funding it received to develop or produce television programmes - Claimed employment ended by expiry of fixed term or alternatively applicant resigned - Whether dismissed or resigned - Whether fixed term employment - Pay sheets showed applicant's work covered 12 distinct terms separated by periods where no work provided and she received no pay - Employed on series of fixed term agreements prior to amendment to s66 Employment Relations Act 2000 ("ERA") - Respondent claimed amendments not relevant because terms of fixed term agreed to prior to - "Key personnel form" was evidence a fixed term agreement entered into prior to date amendments came into effect - Section 66 obligations met - Amendments did not superimpose obligations on existing fixed term agreements - ARREARS OF WAGES - Applicant claimed respondent unlawfully deducted monies from amount should have received as production manager - Not unlawful deductions, rather applicant's employment agreement, as to timing of payments, varied without her consent - PENALTY - Applicant sought penalty for failure to provide written employment agreement -

Personal Grievance - Dismissal - Misconduct - Employment Relations Act 2000

McNeill v Solid Energy New Zealand Ltd

1 May 2007, YS Oldfield, AA 136/07, (6 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Summary dismissal - Applicant dismissed for falsifying sick leave in breach of contractual obligations and policy - Previously warned for taking unauthorised leave - Applicant called in sick and went on pre-booked two day fishing trip - Applicant union delegate - Represented co-worker during disciplinary process regarding co-worker's absence without leave during same fishing trip - Applicant did not mention had been on trip - Manager heard rumours, commenced inquiry and suspended applicant - Concluded applicant should have consulted shift manager or made himself available for alternative duties - Applicant confirmed investigation thorough, but claimed not open on evidence to conclude he falsified a sick leave - Claimed did not think did anything wrong as was just fishing whilst sick - Also believed being delegate affected way treated in investigation - Claimed when applicant arranged for friend to call in sick for him was serious misconduct, and "false declaration" under collective employment agreement ("CEA") - Respondent entitled to conclude applicant misled it by having friend call in sick on second day - Asked friend to say something possibly false and made himself unavailable for work - CEA provided unlimited sick leave and respondent to work with union to resolve attendance issues - Given absences in excess of minimum statutory entitlement, absences governed by CEA - Conduct misleading or fraudulent misuse of sick leave - In first instance, poor attendance from misuse of sick leave less than serious misconduct in CEA - No evidence respondent attempted to resolve attendance issues prior to dismissal - Misuse could not be elevated to serious misconduct without exhausting CEA procedures on poor attendance - Did not apply provisions and failed to use procedures - Fair and reasonable employer would not have dismissed until had done so - Dismissal unjustified - Remedies - Contribution at higher end of scale - Reinstatement totally impracticable - Contributory conduct 50 percent - Mine electrician

Result: Application granted ; Reimbursement of lost wages (3 months reduced to 6 weeks)(Quantum to be determined by parties) ; Compensation for humiliation etc (\$10,000 reduced to \$5,000) ; Costs reserved

Nepia & Anor v AFFCO New Zealand Ltd

26 Apr 2007, PR Stapp, WA 59/07, (9 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Summary dismissal - Applicants accused of unauthorised possession and distribution of company product - Respondent conducted investigation into theft of meat - Respondent identified significant theft occurring at its freezing works - Installed cameras and hired private investigator - Confidential informants told respondent applicants were "thieves" - Applicants told of general allegation at meeting - Handed prepared suspension notice which included allegations - After further meeting applicants dismissed - Applicants denied stealing - Respondent relied on informants' evidence and applicants' failure to make comment or deny allegations - Claimed treated unfairly on basis allegation was a rumour and not given specific evidence or details of allegations - No issue arose about right to used informants in exceptional circumstances so long as acted fairly - Respondent relied on informants' information without giving particulars and details of incidents to applicants - Unable to satisfy responsibility to produce evidence of wrong-doing to match seriousness of allegation - Erred in failing to inform applicants of findings or give opportunity for input on penalty - Fair and reasonable employer would have given applicants notice adverse view would be taken if did not comment on allegations - Paucity of information meant applicants had nothing to comment on - Not sufficient for respondent to rest its decision on failure to comment - Dismissals

unjustified - Remedies - Unable to determine whether applicants involved in stealing - No contributory conduct - Reinstatement of first applicant ordered - Boners

Result: Application granted ; Reinstatement ordered (RN) ; Reimbursement of lost wages (4 months)(Quantum to be determined)(RN) ; (3 months)(Quantum to be determined)(SM) ; Compensation for humiliation etc (\$8,000)(RN, SM) ; Leave reserved to return to Authority on calculation of lost wages ; Costs reserved

Sammons v TPC Group Ltd

29 Mar 2007, J Scott, AA 95/07, (7 pages)

UNJUSTIFIED DISMISSAL - Misconduct - Respondent in receivership - No appearance by respondent - Receivers' advised Authority they did not intend to participate further in defence - As would lessen funds available to creditors - Authority in possession of some information from respondent regarding dismissal - Respondent claimed applicant under quoted on particular job and asked him to explain use of company credit card - Applicant not advised of purpose of meeting or given opportunity to be represented - Respondent alleged applicant refused to answer questions at meeting - Applicant explained quoted only on materials set out by client - Applicant claimed meeting concluded with his termination - Final wages calculated with deductions for credit card expenses - Claimed never gave authority for deductions - Final wages not paid because applicant declined to sign receipt as full and final payment - No evidence from respondent to support concerns - No evidence provided of nature of investigation conducted or evidence to demonstrate applicant treated fairly in process - Dismissal unjustified - Property maintenance manager

Result: Application granted ; Reimbursement of lost wages (\$9,489.07) ; Arrears of wages and holiday pay (\$3,067.33) ; Compensation for lost benefit (Company vehicle) (\$2,500) ; Compensation for humiliation etc (\$5,000) ; Costs reserved

Southcombe v Freedom Air Ltd

2 May 2007, D King, AA 134/07, (5 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Summary dismissal - Applicant dismissed for going on overseas trip while on sick leave - Had booked and paid for holiday before granted annual leave - Did not have adequate accrued annual leave to cover whole holiday - Applicant went on sick leave and provided medical certificates - Applicant's doctor encouraged him to go on holiday - Respondent alleged applicant not using sick leave for purpose it had been granted prior to his going overseas, and asked for clarification - When returned from holiday, disciplinary meeting held - Applicant admitted going overseas and that used unpaid sick leave in order to take it, and actions wrong - Dismissed following day - Applicant obliged to use sick leave honestly and properly - Given real opportunity to refute allegation and explain conduct - Sick leave not available to take overseas holidays - Purpose of sick leave fundamental in present case - Not possible to have absolute rules about appropriate sick leave activities - Authority commented activities undertaken on sick leave must be conducive to enabling recovery and return to work, and should not militate against recovery - Not granted unpaid leave for purposes of taking annual leave - Conduct of such gravity that respondent entitled to say had lost trust and confidence in applicant - Applicant knew actions wrong - Actions constituted misuse of sick leave - Fair and reasonable employer would have dismissed - Dismissal justified - Flight attendant

Result: Application dismissed ; Costs reserved

Tauhore v Farmers Trading Company Ltd

25 May 2007, GJ Wood, WA 84/07, (9 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Summary dismissal - Applicant dismissed for assaulting co-worker outside workplace during work hours - Following incident sent co-worker abusive text message - Co-worker made formal complaint -

Applicant advised of allegations and disciplinary meeting - Following another text message co-worker made complaint to Police - Applicant denied assault and that messages referred to assault - Applicant declined representation at meeting - Respondent rejected explanations and concluded applicant committed assault, sent texts, and made threatening statements to manager - Applicant trespassed from respondent's stores - Subsequently acquitted of criminal charge based on same events - Co-worker's evidence at trial inconsistent - Respondent claimed conducted full and fair investigation and concluded applicant committed assault - Respondent's evidence preferred - Authority rejected applicant's explanations not given prior to dismissal - Summary dismissal penalty open to respondent if serious breach of work rule found - Simply because dismissed for reasons later subject of criminal trial at which acquitted, did not follow that must have been unjustified dismissal - Fair and reasonable employer would have concluded applicant had on balance of probabilities assaulted co-worker - Seriousness of allegations taken into account - Together with applicant's subsequent actions, conduct justified summary dismissal - Decision-maker not required to approach task untainted by preconceptions - No predetermination or bias - Not required to run investigation in nature of criminal trial or adopt criminal standard of proof - Respondent's disciplinary guidelines followed - Failure to give witness statement to applicant not sufficient to make way respondent acted not substantially fair - Dismissal justified

Result: Application dismissed ; Costs reserved

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

Hardgrave v CustomKit Buildings Ltd

1 May 2007, RA Monaghan, AA 135/07, (17 pages)

UNJUSTIFIED DISMISSAL - Poor performance - Respondent claimed applicant resigned prematurely when performance and commitment issues raised - Applicant injured knee and not able to work - Manager found several serious mistakes in applicant's work - Meeting held to discuss mistakes - Applicant claimed needed more training and assistance, and gave no explanation for mistakes - Manager reasonably concluded applicant unresponsive and unapologetic - Advised applicant to consider resigning - Manager made angry statements to applicant told him he wanted to keep job - Another meeting held to discuss mistakes and applicant's unwillingness to work extra hours - Manager suggested applicant return on trial period - Applicant later advised would not return to work - Manager went beyond merely expressing anger, frustration or inconsiderate conduct - When first raised concerns was open to possibility of explanation - Should have used performance management or disciplinary process and kept open mind - Instead, raised prospect of resignation - Unlikely manager's mind open to applicant continuing employment - Viewed employment relationship as having no future - Repudiatory conduct - Discussion of trial period not sufficient to rescue employment relationship - Constructive dismissal - Given finding, not necessary to consider disadvantage grievance or lack of good faith claims - Remedies - Large number of unexplained mistakes - Contributory conduct 50 percent - Claim applicant would have been justifiably dismissed anyway too speculative - Grievance a causative factor of applicant's major clinical depression

Result: Application granted ; Reimbursement of lost wages (\$26,000 reduced to \$13,000) ; Compensation for humiliation etc (\$20,000 reduced to \$10,000) ; Costs reserved

Hollands v Jam Marketing Pty Ltd

31 Jul 2007, D King, AA 179A/07, (3 pages)

UNJUSTIFIED DISMISSAL - Poor performance - No appearance for respondent - No written employment agreement - Earlier determination found applicant an employee - Matter determined on applicant's uncontested evidence - Applicant employed to sell timeshare properties on salary plus commission basis - Within two months told was being let go because was "a round peg in a square hole" - Not given any indication employment at risk or opportunity to comment - Manner dismissal affected "brutal" - Decision predetermined - Dismissal unjustified - PENALTY - Respondent intended to provide employment agreement but failed to do so - Penalty appropriate - COSTS - Applicant entitled to costs - Applicant to forward details of expenditure incurred to Authority

Result: Application granted ; Reimbursement of lost wages (\$5,000)(10 weeks) ; Compensation for humiliation etc (\$8,000) ; Penalty (\$3,000)(Payable to Crown)

Kessell v Harris Transport (1974) Ltd

6 Jun 2007, GJ Wood, WA 90/07, (7 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Poor performance - Summary dismissal - Applicant responsible for scheduling transport jobs and organising staff - Received three written warnings for forgetfulness and mismanagement of jobs - Delay in issuing of third warning - Manager unaware applicant had diabetes - Often neglected to take medication, resulting in forgetfulness - Manager angry with applicant after day's work lost - Applicant called in sick by email next day - Manager sent email terminating employment due to "performance issues" - Respondent claimed in statement in reply

dismissed applicant for serious misconduct - Evidence showed applicant clearly dismissed for poor performance - Basic tenets in *Trotter v Telecom Corporation of New Zealand Ltd* (cited below) not followed - Test of serious or repeated failure deliberateness - Manager acknowledged problem not any deliberate failure to follow instructions - Reasons for warnings raised cursorily if at all - No fair opportunity to answer respondent's concerns - Disciplinary meeting should have been held - Applicant may have disclosed condition and altered manager's perspective - Whole disciplinary and dismissal process fundamentally flawed given applicant had minimal involvement in it - Not given clear information what improvements required, how improvement would be measured or time frames to make them - Dismissal unjustified - Remedies - Applicant responsible for proper management of diabetic condition - Respondent not required to pay for results of applicant's illness on its business - Could have alleviated matters if had been informed of condition - Applicant responsible for many of manager's concerns - However, not responsible for gross breaches of fair and reasonable treatment - Contributory conduct 33.33 percent - PENALTY - Applicant claimed penalties for breach of contract and good faith - Penalties not to be added to remedies for unjustified dismissal in normal course of events - Justice of case met by lost wages and compensation awards - Operations Manager

Result: Application granted ; Reimbursement of lost wages (\$9,750 reduced to \$6,500) ; Compensation for humiliation etc (\$12,000 reduced to \$8,000) ; Costs reserved

Mosen v Anfield Engineering Ltd

12 Jun 2007, V Campbell, AA 171/07, (6 pages)

UNJUSTIFIED DISMISSAL - Poor performance - Triangular employment relationship - Respondent contracted to company ("C") and undertook work at C's direction - Applicant employed on short fixed term agreement - Agreement included motel accommodation - Supervisor ("R") concerned about applicant's skill level and provided assistance - Applicant not made of aware of concerns - C's foreman raised concerns about quality of applicant's welding work asked him to complete welding "test" - Applicant unaware was a test - C's supervisor told R work not to acceptable standand and applicant not to undertake further work - One week after commenced employment R told applicant had not passed test and had to be "let go" - Advised of opportunity to work at different site - Applicant insisted on meeting to discuss situation - At meeting agreed applicant would undertake further work trial - Applicant discovered bags packed when returned to motel before trial - Applicant accepted offer of work out of town and left - Respondent claimed employment abandoned - Applicant not warned of poor performance or given specific information on problems and clear steps on improvements needed before dismissed - Procedural fairness absent - Dismissal substantively and procedurally unjustified - Unjustified dismissal quickly rescinded at instigation and agreement of applicant - Change in accomodation arrangements result of miscommunication - Applicant's actions in leaving town without notice and without completing trial led Authority to conclude applicant left of own accord - Contingent on applicant to stay and complete trial - Overturning of dismissal and agreement by applicant to undergo trial cured respondent's previous failures

Result: Application dismissed ; Costs reserved

Personal Grievance - Dismissal - Redundancy - Employment Relations Act 2000

McGregor v Mobil Oil New Zealand Ltd

2 May 2007, D Asher, WA 69/07, (8 pages)

UNJUSTIFIED DISMISSAL – UNJUSTIFIED DISADVANTAGE - Redundancy - During employment applicant took extensive paid sick leave – While on leave advised respondent proposed restructuring that would see operations shifting to Bangkok - Also claimed advised work had been redistributed to other team members and job "gone" - On return applicant required to do project work - Presented with fait accompli and left with little option but to accept work - Postponement of project resulted in redundancy of applicant's position - Advised redundant unless another position could be found - Efforts to redeploy unsuccessful - Applicant properly did not contest substantive genuineness of redundancy but rather when it should have occurred - Claimed respondent's actions caused her to go on further sick leave until date of redundancy - Given extent of applicant's absences, not unreasonable for respondent to redistribute work - However, it failed to take account of consequences of redistribution when project postponed - Also breached undertaking to give at least two months notice prior to redundancy - No evidence respondent set out to deliberately mislead or deceive applicant - Election and implementation of redundancy decision made without consultation - Unjustifiably disadvantaged and dismissed as result of failure to consult at time elected to postpone project - Election resulted in unilateral decision to terminate - Failure to consult was significant breach of s4(1A)(c) Employment Relations Act 2000 - Dismissal unjustified - Remedies - Applicant claimed medical problems attributable to respondent's actions - Sought medical costs - No reliable evidence actions responsible and sick leave taken for other reasons - Respondent not totally liable for applicant's inability to work and loss of earnings - Not certain applicant's employment would have continued had fair process been followed - Applicant to receive three month lost wages inclusive of additional one month's notice - Accounts clerk

Result: Application granted ; Reimbursement of lost wages (3 weeks)(Quantum to be determined) ; Compensation for humiliation etc (\$8,000) ; Leave reserved to return to Authority to determine quantum of lost wages ; Costs reserved

Personal Grievance - Unjustified Disadvantage - Employment Relations Act 2000

Charles v Waitakere City Council and Anor

19 Nov 2007, R Arthur, AA 362/07, (21 pages)

UNJUSTIFIED DISADVANTAGE – First respondent (“WC”) contracted to provide dog control services to second respondent (“NSC”) – Applicant employed on fixed term to provide services to NSC – NSC expressed concern about applicant’s performance to WC several times - Allegations not put to applicant and she was unaware NSC considering invoking clause in contract to remove her from duties – Clause subsequently invoked and WC attempted to transfer applicant to duties at WC for remainder of fixed term – Applicant raised grievance and did not return to work – Applicant entitled to know, and have opportunity to comment on, allegations and possibility removal clause would be invoked – Also entitled to opportunity to improve work practices – WC breached trust and confidence, and statutory duty of good faith to be active and communicative – Also breached duty not to act in way likely to mislead or deceive when advised applicant of NSC’s demand and transfer – No contractual basis for transfer - Unjustified disadvantage – Remedies – Applicant remained employed on unpaid sick leave – Entitled to wages lost immediately following removal from NSC position – Could have expected to be stood down on full pay while consulted about alternative arrangements – Reasonable period four weeks as did not mitigate loss – Contributory conduct 25 percent - PENALTY – Applicant alleged NSC aided and abetted WC’s breach of employment agreement – Not open to Authority to consider NSC’s commercial decision to invoke removal clause – Whether contract between respondents structured and applied to avoid employee’s rights important question of policy within Authority’s role and powers in equity and conscience – Removal clauses inconsistent with employment statutory regime – No evidence removal clause operated by NSC in calculated way to help WC avoid obligations – No penalty – Dog control officer

Result: Application granted (Disadvantage) ; Reimbursement of lost wages (4 weeks reduced to 3) ; Compensation for humiliation etc (\$10,000 reduced to \$7,500) ; Application dismissed (Penalty) ; Costs reserved

McGregor v Mobil Oil New Zealand Ltd

2 May 2007, D Asher, WA 69/07, (8 pages)

UNJUSTIFIED DISMISSAL – UNJUSTIFIED DISADVANTAGE - Redundancy - During employment applicant took extensive paid sick leave – While on leave advised respondent proposed restructuring that would see operations shifting to Bangkok - Also claimed advised work had been redistributed to other team members and job "gone" - On return applicant required to do project work - Presented with fait accompli and left with little option but to accept work - Postponement of project resulted in redundancy of applicant's position - Advised redundant unless another position could be found - Efforts to redeploy unsuccessful - Applicant properly did not contest substantive genuineness of redundancy but rather when it should have occurred - Claimed respondent’s actions caused her to go on further sick leave until date of redundancy - Given extent of applicant's absences, not unreasonable for respondent to redistribute work - However, it failed to take account of consequences of redistribution when project postponed - Also breached undertaking to give at least two months notice prior to redundancy - No evidence respondent set out to deliberately mislead or deceive applicant - Election and implementation of redundancy decision made without consultation - Unjustifiably disadvantaged and dismissed as result of failure to consult at time elected to postpone project - Election resulted in unilateral decision to terminate - Failure to consult was significant breach of s4(1A)(c) Employment Relations Act 2000 - Dismissal unjustified - Remedies - Applicant claimed medical problems attributable to respondent's actions - Sought medical costs - No reliable evidence actions responsible and

sick leave taken for other reasons - Respondent not totally liable for applicant's inability to work and loss of earnings - Not certain applicant's employment would have continued had fair process been followed - Applicant to receive three month lost wages inclusive of additional one month's notice - Accounts clerk

Result: Application granted ; Reimbursement of lost wages (3 weeks)(Quantum to be determined) ; Compensation for humiliation etc (\$8,000) ; Leave reserved to return to Authority to determine quantum of lost wages ; Costs reserved

Practice & Procedure - Employment Relations Act 2000

Creedy v Commissioner of Police

19 Oct 2007, Elias CJ, McGrath, Anderson JJ, SC 57/2007, (2 pages)

SUPREME COURT – Practice and procedure – Application for leave to appeal Court of Appeal decision – Two questions of law – HELD – Application granted concerning “exceptional circumstances” test and Employment Court’s jurisdiction concerning review of Police Tribunal proceedings – Police sergeant

Result: Application granted ; No order for costs

F Fabbian Lighting (NZ) Ltd v La Cava & Anor

31 Oct 2007, L Robinson, AA 312A/07, (6 pages)

PRACTICE AND PROCEDURE – Application for removal to Employment Court – Preliminary issue determined by Authority challenged in Employment Court – Authority not persuaded question of law important or that arose other than incidentally – Steps taken material consideration as to whether Authority should exercise discretion of removal – Steps taken to date sufficiently advanced in investigation so as to preclude removal – However, preliminary determination subject of challenge in Employment Court involved “same or similar or related issues” to substantive investigation – Matter removed to Employment Court

Meere v Gifted Children's Advancement Charitable Trust Inc

4 May 2007, M Urlich, AA 139/07, (2 pages)

PRACTICE AND PROCEDURE - Discovery - Applicant sought disclosure of certain documents - Respondent claimed documents confidential - First document comprised of chairman of respondent's notes for personal use during restructuring presentation to staff - Second group of documents staff responses to redundancy consultation process - Responses received on basis would be confidential to submitting staff member and respondent - What decision-maker took into account and how reached conclusions tested in inquiry process required by s103A Employment Relations Act 2000 - Confidentiality not bar to relevancy of notes - Notes clearly relevant given chairman was decision-maker in redundancy process - Responses also relevant because were invited by respondent for purposes its deliberations on restructuring proposal which included applicant's position - Documents to be provided to applicant - Authority expected respondent Board's internal communications relating to restructuring to be provided to applicant - Non-publication orders to be made if appropriate

Result: Application granted ; Orders accordingly ; Costs reserved

O'Connell v Redpaths NZ Ltd

1 May 2007, YS Oldfield, AA 133/07, (2 pages)

PRACTICE AND PROCEDURE - Whether accord and satisfaction - Alleged unjustified dismissal - Respondent advised would not participate in investigation because matter settled in full, and respondent had no assets and to be placed in liquidation - No appearance for respondent - Applicant and husband had owned shares in respondent - Parties entered written "understanding" - Gave evidence they gave undertaking that if terms of understanding honoured, would not pursue personal grievance - Claimed steps set out in understanding not completed by respondent, and concluded respondent unable or unwilling to comply with it - Insufficient evidence establishing understanding or oral undertakings amounted to accord - No evidence terms of agreement complied with - No accord and

satisfaction - Applicant not barred from proceeding with grievance
Result: Question answered in favour of applicant

Sefo v Sealord Shellfish Ltd

25 Oct 2007, Shaw J, CC 19/07, (2 pages)

PRACTICE AND PROCEDURE – Nature and scope of hearing – Plaintiff elected non de novo challenge covering issues of suspension, contribution and reinstatement – Plaintiff sought to limit evidence to relevant passages in briefs of evidence and relevant documents before Authority with cross-examination – HELD – Court must have sufficient material before it to make decision – Evidence relating to issues could not be isolated – Matter to be heard as full rehearing – Issues to be decided were limited to suspension, contribution and reinstatement – Mussel opener

Result: Orders accordingly ; No order for costs

Service and Food Workers Union v Air New Zealand Ltd

29 Nov 2007, Y Oldfield, AA 375/07, (3 pages)

PRACTICE AND PROCEDURE – Application for adjournment – Applicant applied for facilitation before parties attempted mediation – Parties accepted need for, and attended, mediation – However, applicant sought to continue facilitation application in case outcome of talks not favourable – Respondent opposed adjournment – Submitted facilitation application could not be put aside in case of “rainy day” and applicant should either proceed with original application or acknowledge no basis for facilitation at this time and withdraw it – Applicant’s argument would effectively require Authority to accept facilitation application could be made on contingent basis, to be activated should circumstances develop to reach threshold in s50 Employment Relations Act 2000 – Not consistent with good faith approach to bargaining – Grounds in s50B couched in past tense and depended on preconditions having been met – Not appropriate to put application on hold in case preconditions met at future stage – Open to parties to apply again should circumstances change – Application for adjournment declined – Applicant withdrew application for facilitation

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

Practice & Procedure - Consent Orders - Employment Relations Act 2000

Bay of Plenty District Health Board and Lakes District Health Board v Association of Professionals & Executive Employees Inc

14 May 2007, RA Monaghan, AA 144/07, (2 pages)

CONSENT ORDER - Parties reached interim agreement on employment relationship problem relating to Code of Good Faith for the Public Health Sector - Agreed on 'gatekeeper' protocol for provision of life preserving services when notice of industrial action given - Terms of agreement to be orders of Authority

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

Diamond v Newtown Heights Lodge Ltd

30 Oct 2007, PR Stapp, WA 147/07, (2 pages)

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

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

Gu and Ors v V and Ors

20 Nov 2007, R Arthur, AA 363/07, (2 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement at investigation meeting - Terms of settlement to be orders of Authority - Terms of settlement full, final and binding - Respondent to pay each applicant wages owed by specified date - Order prohibiting publication of terms of settlement

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

Hill v Methodist Mission Northern

15 Nov 2007, Y Oldfield, AA 356/07, (1 pages)

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

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

Klootwyk v David Reid Homes (Nelson) Ltd

20 Nov 2007, P Cheyne, CA 142/07, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Respondent to pay applicant outstanding holiday pay in sum of \$2618

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

Lewis v CMP Rangitikei Ltd

14 Nov 2007, GJ Wood, WA 152/07, (1 pages)

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

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

Murakami & Anor v The Joun Life Co Ltd

9 Nov 2007, RA Monaghan, AA 348/07, (2 pages)

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

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

Standring v ACP Media Ltd

25 Oct 2007, P Cheyne, CA 124/07, (1 pages)

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

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

Tony Galbraith Ltd v Davies

23 Oct 2007, J Scott, AA 334/07, (1 pages)

CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Order prohibiting publication of terms of settlement except fact respondent acknowledged liability and that acknowledgement led to resolution employment relationship problem

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

Department of Labour
TE TARI MAHI

